IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CINDY ROTE, Plaintiff, vs. TITAN TIRE CORPORATION, Defendant.	No. 4:07-cv-00496-JAJ **ORDER**

This case arises from Plaintiff Cindy Rote's ERISA claim for disability benefits. Rote seeks disability benefits pursuant to the benefit plan of her former employer, Titan Tire Corporation ("Titan"). She also seeks civil penalties under 29 U.S.C. § 1132(c), alleging that Titan failed to provide plan documents for more than two and a half years. Rote filed a trial brief on June 16, 2008 (dkt. 11) and Titan filed its brief on June 30, 2008 (dkt. 12). The plaintiff filed a response on July 8, 2008 (dkt. 13). For the reasons set forth below, the court finds that Titan improperly denied Rote benefits. The court denies Rote's request for monetary penalties under ERISA § 502(c)(1) because they are barred by the statute of limitations.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Cindy Rote worked for Titan Tire Company from November 7, 1984, until October 23, 2001. In 1997, surgeon Dr. Scott Neff performed two CMC anthroplasties on Rote, replacing the joints in each of her thumbs. In April 1998, the union to which Rote belonged went on strike until October 16, 2001. At the end of the strike, Rote wanted to return to work. Titan requested that Dr. Anthony Sciorrotta, M.D., perform a medical evaluation to determine whether Rote could work. Dr. Sciorrotta placed upon

Rote the following restrictions: (1) "No repetitive, frequent pinching requiring force of more than five pounds"; and (2) no kneeling or squatting. (R. 48).

On October 23, 2001, Titan's human resources manager informed Rote that no jobs in the plant met her restrictions. (R. 49). Thereafter, Rote wrote to the human resources manager, requesting an application for disability pension. She received no response and wrote two more letters requesting an application on June 6, 2002, and August 19, 2002. Rote received the application and filed for disability pension on September 24, 2002. (R. 50-53).

As a part of her application, Rote submitted an evaluation from Dr. Neff which was performed on September 16, 2002. (R. 54). He wrote that "her restrictions have not changed and consequently, based on the employers decision, she is considered disabled and not able to return to that specific job. I am pleased with her overall function. The pain she had prior to surgery is gone although certainly she does have some weather related changes and her hands are not entirely normal." (R. 54).

On January 17, 2003, Titan denied Rote's request for disability pension because she did "not qualify as 'disabled' under the plan." (R. 56). Under Titan's plan, an Employee is permanently and totally disabled if,

> (A) [H]e has been permanently and totally disabled by bodily injury or disease so as to be prevented thereby from being physically able to perform the work of any classification in the local plant, and
>
> (B) [S]uch permanent and total disability shall have continued for (5) consecutive months and, in the opinion of a qualified physician designated by the Committee, will presumably be *permanent and total during the remainder of his life*.

1991 Agreement on Employee Benefit Programs (emphasis added).

Rote filed suit in this court on May 18, 2004, challenging the Plan Administrator's decision. The court issued a ruling on February 14, 2006, reversing the decision and remanding it to the Plan Administrator. (R. 60-71). In its decision, the court found that

"Titan failed to provide[] [Rote] with adequate notice of the denial in conformance with the requirements . . . of an adverse decision under 19 CFR §2560.503-1." Rote v. Titan Tire Corp., No. 4:04-cv-10275 (S.D. Iowa Feb. 14, 2006). The court found that the decision did not provide enough specificity as to why Rote was not "totally disabled and unable to work." Id. at 10.

On July 11, 2006, Rote's attorney wrote to Titan, requesting a prompt reconsideration and submitting additional evidence. The evidence included supplemental statements by Drs. Neff and Sciorrotta, as well as an affidavit from John Peno, Chairman of the Employment Appeal Board of the United Steelworker of America Union. First, in a letter dated February 23, 2006, Dr. Sciorrotta wrote, "With respect to whether or not I would recommend that Ms. Rote continue to follow these restrictions indefinitely, I would say that regarding her hands, *she should continue with those restrictions since they were outlined by Dr. Neff and were felt to be of a permanent nature*." (R. 75) (emphasis added).

Second, Rote submitted comments from Dr. Neff that were in response to a letter from Rote's attorney. Dr. Neff wrote that he had not removed the restrictions and recommended that she continue to follow the restrictions indefinitely. (R. 77). Third, Rote submitted an affidavit from John Peno dated July 7, 2006, in which he stated that there were no jobs that Rote could perform in 2001 and there continued to be no jobs for her in 2006. (R. 79). "I am not aware of any current job within the local Titan Tire plant that could be performed with restrictions against no repetitive, frequent pinching involving force of more than five pounds." (R. 79). On August 29, 2006, Titan returned a decision again denying Rote's disability claim. (R. 81). The letter stated that Rote is not "'permanently and totally disabled' as those terms are defined and discussed in Sections 5.03 and 5.04 of the Plan." (R. 81). Jennifer Cramm wrote, "While you have submitted a statement from Dr. Neff stating he has not, to date, removed the restrictions placed on Ms. Rote and that Ms. Rote is to continue to follow these restrictions 'indefinitely,' the

evidence, when viewed as a whole by Titan, does not support the position that Ms. Rote is 'permanently' or 'totally' disabled." (R. 81).

