IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NANCY GILLESPIE d/b/a PRIVATE SENIOR PROVIDERS,	)	
Plaintiff,	)	
vs.	)	No. 2:07-cv-2524-MaV
HERMAN LOVE, BETTY LOVE and AETNA HEALTH MANAGEMENT, LLC,	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

This case was filed seeking relief pursuant to the Employment Retirement Security Income Act ("ERISA"), 29 U.S.C. §§ 1132 (a)(1)(A), a(3), a(5), a(8), and involves the alleged failure to pay compensation due for services rendered. Before the court is the December 26, 2007 motion of the defendant, Aetna Health Management, LLC ("Aetna"), seeking a protective order regarding discovery requests made by the plaintiff, Nancy Gillespie d/b/a Private Senior Providers. Gillespie has filed a response in opposition to the motion. The motion was referred to the United States Magistrate for determination. For the reasons that follow, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND

Gillespie, who operates Private Senior Services, provided home health services for Herman Love ("Love") from January 2, 2007,

through March 31, 2007. (Def.'s Mem. Br. Supp. 1.) Love worked for International Truck and Engine Corporation and was provided health coverage under an employee welfare benefit plan. (*Id.*) The benefit plan was a Medicare Private Fee-for-Services plan, and was administered by Aetna. (*Id.*)

On July 6, 2007, Gillespie filed suit against Herman Love, Betty Love, and Aetna in the Chancery Court of Shelby County, Tennessee, in which she sought payment of $44,904.76 for the health services she rendered to Love. (*Id.* at 2.) Aetna removed the case to this court on August 9, 2007, citing ERISA as the applicable law. (*Id.*) Gillespie subsequently amended her complaint on October 31, 2007, to assert claims against Aetna under ERISA as an assignee of the benefits provided to Love. (*Id.*) On December 5, 2007, she filed her First Set of Interrogatories and First Set of Requests for Production of Documents and Things, the items which are the subject of the present motion. (*Id.*) The remaining claims against the Loves were dismissed on December 6, 2007. (*Id.*)

ANALYSIS

In its present motion, Aetna argues that because Gillespie's claims against it are governed and preempted by ERISA, no discovery should be allowed. (*Id.*) Therefore, Aetna contends it is entitled to the entry of a protective order, pursuant to Federal Rule of Civil Procedure 26(c), alleviating it from the requirement to respond to or answer the written discovery requests. (*Id.*)

Specifically, Aetna claims that review in this case is limited to the administrative record and any discovery seeking information outside of that record is prohibited, unless it is related to a procedural challenge to the claim decision. (*Id.* at 3.) Aetna asserts that Gillespie has not made any procedural challenges that would entitle her to discovery in this case. (*Id.*)

In opposition to the motion, Gillespie argues that her "entire case is based on procedural deficiencies[,] including a refusal to ever reach a decision absent a Medicare number." (Pl.'s Reply 2.) Specifically, Gillespie claims that there is no clear denial of the claim in the record and that Aetna never fully processed the file. (*Id.*) She contends that all of the discovery requests at issue are aimed at "documenting the failure of Aetna to process a claim and the apparent substitution by Aetna of one plan for another." (*Id.*) In particular, Gillespie's discovery requests seek the identity of individuals having knowledge of the facts and matters at issue, the identity of any expert witnesses, the coverage of plans administered by Aetna for Love over the past two years, the description of documents typically furnished to a proposed provider, the name of the type of legal entity Aetna is and whether it is owned by another entity, whether Aetna or any affiliates are involved in other litigation involving a refusal to pay for lack of submitting a Medicare number, the identity of persons answering the interrogatories, the description of communications between Aetna

and other individuals regarding any facts related to this claim, and the identity of any other entity that might be responsible for payment. (Def.'s Mot. Ex. A.) Gillespie also seeks production of all plan documents relating to the case, any documents referred to or referenced in the interrogatories, any training or procedure manuals relating to telephone contact with providers, any documents sent to or received from Gillespie, any documents or logs relating to documents sent to or received from her, and any tape or oral recordings of conversations between her and Aetna. (Def.'s Mot. Ex. B.) Gillespie further argues that Aetna did not give proper notice of the claim's denial as required by ERISA and that discovery should be allowed on the state law claims. (*Id.* at 4, 6.)

