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

CYNTHIA B. WINCHESTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 07-2724-MlV
	)	
UNUM LIFE INSURANCE COMPANY,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION TO STRIKE OR EXCLUDE THE AFFIDAVIT OF ALLAN HERSKOWITZ, M.D. AND GRANTING PLAINTIFF PERMISSION TO SUPPLEMENT ITS MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

Before the court is the April 23, 2008 motion of the plaintiff, Cynthia B. Winchester, to strike or exclude the affidavit of Allan M. Herskowitz, M.D. ("the Herskowitz Affidavit") and to supplement the plaintiff's motion for judgment on the administrative record. As sanctions, Winchester asks the court to consider the appeal under a *de novo* standard and to award attorney fees in bringing this motion. The defendant, Unum Life Insurance Company of America ("Unum"), has filed a response in opposition to the motion, Winchester has filed a reply to the response, and Unum filed a sur-reply. The motion was referred to the United States Magistrate Judge for determination. For the reasons that follow, the motion to strike is denied, the motion to supplement the record is granted, and the request for sanctions is denied.

FACTS

This case arises under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*., and involves the alleged wrongful termination of Winchester's long-term disability benefits. Winchester commenced this lawsuit in state court alleging various state causes of actions. Unum removed the case to federal court alleging federal question jurisdiction on the basis that Winchester's state law claims were preempted by ERISA. Unum filed the administrative record with the court on January 10, 2008. (Doc. No. 18.) On November 11, 2008, Winchester filed an amended complaint alleging improper denial of disability benefits under ERISA. (Doc. No. 20.) The amended complaint alleged in particular that Unum failed to provide Winchester with a full and fair review of her claim as required by 29 U.S.C. § 1133, that Unum had a conflict of interest in determining entitlement to disability benefits because it pays benefits out of its own funds, that Unum's representatives were biased, and that Unum denied Winchester due process. (Compl. ¶¶ 34, 35, 37, 38.) On March 11, 2008, the parties filed cross-motions for judgment on the administrative record pursuant to a briefing schedule established by the court. (Doc. Nos. 25 & 27.) In support of its response to Winchester's motion for judgment on the administrative record, Unum attached the Herskowitz Affidavit. (Doc. No. 29-2.)

ANALYSIS

Winchester argues that when a district court reviews a termination of benefits in an ERISA case, its review is restricted to the administrative record and it may not examine new evidence outside the record. Because the Herskowitz Affidavit was not presented to the plan administrator during its review of Winchester's termination of benefits and was not included in the administrative record filed with the court on January 10, 2008, Winchester contends it cannot be considered by the court and asks that it be stricken.

Unum acknowledges that the scope of review in this type of ERISA case is normally restricted to the record reviewed by the plan administrator, but it offers three theories to justify the court's consideration of the Herskowitz Affidavit. Unum argues that the court may properly consider the affidavit in its review because (1) the affidavit does not contain any additional evidence, medical or otherwise, not considered by Unum in making its determination, but only identifies the medical records actually considered by Herskowitz; (2) the affidavit is being offered to resolve Winchester's procedural challenge to the plan administrator's denial of benefits; and (3) the affidavit is being offered to rebut Winchester's allegations of conflict of interest on the part of Unum. In addition, Unum opposes Winchester's request to supplement her motion for judgment on the administrative record

and further insists that the court's standard of review should remain the same.

A. Motion to Strike the Affidavit

The Sixth Circuit is clear that in conducting either a *de novo* review or a review under the arbitrary and capricious standard of a denial of benefits in an ERISA case,[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 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)) ("When 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

[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, 114-15 (1989). Otherwise, review is *de novo*. *Id.* at 115.

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.

The Sixth Circuit has recognized, however, that new evidence is permissible 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 court stated:

> The only exception to the above 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. Although Winchester denies that she has made a procedural challenge in her motion for judgment on the administrative record, the court construes Winchester's argument that she was denied a full and fair review of her claim because Unum failed to provide

Dr. Herskowitz with certain critical medical records to be just that - a procedural challenge. Thus, new evidence outside the administrative record is permissible.

Winchester argues, nevertheless, that the new evidence exception for a procedural challenge recognized by the Sixth Circuit in *Wilkins* pertains to only discovery of information, not to the introduction of new evidence, and is further limited to the plaintiff in ERISA cases. The court disagrees. The actual language used by Judge Gilman in the concurring opinion in *Wilkins* recognized the exception to apply to the principle of "not receiving new evidence." *Wilkins*, 150 F.3d at 618–19 (Gilman, J., concurring). Thus, *Wilkins* is not confined to a rule of limited discovery in ERISA actions. Furthermore, it would be illogical to allow discovery related to procedural challenges and bias in ERISA cases unless "the discovery appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). Indeed, in *McQueen v Life Insurance Co. of North America*, No. 07-238-JBC, 2008 WL 631198 (E.D. Ky. March 4, 2008), a case relied on by Winchester, the district court allowed limited discovery for the purpose of providing the court information about the financial arrangements between the plan administrator and third-party reviewers to determine undue influence.

The exception allowing submission of new evidence outside the administrative record regarding a procedural challenge in ERISA

cases is not limited solely to the plaintiff. Again, this would be an illogical interpretation of the exception, and Winchester has cited no cases in which a defendant was expressly not allowed to submit additional evidence in response to a procedural challenge in an ERISA case. It would be patently unfair to allow a plaintiff to introduce evidence outside the administrative record in support of a procedural challenge but not allow the defendant the same right in opposition to a procedural challenge.

B. Winchester's Motion to Supplement her Brief

Winchester seeks to supplement her original brief and reply brief to seek a remedy for Unum's alleged violation of ERISA's Full and Fair Review Regulations due to her "receipt of newly discovered information both in the form of Unum's concessions in its reply brief and in the affidavit of Dr. Herskowitz." (Pl.'s Mem. Supp. Mot. Strike 10 n.4.) Unum opposes any supplementation by Winchester, arguing that no new information was imparted to Winchester in Unum's reply brief and the Herskowitz Affidavit.

Because Winchester had sought repeatedly to identify with specificity the documents provided to Herskowitz but was unable to do so until she received the Herskowitz Affidavit, Winchester will be allowed to supplement her original brief and reply brief, as requested, in support of her motion for judgment on the administrative record.

C. Standard of Review

Citing *Abatie v. Alta Health & Life Insurance Co.*, 458 F.3d 955, 971 (9th Cir. 2006)(*en banc*), Winchester next argues that Unum's violations of ERISA are so flagrant as to require *de novo* review of Unum's termination of benefits. In *Abatie*, the court considered the standard of review to be applied when a plan administrator failed to follow ERISA's procedural requirements for claims processing. The court noted that when procedural violations were so flagrant, a less deferential standard of review could be applied but held that the procedural irregularities it found in *Abatie* did not justify a *de novo* review.

The standard of review should be determined by the district judge if procedural violations are found. Accordingly, this court declines to require a *de novo* standard of review.

D. Attorney Fees

Because the motion is granted in part and denied in part, each party shall bear its own attorney fees and expenses in connection with this motion.

CONCLUSION

Winchester's motion to strike the affidavit of Allan Herskowitz, M.D. is denied; Winchester's motion to supplement its motion for judgment on the administrative record is granted; Winchester's request to apply a less deferential standard of review

is denied at this time, but it can be considered by the district judge if raised by Winchester in her supplemental pleading; and Winchester's request for attorney fees is denied. Winchester shall file her supplemental brief on or before ten (10) days of the date of entry of this order.

IT IS SO ORDERED this 7th day of July, 2008.

s/ Diane K. Vescovo
UNITED STATES MAGISTRATE JUDGE