United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 15, 2024
Lyle W. Cayce
Clerk

No. 22-10710

MICHAEL CLOUD,

Plaintiff—Appellee,

versus

THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CV-1277

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before WILLETT, ENGELHARDT, and OLDHAM, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, five judges voted in favor of rehearing (Richman, Elrod, Graves, Ho, and Douglas), and eleven voted against rehearing (Jones, Smith, Stewart, Southwick, Haynes, Higginson, Willett, Duncan, Engelhardt, Oldham, and Wilson).

Judge Ramirez is recused and did not participate in the poll.

JAMES E. GRAVES, JR., *Circuit Judge*, dissenting from denial of rehearing en banc:

I. Background

This case is about a Former National Football League (NFL) running back, Michael Cloud, who suffered severe head trauma, including at least seven major concussions, during his career from 1999 to 2006. That trauma caused debilitating neurological and cognitive impairments and left him with various psychiatric and psychological disabilities that have progressively grown worse. These debilitating injuries entitle him to disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "plan" or "NFL plan"), which was established through collective bargaining between the NFL Management Council and the NFL Players Association. The NFL plan distinguishes between players who were disabled in the "line of duty" (LOD) and those who are "totally and permanently" disabled (T&P). The plan also establishes different categories of benefits.

Cloud was awarded LOD benefits in 2010. In 2014, the Social Security Administration (SSA) found him entitled to disability benefits, with an onset date of disability of December 31, 2008, as a result of severe impairments stemming from multiple NFL concussions and injuries. That same year, Cloud applied for T&P benefits under the plan. Cloud was awarded "T&P (SSA) – Inactive A" benefits effective May 1, 2014. The Disability Initial Claims Committee E-Ballot was dated July 17, 2014. However, Cloud later received a letter dated July 23, 2014, notifying him of the award and describing the committee's decision. This action was described as "SSA Disability Award." Cloud did not appeal this decision to the board.

In 2016, Cloud applied for reclassification of his T&P benefits under the plan for the first time. The committee denied his reclassification on the basis of "[n]o changed circumstances" on February 22, 2016. Cloud later

received a letter of explanation for the denial dated March 2, 2016. Of note, the letter said the committee "interprets 'changed circumstances' to mean a change in a Player's condition (i.e., a new or different impairment). The letter also added additional reasons pertaining to the forty-two-month limitations period under section 5.7(b) and the "shortly after" requirement.

Cloud appealed the denial of reclassification to the board by letter received September 2, 2016. The cover sheet for the appeal said that reclassification had been denied because there was "no clear and convincing evidence of changed circumstances." The summary explicitly stated that Cloud "was granted Inactive A on 7/17/14 by DICC, effective 5/1/14, based on an SSA award. Impairments alleged in the 2014 application: post-concussion syndrome, clinical depression, dementia pugilistica, migraine, vertigo, impaired verbal fluency, acute compartment syndrome, plantar fasciitis, cluneal nerve injury, multiple orthopedics." The summary also said that reclassification was denied because "no clear and convincing evidence of changed circumstances."

The board denied reclassification at its meeting on November 16, 2016, on the basis that there was "no clear and convincing evidence of changed circumstances." Cloud received a letter dated November 23, 2016, that added additional reasons not considered by the board, as acknowledged by the panel. The letter also said that the board interprets the "'changed circumstances' requirement to mean a new or different impairment from the one that originally qualified you for T&P benefits." The letter said that Cloud was unable to establish clear and convincing evidence of changed circumstances, that the evidence "does not show that you are totally and permanently disabled, and it all falls well outside any conceivable 'shortly after' period required for Active Football benefits" under section 5.3(a), (e), and that Cloud's appeal was untimely under section 12.6(a).

II. Procedural History

Cloud subsequently filed suit against the NFL plan, seeking to recover the appropriate benefits under the Employee Retirement Income Security Act (ERISA) and asserting claims for wrongful denial of benefits under 29 U.S.C. § 1132(a)(1)(B) and (a)(3) and failure to provide a "full and fair review" under 29 U.S.C. § 1133(2). Cloud argued that the plan violated ERISA when it denied reclassification.

Following discovery and a week-long bench trial, the district court ruled for Cloud on both issues, finding that the Plan failed to provide a full and fair review and abused its discretion in denying reclassification. The district court subsequently made written findings of fact and conclusions of law in a very thorough opinion and order in favor of Cloud on June 21, 2022. *Cloud v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, Civil Action No. 3:20-CV-1277, 2022 WL 2237451 (N.D. Tex. June 21, 2022) (*Cloud I*). The district court reclassified Cloud to the "Active Football" category of T&P benefits, concluding that the plan's review board denied Cloud a "full and fair review" and wrongly denied benefits owed to him. *Id.* at *2. The district court also found that the board's determinations that Cloud was unable to show changed circumstances and that his administrative appeal was untimely under section 12.6(a) were not supported by concrete evidence in the record. *Id.* at *34. Thus, the district court found that the board abused its discretion.

Of relevance, the district court said, "like many other former players suffering from the effects of head trauma, Plaintiff was forced to navigate a byzantine process in order to attempt to obtain those benefits, only to be met with denial." *Cloud I*, 2022 WL 2237451 at *1. The district court then found that: "What has become clear over the course of this litigation is that Plaintiff's claim for disability benefits was wrongfully and arbitrarily denied

in a process that lacked the procedural safeguards both promised by the benefits plan and required by law." *Id.*

The NFL plan appealed, and the panel reversed and remanded with instructions to enter judgment in favor of the NFL plan.[1] *Cloud v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 83 F.4th 423, 425-26 (5th Cir. 2023) (*Cloud II*). The panel acknowledged the "NFL Plan's disturbing lack of safeguards to ensure fair and meaningful review of disability claims brought by former players who suffered incapacitating on-the-field injuries, including severe head trauma." *Id.* at 425. The panel also acknowledged that the "NFL Plan's review board may well have denied Cloud a full and fair review." *Id.* But the panel concluded that the board did not abuse its discretion in denying reclassification due to Cloud's failure to show changed circumstances, and concluded the district court erred in awarding top-level benefits to Cloud because "he cannot show changed circumstances between his 2014 application and his 2016 claim for reclassification—which was denied and which he did not appeal." *Id.* However, Cloud filed an application for T&P benefits in 2014, which were awarded, and adequately presented "a new and different impairment" to support his 2016 claim for reclassification.

III. Argument

Cloud now seeks en banc rehearing, asserting that the panel applied an improper standard of review or, alternatively, failed to use appropriate methodology, consider the record as a whole, or weigh factors in determining deference owed. Specifically, Cloud asserts that he did not forfeit any

[1] The panel did so while appearing to take issue with the district court's order reclassifying Cloud's benefits "[i]nstead of granting a remand to the Plan administrator for another go-round (the usual remedy)." *Id.* at 429.

arguments at the administrative level and that he was able to establish a change in circumstances. While Cloud makes valid assertions with regard to the standard of review, I focus on his alternative argument and the contents of the record. In doing so, an overview is necessary.

The plan sets out in § 5.2(a) that an eligible player "will be deemed to be totally and permanently disabled" if the board or committee finds "(1) that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit . . ., and (2) that such condition is permanent."

Section 5.2 (b) of the plan states, in relevant part:

> An Eligible Player who is not receiving monthly pension benefits under Article 4 or 4A, who has been determined by the Social Security Administration to be eligible for disability benefits under either the Social Security disability insurance program or Supplemental Security Income program, and who is still receiving such benefits at the time he applies, will be deemed to be totally and permanently disabled, unless four voting members of the Retirement Board determine that such Player is receiving benefits fraudulently and is not totally and permanently disabled. If his Social Security disability benefits cease, a Player will no longer be deemed to be totally and permanently disabled by reason of this Section 5.2(b).

Under section 5.3 of the plan, there are four categories of benefits: (a) Active Football, (b) Active Nonfootball, (c) Inactive A, and (d) Inactive B. Active Football is the highest tier and applies as follows: "Subject to the special rules of Section 5.4, Players will qualify for benefits in this category if

the disability(ies) results from League football activities, arises while the Player is an Active Player, and causes the Player to be totally and permanently disabled 'shortly after' the disability(ies) first arises." Section 5.3(e) defines "shortly after" as follows:

> A Player who becomes totally and permanently disabled no later than six months after a disability(ies) first arises will be conclusively deemed to have become totally and permanently disabled "shortly after" the disability(ies) first arises, as that phrase is used in subsections (a) and (b) above, and a Player who becomes totally and permanently disabled more than twelve months after a disability(ies) first arises will be conclusively deemed not to have become totally and permanently disabled "shortly after" the disability(ies) first arises, as that phrase is used in subsections (a) and (b) above. In cases falling within this six- to twelve-month period, the Retirement Board or the Disability Initial Claims Committee will have the right and duty to determine whether the "shortly after" standard is satisfied.

The special rules of Section 5.4 pertain to substance abuse and psychological/psychiatric disorders. Section 5.4(b) states that:

> A payment for total and permanent disability as a result of a psychological/psychiatric disorder may only be made, and will only be awarded, for benefits under the provisions of Section 5.3(b), Section 5.3(c), or Section 5.3(d), *except* that a total and permanent disability as a result of a psychological/psychiatric disorder may be awarded under the provisions of Section 5.3(a) if the requirements for a total and permanent disability are otherwise met and the psychological/psychiatric disorder

> either (1) is *caused by or relates to a head injury (or injuries*) sustained by a Player arising out of League football activities (*e.g., repetitive concussions*); (2) is caused by or relates to the use of a substance prescribed by a licensed physician for an injury (or injuries) or illness sustained by a Player arising out of League football activities; or (3) is caused by an injury (or injuries) or illness that qualified the Player for T&P benefits under Section 5.3(a).

(emphasis added). Cloud currently receives Inactive A benefits, which apply as follows:

> Subject to the special rules of Section 5.4, a Player will qualify for benefits in this category if a written application for T&P benefits or similar letter that began the administrative process that resulted in the award of T&P benefits was received within fifteen (15) years after the end of the Player's last Credited Season. This category does not require that the disability arise out of league football activities.

Cloud maintains that he qualifies for active benefits, which provide about $130,000 per year more and only about 30 players receive. As quoted above, section 5.3(a) sets out the requirements for active benefits subject to the special rules of section 5.4. Under section 5.4(b), also quoted above, the plan provides for active benefits to players who suffer a concussion(s) and resulting total and permanent disability as a result of psychological/psychiatric disorder. Cloud clearly falls within section 5.4(b), which, importantly, does not include the "shortly after" language.

The opinion(s) and record set out the procedure for obtaining benefits. The panel concedes that "in practice things were far from ideal,"

and that the "record paints a bleak picture of how the [b]oard handles appeals." The board does not individually discuss cases, preferring to deny or approve blocks of 50 to 100 or more cases at a time based on reasons possibly mentioned by someone – the opinion and record are unclear as to who that may be – before the board meetings. The record indicates that nobody really reads any individual applications or administrative records, there's really no oversight, and a paralegal for outside counsel drafts the denial letters and adds language, often incorrect, that the board never considered or said, as acknowledged by the panel. *Cloud II*, 83 F.4th at 429.

The panel ultimately determined that the dispositive issue was whether Cloud could "show that 'changed circumstances' entitle him to reclassification to top-level Active Football benefits." *Cloud II*, 83 F.4th at 430. The panel concluded:

> Cloud did not, and cannot, demonstrate changed circumstances. In his 2016 appeal to the Board, he acknowledged his need to demonstrate changed circumstances but did not make such a showing—or attempt to; instead, he simply asked the Board to waive that requirement. He thus forfeited any claim to changed circumstances at the administrative level. We therefore cannot consider it. Moreover, the record confirms that Cloud has no evidence that he is entitled to reclassification "because of changed circumstances." The absence of changed circumstances was the basis for the Board's denial, and it was not an abuse of discretion on this particular record. We therefore have no choice but to reverse the district court's judgment.

Id. at 431 (citing *Gomez v. Ericsson, Inc.*, 828 F.3d 367, 374 (5th Cir. 2016) ("He tries a new argument not raised before the administrator . . . . But we

cannot consider an argument that a plan did not first have the opportunity to assess."))

However, the record does not support the panel's conclusion. Cloud did make a showing of changed circumstances before the committee and before the board. This is not a new argument that the plan did not first have the opportunity to assess. The quote from *Gomez* is inapplicable here. The panel was not compelled to reverse the district court.

In determining whether Cloud established a change in circumstances, it is necessary to review his applications. The medical records in support of Cloud's 2009/2010 LOD benefits application referenced various impairments including shoulder, neck, back, hip, leg, feet, depression, migraine headaches, insomnia, back pain, vertigo, headaches, memory loss, stutter, impaired verbal fluency, and other cognitive difficulties. Cloud's 2014 T&P application cover sheet stated that he had been approved for LOD benefits at the May 13, 2010, meeting based on a "rating: 38% of the lower extremity, and 25 % combined whole body impairment."

Cloud's 2014 "Total and Permanent Disability Benefits Application" listed the following under (Part 1) of Disabilities and Cause:[2]

> 1. Post-Concussion Syndrome; 2. Clinical Depression; 3. Dementia Pugilistica; 4. Migraine; 5. Benign Paroxysmal Positional Vertigo; 6. Impaired Verbal Fluency; 7. Acute Compartment Syndrome; 8. Plantar Fasciitis; 9. Cluneal Nerve Injury; 10. Bilateral Shoulders; 11. Bilateral Elbows; 12.

[2] (Part 1) states: "Describe all of the conditions that you believe make you unable to work. Please state if any of these conditions resulted from service in the military of any country. You may attach additional sheets if necessary to identify the conditions which you would like the Plan to consider."

> Bilateral Wrists; 13. Hands; 14. Fingers; 15. Bilateral Feet/Toes; 16. Bilateral Ankles; 17. Bilateral Knees; 18. Bilateral Hips; 19. Lumbar; 20. Cervical; 21. Thoracic.

Under (Part 3), Cloud listed the problems he was experiencing as: "Migraine Headaches, Depression, Memory Loss, Vertigo, Insomnia, Unpredictable Irritability." Cloud also said that he had: "Sever (sic) Pain in: Right Foot, Left Great Toe, Left Hip, Base of Neck and Lower Back"; "Numbness in: Right Leg, Arms and Fingers"; "Difficulties with: Verbal Fluency, Decision Making and Concentration." That was the extent of what Cloud included on the face of his application.

The attachments to the application included a letter from Cloud and Jennifer Cloud informing the board of his award of Social Security Disability benefits (SSDI) "as a result of severe impairments of migraine headaches and affective mental disorder stemming from multiple NFL football concussions." Cloud also included numerous medical records, and the SSA decision that said a state agency physician assessed the evidence of record concerning Cloud, and "[h]is impairment diagnosis was stated as migraine headaches and affective disorders."

Cloud's 2016 application for reclassification listed his disabilities under Part 1 as: 1) Migraine; 2) Clinical Depression; 3) Significant Memory & Attention Problems; 4) Vertigo; 5) Impaired Verbal Fluency. Part 3 described the problems he was experiencing as: "Migraines, Clinical Depression, Memory Loss, Attention and Decision Problems, Impaired Verbal Fluency, Post-Concussion Syndrome, Vertigo, Affective Disorder."

Cloud's 2016 application included new disabilities or conditions, including "affective disorder" and "significant memory and attention problems." The panel stated that "[t]hese were not *new* disabilities or

concussion symptoms," and that they were included in his 2014 application and the SSA decision. (Emphasis original). However, again, neither of those conditions was listed on the face of Cloud's 2014 application. The only reference was in the SSA findings and in a letter referencing those findings included as an attachment. Also, at least one committee member offered deposition testimony confirming that these were new disabilities that were not listed in Cloud's 2014 application. *Cloud I*, 2022 WL 2237451, at *20.

Regardless, under the board's definition of "changed circumstances," Cloud establishes that he seeks reclassification for a "different impairment from the one that originally qualified [him] for T&P benefits." The record indicates that Cloud was not awarded T&P benefits under any specific impairment or condition but was awarded benefits pursuant to section 5.2(b), as quoted above, and solely because he was receiving SSA benefits. Significantly, section 5.2(b) provides that a player who is receiving SSA benefits at the time of application will automatically be eligible for T&P benefits unless four board members say otherwise. Further, if the SSA benefits cease, so do the T&P benefits.

In other words, none of the impairments listed in Cloud's 2014 application qualified him for T&P benefits; his SSA eligibility qualified him. Thus, Cloud was free to assert each of them again. This is supported by the board's letter, which said: "The Plan received your original application for T&P benefits on July 1, 2014. As you know, the Committee found you to be totally and permanently disabled by virtue of your Social Security Administration ("SSA") disability award, and it awarded you Inactive A T&P benefits …." This is also supported by various other documents in the record. Moreover, it is supported by the deposition testimony of various committee members. *See Cloud I*, 2022 WL 2237451, at *42, n. 33.

Additionally, the panel cited no authority for the proposition that worsening "symptoms" from repeated concussions cannot establish a change in circumstances. Such a conclusion would undermine the very nature of the intended relief. This is particularly so when all three of Cloud's applications included overlapping impairments.

The panel then concluded that Cloud somehow forfeited his claim of changed circumstances based on statements in a letter, which was apparently written by Cloud's ex-wife and submitted as an attachment to his 2016 appeal. However, the panel failed to cite any authority for such a proposition, and the letter in no way indicated that Cloud was forfeiting any of his claims. The letter merely offered an alternative argument – a valid one under the circumstances – in the event that the board agreed with the committee that Cloud's application should be denied on the basis that he failed to establish a change in circumstances or if the board made a finding pursuant to the 42-month limitations period of section 5.7(b).[3] Additionally, the record does not

[3] Section 5.7(b) addresses reclassification and states, in relevant part:

> A Player who is awarded T&P benefits will be deemed to continue to be eligible only for the category of benefits for which he first qualifies, unless the Player shows by evidence found by the Retirement Board or the Disability Initial Claims Committee to be clear and convincing that, because of changed circumstances, the Player satisfies the conditions of eligibility for a benefit under a different category of T&P benefits. A Player's T&P benefits will not be reclassified or otherwise increased with respect to any month or other period of time that precedes by more than forty-two months the date the Retirement Board receives a written application or similar letter requesting such reclassification or increase that begins the administrative process that results in the award of the benefit. This forty-two (sic) month limitation period will be tolled for any period of time during which such Player is found by the Retirement Board or the Disability Claims Committee to be physically or mentally incapacitated in a manner that substantially interferes with the filing of such claim.

support the panel's presumed finding that only the letter was provided to or considered by the board pursuant to the appeal. Instead, the record establishes that Cloud's actual application and administrative record were sent to the board, and that the board made no such finding of forfeiture. Moreover, the letter Cloud received from the committee explaining the denial of his reclassification and advising him of his right to appeal explicitly said that the "[b]oard will take into account all available information, regardless of whether that information was available or presented to the Committee."

IV. Conclusion

Because Cloud supported his 2016 claim for reclassification by sufficiently alleging a new or different impairment, I disagree with the panel that Cloud "did not" and "cannot" demonstrate changed circumstances. Accordingly, I dissent from the denial of rehearing en banc.