No. _____

In The
Supreme Court of the United States

THE BLACK & DECKER DISABILITY PLAN,

Petitioner,

v.

KENNETH L. NORD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that an ERISA disability plan administrator's determination of disability is subject to the "treating physician rule" and, therefore, the plan administrator is required to accept a treating physician's opinion of disability as controlling unless the plan administrator rebuts that opinion in writing based upon substantial evidence on the record.

LIST OF PARTIES

The parties to the proceeding below are the Petitioner-Defendant, The Black & Decker Disability Plan and the Respondent-Plaintiff, Kenneth L. Nord. There are no other parties.

RULE 29.6 STATEMENT

Petitioner is not a corporation, it is a funded benefit plan sponsored by Black & Decker (U.S.) Inc., which is a wholly owned subsidiary of The Black & Decker Corporation, which is a publicly held corporation.

RELATED CASES

The United States Court of Appeals for the Ninth Circuit decision in this case was based upon its previous decision in *Delta Family-Care Disability and Survivorship Plan v. Frank Regula*, No. 81-1840, which is before this Court on a Petition for a Writ of Certiorari.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner-Defendant, The Black & Decker Disability Plan, respectfully petitions for a writ of certiorari to review the July 15, 2002, decision of the United States Court of Appeals for the Ninth Circuit in the above-entitled proceeding finding that the plan administrator of an ERISA controlled disability plans must apply the "treating physician rule" when reviewing a request for disability benefits and that failure to use the "treating physician rule" is evidence of a conflict of interest.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit reversing the decision of the United States District Court for the Central District of California and the opinion of the United States District Court for the Central District of California are reproduced in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 15, 2002. This Petition for a Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the United States Department of Labor, Employee Retirement Income Security Act of

1974, *Benefit Claims Procedure Regulation* Questions, are reproduced in the Appendix,

STATEMENT OF THE CASE

Respondent was a Material Planner for Kwikset Corporation, a subsidiary of The Black & Decker Corporation. [Appendix, Petitioner's Supplemental Excerpt of Record ("SER") 6] His responsibilities as a Material Planner included ordering goods, interacting with vendors and maintaining inventory levels. [SER 6] His job was sedentary. [SER 8-9] It involved up to six hours of sitting and up to two hours of standing or walking. [SER 154] Respondent's job did not require him to climb, twist, bend over, crouch, stoop, balance, reach above shoulder level, push or pull, grasp, or make repetitive motions with hands or feet. [SER 154] His job description provides that occasionally he was required to carry up to 20 pounds, but never more. *Id.*

As a Kwikset employee, Respondent participated in the company sponsored disability plan ("Plan"). [SER 7] On or about July 15, 1997, Respondent ceased working due to a back injury and submitted a claim for long term disability benefits under the Plan. [SER 7] The Plan provides long term benefits for participants who are disabled from doing their regular job for the Company for the first 30 months of disability, and continuing benefits thereafter for those participants who are disabled from any gainful occupation for which the employee is reasonably qualified. [SER 18, 31]

I. THE CLAIM AND APPEALS PROCESS AND THE PLAN'S DECISION-MAKING AUTHORITY

The Plan provides:

"The determination of Disability shall be made by the Plan Manager based on suitable medical evidence and a review of the Participant's employment history that the Plan Manager deems satisfactory in its sole and absolute discretion." [SER 31] The Plan also vests the Plan Manager with the authority to delegate one or more of his responsibilities to a Claims Administrator. [SER 38]

On February 16, 1998, MetLife informed Respondent that his claim was denied and that he could "request a review of [his] claim" by sending a request to MetLife's "Group Claims Review." [SER 8] On March 25, 1998, Respondent's counsel sent a letter to MetLife requesting review of the denial. [SER 8,159-160] Between March 25, 1998, and October 14, 1998, Respondent's counsel and MetLife exchanged letters and medical documentation. [SER 44-45, 158-160] On October 15, 1998, and October 21, 1998, MetLife made a recommendation to the Plan Manager to uphold the denial of Respondent's claim and provided the Plan Manager with all of the information upon which it relied in coming to that conclusion. [SER 8, 43, 53] The Plan Manager reviewed the information, conducted a further investigation and agreed with MetLife's recommendation. [SER 8-9] The Plan Manager informed Respondent of the results of the first step of his appeal by letter on October 27, 1998. [SER 9]

A. Respondent's Back Injury

Respondent's X-rays and MRI's revealed that he has degenerative disc disease, "mild bilateral L5 radiculopathy," but no spinal stenosis or disk herniation and no root compression. [SER 54-56] At Appellee's request, Respondent was examined by Dr. Antoine Mitri, an independent medical examiner. [Respondent's Excerpts from the Clerk's Record, Record 21:BD 0138]

Respondent informed Dr. Mitri that he had experienced chronic low back pain for 15 years. [SER 54] However, this claim was contradicted by his treating physician's records which, though dating back to 1993, first reported back pain only five months prior to his last day at work in 1997. [SER 54-57, 65-76] There is no evidence that Respondent was prescribed pain killers before July 1997. [SER 65-76] The medical records show that Respondent stated that "medication helps" his pain, he "feels worse without medication" but it is "tolerated with medication," and that his "symptoms are controlled with Relafen, occasional Darvocet and Flexeril." [SER 79, 98, 100]

Dr. Mitri's independent medical examination notes, dated July 17, 1998, provide that Respondent had "no limitation" with respect to transportation, standing, sitting, changing positions between standing and sitting, reaching forward and overhead, grasping or handling, finger dexterity, operating electrical equipment and concentrated visual attention. [SER 58] Dr. Mitri notes "some limitation in assuming cramped or unusual positions," twisting, pushing or pulling, repetitive movements, and operating a truck or dolly. *Id.*

Dr. Mitri's report concludes that Respondent suffered from degenerative disc disease and chronic myofascial pain syndrome. [SER 54-56] However, he also concluded that:

> [after] reviewing the patient's job description, and on the basis of the general examination and neurological examination, and after reviewing the report of his test, I think that the patient should be able to do sedentary work with some interruption by walking in between. Accordingly, I do not think the patient is disabled to perform that kind of work even though he is complaining from low back pain [because] all the work up that was done did not really show any evidence to substantiate disability in doing sedentary work with some walking interruption in between. *Id.*

MetLife sent Dr. Mitri's report to Respondent's attorney and asked that he submit the report to Respondent's treating physician and obtain his comment on it. [Respondent's Excerpts from the Clerk's Record 21:BD0134] Respondent never provided his physician's response to Dr. Mitri's opinion, despite a second request. [Respondent's Excerpts from the Clerk's Record 21:BD0131] Instead, Respondent's attorney contacted Janmarie Forward, a Human Resource representative at Kwikset, and requested that she complete a "Work Capacity Evaluation" responding to several of his questions. [SER 46-48] Among the questions he asked her were:

> Dr. Mitri indicates that's [sic] Kenneth Respondent can do sedentary capacity, as long as he can interrupt his sitting by walking in between at will. In your employer statement provided to Metropolitan, you have described the job as requiring sitting

> between 5 and 6 hours in a day and standing and walking between 1 and 2 hours in a day. Assume that the need to stand and walk to relieve pain is unpredictable and that when the pain requires walking about, the individual must get up and move.
>
> Could the individual with those limitations perform the work of a material planner?
>
> ___yes ___no
>
> Ms. Forward responded "yes." [SER 47-48]
>
> Respondent's counsel also asked the following question:
>
> Dr. Mitri describes Kenneth Respondent as suffering from degenerative disc disease and a chronic myofascial pain syndrome. You have indicated in your employer statement provided to Metropolitan that the work of a material planner requires continuous interpersonal relationships and frequent exposure to stressful job situations. Assume that Kenneth Respondent would have a moderate pain that would interfere with his ability to perform intense interpersonal communications or to act appropriately under stress occasionally (up to one-third) during the day.
>
> Could individual [sic] of those limitations perform the work of a material planner?
>
> ___yes ___no
>
> Ms. Forward responded "no." *Id.*

After receiving MetLife's benefit file and MetLife's recommendation that the denial of Respondent's claim be upheld, Ray Brusca, the Plan Manager, telephoned Ms. Forward and investigated her response to the question

concerning whether Respondent could perform his job if his pain "interfere[d] with his ability to perform intense interpersonal communications or to act appropriately under stress." [SER 8-9] After questioning Ms. Forward about the specific responsibilities that Respondent performed and the reason she responded as she did, the Plan Manager agreed with MetLife's conclusion that Respondent was not disabled from performing his own job. [SER 9]

II. DISTRICT COURT DECISION

Respondent sought review of the Plan Manager's decision by filing a Complaint in the Central District of California under 29 U.S.C. Section 1132(a)(1)(B). At the conclusion of discovery, Petitioner and Respondent made cross motions for summary judgment. The District Court granted Petitioner's motion and denied Respondent's motion. The District Court reviewed the denial of benefits for an abuse of discretion under the standard set forth in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). [SER 202] In doing so, the District Court rejected Respondent's contention that *de novo* review was appropriate because the Plan Administrator filled the dual role of Plan Administrator and insurer. The District Court held that Respondent had failed to present sufficient evidence that this apparent conflict of interest affected the decision to deny Respondent benefits. [SER 203-4] *See, Tremain v. Bell Industries*, 196 F.3d 970, 976 (9th Cir. 1999) ("If, however, the program participant presents 'material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations to the

beneficiary,' a rebuttable presumption arises in favor of the participant") (internal citation omitted).

The District Court concluded that Respondent did not abuse its discretion in denying Respondent's claim for benefits. The District Court noted that "the mere fact that the plan administrator's decision is directly contrary to some evidence in the record does not show that the decision is clearly erroneous." [SER 204-5] The District Court rejected Respondent's arguments that the decision was "clearly erroneous" because: 1) it was contrary to the opinion provided by a Black & Decker employee that Respondent could not perform his job, if his pain *"interfere[d] with his ability to perform intense interpersonal communications or to act appropriately under stress"*; and 2) it credited the medical opinion of an independent medical examiner over those of Plaintiff's treating physicians. [SER 205-6] The District Court concluded that the company employee's opinion lacked sufficient foundation. [SER 206] It also concluded that the opinions of treating physicians were not entitled to more weight than any other medical opinion. [SER 207] After reviewing the entire administrative record, the District Court concluded that the Plan Manager did not abuse his discretion in denying Respondent's claim for benefits. [SER 208]

III. NINTH CIRCUIT DECISION

The Ninth Circuit Court of Appeals reversed the District Court's finding that the Black & Decker employee's "opinion" regarding Respondent's ability to perform his job lacked foundation, and held that the Plan's rejection of her opinion was evidence of a conflict of interest which affected the decision to deny benefits. The Ninth

Circuit also relied on its ruling in *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F. 3d 1130 (9th Cir. 2001), which requires application of the "treating physician rule" to ERISA governed disability plans. Specifically, the Ninth Circuit held that Petitioner's rejection of the conclusions of Respondent's treating physicians without providing "specific, legitimate reasons" based on "substantial evidence in the record" was both evidence of a conflict of interest and a breach of its fiduciary duty to Respondent.

REASONS FOR GRANTING THE PETITION

This Petition should be granted because there are conflicting decisions between six Circuit Courts of Appeal and there is confusion in the district courts. In addition, this plan like many other ERISA controlled disability plans is national in scope and two circuit courts have issued conflicting decisions as to whether this plan administrator's decisions are subject to the "treating physician rule." The Ninth Circuit's decision forces this plan administrator to use conflicting standards of plan administration based upon the circuit court that has jurisdiction. This conflicts with the ERISA mandate for uniform plan administration. *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, 2169, 153 L. Ed. 2d 375 (2002).

One of the Congressional concerns in drafting ERISA was "not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans. . . . " *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). One of ERISA's

goals was to " . . . establish a uniform administrative scheme. . . . " *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). "Uniformity is impossible, however, if plans are subject to different legal obligations in different states." *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001).

ERISA and its Department of Labor ("DOL") regulations are written to provide a balance between plan flexibility and enrollee confidence in disability plans and efficiency in the disability insurance and labor markets. There are no provisions in ERISA which require a plan administrator to use the "treating physician rule." ERISA regulations are written " . . . to preserve the greatest flexibility possible for designing and operating claims processing systems consistent with prudent administration of the plan." (*Benefit Claims Procedure Regulation*, Question B-4; *www.dol.gov/pwba*) The DOL has the authority under ERISA to adopt regulations governing the administration of benefit claims for disability plans. While the DOL, as recently as 2001, issued numerous new and revised ERISA regulations, it has never required ERISA disability plan administrators to apply the "treating physician rule."

Most of the "treating physician rule" cases revolve around conflicting stereotypes of benefit plan administrators and physicians. Respondent and the Ninth Circuit Court of Appeals believe that employee plan administrators have an inherent tendency to cheat other employees. Conversely, they believe that treating physicians are inherently credible and that plan administrators should rely upon the physician's obligation to the patient to

insure the physician's credibility[1]. Other Courts of Appeal hold that the treating physician's opportunity to bill for more services creates an inherent conflict of interest and that the plan administrator's obligations as a co-employee and a fiduciary should be relied upon.[2] Most of the decisions ignore the most obvious reason not to trust the treating physician – "physician's bias." To provide proper medical care, a physician has to build trust with her patient. If the patient reports that he cannot work, the physician in an effort to maintain the physician-patient relationship may report that the patient is disabled from work, without considering whether the patient is actually malingering. As stated by the Seventh Circuit in *Stephens v. Heckler*, 766 F.2d 284, 289 (7th Cir. 1985):

> "The patient's regular physician may want to do a favor for a friend and client, and so the treating

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[1] In *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1139 (9th Cir. 2001), the Ninth Circuit said that the treating physician: "is employed to cure and has a greater opportunity to know and observe the patient as an individual" (citations deleted); in *Edgerton v. CNA Ins., Inc.*, No. 01-2597, 2002 U.S. Dist. LEXIS 15490 at *22, (PA Aug. 6, 2002), the court stated that, "treating physicians are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [the claimant's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations."

[2] *See, e.g., Sally v. E.I. Dupont de Nemours & Co.*, 966 F.2d 1011, 1016 (5th Cir. 1992), "We have considerable doubt about holding the rule applicable in ERISA cases. Under it, the treating physician would stand to profit greatly if the court were to find benefits should not be terminated. There is a clear and strong conflict of interest, and we are doubtful that a court should defer automatically to his or her testimony."

> physician may too quickly find disability. The regular physician also may lack an appreciation of how one case compares with other related cases. A consulting physician may bring both impartiality and expertise." (citation omitted.)

All of these stereotypes are poor attempts to generalize a complex subject and should be ignored. Common sense says that some doctors will lie for their patients, others won't; some plan administrators will ignore their fiduciary obligations, others won't. However, no one has any actual or concrete evidence to show that most doctors tell the truth and most employee plan administrators cheat or vice versa. Therefore, a draconian rule that the treating physician's opinion must be given controlling weight belies common sense. Rather the resolution should be left to the entity charged with making the decision – in this case the plan administrator. As stated by the court in *Dray v. Railroad Retirement Bd.*, 10 F.3d 1306, 1311 (7th Cir. 1993), "In the case of dueling doctors, it remains the province of the hearing officer to decide whom to believe – a treating doctor whose experience and knowledge about the case may (or may not) be relevant to understanding the claimant's condition, or a consulting specialist who may bring expertise and knowledge about similar cases."

