

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG**

ABDELMALEK BOUZHAR,

Plaintiff,

v.

**Civil Action No. 3:04CV52
(BROADWATER)**

**CNA GROUP LIFE
ASSURANCE COMPANY, et al,**

Defendants.

ORDER GRANTING FEES AND COSTS

The above styled matter is before the Court for consideration of the Plaintiff's Motion for Attorney's Fees and Costs (Document No. 34) and the parties' subsequent filings related thereto. The Plaintiff's motions ask the Court to award attorney's fees incurred during the execution of this action under 29 U.S.C. 1132(g)(1) and Fed. R. Civ. P. 54(d)(2).

As grounds for this motion, Plaintiff cites five factors outlined in Quesinberry v. Life Ins. Co., 987 F.2d 1017, 1030 (4th Cir.1993) (en banc):

- (1) degree of opposing parties' culpability or bad faith;
- (2) ability of opposing parties to satisfy an award of attorneys' fees;
- (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances;
- (4) whether the parties requesting attorneys' fees sought 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.

The following review of the applicable factors favors an award of attorney's fees.

(1) With respect to the first factor, the degree of the parties' culpability or bad faith, the Defendant abused its discretion in denying the Plaintiff coverage under a disability insurance policy. The Defendant's decision to deny Plaintiff benefits was not the result of a deliberate reasoning process based on substantial evidence.

Defendant cited video surveillance, an expert's review of the record and its interpretation of the policy language as the basis for its decision to deny benefits. The video surveillance shows an isolated instance of the Plaintiff sitting for more than twenty minutes. This isolated episode does not constitute substantial evidence to controvert the treating physician's testimony that the Plaintiff could not sustain activity requiring him to sit for twenty minutes at a time throughout a full working day. The Defendant's reviewing expert concluded that the Plaintiff's true condition could not be determined based upon the record. The Defendant finally presented an inconsistent interpretation of plan language that would render its terms meaningless by equating objective tests to clinical examination.

The Defendant did not rely upon substantial evidence and a reasonable process to deny Plaintiff's benefits. The Defendant abused its discretion when it had a fiduciary duty to administer the plan in the face of a structural conflict with its economic interest as the payor of plan benefits. The Defendant's actions overall favor an award of attorney's fees with respect to the first factor.

(2) The Defendant, in its Response to the Motion for Attorney's Fee and Costs, conceded that it was in a position to pay attorney's fees.

(3) The award of attorney's fees can deter additional parties in similar circumstances from abusing their discretion, by increasing the economic incentives for parties to fulfill their fiduciary duties.

(4) This case turns on the facts and reasoning used by the Defendant to deny disability benefits to the Plaintiff. As such, there is negligible benefit to all participants and beneficiaries of the ERISA plan and no unsettled legal question regarding ERISA itself.

(5) Judgment was entered against the Defendant based on the record, therefore the fifth factor favors the Plaintiff.

Based upon the Plaintiff successfully arguing abuse of discretion on the part of the Defendant, and the above referenced Quesinberry factors, the Plaintiff is entitled to recover attorney's fees. The critical inquiry in determining a reasonable award of attorney's fees concerns the appropriate hourly rate. Once the hourly rate is properly calculated, a court should usually "determine a 'lodestar' figure by multiplying the number of reasonable hours expended times a reasonable rate." Mitchell v. Fortis Benefits Ins. Co., 163 Fed. Appx. 183, 194 (4th Cir. 2005), quoting Daly v. Hill, 790 F.2d 1071, 1077 (4th Cir. 1986). The district court should generally be guided by the twelve particular factors articulated in Barber v. Kimbrell's, 577 F.2d 216, 226 n. 28 (4th Cir. 1978), when deciding what constitutes a "reasonable" number of hours and rate. See also Brodziak v. Runyon, 145 F.3d 194, 196 (4th Cir. 1998).

Mr. Waddell argues that, based upon his level of expertise, trial ability, the normal local rate in this area of practice as well as the other Barber factors referenced in the Plaintiff's memorandum (Document No. 34.), a rate of \$300 an hour is reasonable. The Plaintiff's argument is supported by a sworn affidavit from another local attorney attesting to the

availability of representation for ERISA actions in the district and the customary fees charged. As the Defendant argues no alternative hourly rate based upon the above referenced factors, the Court finds the Plaintiff's suggested rate of \$300.00 an hour is reasonable.

As directed by Hensley v. Eckerhart, 461 U.S. 424 (1983), district courts are to exclude in the calculation of a reasonable attorney's fee award, those hours that were not reasonably expended by counsel. In this instance, the Court finds that claimed hours are reasonable.

The Court has reviewed the hourly billing statement of Harry P. Waddell in light of the specific objections set forth on pages 6-9 of the Defendant's Response in Opposition to Plaintiff's Motion for Attorney's fees and Costs on Behalf of Defendant (Document No. 37). The Defendant objects to the charge of 10.5 hours for reviewing the record and filing the complaint and 25.5 hours for work on cross motions for summary judgment. As well, Defendant objects to the inclusion of a deposition fee from October 12, 2003 and allotting 1.5 hours for preparation of a motion to continue.

With respect to the hours charged for research and filing of the action the Court concludes that the claimed time is reasonable due to the volume of materials included in the administrative record. The additional work on the cross motions for summary judgment is also found reasonable, based on the Court's experience reviewing such cases.

The Plaintiff concedes that the October 12, 2003, deposition related charge of \$673.60, was improper as it was related to the resolution of the underlying administrative claim. The Court finds that for the same reason, the October 27, 2003, express mail delivery charge of \$24.58, should not be included in permissible fees.

Plaintiff indicates the claim of 1.5 hours to prepare a motion to continue was cited in

error and should be 0.5 hours (Document No. 37, p.7-8). The Court finds this is a reasonable charge and accordingly will reduce the fee by \$300.00.

Based upon the above factors, the Court concludes that attorney fees for the Plaintiff's counsel should be paid as set forth in Document No. 39, minus the shipping charge of October 27, 2003.

Therefore, the Court hereby **ORDERS** that Harry P. Waddell be granted \$14,337.50 as reasonable attorney's fees and that the Plaintiff be awarded \$184.21 in costs as detailed above, to be paid by the Defendant.

The Clerk is directed to transmit true copies of this Order to all counsel of record herein.

DATED this 26th day of June 2006.


W. CRAIG BROADWATER
UNITED STATES DISTRICT JUDGE