

FILED
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LARRY W. PROCTOR
CHARLESTON, SC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Micky Garrett,)	
)	
)	C/A No. 2:02-4240-18
)	
)	
vs.)	ORDER
)	
Fortis Benefits Insurance Company)	
)	
Defendant.)	
_____)	

This matter is before the court upon plaintiff's motion for attorney's fees and costs. For the reasons set forth below, plaintiff's motion is granted.

I. Factual Background

Plaintiff, Mickey Garrett ("Garrett"), was formerly employed at Evans Rule, a division of the L.S. Starrett Company ("Evans Rule"), from 1989 until 2000 as a Chemical Lab and Environmental Manager. Garrett worked at Evans Rule until he contracted pneumonia. Garrett's pneumonia required hospitalization in the intensive care unit. While hospitalized, Garrett suffered respiratory failure following a period of low oxygen delivery on December 3, 1998, a condition which was later diagnosed as "severe hypoxemic respiratory failure" or "hypoxia."

Although plaintiff recovered and was discharged from the hospital on January 5, 1999, he subsequently experienced memory difficulties, depression, headaches, irritability and insomnia, all of which were conditions not present prior to his hospitalization. These difficulties persisted and they eventually rendered Garrett incapable of performing his job with Evans Rule. As a result, Garrett left Evans Rule with disability pay on November

14, 2000.

Following the expiration of his short-term disability benefits provided by his employer, Garrett applied for long-term disability benefits with defendant, Fortis Benefits Insurance Company (“Fortis Benefits”) on July 26, 2001. While Fortis Benefits approved coverage for plaintiff’s condition, the coverage provided was limited to two years because Fortis Benefits asserted that plaintiff’s condition fell within a limiting provision covering mental illnesses. Specifically, Fortis Benefits concluded that Garrett’s disability was the result of a major depressive disorder, not hypoxia. Through his counsel, plaintiff objected to this determination arguing that his condition was the result of a physical injury, not a mental illness, and plaintiff appealed this finding on April 19, 2002. This appeal was later “deemed denied” by order of this court on August 5, 2003 for Fortis Benefits’ failure to provide plaintiff with a decision within the applicable time limits set forth under the relevant regulations of the Employment Retirement Income Security Act (“ERISA”). Fortis Benefits subsequently chose not to pursue the matter any further and has since stipulated that the 24-month mental illness limitation contained in the disability insurance policy is inapplicable to plaintiff’s condition and, as a result, has reinstated plaintiff’s benefits.

Plaintiff has now petitioned the court for an award of attorney’s fees, which are allowed at the court’s discretion under § 1132(g) of ERISA. Given that the parties have reached agreement on all other matters in this case, this is the sole issue remaining before the court.

II. Discussion

A. Whether Fees and Costs are Warranted

An award of reasonable attorney's fees and costs under ERISA is within the discretion of the court. Quesinberry v. Life Ins. Co. of North America, 987 F.2d 1017 (4th Cir. 1993). In Quesinberry, the Fourth Circuit established a five-factor test to guide the court's discretion in awarding attorney's fees under ERISA. The factors include: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of attorney's fees; (3) whether an award of fees against the opposing party would deter other persons acting under similar circumstances; (4) whether the party requesting attorney's fees seeks to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. Id. at 1029. "This five factor approach is not a rigid test, but rather provides general guidelines for the district court in determining whether to grant a request for attorney's fees." Id. In weighing these factors, the court concludes that an award of fees is warranted in this instance.

First, the court concludes that Fortis Benefits was clearly culpable and arguably acted in bad faith in its handling of plaintiff's claim. This is especially true in considering the manner in which Fortis Benefits handled plaintiff's appeal. While the evidence shows that Fortis Benefits was arguably justified in its initial determination that plaintiff's condition was the result of a major depressive disorder,¹ this fact does not overshadow the

¹ The evidence shows that plaintiff had experienced problems with depression in the past. It further reveals that plaintiff may have been less than forthcoming about his previous bouts with this condition following his hospitalization and upon experiencing functional problems at the workplace. This history of depression, however, was never

culpability Fortis Benefits exhibited in its handling of plaintiff's appeal. As plaintiff notes, he was forced to bring this matter before the court following Fortis Benefits' extensive delay in considering his appeal. The delay, however, is not the sole factor supporting a finding of culpability. Most troublesome is the fact that this delay was entirely the result of Fortis Benefits' indifference or incompetence in handling plaintiff's appeal—all while time was running out on plaintiff's presumptive two-year period of coverage.

In support of his appeal, plaintiff submitted substantial evidence from a neurologist, a pulmonologist and a neuropsychologist in arguing that his condition was not the result of a mental illness. Among other things, this evidence reveals that severe attention deficit disorder, a condition from which plaintiff suffers, is a common side effect among individuals who have suffered from hypoxia. (Pl.'s Ex. 13 at ¶ 6). In spite of this evidence, Fortis Benefits sought to have plaintiff evaluated by an independent physician, Dr. Monroe Karetzky. Of course, it was entirely reasonable for Fortis Benefits to seek the advice of an independent physician. The opinions offered by Dr. Karetzky were not reliable, however, in large part because Fortis Benefits' failed to provide him with Garrett's complete medical records and additionally failed to provide Dr. Karetzky with appropriate questions relating to the medical source of Garrett's condition. Indeed, it is not fully clear whether Fortis Benefits ever relied upon Dr. Karetzky's opinions in lieu of these shortcomings, but it is presumable that Fortis Benefits finally chose not to

conclusively linked to plaintiff's disability. Indeed, since the parties have stipulated that the policy's mental illness limitation does not apply to plaintiff's condition, it is clear that depression has now been ruled out as the source of plaintiff's disability.

rely on Dr. Karetzky's findings as it ultimately has agreed to provide plaintiff with long-term benefits. If this were the end of the matter, the court would not conclude that Fortis Benefits acted wrongfully in considering plaintiff's appeal.

Yet, after having a first bite at the apple with Dr. Karetzky, Fortis Benefits later insisted upon obtaining another independent evaluation of plaintiff's condition on October 17, 2002, approximately five months after plaintiff filed his appeal. As plaintiff notes, it was not until over a month later that plaintiff was first made aware of the date of this subsequent examination, which was scheduled for December 12, 2002, nearly seven months after the filing of plaintiff's appeal. Apparently, this examination was never performed as plaintiff, who reasonably was frustrated by Fortis Benefits' actions, filed suit with this court. Even then, when it was clear that plaintiff was justified in treating his appeal as "deemed denied," Fortis Benefits sought to have the matter remanded for further administrative review. Such conduct was not reasonable in light of plaintiff's ongoing circumstances and a prompt decision should have been made by Fortis Benefits especially in light of the fact that plaintiff was receiving only temporary benefits.

In opposing plaintiff's motion for fees, Fortis Benefits contends, as it has throughout the course of this litigation, that the delay in processing plaintiff's appeal has resulted from specific tactics employed by plaintiff's counsel. In this vein, Fortis Benefits contends that, "[a] reasonable conclusion is that the plaintiff, through his counsel, delayed the examination until after the 120 days had elapsed." (Def.'s Response at 3). This argument is without merit. All of the actions Fortis complains of took place during and following October of 2002, five months after plaintiff filed his appeal. Considering this fact, it is surprising that Fortis Benefits would even attempt such an argument.

Furthermore, knowing that Fortis Benefits had failed to properly inform Dr. Karetsky in its first attempt at obtaining an independent medical examination, the court finds plaintiff's counsel's actions with respect to the subsequently scheduled examination entirely proper.

It must additionally be pointed out that Fortis Benefits appears to be under the presumption that it was entitled to 120 days to review plaintiff's appeal as a matter of course. The law provides otherwise. As noted in this court's previous order, the United States Supreme Court observed in Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985) that the applicable regulations contemplate that a decision should be made promptly, and shall not ordinarily be made later than sixty days unless special circumstances require an extension of time for processing. The evidence is completely devoid of any indication of special circumstances in this case and Fortis Benefits has never even argued as much. Rather, quite to the contrary, the evidence clearly shows that all delays in this case are the result of Fortis Benefits' mishandling of plaintiff's appeal. Fortis Benefits' attempt to pin the blame on plaintiff's counsel for the several months it took to address plaintiff's appeal is therefore baseless.

Accordingly, the court finds that Fortis Benefits acted with culpability in dealing with plaintiff's claim and, as such, the first Quesinberry factor supports an award of attorney's fees.

The remaining factors – with the exception of the fourth, which is clearly inapplicable to this case – weigh in plaintiff's favor and support an award of fees as well. The second factor is met as Fortis concedes that it is financially able to satisfy the amount plaintiff is claiming. The third factor also favors plaintiff's position. The court agrees

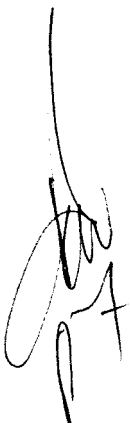


with plaintiff that an award of fees in this case would serve well to encourage defendant and other insurers to more strictly adhere to the requirements of ERISA. And finally, the fifth factor supports plaintiff's position. As plaintiff notes, this court previously ruled in his favor in denying defendant's motion for summary judgment or, in the alternative, for remand. The court also finds that the evidence in this case supports the present stipulation between the parties and concludes that the evidence does not demonstrate that plaintiff suffered from a mental illness, as defendants had previously argued.

Accordingly, the court concludes that an award of attorney's fees and costs is warranted and now considers what amount of fees and costs is reasonable.

B. The "Lodestar" Figure Analysis

"The Fourth Circuit calculates attorney[']s fees by determining a 'lodestar' figure by multiplying the number of reasonable hours expended times a reasonable rate." Brodziak v. Runyon, 145 F.3d 194, 196 (4th Cir. 1998). This calculation is further guided by the court's consideration of the following factors: (1) the time and labor expended; (2) the novelty and difficulty of the question raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the litigation; (5) the customary fee for like work; (6) the attorney's expectation at the outset of the litigation; (7) time limitations imposed by the client or the circumstances of the case; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case within the legal profession; (11) the nature and length of the professional relationship between the attorney and the client; and (12) attorney's fees awarded in similar cases. Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 175 (4th Cir. 1994). "The lodestar




may be adjusted upward or downward based on consideration of the[se] 12 factors.”

Smith v. Continental Casualty Co., 289 F. Supp. 2d 706, 710 (D. Md. 2003).

In this instance, plaintiff’s counsel only requests the “lodestar” amount and does not contend that the above-listed factors support an increase in the amount awarded. In all, plaintiff is requesting a total of \$27,263.75 in fees for the work performed by his leading counsel, \$1,600.00 for work performed by local counsel, as well as \$675.60 for costs. The attorney’s fees are explained by plaintiff’s counsel as follows: 88.55 hours were expended by plaintiff’s lead counsel, Mr. Andrew Whiteman, at a rate of \$250.00 per hour; 12.8 hours were expended by plaintiff’s local counsel, David Bornhorst, at a rate of \$125.00 per hour; and 68.35 hours were expended by Ms. M. Skye Wadsworth, plaintiff’s lead counsel’s paralegal at a rate of \$75.00 per hour. Plaintiff’s counsel has additionally provided a detailed accounting of their fees, as well as supporting affidavits, both from plaintiff’s lead counsel and a leading ERISA attorney in this state, stating that the time and rate expended are reasonable.

Not surprisingly, defendant contends that the fees claimed are unreasonable.² Specifically, defendant protests plaintiff’s lead counsel’s rate as well as the amount of time expended by plaintiff’s counsel’s paralegal. Plaintiff’s counsel originally claimed

² While not specifically referring to any of the twelve factors which the court should consider in determining what amount should be awarded, defendant has only protested the amount of time plaintiff’s counsel’s paralegal spent on the case and additionally taken issue with the fee charged by plaintiff’s lead counsel. Such objections, of course, implicate a consideration of first, fifth, ninth and twelfth factors and the court will address them accordingly. Aside from these listed factors, the court concludes that no other factor augers in favor of a reduction of the amount requested. Furthermore, while plaintiff specifically addressed each factor in his request for fees and costs, defendant has only offered the objections discussed herein and the court therefore sees no need in addressing the remaining factors in detail.



that Ms. Wadsworth recorded 99.20 hours in connection with this case, but has since amended this figure to that reflected above. Defendant has not objected to this recent amendment and the court assumes that the time presently accounted for is reasonable. Accordingly, the court will address only the argument concerning plaintiff's lead counsel's hourly rate.

Defendant argues that a rate of \$250.00 per hour is excessive for plaintiff's lead counsel. Defendant notes that the attorney, Robert Hoskins, whom plaintiff's counsel relied upon for determining the prevailing market rate is a leading specialist in ERISA matters in this district. In his affidavit, Mr. Hoskins explains that, "I believe given my experience that a fair fee for my time and services is \$250 per hour." (Hoskins Aff. at 2). The implication, of course, is that plaintiff's counsel does not merit the same rate because he is not considered "one of the leading attorneys [in ERISA matters] not only in South Carolina but also in the entire Fourth Circuit." (Def.'s Response at 6). As a result, defendant contends that the same rate of \$125.00 should be applied to plaintiff's lead counsel as plaintiff's local counsel.

The law provides that a fee applicant must produce specific evidence of the prevailing market rates in the relevant community for the type of work for which he seeks an award. The prevailing market rate is established through affidavits reciting precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market. Smith, 289 F. Supp. 2d at 712.

In this instance, plaintiff's counsel has presented the court with (1) an affidavit



stating that forty-percent of his practice is devoted to handling ERISA disability cases; (2) an affidavit by Mr. Hoskins stating that a fair rate for his services is \$250.00 per hour; and (3) a number of published cases wherein rates of \$250.00 or more have been approved and awarded by courts within this district in cases involving complex litigation, albeit not necessarily in ERISA cases, see Alexander v. Boyd, 929 F. Supp. 925, 937 (D.S.C. 1995) (listing six instances involving complex litigation (i.e., securities class actions, antitrust actions, and contractual disputes) in which rates ranging from \$250 to \$300 were approved within this district). As to this latter piece of evidence, the court comfortably takes notice that ERISA litigation may duly be regarded as “complex.” As was recently observed in Smith, 289 F. Supp. at 711, ERISA cases are difficult and require a “comprehensive knowledge of statutory and common law.” Perhaps, as a result, “an attorney representing plaintiffs in ERISA benefits cases, is a rare commodity.” Id. at 712. Accordingly, although the court certainly agrees with defendant that Mr. Hoskins is a leading ERISA specialist within both this district and the Fourth Circuit as a whole, it does not also conclude that a fee of \$250 per hour with respect to Mr. Whiteman is unreasonable. As such, the court approves of Mr. Whitemans’s fee. The court additionally finds the remaining fees reasonable and notes that defendant has only objected to Mr. Whiteman’s fee.

As a result, the fees to be awarded in this case are as follows:

Plaintiff’s Lead Counsel:

Mr. Whiteman:	88.55 hours x \$250.00 = \$22,137.50
Ms. Wadsworth:	68.35 hours x. \$ 75.00 = <u>\$ 5,126.25</u>
	<u>\$27, 263.75</u>