The Ninth Circuit's holding in *Regula* that there is "no reason why the "treating physician rule" should not be used under ERISA" begs the question. *Regula*, *supra*, 266 F.3d at 1139. The Court's decision is devoid of any legal basis, any factual basis or any public policy reason to infuse the "treating physician rule" into ERISA disability plans. The only policy reason that the decision offers is the limp reasoning that adoption of the rule will provide consistency for the Court to review disability determinations. *Id.*

In other words, courts in the Ninth Circuit will have a lighter workload if the "treating physician rule" is applied to both Social Security disability and ERISA disability determinations.

Employers do not have to provide employee disability plans. One purpose of ERISA was to encourage employers to adopt such plans. The "treating physician rule" takes away employer discretion and forces employers to pay disability benefits even when their plan administrators have an honest and good faith belief that the employee is malingering. Employers, who are convinced their disability plan is being abused by malingering employees, have no incentive to increase plan benefits. Employers without disability plans have no incentive to adopt a plan which they believe will support and encourage malingering. Forcing the "treating physician rule" onto ERISA plan administrators is counterproductive to the basic purposes of ERISA.

I. THIS PETITION SHOULD BE GRANTED TO RESOLVE CONFLICTING DECISIONS BETWEEN THE SECOND, THIRD, FOURTH, EIGHTH, NINTH, AND ELEVENTH CIRCUIT COURTS OF APPEALS

Currently only the Ninth Circuit Court of Appeals has unequivocally adopted the "treating physician rule" for ERISA disability cases. Four Circuit Courts, the Second, Fourth, Seventh and Eleventh, have unequivocally rejected the "treating physician rule" for ERISA cases. The Third Circuit Court has used the "treating physician rule" as an analogy to support a decision. One Circuit Court, the Fifth, has expressed doubt that the rule applies to ERISA

cases. The Eighth Circuit in an early decision appeared to have adopted the "treating physician rule," but in four subsequent cases has rejected the rule. Another Circuit Court, the Sixth, rejected the "treating physician rule," but did not publish the decision.[3] The First and Tenth Circuits have not ruled on the issue.

A. THE NINTH CIRCUIT CASES

In the Ninth Circuit case of *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130 (9th Cir. 2001), a plan administrator terminated the long term disability benefits of an employee. The employee relied upon the opinions of his treating physicians while the plan relied upon the opinions of expert examining physicians. The Ninth Circuit stated that "the treating physician rule can assist courts to enforce the accuracy of disability determinations under ERISA" and therefore found "no reason why the rule should not be adapted" to such cases. *Id.* at 1139. The Court ruling reflects an inherent trust in treating physicians and an inherent mistrust of examining physicians: "far more troubling is the conflict of interest inherent when benefit plans repeatedly hire particular physicians as experts . . . these experts have a clear incentive to make a finding of 'not disabled' in order to save their employers money and to preserve their own consulting arrangements." *Id.* at 1143.

Since the decision in *Regula*, courts in the Ninth Circuit have followed the decision. *Nord v. Black & Decker*

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[3] *Jackson v. Metropolitan Life*, 24 Fed. Appx. 290, 2001 U.S. App. LEXIS 23792 (6th Cir. 2001) (unpublished).

Disability Plan, 296 F.3d 823 (9th Cir. 2002); *Ehrensaft v. Dimension Works, Inc. Long Term Disability Plan*, No. 01-15062, 2002 U.S. App. LEXIS 7876 (9th Cir. 2002) (unpublished); *Olive v. Am. Express Long Term Disability Benefit Plan*, 183 F. Supp. 2d 1191 (C.D. Cal. 2002)

B. THE SECOND, THIRD, FOURTH, FIFTH, SEVENTH AND ELEVENTH CIRCUIT CASES

The Second Circuit, in *Conners v. Connecticut General Life Ins. Co.* 272 F.3d 127, 135 n. 4 (2nd Cir. 2001) expressly refused to adopt the "treating physician rule." In that case, the employee claimed that he was totally disabled. His treating physicians agreed. However, a reviewing physician found that he was able to perform some work. The court remanded the case to the district court with the following direction:

> "We do not adopt for these purposes – that is, when a district court reviews an ERISA administrator's decision under a de novo standard – the 'treating physician rule,' a standard developed in the Social Security context requiring 'that the fact-finder give greater deference to the expert judgment of a physician who has observed the patient's medical condition over a prolonged period of time."
>
> "As a rule designed to encourage the development of the administrative record so that the district court can determine whether the administrator's decision was supported by substantial evidence, the 'treating physician rule' serves no purpose in the context of de novo review."

Id. (citation omitted).

The Third Circuit in *Skretvedt v. E.I. Dupont De Nemours & Co.*, 268 F.3d 167 (3d Cir. 2001) recently used the "treating physician rule" as an analogy for its determination in an ERISA case. In that case, an employee applied for disability benefits. The court found that the employee's disability was supported by all of the treating and examining physicians who provided an opinion. The court then stated:

> "We find it relevant that Drs. Binhammer and Schiff had long-term treatment relationships with Skretvedt and that therefore they were uniquely able to provide detailed longitudinal information on Skretvedt's condition. We have long recognized that in the analogous area of disability benefits determinations under the Social Security Act, the 'opinions of a claimant's treating physicians are entitled to substantial and at times even controlling weight.' *Fargnoli v. Halter*, 247 F.3d 34, 43 (3d Cir. 2001); see also *Cotter v. Harris*, 642 F.2d 700, 704 (3d Cir. 1981); (7th Cir 1985) *Regula v. Delta Family-Care Disability Survivorship Plan*, No. 98-55853, 2001 U.S. App. LEXIS 20851, at *21 (9th Cir. Sept. 24, 2001) (applying the 'treating physician rule,' which requires administrative law judges to defer to a treating physician's opinions when adjudicating Social Security disability benefits, when reviewing an ERISA plan administrator's termination of benefits)." *Id.* at 184.

Since the Court found no conflict among any of the physicians' opinions, it is unclear whether this decision is an adoption by the Third Circuit of the "treating physician rule" or not. However, it is clear that district courts in the Third Circuit and the next Third Circuit panel will have to

decide whether this decision adopts the "treating physician rule" and therefore is binding on them.

The Fourth Circuit has rejected the "treating physician rule" in *Elliott v. Sara Lee Corp.*, 190 F.3d 601, 607-08 (4th Cir. 1999).[4] In *Elliott* the Court reviewed a plan administrator's decision termination of benefits based upon statements of treating and examining physicians' opinions. The plaintiff urged the court to adopt the "treating physician rule" and to base its review on the entire opinion of her physician. The court declined to adopt the "treating physician rule." *See, also, Sheppard & Enoch Pratt Hospital, Inc. v. Travelers Insurance Co.*, 32 F.3d 120, 126 (4th Cir. 1994) (hospital attempting to recover disability plan benefits for a patient's expenses not entitled to invoke the "treating physician rule" "[t]o require the Plan to give conclusive weight to the opinion of the treating physician would deprive it of its role in determining medical necessity").

The Fifth Circuit has expressed doubt that the "treating physician rule" applies to ERISA cases, but has declined to rule. In *Sally v. E.I. Dupont de Nemours & Co.*, 966 F.2d 1011, 1016 (5th Cir. 1992) the court stated:

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[4] The same plan that is at issue in this case was recently reviewed by the Fourth Circuit in an unpublished opinion in *Webster v. Black & Decker (U.S.), Inc.*, No. 01-1946, 2002 U.S. App. LEXIS 6574 at **14 (4th Cir. 2002) (unpublished). In that case the court reviewed the plan administrator's determination that six treating physicians who found the plaintiff disabled were wrong. The court stated: "We have recognized that it is the Plan Administrator's responsibility to resolve conflicting medical assessments."

> "This Court has not addressed the propriety of the "treating physician rule" in ERISA cases. We have considerable doubt about holding the rule applicable in ERISA cases. Under it, the treating physician would stand to profit greatly if the court were to find benefits should not be terminated. There is a clear and strong conflict of interest, and we are doubtful that a court should defer automatically to his or her testimony." (citation omitted.)

In the Seventh Circuit case of *Wilczynski v. Kemper Nat'l Ins. Co.*, 178 F.3d 933, 938 (7th Cir. 1999), without referring to the "treating physician rule," the court declined to provide any special weight to the opinions of the treating physicians. In that case, an employee with multiple sclerosis was given disability benefits under the company ERISA disability benefit plan. On a review of her continuing disability, the plaintiff offered the opinion of a number of treating physicians and argued that the opinion of treating physicians should control. The plan relied upon the opinions of three examining physicians to terminate her disability benefits. The court held that there was adequate evidence on the record to support the plan administrator's decision.

In the Eleventh Circuit, in the case of *Turner v. Delta Family-Care Disability and Survivorship Plan,* 291 F.3d 1270, 1274 (11th Cir. 2002) the court held that the "treating physician rule" " . . . is contrary to the law of this Circuit" and the administrator could consider all medical reports. *See, also, Jett v. Blue Cross and Blue Shield of Alabama, Inc.*, 890 F.2d 1137, 1140 (11th Cir. 1989).

C. THE EIGHTH CIRCUIT DECISIONS

One Circuit Court of Appeal, the Eighth, has issued conflicting decisions in regard to applying the "treating physician rule" to ERISA plans.[5] In *Donaho v. FMC Corp.*, 74 F.3d 894, 901 (8th Cir. 1996) the court overturned the plan administrator's decision to terminate disability benefits when it rejected the opinions of two treating physicians and one examining physician in favor of the opinion of a reviewing physician. The court stated: "We have held, in Social Security cases, that a reviewing physician's opinion is generally accorded less deference than that of a treating physician, and we apply this rule in disability cases under ERISA as well." *Id.* (citation omitted). However, the Circuit has rejected the "treating physician rule" in all subsequent cases. *Conley v. Pitney Bowes*, 176 F.3d 1044, 1049 (8th Cir. 1999) (The rule is not that a treating physician's opinion trumps all other evidence, but that a court must give it appropriate weight); *Delta Family-Care Disability and Survivorship Plan v. Marshall*, 258 F.3d 834, 842 (8th Cir. 2001) (a treating physician's opinion does not automatically control, since the record must be evaluated as a whole); *Fletcher-Merrit v. NorAm Energy Corp.*, 250 F.3d 1174, 1180 n.3 (8th Cir. 2001) (a treating physician's opinion does "not automatically

[5] The Eighth Circuit has a rule that "one panel cannot overrule another," that is, where a circuit court of appeal panel has issued a decision, subsequent circuit court panels are bound to that opinion until the case is overruled by an *en banc* decision or by a United States Supreme Court case. *See, e.g., U.S. v. Franklin* 250 F.3d 653, 665 (8th Cir. 2001). Whether that rule is intact or has been violated makes little difference to national plan administrators trying to sort out which standard to apply in the Eighth Circuit.

control, since the record must be evaluated as a whole"); *Coker v. Metropolitan Life Ins. Co.*, 281 F.3d 793, 799 (8th Cir. 2001).

II. THE PETITION SHOULD BE GRANTED TO RESOLVE CONFUSION IN THE DISTRICT COURTS

A number of district courts have reviewed the "treating physician rule" in regard to ERISA plans and have looked to their circuits for usable guidance and found none available. *Durr v. Metropolitan Life Ins. Co.*, 15 F. Supp. 2d 205, 213 (D. Conn. 1998), *Lamoreaux v. Medtronic, Inc.*, No. 1:01-CV-179, 2001 U.S. Dist. LEXIS 13625 at *11-12 (W.D. Mich. 2001). A recent example is *Soltysiak v. Unum Provident Corp.*, No. 2:01-CV-15, 2002 U.S. Dist. LEXIS 238 at *12-14 (W.D. Mich. 2002) where the court stated:

> ". . . in Social Security disability determinations, greater weight is to be given to a treating physician's opinion than the opinions of other doctors. This rule was established because a treating physician is employed to cure not merely to evaluate, has typically been treating a patient over a long period of time, and has a greater opportunity to know the patient than an examining physician who sees the patient on one occasion and whose reports are less thorough. *Id.* The Sixth Circuit has not ruled, however, on the applicability of the 'treating physician rule' to ERISA cases. Other circuits are split. Compare *Regula v. Delta Family-Care Survivorship Plan,* 266 F.3d 1130, 1139 (9th Cir. 2001) (holding that the same rationale for the 'treating physician rule' in Social Security cases applies to ERISA cases as well), *Donaho v. FMC Corp.*, 74 F.3d 894, 901

> (8th Cir. 1996) (applying the rule in disability case under ERISA) n.2, with *Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co.*, 32 F.3d 120, 126 (4th Cir. 1994) (rejecting the treating physician rule when an ERISA plan administrator is making a determination about the medical necessity of treatment); *Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1016 (5th Cir. 1992) (expressing "considerable doubt about holding the rule applicable in ERISA cases"); *Jett v. Blue Cross & Blue Shield of Ala., Inc.*, 890 F.2d 1137, 1140 (11th Cir. 1989) (stating that the rule is not applicable to determinations under ERISA-governed plan where treating physician has an economic interest in benefits being paid). One court in this district declined to apply the rule to an ERISA case because the Sixth Circuit has not found that the rule is proper in the ERISA context and because of the potential conflict of interest a treating physician has in benefiting from the continuation of benefits."

The Court should grant this petition. Far too many courts have spent far too much time discussing whether the "treating physician rule" applies to ERISA plans or not. Too many national plan administrators have scratched their heads trying to resolve whether an individual claimant is in a "treating physician rule" jurisdiction or not. Too many court decisions have applied different standards to the same plan. *See, e.g., Turner v. Delta Family-Care Disability and Survivorship Plan,* 291 F.3d 1270, 1273-4 (11th Cir. 2002) ("treating physician rule" does not apply); *Delta Family-Care Disability and Survivorship Plan v. Marshall*, 258 F.3d 834, 843 (8th Cir. 2001) ("treating physician rule" does not apply); and

Regula v. Delta Family-Care Survivorship Plan, 266 F.3d 1130, 1139 (9th Cir. 2001) ("treating physician rule" applies); *see, also, Webster v. Black & Decker (U.S.), Inc.*, No. 01-1946, 2002 U.S. App. LEXIS 6574, at **14 (4th Cir. 2002) (unpublished) ("treating physician rule" does not apply); and *Nord v. The Black & Decker Disability Plan,* 296 F. 3d 823 (9th Cir. 2002) ("treating physician rule" applies).

The issues are clear. Either plan administrators are to be trusted and given flexibility to do their jobs or not. Either treating physicians are to be given predominance in determining disability or they are not. Either employers are going to be encouraged to fund disability plans by allowing permissive administration or they are not. Either there are going to be uniform national standards for review of ERISA plan claims, as stated in *Rush Prudential HMO, Inc. v. Moran,* 122 S. Ct. 2151, 2169, 153 L. Ed. 2d 375 (2002), or there will continue to be inconsistent standards applied throughout the United States. Granting this Petition will bring resolution to an issue which has plagued and, unless resolved, will plague the Circuit and District Courts for years.

CONCLUSION

Petitioner respectfully requests that this Court grant the Petition, on this important issue, to resolve the conflicts within individual circuits and between the circuits.

Respectfully submitted,

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