IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JENNIFER L. HIGGINS and BARBARA RIGGINS,	)	
Plaintiffs,	)	
vs.	)	Civil Action No.
MARGARET SPELLINGS, Secretary of the Department of Education,	)	07-0495-CV-W-SOW
Defendant.	)	

REPLY SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE RECORD

Standard of Review

Plaintiffs have moved this Court to enter an Order of Summary Judgment in Plaintiffs' favor pursuant to Fed. R. Civ. P. 56. Defendant, on the other hand, has requested that the Court review these claims under Fed. R. Civ. P. 52. The difference between these two standards becomes apparent at the appellate level. Under Rule 56, the appeals court evaluates the facts in the light most favorable to the non-moving party. M.Y., ex rel., J.Y. v. Special Sch. Dist. No. 1, 544 F. 3d 885, 888 (8th Cir. 2008). Whereas, under Rule 52, the appeals court evaluates whether the district court's fact finding was clearly erroneous. Richardson v. Sugg, 448 F. 3d 1046, 1052 (8th Cir. 2006). Necessarily, under Rule 52 the appellate court affords the district court more deference in its fact-finding. Under both rules, the appeals court reviews questions of law or

mixed questions of law *de novo*. Koons v. Aventis Pharm., Inc., 367 F. 3d 768, 774 (8th Cir. 2004).

As Defendant notes, a court may consider it more appropriate to treat motions for summary judgment as a mutual request for an entry of a judgment under Fed. R. Civ. P. 52 in cases where the parties have stipulated to the facts of the case. Crow v. Gullet, 706 F. 2d 856, n. 3 (8th Cir. 1983). See also, Rudden v. American Family Mut. Ins. Co., 298 F. Supp. 2d 1067, 1068 (E.D. Mo. 2005). Plaintiffs do not oppose Defendant's request to treat this motion as a motion for a judgment on the record under Fed R. Civ. P. 52. Plaintiffs interpret the Defendant's pleading as a recharacterization of the procedural basis for a judgment herein, whether in favor of Plaintiffs or Defendant. If the Defendant's pleading is actually an independent motion for a final judgment, it was technically due on September 18, 2008, as ordered by this Court on June 24, 2008 [Doc. 26].

Property Interest

The Department of Education (DOE) contends that Plaintiffs do not have a property interest in a disability discharge and suggests that the Court look to bankruptcy cases by analogy. However these cases are not based upon a similar statutory structure. In United States v. Rice, 182 B.R. 795 (N.D. Ohio 1994), aff'd, 78 F.3d 1144 (6th Cir. 1996) and In re Hampton, 47 B.R. 47 (Bankr. N.D. Ill. 1985) the plaintiffs were confronted with a change in the bankruptcy laws. The courts observed that since Congress had the ability to change the laws at any time, there was no contractual property interest in a discharge under the prior repealed section of the law. The court reached a similar result in In re Lewis, 506 F.3d 927, 932 (9th Cir. 2007).

Furthermore, the discharge of a student loan in a bankruptcy proceeding due to "undue hardship" is not similar to the disability discharge. The bankruptcy statute actually provides that

a bankruptcy discharge does not discharge any education loan unless this would impose undue hardship on the debtor 11 U.S.C. § 523(a)(8). As noted in In re Bender, 368 F.3d 846, (8th Cir. 2004), there is a general rule of nondischargability of student loans and "undue hardship" is "inherently discretionary." Id at 848. In considering what is "undue hardship" the bankruptcy courts are required to consider the "totality of the circumstances" in evaluating the debtor's situation. In re Long, 322 F.3d 549 (8th Cir. 2003).

The statutory language requiring disability discharges stands in contrast to bankruptcy discharges. 20 § U.S.C. § 1087(a) provides that "if a student borrower . . . becomes permanently and totally disabled . . . then the Secretary shall discharge the borrower's liability on the loan by repaying the amount owed on the loan." Thus, if a student becomes permanently and totally disabled, the Secretary shall discharge the borrower's liability. As the DOE notes, the determination of permanent and total disability must be determined "in accordance with the regulations of the Secretary." This parenthetical reference to the DOE's regulations does not diminish the mandatory nature of the statute. The DOE clearly has to make a determination as to who is permanently and totally disabled in accordance with its regulations; however, the statute does not even imply that such a determination is made at its discretion.

In Sykes v. City of Gentry, Arkansas, 114 F.3d 829 (8th Cir. 1997), cited by Defendant, a police chief was hired under a state statute that allowed a mayor to remove employees for "cause." Two weeks after his hiring, the law was changed and the "cause" provision was eliminated. The statute gave mayors complete authority to hire and fire all department heads. Several months after enactment of the new provision the police chief was fired. The Eighth Circuit rejected the argument that the sheriff must be fired for cause. The court noted that the legislature may create the property interest in employment, but it had complete authority to

remove that property interest, which it did. Sykes is a good example of when an agency has unfettered discretion, which is not the case herein. When the statute was changed the mayor had complete authority to terminate department heads without cause.

Defendant correctly suggests that there are no cases dealing with the "property interest" in a disability discharge as presented herein. There are a number of decisions that give guidance. The Supreme Court has "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571-2 (1972). There must be more than a "unilateral expectation" of the benefit and there must be a "legitimate claim of entitlement to the benefit." Id. at 577. Property rights are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits that support claims of entitlement to those benefits." Id.

In this case, if a disabled borrower establishes that she is permanently and totally disabled, the DOE "shall" discharge the student loan debt. 20 U.S.C. § 1087(a). The statute creates a mutual understanding that if that student establishes a permanent and total disability, her obligation shall be discharged. The Plaintiffs clearly have a legitimate claim of entitlement to the discharge since they were initially determined to be permanently and totally disabled. The Secretary's regulations enhance the expectation that a disabled borrower should be granted a discharge upon meeting the specific requirements of those provisions. Namely, the regulations provide a definition of disability, 34 C.F.R. § 682.200(b) and explain how an application for disability discharge should be presented to the agency, 34 C.F.R. § 685.213. (See also, FFEL regulations 34 C.F.R. § 682.200; 682.402(c)).

The grant of a disability discharge, even initially, provides a disabled borrower with direct monetary benefit. Collection efforts concerning the debt are ceased, 34 § 685.213(a)(ii), and during a conditional discharge period the debtor is not required to make payments of principal or interest on the loan, § 685.213(d)(1). These provisions have even greater meaning to those disabled borrowers who are receiving Social Security disability or retirement. This will stop the offset of Social Security benefits made directly from their Social Security check each month. 31 U.S.C. § 3716; Lockhart v. U.S., 546 U.S. 142 (2005).

In this case, the property interest is clearly specified by statute and is easy to define. It is unlike the situation presented in Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748 (2005). In that case, the plaintiff sought monetary damages as a result of the police department's failure to enforce a restraining order. Petitioner contended that statutory language which required that officers "shall use every reasonable means to enforce a restraining order" created a property interest for her. The Court found that under state law the provision was not mandatory. The Court noted that law enforcement officers must always use discretion in exercising police power. The term "reasonable means" to enforce an order was inherently subject to interpretation. The Court noted that private citizens did not have an interest in forcing the prosecution of an individual and had no right to demand an arrest. The statute in question gave an individual no particular right to enforce the law and the statute was created primarily to serve the public and not to provide private benefit.

In American Mfr. Mutual Ins. Co. v. Sullivan, 526 U.S. 40 (1999) the plaintiffs sued private workman's compensation insurers following a change in Pennsylvania law. The court found that a determination of whether medical expenses were "reasonable" and "necessary" was required under state law to be made before an employer's obligation to pay the expenses accrued.

The court determined that this did not create a property interest in payment of all medical expenses.

The "reasonable efforts" element in The City of Castle Rock, and "reasonable" and "necessary" requirement in American Mfr. Mutual Ins. Co., do not create an expectation of the benefit. Obviously some discretion is mandated by statute. However, that discretionary element is lacking in this case. Although the DOE must review the evidence and make a decision concerning permanent and total disability, that does not provide it with unfettered discretion. If a disabled borrower meets all of the conditions contained within the statute and the Secretary's regulations, she must be awarded the disability discharge. Plaintiffs do have a property interest in the discharge of their education loan because of permanent and total disability. In Matthews v. Eldridge, 424 U.S. 319 (1976), it was not seriously contested that the statute created a property interest in Social Security disability benefits. The Court noted this was "implicit in their prior decisions." Id. at 332. The Social Security Act, 42 U.S.C. § 423(a), provides that a person meeting the definition of disability under that statute "shall be entitled" to disability benefits. The statute and the Secretary's voluminous regulations further define the definition of disability and provide a mechanism for the agency to determine that disability. The mere fact that there must be a factual decision as to whether a claimant meets the standards, does not diminish the fact that there is a property interest in the benefit. As noted in Plaintiffs' opening brief, property interests exist in a wide variety of government services.

Process Due

Education asserts that it provided Plaintiffs with adequate due process in the consideration of their disability discharge applications. Defendant contends that the minimal process granted Plaintiffs (the letter to the doctor and the post-deprivation letter to the borrower

with a contact telephone number) is adequate under the circumstances. The DOE points out that a borrower is free to file a new application for a conditional discharge and that second application can cover the same time period as the first application.

Plaintiffs disagree. First, there is no reason to assume that any improperly denied applicant would file a new application. From the perspective of disabled individuals, they provided all information which was requested of them and were advised that they met the requirements, subject to further review. They then received a form letter indicating that they have been determined not permanently and totally disabled because of "Medical Review Failure." Why would they reapply under these circumstances? This would simply not be a logical decision based upon the fact that they were just denied after providing all information to the DOE.

Second, disabled borrowers are not notified of this option in the denial letter. All they are told is that their claim was denied for "Medical Review Failure." They are not told that it was denied because their doctor's office did not respond to a request for information. The inadequate notice provided by DOE virtually precludes anyone from understanding the basis for the denial and attempting to challenge that decision or reapply.

Third, there is no guarantee that the same process will not be repeated. If the same process is used, the same result is likely. The Defendant assumes that on the second application disabled borrowers may get lucky and have their application granted.

Plaintiffs suggested appropriate standards in their opening brief. The requested process is extremely modest and of virtually no cost to the DOE. It is nothing like the extensive modifications proposed in Walters v. Weiss, 392 F.3d 306 (8th Cir. 2004) and very similar to the issues addressed in Bliek v. Palmer, 102 F.3d 1472 (8th Cir. 1997).

Arbitrary and Capricious

Plaintiffs contend that the Defendant's failure to grant loan discharges based on disability to Plaintiffs was arbitrary and capricious. An agency's action is considered arbitrary and capricious where it either fails to evaluate a critical aspect of the problem or where the agency's decision runs counter to the evidence in the record. Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mutual Auto. Ins., 463 U.S. 29, 43 (1983).

The sum of the information contained in the Plaintiffs' records supports their assertion of permanent and total disability. There is not one piece of evidence in the record that contradicts their contention of disability. However, Defendant continues to argue that its decision was supported by sufficient evidence. Defendant maintains that the absence of evidence in the record supports its explanation for denying the Plaintiffs' requests for a discharge. This argument is ineffective. In Smith v. Hartford Life and Accident Ins. Co., 2007 WL 1748701 (S.D. Ohio), a claimant's long-term disability benefits were terminated on the basis that his condition did not prevent him from working. Hartford argued that the claimant did not suffer from medication side effects since several treating doctors did not discuss the side effects expressly. The court held that absence of the discussion of side effects could not constitute substantial evidence to support Hartford's decision to terminate the claimant's benefits, and therefore, Hartford's decision was arbitrary and capricious. See also, Mishler v. Metropolitan Life Ins. Co., 2007 WL 518875, 9 (E.D. Mich.)(holding that the "the silence of the record is not substantial evidence on which to disregard a treating physician's opinion.")

In this case, Plaintiffs each submitted the required form from their treating doctors stating that they meet the definition of permanent and total disability and on what diagnosis this finding was based. The Defendant argues that the absence of further documentation from the Plaintiffs'

doctors constitutes sufficient evidence to support denying the Plaintiffs' discharges. However, as in Hartford and Mishler, Defendant reached a decision that was not reasonable in light of the administrative record. The record does not include any evidence to disregard the statements made by Plaintiffs' treating doctors regarding their disability.

Plaintiffs concede that it is reasonable for the Defendant to require additional documentation from an applicant for a discharge of her student loan based on disability. Moreover, Plaintiffs concede that it would be reasonable for the Defendant to deny an applicant's claim if such information was not provided. This is not the case here.

In Pralutsky, v. Metropolitan Life Ins. Co., 435 F. 3d 833 (8th Cir. 2006), a claimant is denied disability benefits on the basis that there was not sufficient documentation to support her claim for disability. Her treating physician had completed a form stating that the claimant was disabled based on fibromylagia. MetLife sent multiple requests to her treating doctor for further information documenting her disability. However, her doctor did not complete these forms. MetLife informed the claimant on multiple occasions that it required additional information during the application process. The claimant failed to provide information. These facts are in marked contrast to the facts before this Court.

In this case, the Defendant never requested additional information from the borrower. The Plaintiffs were not informed that a form was sent to the treating physician, nor were they informed when the treating physician did not return the completed form. In fact, at no time were Plaintiffs informed in any way that the Defendant required additional information to process their applications for a discharge. Instead, Plaintiffs received a letter denying their discharge on the basis of "medical review failure." This vague term did not provide the Plaintiffs with any meaningful explanation as to why their applications for a discharge had been denied. The

Defendant's failure to inform the Plaintiffs at any step in the application process that additional information was required to process their discharge applications further emphasizes the arbitrary and capricious nature of the Defendant's decision to deny their requests.

CONCLUSION

Plaintiffs request that the Defendant's decisions be reversed and agree with Defendant that, if Plaintiffs prevail, that the discharge requests be remanded to DOE in order to provide a proper evaluation of their disability discharge adjudications as set forth herein and in Plaintiffs' opening brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2008, the foregoing was filed electronically using the CM/ECF system and a copy of the electronic notification sent to:

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