

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARK G. HOLOUBEK,

Plaintiff,

v.

MEMORANDUM AND ORDER
06-C-121-S

UNUM LIFE INSURANCE COMPANY OF
AMERICA, UNUMPROVIDENT CORPORATION,
and JOHNSON CONTROLS, INC. LONG
TERM DISABILITY PLAN

Defendants.

Plaintiff commenced this action to recover disability benefits from an employee benefit plan governed by the Employee Retirement Income Security Act. On August 22, 2006 the Court entered summary judgment in plaintiff's favor, finding that defendants' decision to deny benefits was arbitrary and capricious, and retroactively reinstating long term disability benefits. The matter is presently before the Court on plaintiff's motion to recover attorney's fees pursuant to 29 U.S.C. § 1132(g) (1).

MEMORANDUM

Plaintiff, having prevailed on its claim for reinstatement of disability benefits, now seeks to recover attorney's fees in the amount of \$56,302.50. Defendants oppose any fee award arguing that defendants' position in the litigation was substantially justified. Alternatively, defendants argue that the fee request is excessive as to both rates and hours.

Availability of Fees

Section 1132(g) (1) provides that "the court in its discretion may allow a reasonable attorney's fee and costs to either party." There is a moderate rebuttable presumption in favor of awarding fees to a prevailing party. Stark v. PPM America, Inc., 354 F.3d 666, 673 (7th Cir. 2004). In general, fees are awarded if the position of the non-prevailing party was not substantially justified. Id. In considering whether the position taken by defendants was substantially justified the following five factors are relevant: (1) the degree of defendants' culpability or bad faith; (2) defendants' ability to satisfy an attorney's fee award; (3) the potential deterrent effect of an award; (4) the amount of benefit conferred on plan participants; and (5) the relative merits of the parties' positions. Meredith v. Navistar Intern. Transportation Corp., 935 F.2d 124, 128 (7th Cir. 1991).

In granting summary judgment to plaintiff the Court noted that the appropriate inquiry was whether plaintiff was capable of "performing the material and substantial duties of [his] regular occupation" as a materials manager. The record included consistent and undisputed evidence that plaintiff suffered a chronic and worsening condition including chronic headaches, cognitive impairment and a variety of additional fibromyalgia symptoms which made consistent concentration - an essential component of his job as a materials manager - impossible. Based on this evidence

defendants initially determined that plaintiff was eligible for disability benefits under the plan.

The primary basis for the subsequent denial of benefits was a report of a four day surveillance during which plaintiff was observed driving an automobile, operating a lift hoist, walking and lifting various objects. These activities exceed some of plaintiff's earlier descriptions of his limitations. None of them, however, contradict the evidence of impairment. Consistent concentration precludes plaintiff from performing the duties of his regular occupation as a materials manager, not those activities reported during surveillance. Accordingly, the Court concluded that defendants were arbitrary and capricious in relying upon these activities to terminate benefits.

For the same reason that the termination was arbitrary and capricious, defendants' continued (nearly exclusive) reliance on the surveillance evidence as a defense to this action was not substantially justified. The surveillance evidence did not negate the undisputed limitation which precluded plaintiff from performing his former job. Because defendant offered no significant additional argument or legal position during litigation, this case warrants acceptance of the moderate presumption in favor of a fee award.

Viewed in the context of the five factor test, defendants were culpable in their inappropriate termination of benefits and are

financially capable of paying plaintiff's fees, having pursued a litigation position of little merit. Perhaps most important, an award of fees is necessary to make plaintiff's recovery of benefits meaningful and to deter the arbitrary future denial of benefits to other plan participants. Finally, an award of fees is consistent with and necessary to the remedial purpose of ERISA to protect plan participants and their right to pursue benefits. See Meredith v. Navistar Intern. Transportation Co., 935 F.2d at 127.

Amount of Fees

The starting point for determining a reasonable attorney's fee is consideration of whether the requested fees reflect a reasonable number of hours expended at a reasonable hourly rate. Divane v. Krull Electric Co., 319 F.3d 307, 318 (7th Cir. 2003). Plaintiff claims 246.1 hours at a rate of \$250 per hour for lead counsel and less for associates and paralegals who assisted on the case. Defendants challenge both parts of the equation.

Defendants do not take issue with affidavits in support of the fees establishing that \$250 per hour is the rate plaintiff's counsel actually charges and receives from her clients, and that her rates are comparable to those charged by similarly experienced attorneys in the Minneapolis market practicing ERISA law. Rather defendants suggest that the rates have not been sufficiently established because they have not been compared to Madison market

rates. There is a strong presumption that the attorney's regularly charged rate is the market rate for her services. Moriarty v. Svec, 429 F.3d 710, 718 (7th Cir. 2005); Gusman v. Unisys, 986 F.2d 1146, 1150-53 (7th Cir. 1993). Defendants have done nothing to overcome this presumption. Furthermore, there is no reason to find that plaintiff's choice of Minnesota counsel, particularly when plaintiff resides near Minneapolis, was in any way unreasonable or that Minneapolis is outside the relevant market or even that the fees charged were above a Madison market rate. Under these circumstances the Court accepts the regular rate of plaintiff's counsel as a reasonable market rate for the particular services rendered. See Gusman, 986 F.3d at 1153.

The final issue concerns the reasonableness of the hours billed. Defendants suggest that hours in four categories should be disallowed as either inappropriate or excessive: (1) pre-litigation fees; (2) fees related to discovery; (3) fees associated with plaintiff's motion to strike; (4) fees related to the preparation of summary judgment submissions.

Plaintiff's counsel billed 26.5 hours in preparation for and drafting of the complaint. There is no basis to categorically disallow fees incurred prior to filing the complaint. See Schneider v. Wisconsin UFCW Unions and Employers Health Plan, 13 F. Supp. 2d 837, 841 (E.D.Wis. 1998). However, 9.1 hours spent negotiating with plaintiff's former employer for benefits other than the

disability benefits which are the subject of this litigation are not reasonably attributable to this action and must be disallowed, resulting in a \$2,275 reduction from the fee request.

There is no basis to reduce the fee request based on the objections in category 2 above. Plaintiff's pursuit of discovery was reasonable and the fact that plaintiff's motion to compel was granted surely argues against disallowing fees incurred in bringing the motion. Defendant suggests generally that the time spent by plaintiff for summary judgment was excessive. The billings suggest 113.10 hours for an amount of \$26,225. This in itself is excessive. All briefs were workmanlike and appropriately addressed the issues with which the Court was concerned. The complexity of the issues does not merit the time attributed to the briefings, particularly where experienced counsel charging \$250 an hour probably have a wealth of authority and guides to assist them. Having said all of the above, the Court has difficulty in allowing \$26,225 for those filings offered by the successful plaintiff; and provides a reasonable reduction of \$10,000.

Defendants' objection to time expended by plaintiff's counsel in an attempt to expand the facts of the case beyond the administrative record is well taken. Defendants successfully challenged this attempt and succeeded in their motion to strike these proffered materials. Accordingly, the effort was unnecessary to the case and should be disallowed, reducing the fee request by an additional \$1,285 (6.9 @ \$150/hr; 1 @ \$250/hr).

CONCLUSION

Plaintiff was successful in establishing that defendants' denial of disability benefits was arbitrary and capricious. Neither the denial nor the defendants' litigation position defending it was substantially justified. As a result, plaintiff is entitled to recover reasonable attorney's fees from defendants. The rates at which defendants' counsel billed are reasonable, however the total request of \$56,302.50 is reduced by \$13,560 to account for time spent negotiating for unrelated benefits, unsuccessfully attempting to expand the administrative record under review and a reasonable reduction in the time spent preparing the filings related to the motions for summary judgment.

ORDER

IT IS ORDERED that plaintiff's motion for attorney's fees is GRANTED.

IT IS FURTHER ORDERED that fees are awarded in the amount of \$42,742.50 and that judgment be amended accordingly.

Entered this 26th day of January, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge