
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 REPLY BRIEF OF APPELLANT,
CONTINENTAL CASUALTY COMPANY

Bryan D. Bolton
Michael R. McCann
Hisham M. Amin

Funk & Bolton, P.A.
Twelfth Floor
36 South Charles Street
Baltimore, Maryland 21201
(410) 659-7700

Attorneys for Appellant,
Continental Casualty Company

Dated: February 2, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. ARGUMENT 1

 A. Mr. Smith’s Reliance On Pre-*Nord* Decisions Is Unavailing 1

 B. The Post-*Nord* Cases Cited By Mr. Smith Do Not Support
 The District Court’s Pain Analysis..... 3

II. CONCLUSION..... 5

TABLE OF AUTHORITIES

CASES	PAGE
<i>Austin v. Cont’l Cas. Co.</i> , 216 F. Supp. 2d 550 (W.D.N.C. 2002)	2, 3
<i>Barnes v. BellSouth Corp.</i> , No. 1:03CV16-T, 2003 WL 22231261 (W.D.N.C. Aug. 14, 2003).....	4, 5
<i>Black & Decker Disability Plan v. Nord</i> , 538 U.S. 822, 123 S. Ct. 1965 (2003)	2
<i>Conrad v. Cont’l Cas. Co.</i> , 232 F. Supp. 2d 600 (E.D.N.C. 2002)	2, 3
<i>DiCamillo v. Liberty Life Assurance Co.</i> , 287 F. Supp. 2d 616 (D. Md. 2003)	4
<i>Hawkins v. First Union Corp. Long-Term Disability Plan</i> , 326 F.3d 914 (7 th Cir. 2003)	1, 3
<i>Hyatt v. Sullivan</i> , 899 F.2d 329 (4 th Cir. 1990)	2
<i>McGuigan v. Reliance Standard Life Ins. Co.</i> , No. CIV. A. 02-7691, 2003 WL 22283831 (E.D. Pa. Oct. 6, 2003).....	4
<i>Napier v. Hartford Life Ins. Co.</i> , 282 F. Supp. 2d 531 (E.D. Ky. 2003)	4
<i>Reinking v. Phila. Am. Life Ins. Co.</i> , 910 F.2d 1210 (4 th Cir. 1990), <i>overruled in part by Quesinberry v. Life Ins. Co. of N. Am.</i> , 987 F.2d 1017 (4 th Cir. 1993) (en banc).....	1
<i>Rosen v. Provident Life & Acc. Ins. Co.</i> , No. CIV. A. 02-591, 2003 WL 22254805 (E.D. Pa. Sept. 30, 2003)	4
<i>Sabatino v. Liberty Life Assurance Co. of Boston</i> , 286 F. Supp. 2d 1222 (N.D. Cal. 2003)	4

I. ARGUMENT

Mr. Smith mistakenly claims Continental failed to address the third, fourth, and fifth factors in *Reinking v. Philadelphia American Life Insurance Co.*, 910 F.2d 1210 (4th Cir. 1990), *overruled on other grounds by Quesinberry v. Life Insurance Co. of North America*, 987 F.2d 1017, 1030 (4th Cir. 1993) (en banc), and, therefore, concedes these factors in his favor. (Appellee's Supp'l Br., pp. 14, 15, 16.) Mr. Smith errs on both points. (See Appellant's Supp'l Br., pp. 10, 11.)

Mr. Smith also mistakenly claims Continental failed to address his arguments that (i) the Coghill Study was mentioned in a footnote and was not substantive evidence, (ii) Continental was required to request a hearing on the district court's exercise of judicial notice, (iii) many ERISA cases cite Social Security law, and (iv) the Plan did not require objective evidence of his "symptoms." (Appellee's Supp'l Br., pp. 17-18.) Suffice it to say, Continental addressed these arguments and will not reiterate those points here. (See Appellant's Reply Br., pp. 2-3, 10-14; Appellant's Opening Br., pp. 29-31.)

