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IN THE

**United States Court of Appeals  
for the Fourth Circuit**

\_\_\_\_\_  
No. 03-2105L  
\_\_\_\_\_

CONTINENTAL CASUALTY COMPANY,

*Appellant,*

v.

NEAL S. SMITH,

*Appellee.*

\_\_\_\_\_  
APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION  
\_\_\_\_\_

SUPPLEMENTAL BRIEF OF APPELLANT,  
CONTINENTAL CASUALTY COMPANY  
\_\_\_\_\_

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I.     STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION

Neal Smith (“Mr. Smith”) filed a complaint against Continental Casualty Company (“Continental”) in the United States District Court for the District of Maryland seeking benefits under an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et seq.* The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e). After granting, in part, Mr. Smith’s motion for summary judgment (*see* Supplemental Joint Appendix (“Supp. J.A.”) 40), the district court, on October 27, 2003, awarded Mr. Smith attorney’s fees and costs. (Supp. J.A. 60.) On November 25, 2003, Continental noted a timely appeal of the judgment awarding fees and costs. (Supp. J.A. 8.) This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The appeal is from a final order that disposes of all parties’ claims.

II.    STATEMENT OF ISSUES

- A.    Whether the district court erred by awarding attorney’s fees based on an erroneous analysis of the merits of the underlying claim.
- B.    Whether the district court erred by awarding attorney’s fees based on an unpredictable and novel application of a non-ERISA standard to an ERISA claim.
- C.    Whether the district court abused its discretion by awarding attorney’s fees.

### III. STATEMENT OF THE CASE

Mr. Smith filed the underlying action seeking disability benefits under 29 U.S.C. § 1132(a)(1)(B). After the district court granted, in part, and denied, in part, Mr. Smith's motion for summary judgment, Mr. Smith sought and was awarded attorney's fees and costs of the action. Continental appealed both the district court's summary judgment determination and the grant of attorney's fees and costs. By order dated December 2, 2003, this Court consolidated the two appeals.

### IV. STATEMENT OF FACTS

Continental issued group long-term disability policy no. SR-83126022 (the "Plan") to Mr. Smith's employer, J.J. Haines & Company. (Joint Appendix ("J.A.") 610-632.)<sup>1</sup> Mr. Smith submitted a claim for disability benefits under the Plan. (J.A. 565-571.) Continental denied the claim and Mr. Smith, after pursuing his administrative remedies,<sup>2</sup> filed a complaint in the district court. (*See* Supp. J.A. 2; J.A. 254.)

On August 4, 2003, the district court granted, in part, Mr. Smith's motion for summary judgment. (Supp. J.A. 40.) The district court relied upon a Social Security disability case, *Hyatt v. Sullivan*, 899 F.2d 329 (4<sup>th</sup> Cir. 1990), as the

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<sup>1</sup> The Joint Appendix was filed on November 10, 2003 with Continental's opening brief.

<sup>2</sup> A detailed description of the claims process and the medical evidence is set forth in Continental's original brief. (*See* Appellant's Br., pp. 2-16.)

framework for its analysis of Mr. Smith's claim. (Supp. J.A. 20-21.) Applying *Hyatt* to Mr. Smith's claim, the district court found (1) "[a]ll the objective evidence indicates that Mr. Smith has a physical impairment that could cause pain"; and (2) although "[a]lmost no such evidence substantiates the intensity of the pain that Mr. Smith said he was feeling," Continental "offer[ed] no evidence impeaching the veracity of Mr. Smith's account [of his pain]." (Supp. J.A. 22-23.) The district court concluded that Continental did not provide objective medical proof refuting Mr. Smith's disability, and "abused its discretion ... [by] discredit[ing] Mr. Smith without substantial evidence that he was exaggerating." (Supp. J.A. 19-29, 35.)

The district court also relied upon a news release describing "[r]ecent scientific research" that purportedly "uncovered a physiological basis for individual differences in pain sensitivity." (See Supp. J.A. 19-20 (citing *Brain Imaging Confirms that People Feel Pain Differently, Report Researchers at Wake Forest University Baptist Medical Center*, Wake Forest University Baptist Medical Center News Release, at [http://www.wfubmc.edu/news\\_sys/fullstory.php?articleid=4241](http://www.wfubmc.edu/news_sys/fullstory.php?articleid=4241) (June 24, 2003) (the "News Release")).) Neither the News Release nor the study it describes was part of the administrative record or presented to Continental during the claims process.

The district court ordered the parties to brief the issue of attorney's fees and costs, which the parties did. (See Supp. J.A. 41, 43-44.) By order dated October

27, 2003, the district court granted Mr. Smith's fee petition and awarded attorney's fees in the amount of \$28,040.00 and costs of \$450.00. (Supp. J.A. 60.) In its Memorandum Opinion, the district court concluded that Continental "acted in bad faith when it refused to credit Mr. Smith's self-reported pain symptoms, particularly in light of the abundance of medical and occupational reports supporting his claim." (Supp. J.A. 46-47.)

Applying the remaining four factors in *Reinking v. Philadelphia American Life Insurance Co.*, the district court further found that: (i) Continental had the ability to pay Mr. Smith's attorney's fees; (ii) granting attorney's fees would likely deter other insurers from engaging in similar bad faith conduct; (iii) "Mr. Smith's success in establishing that the insured's subjective pain reports should be credited in the absence of substantial evidence to the contrary has resolved a significant legal question with regards to ERISA"; and (iv) Mr. Smith's claim, relative to Continental's defense, had much greater merit. (Supp. J.A. 45, 47); *Reinking v. Phila. Am. Life Ins. Co.*, 910 F.2d 1210, 1217-18 (4<sup>th</sup> Cir. 1990) (citation omitted), *overruled on other grounds by Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1030 (4<sup>th</sup> Cir. 1993) (en banc).

## V. SUMMARY OF ARGUMENT

The district court's award of attorney's fees and costs should be vacated because the court's underlying judgment is erroneous. Specifically, the judgment

violates the Supreme Court's recent decision in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 123 S. Ct. 1965 (2003).

Further, the district court held Continental accountable based on a new ERISA rule supported by new medical evidence. Under these circumstances, an award of attorney's fees and costs simply is unwarranted. Continental could not have anticipated the district court's departure from precedent or its reliance on medical evidence that did not exist at the time of the claim.

Finally, the district court abused its discretion in applying the five factors in *Reinking v. Philadelphia American Life Insurance Co.*, 910 F.2d at 1217-18. Application of these factors augurs against an award of attorney's fees. For the reasons stated above and more fully discussed below, the Court should vacate the district court's October 27, 2003 order.

## VI. STANDARD OF REVIEW

A grant of an award of attorney's fees is reviewed for an abuse of discretion. *Quesinberry*, 987 F.2d at 1028; *see also* 29 U.S.C. 1132(g)(1) ("In any action under this subchapter ... 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."). As this Court has explained in the context of a labor relations case, factual findings made in support of an award of attorney's fees are reviewed for clear error, while questions of law are reviewed *de novo*:

While the ultimate decision to award or deny attorney fees typically has at least a large discretionary component, it may be revealed upon inspection that such a decision actually turned on an express or implicit finding of fact or conclusion of law that dictated the ultimate result. ... Review may correspondingly be an amalgam, depending upon the claims of error. If the claim is of error in underlying factfindings which infected the ultimate decision, review must proceed under the clearly erroneous standard; if of error of law infecting the ultimate decision, under the *de novo* review standard. Only if the claim of error goes exclusively to the impropriety of an ultimate exercise of available discretion is review solely under the abuse of discretion standard.

*United Food & Commercial Workers, Local 400 v. Marval Poultry Co.*, 876 F.2d 346, 351 (4<sup>th</sup> Cir. 1989).

## VII. ARGUMENT

### A. Mr. Smith Is Not Entitled To Attorney's Fees And Costs Because The District Court Erroneously Analyzed The Merits Of The Underlying Claim

Only a prevailing party is entitled to attorney's fees in an ERISA action. *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4<sup>th</sup> Cir. 1997). If the district court's judgment is erroneous and reversed by this Court, then any derivative award of attorney's fees likewise should be reversed. *Id.*; *Freeman v. Cent. States, Southeast & Southwest Areas Pension Fund*, 32 F.3d 90, 94 (4<sup>th</sup> Cir. 1994); *Fuller v. FMC Corp.*, 4 F.3d 255, 264 (4<sup>th</sup> Cir. 1993).

The judgment in favor of Mr. Smith on his claim for benefits was erroneous because (1) the district court violated the Supreme Court's recent decision in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 123 S. Ct. 1965 (2003), and (2) the district court relied upon a new scientific study that was not part of the administrative record or considered during the claims process. A complete discussion of these errors is set forth in Continental's original brief. (*See* Appellant's Br., pp. 20-37.)

B. The District Court Erred By Awarding Attorney's Fees And Costs Based On The Unpredictable And Novel Application Of A Non-ERISA Standard To An ERISA Claim

The district court unquestionably broke new ground when it adopted a pain standard from Social Security law as a substantive decision-making rule in ERISA. The district court also relied on new medical evidence to support its decision, namely a scientific study that purports to show a "physiological basis for individual differences in pain sensitivity." (Supp. J.A. 19.) This study was not published until more than a year after Continental's claim decision. (*See* J.A. 250.) The study was not part of the administrative record and was never presented to Continental. Further, the science underlying the study was new. As the district court acknowledged, the study represents "recent scientific research" that "uncovered" a physiological basis for pain. (Supp. J.A. 19.)

Thus, the district court held Continental accountable based on a new ERISA rule supported by new medical evidence. Under these circumstances, an award of attorney's fees simply is unwarranted and unjust.

C. The District Court Abused Its Discretion In Concluding That The *Reinking* Factors Support An Award Of Attorney's Fees And Costs

There is no presumption that the prevailing party in an ERISA action is entitled to attorney's fees. See *Quesinberry*, 987 F.2d at 1029-30; *Denzler v. Questech, Inc.*, 80 F.3d 97, 104 (4<sup>th</sup> Cir. 1996). An award of fees rests within the district court's discretion. *Quesinberry*, 97 F.2d at 1028.<sup>3</sup> In the exercise of its discretion, the district court must apply five factors:

- (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.

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<sup>3</sup> Unlike 29 U.S.C. § 1132(g)(2), which requires the court to award reasonable attorney's fees and costs to a fiduciary that obtains a judgment in favor of a plan, 29 U.S.C. § 1132(g)(1) is not a mandatory fee shifting statute.

*Reinking*, 910 F.2d at 1217-18; *Quesinberry*, 987 F.2d at 1029. The district court abused its discretion in concluding that the *Reinking* factors support an award of attorney's fees to Mr. Smith.<sup>4</sup>

The district court found that Continental acted in bad faith, and thus satisfied the first factor in *Reinking*, because it “refused to credit Mr. Smith’s self-reported pain symptoms, particularly in light of the abundance of medical and occupational reports supporting his claim.” (Supp. J.A. 46-47.) Continental did not “refuse to credit” Mr. Smith’s complaints of pain. Continental acknowledged the complaints of pain, but found they did not result in a loss of functional capacity that would prevent Mr. Smith from performing all the duties of his occupation. (J.A. 253.) Indeed, Continental concluded Mr. Smith’s pain was “disproportionate when compared to the diagnostic and physical findings.” (*Id.*) Continental thoroughly considered Mr. Smith’s complaints of pain, but did not find those complaints sufficient to support a finding of disability.

Further, the district court’s conclusion that Continental acted in bad faith by refusing to credit Mr. Smith’s complaints of pain is based on the district court’s adoption of the pain standard in SSR 90-1p. (*See* Supp. J.A. 20-21 (citing *Hyatt*,

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<sup>4</sup> Continental does not dispute that it has the ability to satisfy an award of attorney’s fees, but this factor alone cannot justify an award of fees. *See Quesinberry*, 987 F.2d at 1029-30 (indicating that no one factor is necessarily decisive and affirming denial of attorney’s fees to a prevailing party where the only factor favoring an award of fees was the defendant’s ability to pay them).

899 F.2d at 337)); Notice of Social Security Ruling 90-1p, 55 Fed. Reg. 31898 (August 6, 1990). Continental, of course, could not have anticipated, much less applied, that new standard when it adjudicated Mr. Smith's claim. An award of attorney's fees based on this alleged bad faith conduct, therefore, is unwarranted.

Similarly, the third factor in *Reinking* does not support an award of attorney's fees. Ordering a plan administrator to pay fees based on the failure to adhere to an unknowable standard will not deter other plan administrators from engaging in similar conduct. Awarding fees under these circumstances is purely punitive.

The fourth factor in *Reinking* assesses whether the party requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or sought to resolve a significant legal question regarding ERISA itself. *See Reinking*, 910 F.2d at 1218. The district court found this factor satisfied because Mr. Smith achieved "success in establishing that the insured's subjective pain reports should be credited in the absence of substantial evidence to the contrary" and that his success "has resolved a significant legal question with regards to ERISA." (Supp. J.A. 47.) The court also noted that, "the issue of when a patient's self-reports of pain should be credited was novel." (Supp. J.A. 53.)

Although the district court, on its own initiative, issued a decision in this action that strikes new ground, the court's conduct is not under scrutiny here. The

relevant test under *Reinking* is “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[.]” *Reinking*, 910 F.2d at 1218 (emphasis added). Mr. Smith did not seek to benefit all participants and beneficiaries of an ERISA plan and did not seek to resolve a significant legal question under ERISA. (*See Compl.*)

The district court did not reinterpret ERISA or expand the boundaries of ERISA. The district court borrowed a standard from a different area of law and applied it to an ERISA case. The district court, therefore, did not resolve a legal question significant to ERISA.

The fifth *Reinking* factor – the relative merits of the parties’ positions – does not augur in favor of awarding fees to Mr. Smith. Continental advanced strong reasons for its denial of Mr. Smith’s claim for benefits, including (i) the lack of objective testing supporting a disability; (ii) the opinion of an independent medical reviewer; and (iii) the opinion of Mr. Smith’s own treating physician, Dr. Solomon. (*See, e.g., J.A. 250-54, 335-39.*)

#### VIII. CONCLUSION

For the foregoing reasons, Continental Casualty Company respectfully requests that this Court vacate the district court’s October 27, 2003 order granting Mr. Smith an award of attorney’s fees and costs.

Respectfully submitted,

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Dated: February 21, 2007

STATEMENT PURSUANT TO FED. R. APP. P. 34  
AND LOCAL RULE 34(a) REQUESTING ORAL ARGUMENT

Oral argument should be heard in this appeal because the district court's underlying judgment presents a matter of first impression. This Court has not yet addressed or applied the Supreme Court's decision in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 123 S. Ct. 1965 (2003). Moreover, the *Nord* decision and its relationship with existing Fourth Circuit Social Security law are important. Continental Casualty Company respectfully submits the decisional process would significantly benefit from oral argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 5<sup>th</sup> day of January 2004, two copies of Continental Casualty Company's Supplemental Brief to the United States Court of Appeals for the Fourth Circuit were mailed, first class, postage prepaid, to:

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