The Sixth Circuit is clear that in conducting either a de novo review or a review under the arbitrary and capricious standard,[1] the reviewing court may only consider evidence presented to the plan administrator. *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615 (6th Cir. 1998) (citing *Rowan v. Unum Life Ins. Co.*, 119 F.3d 433, 437 (6th Cir. 1997); *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990))(noting that when conducting a *de*

[1] Where an ERISA plan gives the plan administrator discretionary authority to determine eligibility of benefits, the decision of the administrator in denying benefits will be reviewed by the courts under a deferential arbitrary and capricious standard. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Otherwise, review is *de novo*. *Id.* Neither party stated in their memoranda to the court which standard applies in this case.

novo review "the district court [is] confined to the record that was before the Plan Administrator"); *Yeager v. Reliance Standard Life Ins. Co.,* 88 F.3d 376, 381 (6th Cir. 1996) (citing *Miller v. Metro. Life Ins. Co.*, 925 F.2d 979, 986 (6th Cir. 1991)) (noting that "[w]hen conducting a review of an ERISA benefits denial under an arbitrary and capricious standard, [the court is] required to consider only the facts known to the plan administrator at the time he made his decision"); *accord Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 982 (7th Cir. 1999) (citing *Wilkins*, 150 F.3d at 617–20; *DeFelice v. Am. Int'l Life Assurance Co.*, 112 F.3d 61, 65 (2d Cir. 1997); *Donatelli v. Home Ins. Co.*, 992 F.2d 763, 765 (8th Cir. 1993); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1021–27 (4th Cir. 1993) (en banc); *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992); *Luby v. Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1184–85 (3d Cir. 1991)) (holding that "when review under ERISA is deferential, courts are limited to the information submitted to the plan's administrator"). Thus, as a general rule, the court's review is limited to the administrative record, and the court cannot consider evidence outside the record. *Wilkins*, 150 F.3d at 615. Therefore, discovery is not appropriate because it could not produce any relevant evidence under the circumstances.

Gillespie urges that her "entire case is based on procedural

deficiencies" and discovery is proper because of an exception to the general rule. The Sixth Circuit has recognized that new evidence is permissible, and, as a corollary, limited discovery is appropriate when there is a procedural challenge such as allegations that the administrator failed to provide due process or was biased. *See Wilkins*, 150 F.3d at 618–19 (Gilman, J., concurring).

> The only exception to the . . . principle of not receiving new evidence at the district court level arises when consideration of that evidence is necessary to resolve an ERISA claimant's procedural challenge to the administrator's decision, such as an alleged lack of due process afforded by the administrator or alleged bias on its part.

Id. (citing *VanderKlok v. Provident Life & Accident Ins. Co.*, 956 F.2d 610, 617 (6th Cir. 1992)). "Any prehearing discovery at the district court level should be limited to such procedural challenges." *Id*. at 619.

The Sixth Circuit confirmed in an unpublished opinion that merely alleging procedural regularities in broad, conclusory terms is insufficient to justify prehearing discovery. *See Likas v. Life Ins. Co. of N. Am.*, 222 F. App'x 481, 486 (6th Cir. 2007) (unpublished opinion) (citing *Putney v. Med. Mut. of Ohio*, 111 F. App'x 803, 806–07 (6th Cir. 2004) (unpublished opinion); *Gindele v. Am. United Life Ins. Co.*, No. 05-100-DLB, 2006 WL 3193429, at *1–2 (E.D. Ky. Oct. 31, 2006)). The party seeking discovery must present sufficient evidence of a procedural irregularity before

discovery will be allowed. *Likas*, 222 F. App'x at 486. For example, in *Putney*, the Sixth Circuit upheld the district court's refusal to allow prehearing discovery in an ERISA case because the plaintiff had not presented sufficient evidence of bias to justify discovery. *Putney*, 111 F. App'x at 806–07.

Here, Gillespie argues that the entire case is based on procedural irregularities, including a refusal to ever reach a decision absent a Medicare number. (Pl.'s Reply 2.) She points to the complaint's allegations that Aetna refused to "process charges" and did not inform her that services were being performed under Medicare. (*Id.*; Compl. ¶¶ 4, 7.) The complaint also alleges that "Aetna provided no effective means to appeal the refusal to process." (Compl. ¶ 8.) These allegations are, at best, conclusory, and neither the complaint nor Gillespie's Reply present any evidence of procedural irregularities, such as lack of due process or bias, that is sufficient enough to support allowing the discovery served on Aetna. Gillespie has presented no evidence that tends to show she was denied the opportunity to present her claim to Aetna, present evidence in support of her claim, or appeal the refusal to pay on her claim due to the lack of a Medicare number being submitted.

Gillespie's argument that discovery should be allowed on her state-law claims is likewise without merit. ERISA "supercede[s] any and all State laws insofar as they may now or hereafter relate

to any employee benefit plan." 29 U.S.C. 1144(a). The Supreme Court has found that the preemption clause is broad in nature, encompassing any state law that "has a connection with or reference to such a[n employee benefit] plan." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138-39 (1990). For example, in *Cromwell v. Equicor-Equitable HCA Corp.*, the court specifically found that a plaintiff's state law claims based on promissory estoppel, breach of contract, negligent misrepresentation, and breach of good faith were clearly preempted by ERISA. *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991). Similarly, Gillespie's state law claims against Aetna are based in fraud, estoppel, contracts, and negligence. As such, they are preempted by ERISA and discovery is not allowed unless it falls under the exceptions previously discussed.

CONCLUSION

Accordingly, Aetna's motion for a protective order regarding Plaintiff's First Set of Interrogatories and Plaintiff's First Set of Requests for Production of Documents and Things is GRANTED.

IT IS SO ORDERED this 13th day of February, 2008.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE