

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NICK R. NORTON,

Defendant.

No. C99-4092-DEO

ORDER

This matter comes before the Court upon plaintiff's renewed motion for summary judgment (Docket #21). After careful consideration of the parties' written and oral arguments, as well as the relevant statutes and case law, plaintiff's motion is denied.

I. BACKGROUND

On or about February 27, 1983, September 20, 1983, and August 24, 1984, the defendant, Nick R. Norton, executed promissory notes to secure student loans of \$2,500.00, \$2,500.00 and \$2,500.00 from Hawkeye Bank and Trust at 9% interest per annum. These loan obligations were guaranteed by Higher Education Assistance Foundation, MN and then reinsured by the Department of Education under loan guaranty programs authorized under Title IV-B of the Higher Education Act of 1965, as amended 20 U.S.C. §1071 et seq. (34 C.F.R. Part 682).

On May 11, 1984, Norton was injured in an automobile accident and was not able to return to Morningside College as a full time student. He subsequently defaulted on his student loan obligations on December 5, 1985, and the holder filed a claim on the guarantee. The guaranty agency paid a claim in the

amount of \$8,069.19 to the holder. The guarantor was then reimbursed for that claim payment by the Department of Education under its reinsurance agreement. The guarantor attempted to collect the debt from the borrower. The guarantor was unable to collect the full amount due, and on October 31, 1991, assigned its right and title to the loans to the Department of Education.

On September 29, 1999, the United States of America, on behalf of the Department of Education, filed a claim against the defendant for defaulting on his student loans. A judgment against Norton is requested in the amount of \$17,129.09., with interest at the annual rate of 9% per annum after July 23, 1999 to the date of entry of judgment; plus interest from the date of judgment at the current legal rate to be compounded annually pursuant to the provisions of 28 U.S.C. §1961(b); plus a filing fee of \$150.00; and any other relief as this court deems just and proper. (Docket #1).

II. STANDARD OF REVIEW

An entry of summary judgment is appropriate where:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). An issue of material fact is genuine if it has a real basis in the record. See Hartnagel v. Norman, 953 F.2d 394, 396 (8th Cir. 1992)(citing Matsushita Elec. Indus.

Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, give her the benefit of all reasonable inferences that can be drawn from the facts, and refrain from judging credibility. Matthews v. Trilogy Communications, Inc., 143 F.3d 1160, 1163 (8th Cir. 1998).

"When a moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The plaintiff is required under Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Rabushka ex rel. United States v. Crane Co., 122 F.3d 559, 562 (8th Cir. 1997); McLaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 511 (8th Cir. 1995). The necessary proof that the nonmoving party must produce is not precisely measurable, but the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Allison v. Flexway Trucking, Inc., 28 F.3d 64, 66 (8th Cir. 1994).

With these standards in mind, the Court turns to

consideration of the Government's motion for summary judgment.

III. ARGUMENTS & ANALYSIS

One of the ways a person may qualify for forgiveness on a student loan obligation is for them to be found "totally and permanently disabled", as required under 34 C.F.R. §682.402(c)(1)(i). This code section states as follows:

If the secretary has made an initial determination that the borrower is totally and permanently disabled as defined in §682.200(b), the loan is conditionally discharged for up to three years from the date that the borrower became totally and permanently disabled, as certified by a physician. The secretary suspends collection activity on the loan from the date of the initial determination of total and permanent disability until the end of the conditional period. If the borrower satisfies the criteria for a total and permanent disability discharge during and at the end of the conditional discharge period, the balance of the loan is discharged at the end of the conditional discharge period and any payments received after the date the borrower became totally and permanently disabled as certified under §682.402(c)(2), are returned to the sender.

"Totally and permanently disabled" is defined in §682.200(b) as "[t]he condition of an individual who is unable to work and earn money because of an injury or illness that is expected to continue indefinitely or result in death."

The Government asserts that there is no genuine issue of material fact in this case, arguing that Norton does not qualify

for forgiveness on his student loan obligation because he is not "totally and permanently disabled", as required under 34 C.F.R. §682.402(c)(1)(i). In support of its argument, the Government relies on the fact that the U.S. Department of Education has reviewed Norton's physician statements; his Morningside College transcripts and withdrawal documents; and the deposition of Dr. Jem Hof, M.D., and has concluded that Norton does not qualify for forgiveness on his student loan indebtedness because no doctor has certified that he is totally and permanently disabled. The Government also relies on the "Borrower's Total and Permanent Disability" form of July 17, 1985, where Dr. Mumford wrote "Totally disabled only from 6/25 to 9/10/84. He is not permanently disabled - has some permanent restrictions but may certainly work within these restrictions."

Dr. Hof¹, who has great credentials, was asked in his deposition on page thirty-three (33) as follows:

Does Mr. - - Dr. Mumford's opinion, which apparently he reached in 1985, just about a year or so after the accident, affect at all your opinion concerning Mr. Norton's - - either Mr. Norton's total and permanent disability or your opinion concerning whether or not he is significantly deteriorated since October of '84?

¹Dr. Hof is the director of Physical Medicine and Rehabilitation Services at the Veteran's Administration Hospital in Sioux Falls, South Dakota. He personally oversees ten (10) varied departments in the hospital. He is board certified by the American Board of Physical Medicine and Rehabilitation.

Dr. Hof answered at line 15: "It doesn't change my opinion at this time."

The Court is persuaded that a genuine issue of material fact does exist in this case. There is clearly a dispute as to whether Norton is "totally and permanently disabled" as required by the statute. Dr. Hof, Norton's physician, testified on August 17, 2001, that Norton is permanently disabled and unemployable and he was when he examined him on July 20, 2000. Dr. Hof stated:

This gentlemen has not been formally employed since 1980- if anybody has gone that long, over a year, in any type of injury, your percentage of being re-employed goes down to less than a fraction of one (1) per cent of the odds of ever getting viably employed.

(Depo. pp. 14, 21, 24, 26, and 33).

Dr. Hof testified (on August 17, 2001) that in his opinion Norton was permanently disabled and unemployable when he examined him on July 20, 2000. Dr. Hof said of Norton at the time he examined him, "Someone must have brought him here to see me, he couldn't have made it on his own." (Depo. 14, 21, 24, 26, 33). He further testified that Norton suffers from chronic lower back pain which gets very severe (Depo. p. 8, 26, 27, 29, 32) and from a condition called degenerative arthritis, a condition that worsens and becomes more painful as time progresses. (Depo. p. 26). Dr. Hof stated that in order to

assess Norton's cognition², he would need to perform a functional capacity evaluation. (Depo. 21).

A letter of October 6, 2000 which the Government relies on (Government's Exhibit 1) is from Senior Loan Analyst, Linda L. Martin to the defendant which states as follows:

After a thorough review of the disability form, the U.S. Department of Education has determined that you do not qualify for loan discharge for the following reasons:

g A borrower's account is not dischargeable under total and permanent disability regulations based on a condition that existed at the time the borrower applied for the loan. However, the loan may be discharged if the borrower's condition substantially deteriorated after the loan was made so as to render the borrower totally and permanently disabled, per 34 C.F.R. §682.402(c). Your loan was disbursed 10/84. Your doctor certified that your condition started and that you became unable to work and earn money or go to school 5/84. (emphasis added)

g To be totally and permanently disabled the borrower must be unable to work and earn money or go to school because of an impairment that is expected to continue indefinitely or result in death. It should be noted that the standard for determining disability for cancellation of the borrower's loan

²Generic term embracing the mental activities associated with thinking, learning, and memory. Stedman's Medical Dictionary, 26th Ed.

obligation may be different from standards used under other public and private programs in connection with occupational disability or eligibility for social service benefits. Since you continued in school, as evidenced by your loan disbursed 5/84, you do not meet the definition of total and permanent disability. (emphasis added)

- g** The physician did not certify that the medical condition is total and permanent. To be totally and permanently disabled the borrower must be unable to work and earn money or go to school because of an impairment that is expected to continue indefinitely or result in death. It should be noted that the standard for determining disability for cancellation of the borrower's loan obligation may be different from standards used under other public and private programs in connection with occupational disability or eligibility for social service benefits. Your doctor stated that the date you will be able to return to work and the percentage of your disability are undetermined. (emphasis added)

This Court will now discuss the three (3) paragraphs set out above. In the first paragraph, the letter says Mr. Norton's "loan" was disbursed 10/84. Mr. Norton's doctor testified that his condition started, and that he became unable to work and earn money, on or about 5/84. So, we must assume that in May of 1984, Mr. Norton had the accident and could not work. Now, the record is not clear as to when he had actually made an application to secure these loans. As stated earlier he signed

one note on or about February 27, 1983, one on September 20, 1983 and one on August 24, 1984. Common sense would tell us that three notes, signed on dates that far apart, were not all dispersed on the same day. If he got the money for one of the notes in October of 1984, as Ms. Martin says in her letter, he certainly had made the application sometime prior to that. Linda Martin, in her letter, is not clear at all as to when the applications were made. She does make the point that the day it was disbursed, sometime in October of 1984, that Mr. Norton claimed to be totally disabled. However, any implication that Norton applied for a loan after he was disabled is without merit.

In paragraph two (2), Ms. Martin starts out by stating, "To be totally and permanently disabled the borrower must be unable to work and earn money or go to school because of an impairment that is expected to continue indefinitely or result in death" (emphasis added). That same second paragraph goes on to say, "Since you continued in school, as evidenced by your loan disbursed 5/84, you do not meet the definition of total and permanent disability." Now, the date as written in paragraph two (2) says that the loan was disbursed in 5/84, which does not jibe with the first paragraph which says the loan was disbursed 10/84. There is nothing in the record to show that there was a loan that was disbursed in 5/84. After the Court asked for clarification, Ms. Martin told her lawyer that the 5/84 date was a typographical error. A careful perusal of all of the federal regulations that are pertinent to this problem, say nothing at all about, "or go to school." The same second paragraph states

that since Norton was still in school when the check finally showed up, that he could not meet the definition of totally and permanently disabled. This is a new added provision, not in the Code of Federal Regulations or anywhere else, which Ms. Martin has adopted to assist her in finding that the defendant is not totally and permanently disabled. That is, that you cannot be "going to school." As mentioned, this Court has been unable to find any support in the case law or under the Code of Federal Regulations or any place else which supports Ms. Martin's conclusion that you cannot be in school and still be permanently disabled.

In the third paragraph, Ms. Martin has set out that the physician (Dr. Hof) did not certify that the medical condition is total and permanent and then repeats what is set out in paragraph two (2) above, the words, "to be totally and permanently disabled the borrower must be unable to work and earn money or go to school because of an impairment" (emphasis added). As set out above, this is an added new element adopted by Ms. Martin that she has no support for.

The third paragraph then goes on to say,

It should be noted that the standard for determining disability for cancellation of the borrower's loan obligation may be different from standards used under other public and private programs in connection with occupational disability or eligibility for social service benefits.

This "standard" seems to be the "Ms. Martin standard", it is not set out anywhere that is revealed in the record or that

this Court can find. Dr. Hof in an effort to show the defendant that they were taking a non-medical, non-recognized standard, wrote, when filling out the defendant's form entitled Physician's Statement:

I tried to call several times but couldn't get through to a Linda Martin. Question: by what nationally recognized format (standard) would he be rated on for the government. Please call or write to inform me. Thank you. Dr. Hof.

Had Ms. Martin talked with Dr. Hof he well could have explained to her, as set out elsewhere in this order and as he said several times, "Norton is permanently and totally disabled by any recognized standard that I am aware of."

The third paragraph goes on to say, "Your doctor stated that the date you will be able to return to work and the percentage of your disability are undetermined." This again was a reference to the statement of Dr. Mumford which was written and referred to defendant's condition in the summer of 1985 and, as mentioned earlier herein, Dr. Hof said Dr. Mumford's conclusion in 1985 did not in any way change Dr. Hof's conclusion that Norton was disabled as of July 20, 2000. Dr. Hof is an expert on rehabilitation. There is nothing in the record to show that Dr. Mumford was. Further, the record shows that Norton's problems are progressive and get worse each year. Dr. Hof saw Norton fifteen years after Dr. Mumford did. Dr. Hof, in response to Ms. Martin's contention that there was no showing that Norton's health was deteriorating over the years, said what Norton has, degenerative arthritis, gets worse and more painful

as time progresses. It is not surprising that Norton's condition had deteriorated from 1985 to 2000.

It is true that Dr. Hof has not certified that Norton's mental condition is total and permanent. The word "certify" is in the Code, and this Court is not ignoring it or overlooking it. But, the situation here is that Dr. Hof is an expert on rehabilitation. He says in five (5) different places, as set out in this Order, that Norton is disabled and unemployable. He does say, as previously mentioned, that there is less than a fraction of one per cent (maybe 1/4 of 1%) chance that if he had Norton as a patient and was in a position to spend whatever funds were necessary to give Norton additional tests to see if he could improve Norton's condition, that there is an almost negligible possibility that he [Hof] with his expertise, could get Norton back to where he might be employable and other than permanently and totally disabled. All that Dr. Hof is really saying is that he cannot flatly and unequivocally state, as a matter of medical certainty that "I can't salvage him." He would have to have Norton under his care and be able to try all the "tricks of the trade" on Norton. Then there would be a very, very slight chance that Dr. Hof might salvage him (maybe less than 1/4 of 1%). The Government is hanging its hat on the word, "certify," saying that since Dr. Hof will not "certify", Norton must lose.

Under the circumstances here, as set out in this Order, this Court is persuaded that Dr. Hof, again with superior credentials, has flatly said, several times, that Norton is unemployable and totally and permanently disabled. This is

equivalent to certification.

This Court has before it the defendant's motion for summary judgment. For all the reasons set out herein, that motion is denied. That leaves us with a pending case. Should we have a trial? If so, who would be the witnesses? Perhaps Ms. Martin and Dr. Hof. We already know what they will say don't we? Could we have a trial on the record we now have? Do we need other witnesses? Who?

Another avenue might be the filing of a motion for summary judgment by the defendant. Another avenue might be a suit by the defendant under the Administrative Procedures Act praying that this Court find the decision of the Department of Education to have been arbitrary and capricious, asking that this Court find that the decision that the defendant is not disabled be voided.

It should be remembered that 34 C.F.R. §682.402(c)(1)(i), as set out on page 4 of this order, explains the procedure that would happen if the Secretary made an initial determination that Norton was "totally and permanently disabled." Perhaps that procedure is appropriate but this Court is persuaded that it cannot order that procedure to commence under the present state of this record.

Counsel in this case may have more appropriate avenues for this case to take in the future; for example does 34 C.F.R. Ch.VI 682.402(a)(4)(i) apply here?

IV. CONCLUSION

IT IS THEREFORE HEREBY ORDERED that plaintiff's renewed

motion for summary judgment is denied.

IT IS FURTHER HEREBY ORDERED that the parties shall confer to see if they can agree as to how this case should proceed. If counsel can so agree this Court will try to accommodate the procedure agreed upon. If counsel cannot arrive at an agreement they should report to this Court their positions within fifteen (15) days of the date of this order. This Court will thereafter hold a hearing if necessary.

IT IS SO ORDERED.

DATED this ___ day of February, 2002.

Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa