COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 19, 1995

No. 95-1076

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MARSHA VANBUSKIRK,

Plaintiff-Respondent,

v.

WEA INSURANCE GROUP,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. WEA Insurance Corporation (WEAIC)[1] appeals a judgment awarding Marsha Vanbuskirk compensation for total disability under

[1] WEA Insurance Corporation appeals a judgment granted under the caption WEA Insurance Group.

the terms of an insurance policy. It argues that Vanbuskirk failed to timely satisfy the proof of loss requirement under the policy, that she failed to exhaust the administrative remedies required under the contract, and that she failed to prove that she was totally disabled. We reject these arguments and affirm the judgment.

Vanbuskirk, an art teacher, filed a claim for total disability under the terms of the insurance policy claiming that her disability began March 26, 1990. The claim was based on physical and psychological disorders. WEAIC approved the claim for a period of April through July 1990, but informed Vanbuskirk that benefits beyond July 31, 1990 would be conditioned upon her submission of additional proof of loss in the form of medical information establishing her total disability beyond July 31, 1990. On October 10, 1990, Vanbuskirk made a claim for disability benefits for the period beyond July 31. That claim was denied for insufficient medical basis. Vanbuskirk was notified by letter dated November 15, 1990 that her claim was denied and she was invited to submit additional medical support for her claim if she wished further consideration. Under a cover letter dated December 26, 1990, she submitted a letter from Dr. Duus to support her disability claim. WEAIC then submitted her claim to an independent consultant for review. His report found that the records did not provide a basis for a total disability claim. The final determination denying the claim was made March 25, 1991. At that time, Vanbuskirk was advised of her appeal rights under the terms of the policy.

On May 17, 1991, Vanbuskirk wrote to the person designated for receiving appeals submitting additional information and requesting that the matter be further examined. On June 10, WEAIC responded that the proof submitted was insufficient. Sixteen months later, Vanbuskirk called WEAIC and questioned whether the file could be reopened. She was told it could not. Eleven months later, Vanbuskirk mailed a package of documents to WEAIC establishing a further basis for her claim. The documents were sent back because Vanbuskirk was no longer insured. Shortly thereafter, Vanbuskirk filed this action for recovery under the terms of the contract. The trial court ruled that Vanbuskirk was entitled to an award of long-term disability benefits from July 31, 1990.

Vanbuskirk timely submitted proof of loss under the policy. The policy provides:

> Written proof of loss must be furnished to the company at its said offices in case of claim for loss for which the policy provides any periodic payment contingent upon continuing loss within ninety (90) days after the termination of the period for which the company is liable, and in case of claim for any other loss, within ninety (90) days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate or reduce any claim if it was not reasonably possible to get proof within such time, provided such proof is furnished as soon as reasonably possible.

The additional proof submitted by Vanbuskirk was not available at the time WEAIC initially reviewed her claim. By 1993, Vanbuskirk had a new diagnosis for symptoms she had previously reported. It was not possible for her to submit these medical reports before they were created.

Citing ***Gerrard Realty Corp. v. American States Ins. Co.***, 89 Wis.2d 330, 277 N.W.2d 863 (1979), WEAIC argues that Vanbuskirk was required to prove that WEAIC was not prejudiced by her failure to present proof of her loss within ninety days. ***Gerrard*** involves a construction of § 631.81, STATS., which states:

> Provided notice or proof of loss is furnished as soon as reasonably possible and within one year after the time it was required by the policy, failure to furnish such notice or proof within the time required by the policy does not invalidate or reduce a claim unless the insurer is prejudiced thereby and it was reasonably possible to meet the time limits.

This statute and the ***Gerrard*** holding are not applicable to this case because the time provided for proof of loss under the policy did not expire. By its terms, the policy allows proof of loss after the ninety days if it was "not reasonably possible to get the proof within such time." The policy requires no proof regarding prejudice to the insurer. It was not necessary for Vanbuskirk to rely on the extra time provided by § 631.81, and the terms under which that extension applies are inapposite.

WEAIC next argues that Vanbuskirk failed to exhaust her administrative remedies as required by the terms of the policy. The policy provides that, within sixty days of receipt of notice of the denial of benefits, the employe has the right to appeal to an appeals committee. The policy further provides that "no action at law or equity shall be brought to recover on this policy prior to the exhaustion of the appeal procedures set forth above." The exhaustion of remedies argument fails for two reasons. First, Vanbuskirk concurred at the time benefits were denied that the medical record was insufficient to support her demand for continuing benefits. It was only after development of sufficient medical history that she was able to demonstrate her entitlement. Because she was not contesting the findings as they existed, the policy provisions regarding appeals are inapplicable.

Second, the policy does not require that the appeal be in any specific form. Within the sixty-day time, Vanbuskirk wrote to the president of the company as she was instructed to do, requesting that her case be examined further. The company treated Vanbuskirk's letter as an appeal. The policy provided no additional guidance on how a matter could be reopened based on a new diagnosis that shed light on the previous condition. We conclude that Vanbuskirk did not violate any specific provisions of the policy regarding exhaustion of her appeal remedies.

Vanbuskirk presented sufficient evidence of disability to support the trial court's finding. While sufficiency of the evidence is a question of law, this court must defer to the trial court's findings of fact. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 249-50, 274 N.W.2d 647, 650 (1979). Vanbuskirk presented evidence that the symptoms she had in 1990 continued up until the day of trial. She presented medical expert testimony that if her condition was the same in July 1990 as it was in February 1992 and March 1993 when the doctors examined her, then she was totally disabled in July 1990. The combination of this testimony provides sufficient basis for the trial court's finding that she was disabled in July 1990. WEAIC argues that Vanbuskirk should not be allowed to testify in a manner that contradicts and enhances the contents of the medical records she submitted in 1990. Vanbuskirk attempted to submit this information to WEAIC as it became available, but WEAIC returned her packet of documents and would not reconsider its original decision. The inconsistencies between Vanbuskirk's testimony and the medical records are matters relating to her credibility, not the admissibility of her testimony. The credibility of witnesses is the sole province of the trier of fact. ***Id***. The trial court

reasonably found that Vanbuskirk was unable to work since July 1990 on the basis of her testimony and the medical evidence she presented at trial.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.