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No. 17-4072

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DEBORAH S. HUNT, Clerk

RICHARD WAGNER, Plaintiff-Appellant, v. AMERICAN UNITED LIFE INSURANCE COMPANY, Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: MOORE, CLAY, and KETHLEDGE, Circuit Judges.

KETHLEDGE, Circuit Judge. American United Life Insurance Company started paying Richard Wagner disability benefits after a motorcycle accident left him with severe leg pain. American stopped paying 34 months later, and Wagner sued. The district court held that Wagner was no longer entitled to benefits. We disagree and reverse.

I.

When Wagner was 16 years old, he was paralyzed in a motorcycle accident. Yet he graduated from college, worked several jobs, completed marathons in his wheelchair, and continued to ride motorcycles. In 2011, at the age of 45, he had another accident, this time breaking his right femur. He spent two weeks in the hospital; severe leg pain kept him from working thereafter.

At the time of that accident, Wagner worked at Maxim Crane Works, where he was covered by an American insurance policy. Per that policy, American must pay Wagner part of his salary while he is "totally disabled." Specifically, it must pay him for up to 36 months if he

"cannot perform . . . his regular occupation[.]" It must continue to pay him thereafter only if he "cannot perform . . . any gainful occupation" for which he is reasonably suited.

After the accident, Wagner received disability benefits from American for 34 months. Then American's claims administrator, Disability Reinsurance Management Services (DRMS), determined that Wagner could in fact "perform the full time duties of [his] previous occupation." He unsuccessfully appealed that decision within DRMS. Wagner thereafter sued American for unpaid benefits under the Employee Retirement Income Security Act of 1974 (ERISA). *See* 29 U.S.C. § 1132(a)(1)(B). Each party moved for judgment on the administrative record. The district court entered judgment for American. This appeal followed.

II.

We review the administrative record de novo to decide whether Wagner has proven that he was "totally disabled" at the time his benefits ended. *See Javery v. Lucent Techs., Inc. Long Term Disability Plan*, 741 F.3d 686, 700-01 (6th Cir. 2014). Since his benefits ended in the first 36 months, the main question is whether he could perform his "regular occupation."

In Wagner's "regular occupation" as a service analyst, he monitored the oil levels in Maxim's cranes. Wagner normally could do this job from his wheelchair using a computer and phone. What kept him from working, he says, was the severe pain in his leg, which he described as "pain flashes that feel[] like an ice pick in his thigh[.]"

Every professional who met Wagner agreed that he should not return to work. DRMS's own vocational rehabilitation counselor said that Wagner was "not capable of full time employment" a year before his benefits ended, due to the "pain flashes" and grogginess from lack of sleep. Wagner's doctor, Dr. Sullivan, echoed that conclusion in reports he sent DRMS both before and after it found that Wagner could work. So did two other doctors—a neurologist

and a pain specialist—who examined Wagner in person during the DRMS appeals process. And so did a vocational expert, who reviewed these opinions and concluded that Wagner was "permanently unable [to] perform[] sustained remunerative employment in any work field." This evidence shows that Wagner never recovered from his initial disability, and thus could not perform his "regular occupation" when his benefits ended. *See id.* at 690 & n.1.

American argues that Wagner's evidence has two problems. First, it contends that Wagner's doctors gave different opinions at different times. On one form that Dr. Sullivan sent DRMS, for example, he remarked that Wagner might be capable of "light clerical work only if able to take frequent breaks[.]" But Dr. Sullivan also said (among other things) that Wagner's condition was "[u]nchanged" and that he could perform "0" hours of sedentary work. Dr. Sullivan never opined that Wagner was able to return to work. The neurologist did give such an opinion, but later said that his opinion was in error. Second, American suggests that Wagner's doctors failed to rely on "objective medical evidence," *i.e.*, evidence other than Wagner's self-reported symptoms. Although the absence of that evidence has sometimes justified the denial of disability benefits, in those cases the insurance policies expressly required it. *See, e.g.*, *Boone v. Liberty Life Assur. Co. of Bos.*, 161 F. App'x 469, 473 (6th Cir. 2005). Nothing in American's policy does.

American also contends that another doctor's opinion outweighs the above opinions. DRMS's medical reviewer, Dr. Russell, examined Wagner's file during the appeals process. He concluded based on anecdotal evidence—namely video surveillance and Wagner's self-reported activities—that Wagner could work and that Wagner was merely lying. That type of credibility opinion is entitled to little weight when based on a paper review—especially when the insurer can order an in-person examination. *See Judge v. Metro. Life Ins. Co.*, 710 F.3d 651, 663 (6th

Cir. 2013). Here, Dr. Russell did a paper review even though the policy gave American "the right to have [Wagner] examined" by an independent doctor. Moreover, the surveillance video captured Wagner for 20 minutes over a two-hour period, and only for a few minutes at a time. It is weak evidence of anything beyond those minutes, given that (according to Wagner and his doctors) his pain would come and go. And Wagner's ability to live alone and to engage in sporadic activities says little about his ability to go to work. *Cf. Diaz v. Prudential Ins. Co. of Am.*, 499 F.3d 640, 648 (7th Cir. 2007). He need not be bedridden to receive benefits. Thus the opinions of Wagner's doctors deserve more weight. As shown above, they say that he was still disabled when his benefits ended.

That leaves the question of remedy. American must pay Wagner benefits "as long as Disability continues provided that proof of continued Disability is submitted to [American] upon request and [he] is under the regular attendance of a Physician." That is true even beyond month 36—when the "total disability" standard changes—unless American affirmatively and correctly determined that Wagner is no longer disabled. We have no such determination here, and Wagner has otherwise met the policy conditions for the continuation of benefits.

American argues that Wagner should receive benefits only for months 35 and 36, since (it says) Wagner might be ineligible for benefits under the stricter "total disability" standard that applies beyond then. Specifically, American contends that DRMS should decide in the first instance whether Wagner has met that standard, *i.e.*, whether he "cannot perform . . . any gainful occupation" for which he is reasonably suited. DRMS could have made that decision at month 36. But it instead chose to forgo that opportunity when it (wrongly) decided that Wagner was no longer entitled to benefits at month 34. Moreover, the usual remedy in cases like this is to reinstate benefits retroactively, and there is no reason to depart from that practice here. *See*

Glenn v. MetLife, 461 F.3d 660, 674-75 & n.5 (6th Cir. 2006). Whatever American and DRMS might decide about Wagner's eligibility in the future, therefore, American must pay him the three years of benefits that he has missed.

* * *

The district court's judgment is reversed, and the case remanded for entry of judgment in Wagner's favor.