Rote's counsel wrote Cramm on September 28, 2006, requesting additional information relating to the denial. Specifically, they asked for (1) the specific basis for the denial, (2) whether she was both totally and permanently disabled, and (3) the additional evidence that was considered. (82-83). Cramm responded on October 16, 2006, stating that she considered Rote's supplemental evidence submitted on August 29, 2006, as well as the evidence Rote submitted with her first application. (R. 84-85). No other evidence was obtained beyond that which Rote submitted. Cramm wrote the evidence did not support a finding of "permanent disability." (R. 84).

Regarding the reasons for the non-disability finding, Cramm wrote,

> [Y]ou have not provided the Plan with any information from a physician or otherwise which states that Ms. Rote's alleged disability will remain permanent. While the Plan acknowledges that you have provided evidence from physicians regarding Ms. Rote's current restrictions, the evidence does not support your position that these restrictions will be permanent.

(R. 84).

On October 24, 2006, Rote requested a formal review of Titan's decision. (R. 86). Pointing to the supplemental evidence from Drs. Neff and Sciorrotta, Rote contested Cramm's statement that she had not provided evidence that her disability was permanent. She also sought review because Titan had obtained no additional information. Included with the request, Rote's counsel enclosed a letter clarifying Dr. Neff's opinion. Dr. Neff indicated that he intended the hand restrictions to be permanent. (R. 88).

On December 8, 2006, attorney Susan Freed responded that they were reconsidering the application and would be "consulting with an independent medical expert regarding Ms. Rote's appeal." (R. 90). Titan General Counsel Cheri Holley issued a decision on December 22, 2006, denying Rote's claim, finding insufficient evidence to establish

permanent restrictions. (R. 92). Holley based her decision on Drs. Neff and Sciorrotta's statement that Rote's restrictions are "indefinite." She wrote,

> "Indefinite" is defined by Black's Law Dictionary as "without fixed boundaries or distinguishing characteristics; not definite, determine or precise. Term is more synonymous with temporary than permanent; indefinite contemplates that condition will end at an unpredictable time, whereas 'permanent' does not contemplate that the condition will cease to exist."

(R. 92). Holley also found that even though Dr. Neff clarified that he meant "indefinite" to mean "permanent," there was "no corresponding medical evidence to support this assertion nor is there any evidence to suggest Dr. Neff has evaluated Ms. Rote since 2002." (R. 92). She found that Rote has "not been seen by either [Dr. Neff or Dr. Sciorrotta] since 1998." (R. 93). She also cited to a 1998 report from Dr. Neff in which he found,

> Her finger motion is excellent, and her strength is improving. Her thumb flexion is improving but it is not normal. She does not have grip strength and motion enough to allow her to grasp with tools. I think it is time to enter her into a formal work hardening or work conditioning program.

(R. 93). Holley interpreted these comments to mean that Dr. Neff "believed she would eventually be able to grasp with tools." (R. 93). Holley also stated that they consulted an independent physician. (R. 93).

On January 29, 2007, Rote's attorney wrote Holley asking for documentation from the independent physician. (R. 95). Rote's counsel did not receive a response. Rote's attorney then sent a letter to Titan's attorney Susan Freed on April 11, 2007 (R. 96), and another request to Holley on April 12, 2007, to which he received no response. Rote's attorney sent another request to Freed on May 16, 2007. Rote's attorney received a response that day, providing the name and contact information of the independent

physician Titan consulted. (R. 97-99). Freed stated that the physician did not provide any written information. (R. 99).

