IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES L. EMIL,	:	
Plaintiff,	:	No. 3:CV 02-2019
vs.	:	(Judge Caputo)
UNUM LIFE INS. CO. OF AMERICA,	:	
Defendant.	:	

MEMORANDUM

Presently before the Court is Defendant's motion to dismiss (Doc. 3) Counts II and III of Plaintiff's complaint. Defendant's motion will be granted, and Counts II and III will be dismissed.

BACKGROUND

Plaintiff's complaint alleges the following: Plaintiff Charles L. Emil worked as a boiler tender for UGI Electric Utilities from 1982 until May, 2001. Plaintiff was a covered beneficiary under a group long-term disability benefits policy issued by UNUM through his employer.

Plaintiff was hospitalized between July 30 and August 8, 1996 due to the onset of angina. He underwent cardiac catheterization and ultimately a coronary arterial bypass graft surgery in 1996. Following a recovery period, Plaintiff returned to work. In May 2001, Plaintiff experienced a new on set of cardiac symptoms including angina. He underwent cardiac catheterization which revealed a lesion in the right coronary artery. He then underwent a stenting procedure. Plaintiff's treating physicians have not yet released him to return to work.

Following his illness in May 2001, Plaintiff filed an application for long-term

disability benefits. This application was denied initially on October 11, 2001, and again on November 28, 2001.

Plaintiff filed the complaint in the present action on November 7, 2002. (Doc. 1.) Count I is a claim for wrongful denial of benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 11 U.S.C. § 1132. Count II, also under ERISA, alleges breach of fiduciary duty. Count III is a bad faith claim under 42 PA. CONS. STAT. ANN. § 8371.

Defendant moved to dismiss Counts II and III of Plaintiff's complaint on January 7, 2003. (Doc. 3.) The motion has been fully briefed and is ripe for disposition.

STANDARD OF REVIEW

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. Dismissal is appropriate only if, accepting all factual allegations in the complaint as true and "drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations in the complaint." *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.,* 140 F.3d 478, 483 (3d Cir. 1998).

In deciding a motion to dismiss, the court should consider the allegations in the complaint, exhibits attached to the complaint and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (1993). The court may also consider "undisputedly authentic" documents where the plaintiff's claims are based on the documents and the defendant has attached a copy of the document to

the motion to dismiss. *Id.* The court need not assume that the plaintiff can prove facts that were not alleged in the complaint, *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 263 (3d Cir. 1998), nor credit a complaint's "bald assertions" or "legal conclusions." *Morse v. Lower Marion School District,* 132 F.3d 902, 906 (3d Cir. 1997).

When considering a Rule 12(b)(6) motion, the court's role is limited to determining whether the plaintiff is entitled to offer evidence in support of the claims. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). The court does not consider whether the plaintiff will ultimately prevail. *See id.* In order to survive a motion to dismiss, the plaintiff must set forth information from which each element of a claim may be inferred. *See Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). The defendant bears the burden of establishing that the plaintiff's complaint fails to state a claim upon which relief can be granted. *See Gould Electronics v. United States,* 220 F.3d 169, 178 (3d Cir. 2000).

DISCUSSION

A. Breach of Fiduciary Duty

Plaintiff alleges that Defendant breached its fiduciary duty by: wrongfully denying him a full, fair and impartial review of his benefits claim; not giving proper weight to his complaints regarding his subjective limitations; ignoring the records and opinions of Plaintiff's treating physicians; ignoring the evidence from Defendant's own vocational expert; and disregarding all evidence supporting Plaintiff's claim while using its own internal consultants to support a denial of benefits. Defendant moves to dismiss Plaintiff's breach of fiduciary duty claim.

Section 1132(a)(3)(B) provides that a participant may bring a civil action to obtain

"other appropriate equitable relief." In *Varity v. Howe,* 516 U.S. 489 (1996), the Supreme Court contemplated plaintiffs' practice of asserting overlapping claims for recovery of benefits and breach of fiduciary duty under this section:

> We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the special nature and purpose of employee benefit plans, and will respect the policy choices reflected in the inclusion of certain remedies and the exclusion of others. Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

See id. at 515 (internal quotations and citations omitted). The Third Circuit Court of Appeals, citing *Varity,* has noted that actions for breach of fiduciary duty are appropriate where the plaintiff "has no alternative means of recovering for his losses." *Ream v. Frey,* 107 F.3d 147, 152 (3d Cir. 1997).

Some district courts within the Third Circuit have held that, under *Varity*, a plaintiff may proceed with overlapping claims for both recovery of benefits and breach of fiduciary duty. *See e.g. Doyle v. Nationwide Ins. Co.s & Affiliates Employee Health Care Plan,* No. 01-5768 at *19 (E.D. Pa. Jan. 28, 2003)*; Parente v. Bell Atlantic-Pennsylvania,* No. 99-5478, 2000 WL 419981 at *3 (E.D. Pa. 2000). These courts reason that, "a plaintiff is only precluded from seeking equitable relief under § 1132(a)(3)(B) when a court determines that plaintiff will certainly receive or actually receives adequate relief for her injuries under § 1132(a)(1)(B) or some other ERISA section." *Parente,* 2000 WL 419981 at *3. I disagree. In *Varity*, the plaintiffs could not proceed under § 1132(a)(1)(B) because they were no longer plan members, and could not proceed under

§ 1132(a)(2) because that subsection does not authorize individual causes of action. *See* 516 U.S. at 515. The Supreme Court held that the plaintiffs could proceed under § 1132(a)(3)(B), noting that "they must rely on the *third* subsection or they have no remedy at all." *Id.* (emphasis in original). By contrast, in the present case, Plaintiff has a remedy under § 1132(a)(1)(B). Both the Supreme Court and the Third Circuit Court of Appeals have cautioned that, in fashioning appropriate equitable relief under § 1132(a)(3)(B), courts must "respect the policy choices reflected in the inclusion of certain remedies and the exclusion of others." *Ream,* 107 F.3d at 152 (quoting *Varity*, 516 U.S. at 515). Plaintiff's claim for breach of fiduciary duty is no more than a claim that Defendant wrongfully denied him benefits under the terms of the plan. Congress' creation of a specific remedy for the wrongful denial of benefits in § 1132(a)(1) makes it inappropriate for Plaintiff to pursue an overlapping claim for breach of fiduciary duty here. *See Post v. Hartford Life and Accident Ins. Co.,* No. 02-1917, 2002 WL 3174170 at *2-3 (E.D. Pa. 2002); *Feret v. Corestates Financial Corp.,* No. 97-6759, 1998 WL 426560 at *5 (E.D. Pa. 1998). Defendant's motion to dismiss Count II will be granted.

B. ERISA's Preemption of Bad Faith Claims

Courts in the Middle District of Pennsylvania have long held that claims under Pennsylvania's bad faith statute, 42 PA. CONS. STAT. ANN. § 8371,[1] are preempted by

[1]Section 8371 provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> 1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> 2) Award punitive damages against the insurer.

ERISA. *See e.g. Garner v. Capital Blue Cross,* 859 F. Supp. 145, 148 (M.D. Pa. 1994) (Caldwell, J.), *aff'd* 52 F.3d 214 (3d Cir. 1995), *cert. denied* 516 U.S. 870 (1995). Plaintiff argues that, pursuant to a recent Supreme Court decision, *Rush Prudential HMO, INC., v. Moran,* 122 S.Ct. 2151 (2002), § 8371 is not preempted by ERISA because it falls under ERISA's saving clause.

The ERISA preemption clause, 29 U.S.C. § 1144(a), provides that, "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." However, ERISA's saving clause exempts from preemption, "any law of any State which regulates insurance." 29 U.S.C. § 1144(b)(2)(A).

In *Rush*, the Supreme Court applied a three prong test to determine whether a state statute falls within the saving clause. First, the court must determine whether the state law regulates insurance under a "common sense view." *See Rush,* 122 S.Ct. at 2159. Then, the court must test the results of the common-sense enquiry by employing a three factor test used to point to insurance laws spared from preemption under the McCarran-Ferguson Act,[2] 15 U.S.C. § 1011 *et seq*. *See id.* Finally, a statute that might otherwise fit under the saving clause based on the first two factors is still preempted if it conflicts with the carefully crafted and exclusive remedial scheme of ERISA by providing alternative remedies which supplant the remedies available under ERISA. *See id.* at

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3) Assess court costs and attorney fees against the insurer.

[2]The McCarran-Ferguson factors are: (1) whether the law has the effect of transferring or spreading a policy holder's risk; (2) whether the law is an integral part of the policy relationship between the insurer and the insured; and (3) whether the law is limited to entities within the insurance industry. *See Rush,* 122 S.Ct. at 2163.

2165-67.

Plaintiff argues that the bad faith statute falls under the saving clause under both the common sense view and the McCarran-Ferguson analysis. While it is widely agreed that, under the common sense view, the bad faith statute is specifically directed toward the insurance industry, district courts within the Third Circuit have disagreed as to whether the statute regulates the insurance industry under the McCarran-Ferguson analysis. *See e.g. Sprecher v. Aetna U.S. Healthcare, Inc.,* No. 02-580, 2002 WL 1917711 at *5-6 (E.D. Pa. 2002) (finding that two of the three McCarran-Ferguson factors were not met, and thus that the bad faith statute does not regulate the insurance industry under the McCarran-Ferguson analysis); *Rosenbaum v. Unum Life Ins. Co. of America,* No. 01-6758, 2002 WL 1769899 at *2-3 (E.D. Pa. 2002) (finding that two of the three McCarran-Ferguson factors were met, and thus that the bad faith statute does regulate the insurance industry under the McCarran-Ferguson analysis).

However, the Court need not resolve this split of opinion today, as, under the third *Rush* factor, the bad faith statute does not fit under the saving clause because it allows plan participants to obtain remedies that Congress did not include in ERISA. Under ERISA, a participant or beneficiary may recover benefits, obtain a declaratory judgment that a plan participant is entitled to benefits, and to enjoin an improper refusal to pay benefits. *See* 29 U.S.C. § 1132(a). In addition, a participant or beneficiary may seek to remove a fiduciary, and to recover losses to a plan resulting from a breach of fiduciary duty. *See* 29 U.S.C. §§ 1109 and 1132(a). ERISA also permits an award of attorney's fees. *See* 29 U.S.C. § 1132(g). Unlike the bad faith statute, ERISA does not provide for

punitive damages and interest penalties. Thus, ERISA preempts the bad faith statute because the Pennsylvania statute "authorizes [a] new form of ultimate relief." *Rush,* 122 S.Ct. at 2167. *See also Snook v. Penn State Geisinger Health Plan,* No. 00-CV-1339, 2003 WL 215053 at *8 (M.D. Pa. Jan. 31, 2003) (McClure, J.); *Sprecher,* 2002 WL 1917711 *7 (finding that the bad faith statute is preempted because it provides additional remedies not available under ERISA); *Kirkhuff,* 221 F. Supp. 2d 572, 576 (E.D. Pa. 2002) (same); *Bell v. UmunProvident Corp.,* 222 F. Supp. 2d 692, 698-700 (E.D. Pa. 2002) (same). Defendant's motion to dismiss Plaintiff's bad faith claim will be granted.

CONCLUSION

Defendant's motion to dismiss Counts II and III of Plaintiff's complaint will be granted.

An appropriate order will follow.

_____ _____

Date A. Richard Caputo
United States District Judge

signed February 4, 2003

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CHARLES L. EMIL,	:	
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vs.	:	(Judge Caputo)
UNUM LIFE INS. CO. OF AMERICA,	:	
Defendant.	:	

ORDER

And now, this 4th day of February, 2003, **IT IS HEREBY ORDERED** that Defendant's motion to dismiss (Doc. 3) Counts II and III of Plaintiff's complaint is **GRANTED**.

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A. Richard Caputo
United States District Judge