

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**MAURICE SCHMIR, M.D.,** )  
 )  
**Plaintiff** )  
 )  
**v.** ) **Docket No. 03-187-P-S**  
 )  
**PRUDENTIAL INSURANCE COMPANY** )  
**OF AMERICA, et al.,** )  
 )  
**Defendants** )

**RECOMMENDED DECISION ON DEFENDANTS’ MOTION TO DISMISS**

The defendants, Prudential Insurance Company of America and Allegiant Physician Services, Inc., move to dismiss the complaint in this action arising under the Employee Retirement Security Income Act of 1974 (“ERISA”), 29 U.S.C. § 1101, *et seq.* I recommend that the court grant the motion in part.

**I. Applicable Legal Standard**

The motion invokes Fed. R. Civ. P. 12(b)(6). Motion to Dismiss of Defendants The Prudential Insurance Company of America and Allegiant Physician Services, Inc. (Docket No. 9) at 1. “In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see*

also *Wall v. Dion*, 257 F.Supp.2d 316, 318 (D. Me. 2003). Ordinarily, a court may not consider any documents not expressly incorporated in the complaint in connection with a motion to dismiss; doing so would convert the motion into one for summary judgment. *Alternative Energy*, 267 F.3d at 33. However, an exception to this rule exists for, *inter alia*, documents the authenticity of which is not disputed by the parties and documents central to the plaintiff's claim. *Id.* In this case, the insurance policy at issue and the claim notification correspondence from defendant Prudential to the plaintiff are such documents.

## II. Factual Background

The complaint includes the following relevant factual allegations. The plaintiff, a resident of Eliot, Maine, was in 1994 a surgical anesthesiologist "with" defendant Allegiant. Complaint and Demand for Injunctive Relief ("Complaint") (Docket No. 1) ¶¶ 1-2, 4, 8. After undergoing pulmonary thromboendarterectomy surgery, the plaintiff developed ophthalmic migraines, from which he suffers at least three times a week, resulting in functional blindness for periods up to 30 minutes. *Id.* ¶¶ 8-9. The plaintiff applied for long-term disability benefits under a policy provided by his employer. *Id.* ¶ 10. Defendant Prudential was the underwriter and administrator of a benefit plan which included this policy. *Id.* ¶ 3. Defendant Allegiant was the contract holder of the policy and an administrator of the same benefit plan. *Id.* ¶ 4.

Prudential determined that the plaintiff was eligible for long-term disability benefits in February 1995. *Id.* ¶ 11. The plaintiff was awarded Social Security disability insurance benefits in August 2000. *Id.* ¶ 12. Prudential conducted periodic reviews of the plaintiff's eligibility for benefits. *Id.* ¶¶ 13-20. On October 31, 2002 Prudential terminated the plaintiff's long-term disability benefits. *Id.* ¶ 23. The plaintiff appealed the decision by letter dated December 26, 2002. *Id.* ¶ 26. On June 3 or 4, 2003 Prudential

denied the appeal. *Id.* ¶¶ 30-31. The letter conveying this decision invited the plaintiff to appeal again. *Id.*

¶ 32. The complaint was filed in this court on August 7, 2003. Docket.

### III. Discussion

#### A. Count I

Count I of the complaint alleges wrongful denial of disability benefits and seeks recovery under 29 U.S.C. § 1132(a)(1). Complaint ¶¶ 35-36. The defendants contend that the plaintiff failed to exhaust his administrative remedies under the policy at issue before bringing this action or to plead any of the available exceptions to this requirement, and that this count must accordingly be dismissed. Memorandum of the Prudential Insurance Company of America and Allegiant Physician Services, Inc. in Support of Their Motion to Dismiss (“Memorandum”) (Docket No. 10) at 4-6.

The complaint neither alleges that applicable administrative remedies have been exhausted nor that such exhaustion is not required under the circumstances. In this circuit, “a prerequisite to obtaining judicial review under §1132(a)(1)(B) is that the claimant have exhausted the internal administrative remedies available to him.” *Terry v. Bayer Corp.*, 145 F.3d 28, 36 (1st Cir. 1998). By the terms of the complaint, the plaintiff was “invited . . . to appeal again” after his initial appeal of the termination of his benefit payments was denied. Complaint ¶ 32. He does not allege that he did so. The letter denying the initial appeal, written to the plaintiff’s current lawyer, includes the following passage:

You may again appeal this decision. If you elect to do so, the appeal must be made in writing by you or your authorized representative. The appeal may identify the issues and provide other comments or additional evidence you may wish considered, as well as any pertinent documents you may wish to examine. The written appeal should be submitted within the next 60 days to:

Appeals Review Unit  
P.O. Box 1586  
Blue Bell, PA 19422

Letter dated June 3, 2003 from Irene Martin to Tyler N. Kolle, Exh. 3 to Memorandum, at 3. Just over 60 days later, the plaintiff filed the complaint initiating this action. Docket.

In response, the plaintiff argues that he “has adequately exhausted the right of review under the Policy.” Plaintiff’s Objection to Defendants’ Motion to Dismiss (“Objection”) (Docket No. 16) at 11. This is so, he explains, because (i) Prudential did not deny his first appeal in a timely fashion, (ii) despite the quoted language in the letter denying his initial appeal, neither the letter nor the policy makes any further administrative process available or mandatory, (iii) Prudential provided the plaintiff with insufficient information so that any access he may have had to further administrative process was not meaningful, and (iv) resort to any such further appeal would have been futile due to Prudential’s arbitrary conduct that has left the plaintiff without any income for over a year. *Id.* at 11-16. The last of these arguments is not pleaded in the complaint, no matter how indulgent a reading it may be given in the plaintiff’s favor, and the plaintiff has not moved to amend the complaint to include such a claim. It will not be considered further.

The plaintiff’s first argument finds support in paragraphs 25-26 and 28-31 of the complaint. Although the fact that the complaint does not specifically allege either exhaustion of administrative remedies or that such a requirement is excused under the circumstances is concerning, *see, e.g., Snow v. Borden*, 802 F. Supp. 550, 558 (D. Me. 1992), the case law does support a “deemed denial” of an appeal as the basis for exemption from the exhaustion requirement, *e.g., Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985); *Sidou v. UnumProvident Corp.*, 245 F.Supp.2d 207, 216 (D. Me. 2003). A 120-day maximum period for a plan’s “benefit determination on review” is set by 29 C.F.R. § 2560.503-1(i)(1)(i). The defendants contend that this is not a “deemed denial” case because it sent a letter denying the appeal before the plaintiff filed this action. Defendants’ Reply Memorandum in Support of Their Motion to Dismiss (“Reply”) (Docket No. 22) at 3. This response misses the point. The plaintiff’s argument is that his appeal had been “deemed denied,” allowing him to file a court action, when the 120-day period expired well before Prudential issued its letter dated June 3, 2003 denying his initial appeal. The defendants cite no

authority in support of their necessarily-implied contention that the deemed denial was cut off by their untimely denial letter offering an additional appeal under the policy. Indeed, the defendants do not identify any particular section of the policy at issue that provides for a second level of appeal under circumstances like those present in this case. Such evidence is necessary to support the defendants' position. My own research has not located any reported cases in which a plan administrator was allowed to avoid the consequences of a deemed denial by issuing an untimely denial that included an offer of an additional administrative appeal.

Neither of the plaintiff's two remaining arguments would save this complaint. Prudential provided the plaintiff with sufficient notice of the availability of an additional appeals process in the June 3, 2003 letter; the plaintiff cites no authority in support of his suggestion that he is only required to exhaust administrative remedies that are "mandatory." There is no showing on the face of the complaint, even indulgently read, that Prudential deprived the plaintiff of sufficient information to make such an appeal meaningful.

However, Prudential's untimely response to the plaintiff's initial appeal of its termination of his benefits under the policy does constitute a deemed denial of that appeal, allowing him to proceed to court review. In order to rely on an additional level of administrative review, the defendants must make it available in a timely fashion. From all that appears at this stage of these proceedings, they did not do so. The motion to dismiss Count I should therefore be denied.

## **B. Count II**

Count II alleges breach of fiduciary duty, invoking 29 U.S.C. §§ 1109 and 1132(a)(3). Complaint ¶¶ 37-40. The defendant contends that the plaintiff may not bring a claim under either statute as a matter of law. Memorandum at 6-9. In response, the plaintiff states that he "has brought no claim under 29 U.S.C. § 1109." Objection at 17. The complaint could certainly be read to assert such a claim. Complaint ¶ 40.

To the extent that the plaintiff's current disavowal might not be sufficient to set this question to rest, it is clear that relief is not available to individual plan beneficiaries under section 1109, *Russell*, 473 U.S. at 144, but only to the plan itself; the defendants are entitled to dismissal of any claim asserted under section 1109.

With respect to the claim under section 1132(a)(3), the defendants contend that a plan beneficiary is not entitled to recover monetary damages under this section. Memorandum at 8-9. The plaintiff responds that, because the statute allows a beneficiary "to obtain other appropriate equitable relief . . . to enforce any . . . terms of the plan," 29 U.S.C. § 1132(a)(3), he is entitled to bring a claim as an alternative means of recovery if his Count I claim "were to be deemed unavailable due to some failure to exhaust administrative remedies or other procedural defect." Objection at 17. Merely to state the proposition is to demonstrate its invalidity. Under the plaintiff's view of ERISA, any beneficiary who failed to exhaust administrative remedies could nonetheless recover under section 1132(a)(3), effectively avoiding the exhaustion requirement. In *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996), a case cited by the plaintiff, Objection at 18, the Supreme Court stated that the "catchall" provision of section 1132(a)(3) was intended to provide equitable relief for injuries caused by violations that section 1132 "does not elsewhere adequately remedy." Section 1132(a)(1), the basis for Count I of the plaintiff's complaint, provides an adequate remedy for a plan's wrongful denial of benefits. The fact that a beneficiary may have failed to take the necessary procedural steps to obtain such a remedy does not mean that he may invoke section 1132(a)(3); he has lost his adequate remedy, if at all, only as a result of his own conduct. Even if Count I of the plaintiff's complaint were to be dismissed in this case, he could not pursue his Count II claim under section 1132(a)(3). *Turner v. Fallon Cmty. Health Plan, Inc.*, 127 F.3d 196, 200 (1st Cir. 1997).

The defendants are entitled to dismissal of Count II.

#### IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **GRANTED** as to Count II and otherwise **DENIED**.

#### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 30th day of October, 2003.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

**Plaintiff**  
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