STATE OF MICHIGAN

COURT OF APPEALS

JESS SCHELL,

Plaintiff-Appellee,

v

FARMERS INSURANCE EXCHANGE,

Defendant-Appellant.

UNPUBLISHED
March 8, 1995

No. 163778
LC No. 92-014552-CK

Before: Fitzgerald, P.J., and MacKenzie and L.M. Glazer*, JJ.

PER CURIAM.

Defendant appeals as of right an order granting summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10), as well as an order awarding attorney fees to plaintiff. We reverse.

On March 10, 1989, plaintiff suffered multiple hip and leg fractures in a motor vehicle accident. Defendant paid no-fault benefits, including wage-loss benefits. On March 19, 1990, and May 10, 1990, plaintiff applied for and was denied social security disability benefits. Plaintiff appealed and was awarded social security disability benefits on June 10, 1991. In his findings, the administrative law judge found that plaintiff was disabled as of March 10, 1989. The findings stated in relevant part:

> 1. The claimant met the disability insured status requirements of the [Social Security] Act on March 10, 1989, the date on which the claimant stated that he became unable to work, and continues to meet them through the date of this decision.
>
> 2. The claimant has not engaged in substantial gainful activity since March 10, 1989.
>
> 3. The medical evidence establishes that the claimant has severe impairments consisting of status post fractures of his left hip, post traumatic arthritis, depression, a personality disorder, and generalized anxiety disorder.
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> 4. The severity of the claimant's impairment meet[s] the requirements [for finding three psychological disorders], and has precluded him from working for at least 12 continuous months . . . .
>
> 5. The claimant has been under a "disability," as defined in the Social Security Act, since March 10, 1989 . . . .

Defendant discontinued plaintiff's no-fault wage-loss benefits, claiming a setoff for the social security disability award. This action followed, with plaintiff alleging that defendant had unlawfully set off the social security benefits from his no-fault wage-loss benefits. The trial court agreed and granted summary disposition in plaintiff's favor. In so doing, the court found that the administrative law judge

* Circuit judge, sitting on the Court of Appeals by assignment.

awarded plaintiff social security disability benefits based on his psychological impairments and not his physical problems arising from the accident.

On appeal, defendant contends that the trial court erred in granting summary disposition in favor of plaintiff. Specifically, defendant claims that its setoff was appropriate because plaintiff's social security disability benefits arose from the same motor vehicle accident for which defendant paid no-fault wage-loss benefits. We agree.

Social security disability benefits must be deducted from no-fault benefits under MCL 500.3109(1); MSA 24.13109(1) if they: (1) serve the same purpose as the no-fault benefits, and (2) are provided or are required to be provided as a result of the same accident. Jarosz v Detroit Automobile Inter-Ins Exchange, 418 Mich 565, 577; 345 NW2d 563 (1984). When applying the second criterion, the inquiry is whether the triggering event for payment of the benefits is the same automobile accident. See id. at pp 583-584.

Here, it is undisputed that the first Jarosz criterion is met; both benefits compensate for wages lost due to a disability or impairment. At issue is whether the second criterion is also met. We reject the trial court's determination that the administrative law judge's award of social security disability benefits was based on some triggering event other than his March 10, 1989 automobile accident.

As relevant to this appeal, the administrative law judge who awarded plaintiff social security benefits identified two issues to be determined: (1) whether plaintiff was under a "disability" as defined in the social security act, and, if so, (2) when such disability commenced. In resolving these issues, the administrative law judge referred to reports of physicians Quinton Burnett and James Coretti, and of psychologist Edward DeVries. DeVries' report indicates that plaintiff held several short-term jobs before the accident. According to the administrative law judge, plaintiff had not successfully worked since the date of the accident. Plaintiff's position for purposes of using social security benefits was that he became disabled from working on the day of the automobile accident. A fair reading of DeVries' report is that plaintiff, because of his personality disorders, was able to perform supervised manual labor before the accident, but after the accident was unable to perform this work. DeVries reported:

> [Plaintiff] complains of a variety of problems. Specifically, as indicated, he has a weight [lifting] restriction which affects the kinds of work he can do. He also indicates that he has difficulty with concentration and attention with episodic memory lapses. . . . As a result of his problems he feels that he is not particularly employable, primarily because of the physical limitations he has . . . . As he has indicated, he has tried to make job applications for new openings, but admits that he has lost all confidence in his ability to do anything, primarily because of the pain problems he has, the limited strength in his back and also a continuing problem not noted before, that of an elbow pain which was noticed as we began the very simple finger oscillation subtest.
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> . . . As admitted, he does have ongoing problems with concentration and persistence, mostly from a physical basis which keeps him from engaging in most of the activities that he previously enjoyed. As a result, I think this gentleman does meet or equal the listings of the Social Security Regulations. The numerous orthopedic problems he has and the poor prognosis given the fact that he has already been through a rehabilitation program with trained experts who have closed his case as not capable of being placed give us an idea of the difficulty this gentleman presents from a rehabilitation perspective.

Based on our reading of the administrative law judge's findings and the reports upon which they were based, we are satisfied that social security benefits were awarded because, although plaintiff could work before the automobile accident, his physical disabilities caused by the accident, combined with the preexisting mental and emotional impairments, render him totally disabled after the accident.

Because the event triggering the payment of both no-fault wage-loss and social security disability benefits was the same March 1989 automobile accident, we reverse the trial court's order granting summary disposition in favor of plaintiff, as well as the order awarding attorney fees.

Reversed.

/s/ Barbara B. MacKenzie
/s/ Lawrence M. Glazer

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FITZGERALD, J. (dissenting.)

I respectfully dissent from the majority's conclusion that the event triggering the payment of both no-fault wage-loss and social security benefits was the same March 1989 automobile accident. Defendant has not challenged the administrative law judge's factual finding that plaintiff was disabled as a result of three psychological-based impairments, but rather the meaning and effect of that finding. However, I believe that a plain reading of the administrative law judge's opinion reveals that plaintiff's psychological impairments that entitled him to social security benefits did not arise from the automobile accident.[1] Hence, setoff is not mandated by statute and plaintiff is entitled to continuation of the wage-loss benefit. Profit v Citizens Ins Co of America, 444 Mich 281, 284; 506 NW2d 514 (1993). I would therefore affirm the order granting summary disposition in favor of plaintiff.

I would also affirm the award of attorney fees. Section 3148(1) of the no-fault act, MCL 500.3101 et seq.; MSA 24.13101 et seq., permits a court to award reasonable attorney fees if it finds that the insurer refused to pay the claim or unreasonably delayed in making proper payment. McKelvie v Auto Club Ins Ass'n, 203 Mich App 331, 335; 512 NW2d 74 (1994). A refusal or delay in payment by an insurer will not be found unreasonable under this statute where it is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty. Id. at 335. However, where there is a delay or refusal, a rebuttal presumption of unreasonableness arises such that the insurer has the burden to justify the refusal or delay. Id. The trial court's grant of attorney fees under the no-fault act for unreasonable refusal or delay in making payment will not be reversed unless it is clearly erroneous. Id.

In the present case, the trial court refused to award statutory attorney fees for proceedings held to resolve the initial dispute between the parties over the interpretation of the administrative law judge's opinion. The court did find, however, that defendant unreasonably delayed in making payment by (1) objecting to entry of the proposed order, drafted by defendant, because it was titled "Order" rather than "Judgment," and (2) forcing plaintiff to file a motion to settle the order because defendant had not yet paid, and awarded attorney fees in the amount of $600. Based on the record, the trial court's decision to award attorney fees incurred as a direct result of defendant's unreasonable delay in paying benefits after the legitimate dispute had been decided was not clearly erroneous.

/s/ E. Thomas Fitzgerald

[1] Given that unemployment is a prerequisite to eligibility for social security disability benefits, the administrative law judge's use of the date of the automobile accident as the date plaintiff became eligible for social security disability does not mandate the conclusion that plaintiff's disability arose from the automobile accident.

*Circuit judge, sitting on the Court of Appeals by assignment.