

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 1379-CIV-GRAHAM

MAGISTRATE JUDGE BANSDSTRA

ROBERT K. JORDAN,

Plaintiff,

v.

PRUDENTIAL INSURANCE COMPANY OF
AMERICA,

Defendant.

PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

Plaintiff, Robert K. Jordan, by and through undersigned counsel, pursuant to 29 U.S.C. § 1132 (g), moves this Court for entry of an Order Awarding Attorneys' Fees and Costs to Plaintiff and as grounds says:

1. This suit was initiated by the Plaintiff, Robert K. Jordan, against the Defendant, The Prudential Life Insurance Company of America, as the result of the wrongful termination of his monthly disability benefits pursuant to the terms of a long term disability plan .

2. The Defendant reversed its decision denying further benefits and has paid Plaintiff all past due benefits, plus interest.

3. As the prevailing party in this action, Plaintiff seeks an award of attorneys' fees and costs pursuant to 29 U.S.C. § 1132 (g). See also, Ironworkers Local #272 v. Bowen, 695 F.2d 531 (11th Cir. 1983).

4. Plaintiff seeks total attorneys' fees in the amount of \$_____ for Mr. Deutsch and \$_____ for Mr. Wagar plus a multiplier in the amount of 2.5. A breakdown of the fees is set forth in the attached verified statement of professional services.

5. Plaintiff seeks total costs in the amount of \$_____. A breakdown of the costs is set forth in the attached verified statement of professional services.

WHEREFOR, Plaintiff, Robert K. Jordan, respectfully request this Court enter an Order Awarding Attorneys' Fees and Costs to Plaintiff in the amounts set forth above.

MEMORANDUM OF LAW IN SUPPORT

Standard for an Award of Attorneys' Fees and Costs

Plaintiff, Robert K. Jordan seeks to have attorneys' fees and costs awarded for prevailing in enforcing his entitlement to the benefits of his disability plan¹. In an ERISA action by a plan participant, beneficiary, or fiduciary, the trial court, at its discretion, may award a reasonable attorneys' fee to either party. ERISA § 502 (g)(1); 29 U.S.C. § 1132 (g)(1). Only the prevailing party in an ERISA action is entitled to an award of fees and costs. Curry v. Contract Fabricators Inc. Profit Sharing Plan, 744 F.Supp. 1061, 1068 (M.D. Ala. 1988). ERISA's fee shifting provision was enacted by Congress to advance the underlying purpose of ERISA.

“The intent of Congress in enacting ERISA was to protect the ‘interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans.’ 29 U.S.C. § 1001(b).”

Drennan v. General Motors Corp., 977 F.2d 246, 250 (6th Cir. 1992).

¹ This Court ruled that the plan at issue was governed by 29 U.S.C. § 1001, et seq. (ERISA).

The award of attorneys' fees to the non-culpable party aids in maintaining the integrity of, and confidence in, an employee benefit plan.

This Circuit has adopted a five part test to determine whether to award attorneys' fees in an ERISA action.

“(1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the 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. No one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a court should address in applying section 502 (g).

Ironworkers Local # 272 v. Bowen, 695 F.2d 531, 534 (11th Cir. 1983).

Factor (1) - Prudential's Culpability or Bad Faith

The conduct of the Defendant, Prudential, in handling the disability claim of the Plaintiff, Robert Jordan, represents a well calculated and planned scheme and course of conduct to deprive its covered plan member of disability benefits. This well calculated and planned scheme and course of conduct clearly represents “bad faith” and the most severe breach of fiduciary duty to Mr. Jordan. Prudential and its attorneys have devised a diabolical scheme and plan first to improperly deprive its plan member of disability benefits and then if this does not work, a plan to avoid the payment of attorneys fees and costs through legal trickery. Prudential will say or do anything to accomplish these ends. The upshot of these actions is Prudential's well calculated use of ERISA as a shield to improperly deprive plan members of disability benefits knowing no matter how gross its conduct, the worst thing that can happen is that it be made to pay the benefits which it

owes, plus the possibility of interest at a rate probably less than what it is earning on its investments². This scheme and plan is predicated on patent misrepresentations, breach of fiduciary responsibilities, and an overt attempt to deceive its plan members as well as the Court, as is more specifically set forth below:

A) Prudential, based upon a report submitted by Dr. Rodney Falk on Boston University stationary, terminated Mr. Jordan's disability benefits on March 1, 1998. In its termination letter to Mr. Jordan dated February 25, 1998, Prudential represented that Dr. Falk, in his capacity as Director of Clinical Cardiac Research at Boston University Medical Center, Professor of Medicine, reviewed Mr. Jordan's file in order to have a full and fair review. Prudential, in answer to Plaintiff's Interrogatory number 7 answered on December 15, 1998, refers to Dr. Falk as "independent." Further, Prudential represented to the Court in its Motion for Order Requiring Submission to Physical Examination, that Prudential "has already had one independent medical evaluation by Dr. Falk." At no time prior to the termination of benefits did Prudential request a physical examination of Mr. Jordan by a cardiologist. Prudential misrepresented to Mr. Jordan that all his medical records had been reviewed when in fact, this was not true and Prudential had not ever taken the time to contact Mr. Jordan's treating physician to inquire as to the specifics of his conditions.

Even Dr. Falk testified at his deposition that Prudential should have contacted Mr. Jordan's treating cardiologist to get as much current information as was available and the failure to do so was not reasonable and not fair to Prudential's insured³.

² The intent of ERISA is to protect plan participants, not the plan administrator.

³ Dr. Falk deposition, p. 103-104.

During discovery in the subject litigation, the deposition of Dr. Falk was taken in Boston, Massachusetts and it became clear that Dr. Falk was not and could not be referred to as an independent examiner as represented by Prudential for the following reasons:

i) Dr. Falk, in the prior eighteen months performed one or two reviews a week on behalf of Prudential⁴. He performed these types of evaluations almost exclusively on behalf of Prudential⁵.

ii) Twenty percent of Dr. Falk's income in the prior year was generated from reviews performed on behalf of Prudential⁶.

iii) Dr. Falk traveled on numerous occasions to New Jersey to lecture Prudential's claims examiners on matters pertaining to claims handling⁷.

iv) Prior to the preparation of the subject report, Dr. Falk discussed the subject claim with adjusters from Prudential⁸.

v) Although Dr. Falk's report was typed on Boston University stationery, his review on behalf of Prudential was not part of his employment with that facility. In fact, the reviews were performed at home and "out of hospital work." Even the secretary who typed the report was not on salary from Boston University and typed these reports after hours⁹.

vi) SOAP notes (adjusters' logs) reflect conversations with Dr. Falk prior to the issuance of his report indicating that "Dr. Falk is hesitant to challenge the [treating physicians'] diagnosis of pericarditis as the [treating physicians] were able to see

⁴ Dr. Falk deposition, p. 32.

⁵ Dr. Falk deposition, p. 36.

⁶ Dr. Falk deposition, p. 164.

⁷ Dr. Falk deposition, p. 28, 37, 44.

⁸ Dr. Falk deposition, p. 65.

the patient and he is merely reviewing the chart.” Contrary to these statements, Dr. Falk’s report states: “There is no objective evidence that this is pericarditis, specifically absent for such a diagnosis is the finding if a pericardial rub.” The report which was communicated to Mr. Jordan makes no reference to the hesitancy to challenge the treating physicians’ diagnosis.

vii) Dr. Falk had an ongoing relationship with Prudential which made him anything but independent, a relationship which was not disclosed by Prudential to Mr. Jordan.

B) Prudential has misrepresented to the Court that Mr. Jordan refused to be examined by Dr. Robert Myerberg. At no time prior to the termination of benefits did Prudential ever request that Mr. Jordan be examined by any cardiologist and in fact this offer was not extended until after the subject lawsuit was filed, Dr. Falk was set for deposition, and it was evident that there was no factual basis for the termination of coverage.

C) Prudential intentionally failed to disclose to Mr. Jordan that it would take the position that administrative remedies must be exhausted prior to the filing of a lawsuit. This was part of the plan, scheme and course of conduct to fall back on this defense if the improper basis of the termination was uncovered. Prudential and its attorneys, although being fully aware that this would be its defensive position, improperly failed to disclose this to Mr. Jordan as is more fully set forth below:

i) The Web Site of counsel for Prudential indicates they have prepared motions and legal memoranda addressing issues particular to ERISA litigation

⁹ Dr. Falk deposition, p. 161-162.

such as “Failure to Exhaust Administrative Remedies.” A copy of the Web Page is attached as **Exhibit A**.

ii) The plan documents never specifically refer to exhaustion of administrative remedies as a condition precedent to filing a lawsuit, but rather state the following:

“No action at law or in equity shall be brought to recover on the Group Contract until 60 days after the written proof disclosed above is furnished. If you have a claim for benefits which is denied or ignored in whole or in part you may file suit in a State or Federal Court.” (emphasis provided).

The documents indicate a right to review but never suggest or indicate that this is a condition precedent to file a lawsuit.

iii) The termination letter dated February 25, 1998, likewise indicated a right to appeal the decision, however, it does not indicate or suggest that said appeal must be filed as a condition precedent to initiate a law suit.

iv) Representatives of Prudential represented to Mr. Jordan that an appeal would serve no purpose because the denial of Mr. Jordan’s claim was made by the same individuals who would be involved in the appeal. No representative of Prudential ever suggested that an appeal was a prerequisite to filing a lawsuit.

v) In the Court-ordered Joint Status Report dated August 27, 1998, which required a disclosure of all of the issues presently known, Prudential never specifically raised this defense yet knew full well that it would be raised as an issue.

The above represents a well calculated scheme on the part of Prudential to take advantage of its plan members who are disabled and in dire need of the financial compensation for which premiums were paid.

Mr. Jordan is disabled due to certain cardiac related problems. His health deteriorated over a period of time culminating in his treating cardiologists ordering him to quit working. His medical history, in brief, follows. In 1985, Mr. Jordan was given extensive radiation treatment for Hodgkin's Disease which contributed to the development of certain heart related complications. In 1994, Mr. Jordan suffered three separate heart attacks ultimately leading to heart surgery as well as other heart complications. As a result of his condition, in 1996 Mr. Jordan was ordered by his treating physician to discontinue working or face death. His condition renders him disabled under the terms and conditions of the subject plan

Prudential is a fiduciary under the subject plan. A fiduciary is not allowed to place its own financial interests ahead of its own, it is obligated to act solely in the interest of the plan participants. 29 U.S.C. § 1104 (a)(1). *If* Dr. Falk's report *had* concluded that Mr. Jordan was not disabled, at best, Prudential had conflicting medical evidence. Prudential had a duty to investigate this claim further if it had conflicting medical evidence.

“Defendants . . . had a duty to take an initiative themselves to cause reasonably available evidence—that is, evidence substantially bearing upon the plaintiff's claim and available through reasonable efforts—to be developed and considered in the decision making process. Their determination that they should deny plaintiff's application without having caused the reasonably available evidence to be gathered and placed before them for consideration was an error of law by reason of which their denial of his application was ‘erroneous on a question of law.’

Toland v. McCarthy, 499 F.Supp. 1183, 1190 (D.Mass. 1980).

Prudential ignored its duty to Mr. Jordan and violated the provisions, spirit and intent of ERISA.

“Under ERISA, no matter how unfounded the denial of a claim may be, the only recovery permitted to the claimant is the amount of the benefit.

As this case demonstrates, the reform of shifting the attorney's fee to the insurer is not enough to deter this type of conduct. UNUM's bad faith acts placed pressure on the Dishmans because they were deprived of monthly income which they needed to live. A lump sum benefit after a lawsuit, even with interest and free from legal expense, did nothing to alleviate the pressure upon them at the time the claim was denied and during the entire course of the litigation. UNUM was not deterred by the prospect of paying the Dishmans' attorneys' fees, because it had every reason to believe that the economic straits in which it had placed the Dishmans would force a favorable settlement long before any substantial fees had been accumulated.

It is still the Court's view that bad faith tort liability under state law is so extreme and unpredictable that it would detrimentally disturb the ERISA balance. However, without any statutory or other legal deterrent it is entirely predictable that insurers will go overboard to minimize claims."

Dishman v. UNUM Life Ins. Co. of America, Case No. 96-0015 JSL, p. 18-19 (C.D. Calif. May 9, 1997)(finding that it "would be inequitable under the circumstances of this case to require UNUM to pay less than 16% pre-judgment interest" and further issuing an injunction against discontinuing future disability payments)(attached as **Exhibit B**).

Prudential's decision was made in bad faith and it should pay Mr. Jordan's attorneys' fees and costs as a result.

Factor (2) - Prudential's Ability to Pay

Prudential has the ability and resources to satisfy an award of attorneys' fees and costs. Prudential is one of the largest insurance companies in the world and has assets worth billions of dollars. Its ability to satisfy an award of attorneys' fees and costs cannot be disputed.

Factor (3) - Deterrent Effect

Only by awarding attorneys' fees to Mr. Jordan can Prudential be deterred from summarily denying benefits to a similarly situated plan participant and engaging in the bad faith conduct described *supra*. In fact, there is an incentive for Prudential to deny claims and continue their bad faith conduct if attorneys' fees are not awarded.

Without the added expense of paying the attorneys' fees and costs to a victorious plaintiff, Prudential only has to pay the benefits it would have had to pay if it properly investigated and approved the claim¹⁰. Prudential was legally obligated to continue paying Mr. Jordan his monthly disability benefits. Mr. Jordan was forced to sue to collect his benefits. Prudential paid Mr. Jordan's back benefits and is currently paying the benefits he is due. Prudential is no worse off after losing than they were before this litigation began.

There is an added incentive for Prudential to deny all claims and engage in bad faith conduct. There are always some meritorious claims which will never be pursued by a claimant¹¹ which results in a windfall to Prudential because it can reinvest the money it should have paid out on a legitimate claim. Of the remaining claims that are pursued, there is no guarantee of victory on a meritorious claim due to the deferential preference given to Prudential. With no downside to litigating a case, they might as well take their best shot. The costs of losing to Prudential are slim to none with a potential enormous gain. Even a rookie gambler in Vegas would win with the hand Prudential has been dealt.

An award of attorneys' fees and costs would level the playing field. By forcing Prudential to pay the added fees and costs of a prevailing plaintiff, it would no longer be cost effective for Prudential to litigate a legitimate claim. Prudential would be forced to perform a proper investigation into a claim; it would be deterred from advancing an

¹⁰ Although Prudential would incur its own attorneys' fees and costs, this amount would be offset by: 1) the amount of money saved by not performing a proper investigation; 2) the amount of money made by investing the reserves it would have had to set aside to pay the claim; and 3) the amount of money made by investing the amount of benefits it should have been paying. Furthermore, litigation expenses are tax deductible normal operating expenses. The net result could actually be a surplus to Prudential on its income statement.

¹¹ Certain people are afraid of the litigation process, do not or cannot endure the stress of litigation, cannot find an attorney who understands ERISA, etc.

unmeritorious position. The purpose of ERISA would be advanced by protecting the plan participants.

Factor (4) - Benefit to the Plan and Resolution of a Significant ERISA Question

Mr. Jordan benefited the plan by conclusively establishing that the plan at issue is governed by ERISA, even for the partners. ERISA only applies to employee welfare benefit plans. Partners are not employees under ERISA¹², they are the employer. “When the employee and employer are on and the same, there is little need to regulate plan administration.” Meredith v. Time Ins. Co., 980 F.2d 352, 358 (5th Cir. 1993)(excluded employer benefit plans from the scope of ERISA). Accord, Matinchek v. John Alden Life Ins. Co., 93 F.3d 96, 101 (3rd Cir. 1996)(“Congress clearly intended ‘employer’ and ‘employee’ to be mutually exclusive definitions under ERISA.”).

The plan in this case had different benefits available to different classes of employees and partners. The partners were in the class which offered the most benefits. The plan was similar, in this respect, to the plan in Slamen v. Paul Revere Life Ins. Co., 166 F.3d 1102 (11th Cir. 1999). Slamen’s dental practice established a plan for health and life insurance benefits which covered Slamen and his employees. Slamen purchased a disability policy for himself. As in Mr. Jordan’s plan, Slamen, as the owner, was in the class which offered the most benefits. The Slamen Court, however, found that the disability plan was not governed by ERISA.

In another case, Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346 (11th Cir. 1998), a partner in a surgical group was found to be an ERISA plan beneficiary. Whether Mr. Jordan’s plan fell under ERISA was unclear. This Court concluded that the plan at

¹² 29 C.F.R. § 2510.3-3(c)(2).

issue was governed by ERISA thus resolving a significant legal question for both the plan and the other participants and beneficiaries.

“[W]hile Plaintiff’s position was not adopted by the court, it was certainly not a frivolous one; to the extent that her action resolved an unclear issue regarding the preemptive effect of Pennsylvania law on the terms of the Fund’s plan, the action has benefited both the Fund itself and other plan participants.”

Travitz v. Northeast Dept. ILGWU Health and Welfare Fund, 818 F.Supp. 761, 771 (M.D. Penn. 1993).

Mr. Jordan also benefited the plan by exposing Prudential’s bad faith handling of claims, discussed *supra*. Even though it will take an award of fees and costs to the Plaintiff to significantly deter future such conduct, by exposing Prudential’s scheme, Mr. Jordan has made it more difficult for Prudential to conduct business as it has done in the past.

Factor (5) - Merits of Prudential’s Position

There was no merit to Prudential’s position to deny this claim with the information it had in its possession. Mr. Jordan submitted medical evidence from his treating cardiologists certifying him to be disabled from his occupation. The only evidence Prudential had in its possession to dispute these findings was a medical report from one of their paid physicians, Dr. Falk, which was inconclusive on the issue of disability. Dr. Falk never took a history, performed a physical or even spoke to Mr. Jordan or any of his doctors. Dr. Falk admitted during his deposition that it would be below the standard of care in the cardiac practice to treat a cardiac patient without taking a history and performing a physical. Prudential relied on his inconclusive report, that was erroneous on

its face, to terminate Mr. Jordan's benefits. There was no reasonable basis to deny Mr. Jordan's benefits based on this report. Prudential pushed a meritless position.

Prudential, as a fiduciary, has a duty to act solely in the interests of the plan participants. ERISA 404 (a)(1); 29 U.S.C. § 1104 (a)(1). Assuming, *arguendo*, that Prudential had a reasonable basis to rely on this report, there was no reasonable basis to terminate benefits given the conflicting medical opinions. Prudential was acting in its own self interest in direct conflict with the applicable provisions of ERISA. Prudential should be required to pay Mr. Jordan's attorneys' fees and costs for furthering a denial of benefits that was without merit.

Determining the Lodestar Figure

Once it is determined that attorneys' fees should be awarded, the amount needs to be calculated. The Court must determine that both the number of hours and the hourly rates charged is reasonable and multiply the two amounts together to get the lodestar figure. There are twelve factors used by this Circuit to calculate the reasonable attorneys' fees under the lodestar method. These factors, as set forth in, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), are: 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitation imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases.

Factors (1), (2), (3) - Time and Labor, Novelty and Difficulty, Requisite Skill

“The trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities.” Johnson, at 717. “Cases of first impression generally require more time and effort on the attorney’s part . . . he should be appropriately compensated for accepting the challenge.” Id at 718. “The trial judge should closely observe the attorney’s work product, his preparation, and general ability before the court.” Id at 718.

This case dealt with issues involving ERISA law. ERISA law is convoluted in and of itself requiring an attorney to digest and interpret a lengthy statute while weaving his way through a perplexing web of contradicting decisions. “ERISA law is extremely complex and substantially still unsettled.” Curry, 744 F.Supp. at 1069. This case involved unique and difficult ERISA questions.

The skill required to bring this case to a successful resolution for Mr. Jordan required an exceptional level of legal skill, beyond the capabilities of most attorneys. Plaintiff’s counsel were required to do extensive research which is evident from the thorough briefs submitted to the Court. This case required an expertise by the attorneys not required in most cases. The attorneys’ fees should awarded in the amounts requested.

Factor (4) - Preclusion of Other Employment

This case necessitated an enormous amount of time to handle properly. In addition to the extensive research required, there were numerous conference calls and correspondence between the parties. While engaged in handling this case, the attorneys were not free to use the time spent on Mr. Jordan’s behalf for other purposes. This factor favors an award of fees in the amounts requested.

Factor (5) - Customary Fee

ERISA litigation is a very specialized area of practice which very few attorneys practice. There is no customary fee in the community for similar work due to the specialty. However, specialists in other fields (i.e. neurosurgeons as opposed to general practitioners) receive a premium for their specialty. Likewise, the hourly rates charged should be given in the amounts requested.

Factor (6) - Fee Status

The majority of Mr. Jordan's fee agreement was based on a contingency of the amount recovered, but the initial hours were billed at a fixed rate which clearly established the hourly rate his attorneys expected. Due to the contingent nature of the majority of the fee agreement, attorneys' fees should be awarded to compensate for the contingency of recovery.

Factor (7) - Time Limitations

"Priority work that delays the lawyer's other legal work is entitled to some premium. This factor is particularly important when a new counsel is called in to . . . handle other matters at a late stage in the proceedings." Johnson at 718.

Mr. Wagar was brought into this case after it had already been in litigation for some time. The Court had already set a trial and discovery cutoff date at this point, but had only recently ruled that the action was governed by ERISA. Mr. Wagar was obligated to focus on Mr. Jordan's case to ensure that it was handled properly. This necessarily delayed other legal work. This factor supports the award of fees in the amounts requested.

Factor (8) - Amount and Results

This case involved a \$15,000 monthly benefit amount and resulted in Mr. Jordan receiving more than \$180,000 in back benefits plus interest. This is the maximum amount that could have been attained. The result favors an award of attorneys' fees.

Factor (9) - Experience, Reputation and Ability of the Attorneys

Mr. Deutsch is a respected attorney in the State of Florida. He is board certified by the National Board of Trial Advocacy and by the Florida Bar. His achievements and accomplishments as an attorney are impeccable.

Mr. Wagar's reputation in the ERISA field is equally unimpeachable. His expertise in ERISA is nationally known and he lectures on the subject across the country.

This factor favors an award of attorneys' fees.

Factor (10) - Undesirability of the Case

The complexity and risk factor associated with handling an ERISA benefit claim make this type of case undesirable to most attorneys. This factor favors an award of attorneys' fees.

Factor (11) - Professional Relationship

This factor does not apply to this case.

Factor (12) - Awards in Similar Cases

Mr. Jordan received all his past due benefits plus interest and he continues to be paid. Because there are no extra-contractual damages allowed in an ERISA action, he received the maximum amount possible. This type of success favors an award of attorneys' fees.

Determining the Multiplier

The lodestar figure may be enhanced by a multiplier if specific findings of fact support the fee award and they are justified on the record. Drennan, 977 F.2d at 253. Factors which may support a multiplier include the risk factor associated with enforcing an ERISA benefit claim, the complexity of an ERISA benefit claim, the delay in receipt of payment, and the contingent nature of the fee agreement. Id. All of these factors are present in this case and support the award of a multiplier.