II. CONCLUSIONS OF LAW

A. Standard

In reviewing a claim pursuant to ERISA, the court will review under a *de novo* standard unless the Plan administrator has "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). If the Plan administrator has discretionary authority, the court then reviews for abuse of discretion. Id.; see also Chronister v. Unum Life Ins. Co. of Am., No. 07-3552, 2009 U.S. App. LEXIS 9033, at *5-6 (8th Cir. April 30, 2009). Titan's plan gives the administrator discretionary authority; therefore, the appropriate standard of review is abuse of discretion.[1]

Under an abuse-of-discretion standard, "we consider whether the administrator's decision is supported by such relevant evidence that a reasonable mind might accept as adequate to support such a conclusion." Lasalle v. Mercantile Bancorporation, Inc., 498 F.3d 805, 809 (8th Cir. 2008) (citing King v. Hartford Life & Accident Ins. Co., 414 F.3d 994, 999 (8th Cir. 2005) (en banc)). The court "must affirm if a reasonable person *could* have reached a similar decision, given the evidence before him, not that a reasonable person *would* have reached that decision." Wise v. Kind & Knox Gelatin, Inc., et. al., 429 F.3d 1188, 1190 (8th Cir. 2005) (quotation omitted); see also Johnson v. Bell, 468 F.3d 1082, 1086 (8th Cir. 2006) (same). This standard, "though deferential, is not

[1] Rote maintains her argument that the claim should be reviewed under a "sliding scale" standard of review. See Woo v. Deluxe Corp., 144 F.3d 1157 (8th Cir. 1998). The "sliding scale" standard is used in ERISA cases where there are procedural irregularities and a conflict of interest. In its 2006 order, this court determined that the sliding scale standard of review was inapplicable. Rote, No. 4:04-cv-10275, at *4-8. Rote has presented no additional argument or evidence about a conflict of interest regarding or procedural irregularity. Therefore, the court will review under the abuse-of-discretion standard.

tantamount to rubber-stamping the result." Torres v. UNUM Life Ins. Co. of Am., 405 F.3d 670, 680 (8th Cir. 2005).

The court must look at whether the decision to deny benefits was supported by substantial evidence. Midgett v. Wash. Group Int'l Long Term Disability Plan 561 F.3d 887, 897 (8th Cir. 2009). Substantial evidence is "more than a scintilla but less than a preponderance" of evidence. Id. (quoting Schatz v. Mut. of Omaha Ins. Co., 220 F.3d 944, 949 (8th Cir. 2000) (internal quotation marks omitted).

B. Denial of Benefits

Rote argues that there is not substantial evidence in the record to support Titan's conclusion that Rote's restrictions are not permanent. She contends that the only evidence in the record is the 1998 evaluation from Dr. Neff that said she was improving and recommended a work-hardening program. Titan argues that the decision of the Plan administrator should be upheld because of the inconsistencies in the case, a lack of objective evidence, and because the administrator gave a reasonable explanation for denying the claim. The court finds that despite the deferential abuse-of-discretion standard, the plan administrator should have granted Rote benefits.

The central issue is whether the disability will be "permanent." The evidence Titan cited in support of the denial are (1) the opinions of Dr. Neff and Dr. Sciorrotta in which they said that the restrictions were "indefinite"; and (2) the 1998 treatment note from Dr. Neff. Regarding the comments that the restrictions would be "indefinite," the court finds that the administrator took these comments out of context. The Administrator quotes the definition of "indefinite" from Black's Law Dictionary which states, in part, that the term is "more synonymous with temporary than permanent." (R. 92). In reading the letter from Rote's attorney to Drs. Sciorrotta and Neff, it is clear that Rote's attorney meant indefinite to mean "without fixed boundaries . . . not definite, determine or precise without end or fixed boundaries," which is also a definition of "indefinite." (R. 92). Rote's attorney wrote,

> A question has now arisen as to whether the restrictions you imposed against repetitive gripping and pinching activities were only temporary or were intended to be permanent. . . 1. Have you ever removed those restrictions? 2. Would you recommend that Ms. Rote continue to follow these restrictions indefinitely?

(R. 77). Dr. Neff replied "No" to the first question "yes" to the second. (R. 77). If Dr. Neff meant "indefinite" to mean "temporary," he likely would have removed the restrictions. But at that point, nine years after her surgery, Dr. Neff had not removed the restrictions.

It is clear that Dr. Sciorrotta understood the context of the question, as he wrote "yes," in the line next to whether the restrictions are indefinite and then gave narrative comments detailing the permanency of the restrictions. "I would say that regarding her hands, she should continue with those restrictions since they were outlined by Dr. Neff and were felt to be of a permanent nature." (R. 75). It is clear viewing the correspondence as a whole and in context, "indefinite" was meant to be "permanent."

But regardless of the clarity of the initial letter and the doctors' responses, Rote's attorney cleared up the dispute about "indefinite." In his follow-up letter, Rote's attorney asked Dr. Neff, "Were the restrictions you imposed in 1999 against repetitive pinching and gripping activities intended to be permanent restrictions?" (R. 88). Dr. Neff responded affirmatively. This leaves no question as to Dr. Neff's opinion. The plan administrator's statement that Dr. Neff's opinion that the restrictions are "indefinite," meaning not permanent, is not supported by substantial evidence.

Ruling out the evidence about Rote's restrictions being "indefinite," the only remaining evidence in support of denial is Dr. Neff's treatment note in which he stated that Rote was improving and recommended a work-hardening program. Dr. Neff did not say, however, whether Rote's restrictions were improving to a level in which he was or would be able to remove the restrictions he placed upon her. Nor did he discuss whether the work-hardening program was for the purpose of returning to her previous job at Titan.

When placed against Drs. Neff and Sciorrotta's comments that Rote's restrictions are permanent, this evidence is merely speculative, at best, that Rote can return to her former employment.

The court finds that doctors have consistently imposed permanent restrictions over a seven-year period. Dr. Neff imposed restrictions at the time of her surgery in 1999, again in 2002, and again in 2006. These restrictions were also affirmed by Dr. Sciorrotta in 2001 and 2006. The court finds that the Administrator abused her discretion in denying benefits. Reviewing the record as a whole, the evidence is not substantial. A reasonable person could not have denied benefits.

C. Monetary Penalties

Rote next argues that she is entitled to civil monetary penalties because Titan failed to provide a summary plan description in a timely fashion. ERISA requires the plan administrator to provide certain documents to a plan beneficiary upon request, including a summary plan description. 29 U.S.C. 1024(b)(4). A plan administrator must mail materials to the requesting participant within 30 days of the request. 29 U.S.C. § 1132(c)(1)(B). Under Section 502(c)(1) of ERISA, a court may order civil penalties when a plan administrator does not provide the summary plan description as required. Id. The court has the discretion to order penalties of up to "$100 a day from each date of such failure or refusal [or] order such other relief as it deems proper." Id. Rote requested the summary plan description on March 5, 2003 and again on May 1, 2003. She did not receive those materials until November 27, 2005.

There is no statute of limitations under this provision of ERISA. Iverson v. Ingersoll-Rand Co., 125 Fed. Appx. 73, 76 (8th Cir. 2004) (unpublished). The court must therefore "look to state law and choose the most analogous statute of limitations." Id. The Eighth Circuit Court of Appeals interprets this section of ERISA as "'penal' for statutory construction purposes." Id. "A $100/day sanction for untimely disclosure of information is, as this court has explained, designed 'to punish noncompliance,' and 'to provide . . .

an incentive to timely respond to request for documents.'" Id. (internal citations omitted). In Iverson, the court applied the North Dakota statute of limitations for actions based on statutory penalties.

Under Iowa law, the limitations period for statute penalties for an injury to a person is two years. Iowa Code § 614.1(2).[2] Here, Rote first requested plan documents on March 5, 2003 and again on May 1, 2003. The plan administrator had thirty days to provide the documents; therefore, the cause of action accrued, at the latest, on June 1, 2003.[3] The statute of limitations began running at that time, which means she should have filed an action for monetary penalties by June 1, 2005. Rote filed her complaint on October 30, 2007. (dkt. 1). Her claim is therefore barred by the statute of limitations.

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[2] Iowa Code states,

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> . . .
>
> 2. *Injuries to person or reputation -- relative rights -- statute penalty*. Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

Iowa Code § 614.1.

[3] When a beneficiary makes multiple requests for plan documents, as Rote did here, there is some uncertainty regarding when a cause of action accrues. Some courts have held that the claim accrues after the first request. See Hemphill v. Ryskamp, No. CV-F-05-1319, 2008 U.S. Dist. LEXIS 22528, at *53 (E.D. Cal. Mar. 21, 2008) (statute of limitations calculated from the first of three requests). Other courts have calculated the limitations period from the most recent request. See Gregorovich v. E.I. DuPont DeNemours, 602 F. Supp. 2d 511 (D. Del. 2009) ("[T]his claim accrued at the latest thirty days from . . . the date of plaintiff's second request for a copy of the plan documents . . . ."). The distinction is immaterial in this case. Whether the claim accrued on April 5, 2003, or June 1, 2003, Rote filed her complaint on October 30, 2007, well after two years from either date.

Upon the foregoing,

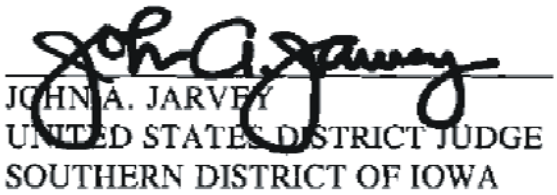
IT IS SO ORDERED

Plaintiff's claim for benefits pursuant to ERISA is hereby GRANTED. The Plan shall award the requested disability benefits effective October 23, 2001, together with costs of this action. Any action for attorney's fees shall be made pursuant to Local Rule 54.1.

Plaintiff's claim for civil monetary penalties pursuant to ERISA § 502(c)(1) is hereby DENIED.

The clerk of court should enter judgment accordingly.

DATED this 27th day of May 2009.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA