

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

DARRYL ASHMORE,

Plaintiff,

Case No.:

v.

NFL PLAYER DISABILITY AND
NEUROCOGNITIVE BENEFIT PLAN,

Defendant.

COMPLAINT FOR DISABILITY BENEFITS

Plaintiff, Darryl Ashmore, by and through undersigned counsel hereby files his Complaint against Defendant, NFL Player Disability and Neurocognitive Benefit Plan, and says:

I. JURISDICTION AND VENUE

1. Plaintiff's claims are filed pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* Jurisdiction exists pursuant to 29 U.S.C. § 1132(f) and venue is proper pursuant to 29 U.S.C. § 1132(e).

II. PARTIES

2. Plaintiff, Darryl Ashmore ("Mr. Ashmore"), is a resident of Palm Beach County, Florida, and was at all times relevant a participant of the NFL Player Disability & Neurocognitive Benefit Plan at issue.

3. Defendant, NFL Player Disability and Neurocognitive Benefit Plan (the "Defendant NFL" and/or the "Plan"), is an employee welfare benefit plan as defined under ERISA, 29 U.S.C. § 1002(1).

III. FACTS

4. At all times material to this action, there was in full force and effect an employee welfare benefit plan named the NFL Player Disability & Neurocognitive Benefit Plan.

5. Among other benefits, the Plan provides eligible participants a monthly disability benefit payment in the event of a total and permanent disability.

6. Mr. Ashmore played professional football in the National Football League (“NFL”) for 11 seasons. As a former player in the NFL, Mr. Ashmore was an eligible participant of the Plan at all times material to this action.

7. The Plan defined total and permanent disability, in pertinent part, as follows:

3.2 Determination of Total and Permanent Disability.

General Standard. An Article 3 Eligible Player who is not receiving monthly retirement benefits under Article 4 or Article 4A of the Bert Bell/Pete Rozelle Plan will be deemed to be totally and permanently disabled if the Disability Board or the Disability Initial Claims Committee finds (1) that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit, but expressly excluding any disability suffered while in the military service of any country, and (2) that such condition is permanent. The educational level and prior training of a Player will not be considered in determining whether such Player is “unable to engage in any occupation or employment for remuneration or profit.” A Player will not be considered to be able to engage in any occupation or employment for remuneration or profit within the meaning of this Section 3.2 merely because such person is employed by the League or an Employer, manages personal or family investments, is employed by or associated with a charitable organization, is employed out of benevolence, or receives up to \$30,000 per year in earned income. A disability will be deemed to be “permanent” if it has persisted or is expected to persist for at least twelve months from the date of its occurrence, excluding any reasonably possible recovery period.

8. Mr. Ashmore suffers from multiple medical conditions, including, but not limited to: chronic pain in his neck, knees, back, wrist, and shoulders, herniated discs, degenerative arthritis, lumbosacral radiculopathy, hypertension, nausea, and frequent and severe migraines.

9. Mr. Ashmore also suffers from multiple cognitive and mental health conditions, including, but not limited to: encephalopathy, dementia, memory loss, depression, anxiety, and impaired concentration.

10. In accordance with the procedures set forth by the Plan, Mr. Ashmore submitted an application for total and permanent disability benefits.

11. On October 9, 2015, Mr. Ashmore was notified by Defendant NFL that it had scheduled him for three medical evaluations by physicians chosen by Defendant NFL as follows: a neurological examination on October 16, 2015 in San Antonio, Texas, an orthopedic evaluation on October 20, 2015 in Palm Beach, Florida, and a neuropsychological evaluation October 22, 2015, in Tampa, Florida.

12. On October 13, 2015, Mr. Ashmore, through legal counsel, sent a letter to Defendant NFL that stated Mr. Ashmore has no objection to submitting to examinations and requested the examinations be rescheduled to locations closer to his residence on account of difficulties traveling to the three examination locations due to his medical conditions and cognitive impairments.

13. On October 14, 2015, Defendant NFL sent Mr. Ashmore a letter acknowledging that he gave notice of his inability to attend the examinations and requested that they be rescheduled. The letter also stated that Mr. Ashmore would receive new appointments by separate letter.

14. By email also dated October 14, 2015, Defendant NFL agreed the examinations would be rescheduled, but stated the examinations would not be any closer to Mr. Ashmore's residence.

15. Mr. Ashmore, through legal counsel, responded via letter to Defendant NFL's October 14, 2015 email the same day, stating that Mr. Ashmore physically cannot endure travel due to chronic pain, especially travel by plane. Through that letter, Counsel for Mr. Ashmore reiterated that he is agreeable to undergoing examinations, stated that Mr. Ashmore's attending physician would be consulted about whether the current examination locations pose a concern to his well-being, and further stated that "the examinations be postponed" and that "we will work together to reschedule."

16. On October 15, 2015, counsel for Mr. Ashmore submitted a letter authored by his attending physician, Frank Conidi, M.D., in which Dr. Conidi reported that Mr. Ashmore's medical conditions prevent him from flying and recommended that any examination be conducted by a physician located in Florida.

17. The next day, on October 16, 2015, Defendant NFL sent Mr. Ashmore notifications that the examinations had been rescheduled to take place on November 2, 3 and 4, 2015 in Atlanta, Georgia.

18. In a letter dated October 27, 2015, Mr. Ashmore, through legal counsel, responded to Defendant NFL, stating that concerns about his inability to travel to examinations were not addressed and that Defendant NFL had instead simply "given new dates for out-of-state examinations as before." In that letter, Mr. Ashmore requested certain accommodations for the Atlanta examinations and confirmed that he "will attend examinations in Atlanta if he can be accommodated."

19. Mr. Ashmore requested that his October 27, 2015 letter be presented to the Plan's Disability Initial Claims Committee (the "committee") for consideration.

20. Ms. Elise Richard, who was acting on behalf of Defendant NFL, had suggested to Counsel for Ashmore to write a letter which she would take to the committee.

21. On October 28, 2015, Mr. Ashmore's legal counsel wrote Ms. Richard an email asking, "Did you present my letter to the committee so Mr. Ashmore's situation can be given proper consideration."

22. That same day, Ms. Richard wrote back Counsel for Mr. Ashmore and stated, "I will be presenting everything to the Committee."

23. By letter dated November 3, 2015, Defendant NFL denied Mr. Ashmore's application for total and permanent disability benefits. The sole reason given for denying Mr. Ashmore's application was that Mr. Ashmore "failed to attend the scheduled appointment" and "failed to provide sufficient notice" of his inability to attend.

24. No prior notice of this course of action was given by Defendant NFL to Mr. Ashmore.

25. Upon written request, Defendant NFL provided a copy of the administrative record concerning Mr. Ashmore's application.

26. Omitted from the administrative record were correspondences between Defendant NFL and Mr. Ashmore's legal counsel regarding rescheduling the medical examinations and requests for accommodations.

27. On April 29, 2016, Mr. Ashmore, through legal counsel, timely appealed Defendant's decision to deny his application for total and permanent disability benefits.

28. In the appeal letter, Mr. Ashmore stated the denial was particularly disconcerting considering the regular communication between Mr. Ashmore's legal representative and

Defendant NFL regarding rescheduling the medical examinations and requests for accommodations.

29. Included with Mr. Ashmore's appeal were the correspondences between Mr. Ashmore's legal representative and Defendant NFL that were omitted from the record.

30. Also included in the appeal were the following medical records, documentation, and information that supported Mr. Ashmore's total and permanent disability: A medical report provided by Dr. Conidi dated April 26, 2016, psychological report provided by Laura Hopper, Ph.D. dated March 14, 2016, a comprehensive rehabilitation evaluation completed by Craig H. Lichtblau, M.D. dated May 10, 2016, independent neurological evaluation provided by J. Lucas Koberda, M.D., Ph.D. dated May 31, 2016, a clinical dementia rating report provided by Sammantha Barker, L.P.N. dated March 04, 2016, progress notes provided by Marc F. Matarazzo, M.D., progress notes provided by Joseph Purita, M.D. progress noted provided by David Rudnick, D.C., progress notes provided by Gary Richman, M.D., medical report provided by George H. Canizares, M.D. dated March 26, 2010, neutral physician evaluation provided by Adam S. Di Dio, M.D. dated March 25, 2010, progress notes provided by Joshua Gottsegen, M.D., progress notes provided by Paul Lin, M.D. progress notes provided by Charles R. Johnson, M.D., progress notes provided by Dr. Conidi, and numerous MRIs of the spine, knees, and brain.

31. By letter dated August 24, 2016, Defendant denied Mr. Ashmore's appeal of the denial of his total and permanent disability benefits.

32. The sole reason given by Defendant NFL for denying the appeal was that Mr. Ashmore had not attended the medical examinations without providing at least two days advance notice.

33. Mr. Ashmore and Defendant NFL were in regular communication with respect to scheduling the medical examinations. Defendant NFL was made aware on several occasions that Mr. Ashmore was agreeable to attending the examinations.

34. Defendant NFL had caused Mr. Ashmore to believe that Defendant NFL was giving consideration to Mr. Ashmore's requests for accommodations with respect to the examinations.

35. In denying Mr. Ashmore's disability application, Defendant NFL failed and refused to review or address the significant medical documentation accompanying the appeal.

36. The denial of Mr. Ashmore's total and permanent disability benefits was a breach of the terms of the Plan, and the decision was wrong and arbitrary and capricious.

37. Defendant NFL's denial of Mr. Ashmore's disability benefits breached the fiduciary duties owed to Mr. Ashmore under ERISA. Defendant NFL further failed to discharge its duties in respect to discretionary claims processing solely in the interests of Mr. Ashmore as a participant of the Plan.

IV. COUNT I: TOTAL AND PERMANENT DISABILITY BENEFITS

Plaintiff incorporates the allegations contained in Paragraphs 1 through 37 as if fully stated herein and says further that:

38. Plaintiff is entitled to certain benefits of the policy consisting of past total and permanent disability benefits including prejudgment interest, retroactive to the day benefits were due to begin pursuant to 29 U.S.C. §1132(a)(1)(B).

39. Plaintiff is entitled to the benefits identified herein because:

- a. the benefits are permitted benefits under the Plan;
- b. Plaintiff has satisfied all conditions to be eligible to receive the benefits;

c. Plaintiff has not waived or otherwise relinquished his entitlements to the benefits.

40. Defendant NFL has refused to pay the benefits sought by Mr. Ashmore, ignoring the medical evidence establishing his total and permanent disability, on the false assertion that he did not give notice that he would not be attending the medical examinations.

V. COUNT II: ATTORNEY'S FEES

Plaintiff incorporates the allegations contained in Paragraphs 1 through 40 as if fully stated herein and says further that:

41. To the extent that Defendant NFL violated any provisions of Subchapter I of Title 29, Chapter 18 of the United States Code, Plaintiff is entitled to reasonable attorney's fees and costs of this action pursuant to 29 U.S.C. §1132(g)(1).

VI. RELIEF REQUESTED

Plaintiff incorporates the allegations contained in Paragraph 1 through 41 as if fully stated herein and says further that:

42. As a result of the acts and/or omissions of Defendant NFL as alleged herein, Defendant NFL owes Plaintiff unpaid total and permanent disability benefits, plus interest.

43. Defendant NFL is also liable for Plaintiff's attorney's fees and the costs of litigation in an amount to be proven at trial.

44. Defendant NFL is also liable to place Plaintiff in the position he would have enjoyed under the Plan had he not been wrongfully denied benefits by Defendant NFL.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Darryl Ashmore, prays for a judgment against Defendant NFL for the relief as pleaded herein and for such other relief as this Honorable Court deems just and proper.

Respectfully submitted this 11th day of October 2016.

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