

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

JON CLARK,

Plaintiff,

OPINION AND ORDER

v.

14-cv-412-wmc

CUNA MUTUAL LONG TERM DISABILITY
PLAN and CUNA MUTUAL INSURANCE
SOCIETY,

Defendants.

In this ERISA action, the court previously granted plaintiff Jon Clark's motion for summary judgment and remanded this case for further administrative proceedings consistent with its opinion. (3/15/16 Op. & Order (dkt. #41).) In that same order, the court invited plaintiff to move for an award of fees and costs pursuant to 29 U.S.C. § 1132(g)(1) and to file all supporting materials in support of his request. Plaintiff accepted the court's invitation. (Dkt. #43.) For the reasons that follow, the court finds an award of fees appropriate under § 1132(g)(1) and will award fees and costs in the amount of \$54,512.21.

BACKGROUND

At summary judgment, the court concluded that defendants CUNA Mutual Long Term Disability Plan and CUNA Mutual Insurance Society acted arbitrarily and capriciously in violation of ERISA by failing to offer a reasoned explanation for: (1) rejecting the opinions of two treating physicians that Clark was not capable of working and (2) accepting the opinions of medical consultants who failed to provide reasoned explanations for their findings that Clark was not disabled. Because defendants had

denied Clark's request for long-term disability benefits, the court remanded the case for further administrative proceedings consistent with the Seventh Circuit's instruction to return the case to the status quo, rather than ordering the reinstatement of benefits. (3/15/16 Op. & Order (dkt. #41) 27.)

OPINION

Plaintiff's motion presents two questions: (1) whether the court should award fees to plaintiff as the prevailing party under 29 U.S.C. § 1132(g)(1); and (2) the amount of reasonable fees and costs. Defendants' response to plaintiff's motion focuses solely on the first question.

This court may in its discretion award a reasonable attorney's fee and costs to either party in an ERISA action brought under § 1132:

In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1132(g)(1). In *Hardt v. Reliance Standard Life Insurance Company*, 560 U.S. 242 (2010), the Supreme Court provided guidance as to the threshold a party must reach to be eligible for a discretionary award under this fee-shifting provision. Specifically, the Court held that the party need not be the "prevailing party" (as, for example, would a plaintiff in civil rights cases under 42 U.S.C. § 1988); rather, the party must simply show "some degree of success on the merits before a court may award attorney's fees under § 1132(g)(1)." *Id.* at 255. Providing further guidance, the Court explained:

A claimant does not satisfy that requirement by achieving trivial success on the merits or a purely procedural victory,

but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a lengthy inquiry into the question whether a particular party's success was substantial or occurred on a central issue.

Id. (internal quotation marks and alterations omitted).¹

Once a party has achieved “some success on the merits,” the court decides whether awarding fees is appropriate under two tests: the “substantial justification” test and the “five-factor” test. *Raybourne v. Cigna Life Ins. Co. of New York*, 700 F.3d 1076, 1089 (7th Cir. 2012). “The two tests essentially pose the same question: was the losing party’s position substantially justified and taken in good faith, or was that party simply out to harass its opponent?” *Id.* at 1090. More recently, the Seventh Circuit arguably left open the possibility of a district court considering *only* whether a party achieved some degree of success on the merits, while still encouraging and giving deference to rulings that also apply a more stringent test. *Temme v. Bemis Co., Inc.*, 762 F.3d 544, 550 (7th Cir. 2014).

In this court’s finding that defendants violated ERISA by acting arbitrarily and capriciously in denying Clark’s benefits, and by ordering remand to the Plan Administrator for further review, plaintiff essentially achieved all he could reasonably expect to achieve in this court.² The court also finds plaintiff is entitled to recover fees under the substantially justified and five factors tests. In particular, determining whether a defendant in an ERISA action was “substantially justified,” the court is to consider “a

¹ In so holding, the Supreme Court noted specifically that use of a “five factor” test referred to in some Seventh Circuit decisions and in decisions from other circuits is “not required for channeling a court’s discretion when awarding fees under this section.” *Hardt*, 560 U.S. at 255.

² As this court explained at length in an opinion in another ERISA denial-of-benefits case, the fact that the relief provided is remand and not an award of benefits does not foreclose an award of fees. *Rappa v. Sun Life Assur. Co. of Canada*, No. 10-CV-585-WMC, 2014 WL 4415242, at *2 (W.D. Wis. Sept. 8, 2014).

party's posture during the case as a whole," including "prelitigation behavior." *Temme*, 762 F.3d at 551 (emphasis in original). Here, defendants' failure to provide a reasoned explanation of their b Clark's treating physicians, much less their wholesale reliance on the unreasonable opinions of medical consultants, in particular Dr. Russell, renders defendants' posture during the case as a whole not substantially justified.

Under the five factors test, courts are to consider:

- 1) the degree of the offending parties' culpability or bad faith;
- 2) the degree of the ability of the offending parties to satisfy personally an award of attorney's fees;
- 3) whether or not an award of attorney's fees against the offending parties would deter other persons acting under similar circumstances;
- 4) the amount of benefit conferred on members of the pension plan as a whole; and
- 5) the relative merits of the parties' positions.

ERISA § 502(g)(1). *Kolbe & Kolbe Health & Welfare Benefit Plan v. Med. Coll. of Wis., Inc.*, 657 F.3d 496, 506 (7th Cir. 2011).

Here, the court's finding that defendants' position was not substantially justified bears directly on a similar finding that defendants were substantially culpable and acted with little merit in denying plaintiff's benefits (the first and fifth factors). Further, the second and third factors -- defendants' ability to pay and the fact that such an award may deter defendants and other plan administrators from denying benefits arbitrarily and capriciously -- weigh in favor of an attorney's fee award. While the fourth factor is not relevant given that this case involves a single beneficiary, rather than a broader group of plan participants, neither does it militate against an award of fees called for by the other four factors.

Having found an award of attorney's fees and costs appropriate under 29 U.S.C. § 1132(g)(1), the court must determine the amount. In his motion, plaintiff seeks an award of fees of \$53,795.00, representing 161.95 hours of work across four attorneys' with varying hourly rates. Plaintiff's counsel provides detailed, contemporaneous time records, documenting each attorney's time and provides support for their respective hourly rates. (Schroder Decl. (dkt. #45); Schroder Decl., Ex. B (dkt. #45-1); Parsons Decl. (dkt. #46); Williams' Decl. (dkt. #47); Loadhl Decl. (dkt. #48).) The court finds both the time spent and the hourly rates reasonable. Moreover, defendants did not challenge the reasonableness of plaintiff's fee request. In addition, plaintiff seeks an award of costs of \$717.21, which is also well-documented. (Schroder Decl., Ex. A (dkt. #45-1).) Accordingly, the court will award plaintiff fees and costs in the amount requested.

ORDER

IT IS ORDERED that:

- 1) Plaintiff's motion for attorney fees and costs (dkt. #43) is GRANTED. Plaintiff is awarded fees and costs in the total amount of \$54,512.21.
- 2) The clerk of court is directed to amend the judgment to reflect this award.

Entered this 23rd day of December, 2016.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge