United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7032 **September Term, 2019**

FILED ON: APRIL 7, 2020

JOSEPHINE KEMATHE,
APPELLANT

v.

RELIANCE INSURANCE COMPANY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00903)

Before: SRINIVASAN, *Chief Judge*, and ROGERS and PILLARD, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record and on the briefs of the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The Court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and ADJUDGED that the judgment of the United States District Court for the District of Columbia be **AFFIRMED.**

Josephine Kemathe brought this action against Reliance Standard Insurance Company (Reliance), the claims administrator of a long-term disability plan established by her former employer MedStar Health. Beginning in 2014, Kemathe's asthma rendered her unable to continue working as a respiratory care practitioner at MedStar. Under the terms of MedStar's disability plan, its employees qualify as disabled for the first two years of not working if they cannot perform the duties of their previous position. Kemathe met that standard, and Reliance thus paid her monthly benefits until 2016.

After the first two years of not working, the plan's definition of disabled narrows. At that point, an employee is considered disabled only if she "cannot perform the material duties of *Any Occupation*," not merely her former occupation. Reliance Standard Life Insurance Company, MedStar Health Long Term Disability Insurance Policy at 2.1 (Policy), J.A. 45 (emphasis added). The plan defines "Any Occupation" as "an occupation normally performed in the national

economy for which [the claimant] is reasonably suited based upon his/her education, training or experience." *Id.* at 2.0, J.A. 44. Reliance determined that Kemathe could perform at least five such jobs with her asthma. As a result, Reliance discontinued her disability benefits.

Kemathe sued Reliance under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, arguing that she was entitled to continued payments under the terms of the disability plan, *see* 29 U.S.C. § 1132(a)(1)(B). The district court granted summary judgment to Reliance. *Kemathe v. Reliance Standard Life Ins. Co.*, No. 1:17-cv-903 (TNM), 2019 WL 415817 (D.D.C. Feb. 1, 2019). On appeal, Kemathe challenges two aspects of the district court's decision. We reject both arguments.

First, Kemathe argues that the case should be remanded to allow further discovery of Dr. Ross Myerson, the third-party doctor who examined her as part of Reliance's internal appeal process. The district court allowed limited discovery about Dr. Myerson's evaluation of Kemathe. But the court denied discovery into the matters on which Kemathe now seeks information, such as Dr. Myerson's relationship with the third-party vendor Reliance uses to conduct claim evaluations. *See Kemathe v. Reliance Ins. Co.*, No. 1:17-cv-903 (TNM) (D.D.C. May 9, 2018) (order granting in part and denying in part motion to compel discovery).

We reject the remand request for further discovery because we do not think the district court's discovery ruling was an abuse of discretion. Kemathe argues that Reliance's use of Dr. Myerson ran afoul of a Department of Labor regulation governing ERISA plans. *See* 29 C.F.R. § 2560.503-1(h)(3)(v). That regulation, though, is inapposite. It dictates that the physician consulted during an internal plan appeal may not be the same "individual who was consulted in connection with the adverse benefit determination that is the subject of the . . . appeal." *Id.* That limitation does not pertain to Dr. Myerson, who did not consult on Reliance's initial "adverse benefit determination" regarding Kemathe. The initial physician instead was Dr. Ajeet Vinayak. Accordingly, we deny Kemathe's request for further discovery into Dr. Myerson.

Second, Kemathe argues that the district court should have considered the decision of a Social Security Administration Administrative Law Judge (SSA ALJ) who found that Kemathe was eligible for social security disability insurance. The SSA decision postdated Reliance's decision to discontinue benefits. Kemathe asks for a remand to allow the district court to consider the SSA decision.

The district court declined to consider the SSA decision on the basis that it was not part of the record before the plan administrator. *Kemathe*, 2019 WL 415817, at *2. Our circuit has not addressed whether courts may consider such extra-record evidence when reviewing an administrator's decision *de novo*, as we do here. The decision cited by the district court, *Block v. Pitney Bowes Inc.*, 952 F.2d 1450, 1455 (D.C. Cir. 1992), concerned abuse-of-discretion review,

not *de novo* review. And many other circuits allow consideration of extra-record evidence on *de novo* review. *See Hurley v. Life Ins. Co. of N. Am.*, No. 1:04-cv-252 (CKK), 2006 WL 1883406, at *4–5 (D.D.C. July 9, 2006) (collecting cases).

We need not resolve the issue, though, because summary judgment for Reliance is warranted even taking account of the SSA decision. *See Wash.-Balt. Newspaper Guild, Local 35 v. Wash. Post*, 959 F.2d 288, 292 n. 3 (D.C. Cir. 1992) (we may affirm summary judgment on any ground found in the record).

Nothing in the SSA decision creates a genuine issue of fact as to whether Kemathe could perform the material duties of any occupation. The SSA examining physician concluded, just as Drs. Vinayak and Myerson did, that Kemathe "could sit at a desk and do manual labor, walk several blocks[,] and climb a flight of stairs without difficulty." Josephine M. Marangu Kemathe, Social Security Administration Office of Disability Adjudication and Review Decision at 5 (Aug. 25, 2017) (Social Security Decision), J.A. 1684. That is, every doctor to examine Kemathe agreed that she could perform sedentary work. The SSA ALJ made the same factual finding. That conclusion is consistent with Reliance's determination that there were at least five sedentary jobs "normally performed in the national economy" for which Kemathe would be "reasonably suited based upon her education, training, or experience." Policy at 2.0–2.1, J.A. 44–45. Kemathe provided no evidence to the district court contesting her ability to perform any of the five suggested jobs. There thus is no dispute of fact that she can perform them. Under the terms of the plan, then, Kemathe is ineligible for continued disability payments.

Moreover, the SSA ALJ's conclusion that Kemathe is disabled for purposes of social security disability benefits rested on a mechanical burden-shifting framework under which, for a person of Kemathe's age, "job skills do not transfer" for sedentary work unless "the sedentary work is so similar to [the claimant's] previous work that [she] would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry." 20 C.F.R. § 404.1568(d)(4); *see* Social Security Decision at 5–6, J.A. 1684–85. There is no such age-related presumption at work in the MedStar plan's definition of total disability. Indeed, the importance of age to the social security disability framework stands in contrast to the importance of age to the plan's framework: for the latter, age is irrelevant. *See* Policy at 2.0, J.A. 44. What matters instead is Kemathe's ability to "perform the material duties of . . . an occupation normally performed in the national economy for which [she] is reasonably suited based on education, training, or experience." *Id.*

For the same reason, Kemathe's ability to earn a "livable wage" in a different job, another factor she claims Reliance should have considered, is irrelevant to whether she is eligible for disability payments from Reliance. That is because "what qualifies as a disability for social security disability purposes does not necessarily qualify as a disability for purposes of an ERISA

benefit plan—the benefits provided depend entirely on the language in the plan." *Smith v. Cont'l Cas. Co.*, 369 F.3d 412, 420 (4th Cir. 2004). The MedStar plan here makes no mention of other occupations' wages as a factor in determining whether an employee is entitled to disability payments.

For the foregoing reasons, we conclude that the district court did not err in denying further discovery into Dr. Myerson, and we further conclude that Reliance was entitled to summary judgment. We thus affirm the decision of the district court.

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Pursuant to D.C. Cir. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk