

# Have You Achieved Success on the Merits?

## A Primer on Fee Awards in ERISA Disability Benefits Cases

by Jeffery L. Patenaude



*Jeffery L. Patenaude is an associate with the law firm of Thompson, Sizemore, Gonzalez & Hearing PA in Tampa, Florida, where he practices management-side labor and employment law with an emphasis on Employee Retirement Income Security Act cases. He received his undergraduate degree from Sewanee: The University of the South and his law degree from the Florida State University College of Law. As part of his practice, Patenaude has lectured and authored several papers on labor and employment-related topics.*

In today's society, it is customary for individuals to purchase disability insurance to afford themselves and their families financial security should circumstances arise that prevent them from working. In addition to private individual disability insurance plans, many employers offer their employees disability insurance coverage as a benefit. Regardless of their source, such policies constitute "welfare benefit plans" under the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, and disputes arising from them are a common source of litigation. This article examines a small yet very important aspect of ERISA disability litigation: when and under what circumstances courts may award attorney's fees in ERISA disability cases.

In an ideal world, the disability benefits claims process would function without any disputes. In reality, benefits claims frequently are contested for a variety of reasons, including untimely claims submissions, inadequate supporting medical documentation, and other bases. But what happens when a company (most frequently an insurance company) denies a plan participant's claim for disability benefits? Typically in this scenario, the benefit plan will provide an administrative appeals process that claimants must follow before challenging the denial in court.<sup>1</sup> During the appeals process, claimants are given an opportunity to submit materials in support of their claims. If the administrator upholds the denial of a claimant's disability benefits claim, the claimant has the right to file a lawsuit in federal court seeking review of the benefits decision pursuant to ERISA § 1132.<sup>2</sup>

Although an ERISA disability case may unfold in a variety of ways, most often the district court rules on the benefits denial based on the parties' cross motions for summary judgment. The district court may rule that the administrator acted correctly and reasonably in denying a plaintiff's benefits claim, which effectively ends the litigation. The court may, however, determine that the administrator wrongfully denied the plaintiff's benefits claim. In such a circumstance, the court may award a variety of relief including, *inter alia*, benefits sought by the claimant pursuant to the benefits plan

and/or a declaration that the plaintiff is entitled to benefits under the plan.<sup>3</sup> When a district court determines that an administrator has improperly denied a plan participant benefits, its determination will be premised on the conclusion that the administrator's decision was either wrong (under a *de novo* standard) or arbitrary and capricious.<sup>4</sup> Alternatively, a court may find that the plaintiff's claim needs further processing and remand the claim to the plan administrator without determining whether the plaintiff is disabled and/or entitled to benefits.

But what about attorney's fees and costs in ERISA disability claims cases? ERISA § 1132(g)(1) permits the court to award attorney's fees to either party or neither party "in accordance with the district court's discretion."<sup>5</sup> In *Hardt v. Reliance Standard Life Ins. Co.*, the U.S. Supreme Court addressed the standard for fee awards in ERISA actions and placed an important limitation on district courts' discretion to issue them, holding that a claimant seeking fees and costs pursuant to § 1132(g)(1) must establish "some degree of success on the merits" to be eligible for a discretionary award. *See* 560 U.S. 242, 254 (2010).<sup>6</sup> The Supreme Court further explained that a claimant cannot satisfy this requirement with a mere "trivial success on the merits" or a "purely procedural victory." *Id.*

Where a court overturns an administrator's benefits denial, it is clear that the plaintiff has achieved success on the merits of his or her claim and is thus eligible to receive a fee award. However, whether a plaintiff whose claim is remanded for further processing is entitled to an award of attorney's fees and costs under § 1132(g)(1) remains uncertain, because the Supreme Court declined to determine whether a "remand order, without more, constitutes 'some success on the merits' sufficient to make a party eligible for attorney's fees." *Hardt*, 560 U.S. at 256. Because the Supreme Court declined to answer that question, a split of authority has arisen among federal courts.

Several federal district courts have held that a remand with no adjudication of disability and no award of benefits does not amount to success on the merits. For example, in *Vivas v. Hartford*, the court

denied the plaintiff's request for fees and costs following the remand of her claim to the plan administrator, explaining that the remand amounted to a pure procedural victory. *See* No. 10-22992-CIV, 2013 WL 5226720, at \*2-3 (S.D. Fla., June 17, 2013) (adopted by 2013 WL 5226506 (S.D. Fla., Aug. 27, 2013)). Similarly, in *Dickens v. Aetna Life Ins. Co.*, the court granted the plaintiff's motion for summary judgment, but only to the extent she sought a remand of her claim to the administrator so that the plan administrator could adequately consider a finding by the Social Security Administration that the plaintiff was disabled. *See* No. 2:10-cv-00088, 2011 WL 1258854, at \*5-6 (S.D. W.Va., March 28, 2011). When the plaintiff sought fees, the court denied her request, noting that it had expressed no opinion as to her alleged disability and explaining that fees were not warranted at that time. *Id.*<sup>7</sup>

In contrast, other federal courts have reached the opposite conclusion, finding that a remand order alone amounts to success on the merits. *See, e.g., Gross v. Sun Life Assurance Co. of Canada*, 763 F.3d 73, 76-81 (1st Cir., 2014); *McKay v. Reliance Std. Life Co.*, 428 Fed. App'x 537, 547 (6th Cir., 2011) (holding that a remand alone serves as a sufficient basis to award fees under § 1132(g)). In *McKay*, the Sixth Circuit reasoned that a remand order is not trivial success because it provides a plaintiff with "another shot" at his claim for benefits and is premised upon the plaintiff persuading a federal court that the plan administrator failed to comply with ERISA's guidelines. *McKay*, 428 Fed. App'x at 547. Likewise, in *Gross*, the First Circuit explained that a remand for further administrative proceedings commonly results from a substantive review of the evidence and that a remand "ordinarily will reflect the court's judgment that the plaintiff's claim is sufficiently meritorious that it must be reevaluated fairly and fully." *Gross*, 763 F.3d at 78. The *Gross* court further noted that most courts "have held that a remand to the plan administrator for review of a claimant's entitlement to benefits, even without guidance favoring an award of benefits or an actual grant of benefits, is sufficient success on the merits." *Id.*

Several district courts have followed the reasoning in *Gross* and *McKay*. *See, e.g., Groth v. Centurylink Disability Plan*, No. 2:13-cv-1238, 2015 WL 1396380, at \*2 (S.D. Ohio, March 25, 2015) (explaining that a remand amounts to success on the merits); *Basham v. Prudential Ins. Co. of Am.*, No. 3:11-cv-00464-CRS, 2014 WL 7076363, at \*2 (W.D. Ky., Dec. 15, 2014) (noting that the Sixth Circuit has determined that a remand order constitutes some success on the merits); *Cannon v. Aetna Life Ins. Co.*, No. 12-10512-DJC, 2014 WL 5487703, at \*2-3 (D. Mass., May 28, 2014) (awarding fees and costs where benefits claim remanded for further processing); *Mullins v. Prudential Ins. Co. of Am.*, No. 3:09-CV-371-S, 2012 WL 1067898, at \*3-5 (W.D. Ky., March 29, 2012); *Olds v. Retirement Int'l Paper Co.*, No. 09-0192-WS-N, 2011 WL 2160264, at \*3-4 (S.D. Ala., June 1, 2011) (noting that a remand to the defendant to conduct further proceedings is not merely a procedural victory); *see also Fura v. Federal Express Corp. LTD Plan*, No. 10-13298, 2014 WL 346020, at \*1 (E.D. Mich., Jan. 30, 2014). Notably, however, many of the foregoing decisions were premised on a determination by the court that the plan administrator acted in an arbitrary and capricious manner. *See Gross* 428 Fed. App'x at 546; *Groth*, 2015 WL 1396380, at \*2; *Cannon*, 2014 WL 5487703, at \*1; *Mullins*, 2012 WL 1067898, at \*3; *Fura*, 2014 WL 346020, at \*1; *Olds*, 2011 WL 2160264, at \*1.

The split in authority discussed above provides ammunition for

both defendants and plaintiffs in ERISA disability actions to support or oppose a request for fees where the court remands a benefits claim. Defendants will likely argue that a remand without a determination as to whether a plaintiff is disabled is not a determination on the merits, particularly where the district court has not determined that the defendant's benefits decision was wrong or arbitrary and capricious. At a minimum, defendants will request that the court reserve ruling on a plaintiff's request for fees and costs following a remand that potentially avoids a scenario where the court is required to rule on two fee motions—one at the time of the remand and one following the remand. In contrast, plaintiffs will likely argue that the emerging trend among federal courts is that a remand, alone, supports a fee award. Plaintiffs are also likely to argue that a remand must equate to success on the merits because it fundamentally alters the outcome of the plan administrator's prior benefits decision by affording the plaintiff another chance to obtain benefits.

Whether the Supreme Court will provide clarification as to the success on the merits standard is yet to be seen. Notably, although outside of the disability claims context, the Third Circuit recently endorsed a catalyst theory for the recovery of attorney's fees in ERISA cases, holding that even a settlement growing out of an ERISA lawsuit is sufficient to establish success on the merits. *See Templin v. Independence Blue Cross*, 785 F.3d 861, 868-69 (3rd Cir., 2015). It is very possible that other circuit courts of appeal may disagree with *Templin*, creating a circuit split and potentially causing the Supreme Court to revisit the success on the merits standard. Nevertheless, litigants would be wise to monitor district court and appellate decisions addressing this topic, as such cases may provide useful support for opposing or requesting attorney's fees and costs in disability cases which are remanded.

## Endnotes

<sup>1</sup>Under ERISA, a plan cannot require more than two levels of appeal. *See* 29 C.F.R. 2560.503-1(d).

<sup>2</sup>*See* 29 U.S.C. § 1132(a).

<sup>3</sup>Such relief is available under ERISA. In particular, ERISA § 1132(a) (1) provides, in relevant part, that a civil lawsuit may be brought "by a [plan] participant or beneficiary ... to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

<sup>4</sup>The U.S. Supreme Court has held that district courts must apply a de novo standard of review when reviewing a denial of benefits under ERISA, unless the benefit plan gives plan administrators discretionary authority to determine eligibility, in which case the court reviews the denial under the arbitrary and capricious standard. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

<sup>5</sup>There is, however, "no presumption" in favor of granting attorney's fees to a prevailing plaintiff or defendant. *See, e.g., Starr v. Metro Sys. Inc.*, 461 F.3d 1036, 1041 (8th Cir., 2006); *Florence Nightingale Nursing Svc. Inc. v. Blue Cross/Blue Shield of Ala.*, 41 F.3d 1476, 1485 (11th Cir., 1995). Attorney's fee awards to prevailing administrators in ERISA disability claims cases are rare.

<sup>6</sup>If the threshold *Hardt* "success on the merits" test is satisfied, a district court may, but is not required to, then apply a common law five-factor test to assist the court in determining whether to exercise its discretion to award fees and costs. The five factors are: (1) the degree of the opposing party's bad faith or culpability; (2) the ability



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of the opposing party to satisfy an award of attorney’s fees; (3) whether an award of attorney’s fees against the opposing party would deter other persons acting under similar circumstances; (4) whether the party requesting attorney’s fees sought to benefit all beneficiaries and participants of an ERISA plan or to resolve a significant legal question involving ERISA itself; and (5) the relative merits of the parties’ positions. *Id.* These factors, however, are not controlling and, as noted above, need not be applied. Indeed, in *Hardt*, the Supreme Court noted that “[b]ecause the five factors bear no obvious relation to § 1132(g)(1)’s text or to our fee-shifting jurisprudence, they are not required for channeling a court’s discretion when awarding fees under this section.” *Id.* at 255.

<sup>7</sup>Other district courts are in accord with *Vivas* and *Dickens*. See, e.g., *Cramasta v. Walgreen Income Protection Plan for Pharmacists and Registered Nurses, et al.*, No. 8:12-CV-01461-T-23TGW, Dkt. No. 77 (M.D. Fla., April 18, 2014) (adopted by No. 8:12-CV-01461-T-23TGW, Dkt. No. 82 (M.D. Fla., May 22, 2014)) (holding that the remand of the plaintiff’s claim for further review by the administrator without a determination on the merits of plaintiff’s claim did not warrant an award of attorney’s fees and costs); *Adair v. El Pueblo Boys & Girls Ranch Inc. Long Term Disability Plan*, No. 11-cv-02749-WYD-KLM, 2013 WL 4775927, at \*22 (D. Colo., Sept. 5, 2013) (explaining that plaintiff may renew her request for attorney’s fees if she achieves success on remand); *Duncan v. Hartford Life Ins. Co.*, No. 2:11-cv-01536-GEB-CKD, 2013 WL 1785904, at \*2 (E.D. Cal., April 25, 2013) (declining to award the plaintiff attorney’s fees because she had not shown that the order remanding her claim to the plan administrator was anything “other than a procedural victory”); *McCollum v. Life Ins. Co. of North America*, No. 10-11471, 2013 WL 308978, at \*1 (E.D. Mich., Jan. 25, 2013) (declining to award attorney’s fees where the court remanded the plaintiff’s claim); *Kingsmill v. Louisiana Health Service & Indemnity*, No. 09-6787, 2012 WL 1193547, at \*3 (E.D. La., April 10, 2012) (holding that an order permitting another review for medical benefits was procedural and did not constitute some success on merits, when the substance of plaintiff’s claim was not addressed); *Yates v. Bechtel Jacobs Co. LLC*, No. 3:09-CV-51, 2011 WL 2462840, at \*2 (E.D. Tenn., May 5, 2011) (adopted by 2011 WL 2462811, at \*1 (E.D. Tenn., June 20, 2011)); *Christoff v. Ohio Northern Univ. Employee Benefit Plan*, No. 3:09cv540, 2010 WL 3958735, at \*2 (N.D. Ohio, Oct. 8, 2010). ©