A. Mr. Smith's Reliance On Pre-*Nord* Decisions Is Unavailing

Mr. Smith argues the pain analysis undertaken by the district court could have been anticipated by Continental because support for that analysis may be found in a "series of cases." (Appellee's Supp'l Br., p. 18.) Mr. Smith cites three cases, *Hawkins v. First Union Corp. Long-Term Disability Plan*, 326 F.3d 914 (7th

Cir. 2003), *Conrad v. Continental Casualty Co.*, 232 F. Supp. 2d 600 (E.D.N.C. 2002), and *Austin v. Continental Casualty Co.*, 216 F. Supp. 2d 550 (W.D.N.C. 2002), as supporting the district court's application of the pain standard in *Hyatt v. Sullivan*, 899 F.2d 329 (4th Cir. 1990). (*Id.*, pp. 18-19.)

Conrad and *Austin* were decided after Continental completed its administrative review of Mr. Smith's claim. (*See* J.A. 250.) Those decisions, therefore, could not have put Continental on notice of the district court's pain analysis, as Mr. Smith suggests.

Further, even if *Conrad* and *Austin*¹ were decided prior to Continental's administrative review of Mr. Smith's claim, and even if Continental was required to adhere to a standard adopted by federal courts in North Carolina, these cases do not support an award of attorney's fees. *Conrad* and *Austin* were effectively overruled by *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 123 S. Ct. 1965 (2003), in which the Supreme Court squarely rejected the notion that Social Security decision-making rules may be applied in an ERISA benefits case. 123 S. Ct. at 1970-72; (*see also* Appellant's Opening Br., pp. 22-26). The Social Security Ruling applied in *Conrad*, *Austin*, and *Hyatt*, like the treating physician rule in

¹ In *Conrad* and *Austin* the court applied the pain standard in *Hyatt*. *See Conrad*, 232 F. Supp. 2d at 604 (stating that the pain standard in *Hyatt* is "relevant and applicable in the context of an ERISA determination"); *Austin*, 216 F. Supp. 2d at 560-61 (holding that administrator abused its discretion in denying claim in a manner inconsistent with the pain standard in *Hyatt* and SSR 90-1p).

Nord, is a substantive rule of law that cannot be engrafted on an ERISA plan. *Conrad* and *Austin* are inapposite.

Mr. Smith's reliance on *Hawkins*, which also was decided before *Nord*, is equally unavailing. In that case, the Seventh Circuit did not discuss or adopt *Hyatt*. Rather, the Court addressed whether the treating physician rule could be applied in an ERISA case, and discussed the then extant split in the federal courts. Foreshadowing the Supreme Court's rationale in *Nord*, however, the Seventh Circuit declined to apply the treating physician rule. *See* 326 F.3d at 917.² *Hawkins*, therefore, provides no possible support for the district court's decision.

B. The Post-*Nord* Cases Cited By Mr. Smith Do Not Support The District Court's Pain Analysis

According to Mr. Smith, six post-*Nord* decisions applied a "similar analytical framework" to the *Hyatt* pain analysis adopted by the district court.³ (Appellee's Supp'l Br., pp. 19-21.) Mr. Smith misreads the cases.

In none of the cases cited by Mr. Smith did the court engage in a pain analysis remotely similar to that applied by the district court. The courts did not

² The courts in *Conrad* and *Austin* also addressed the now rejected treating physician rule but, unlike the court in *Hawkins*, applied that rule. *See Conrad*, 232 F. Supp. 2d at 605; *Austin*, 216 F. Supp. 2d at 559.

³ Mr. Smith incorrectly states he did not have the opportunity to "address the issue as it presented itself" because *Nord* was decided after briefing in the district court. (Appellee's Supp'l Br., p. 19.) Although *Nord* was decided after summary judgment briefing was completed in the district court, Mr. Smith had the opportunity to address the implications of *Nord* in his opening brief filed with this Court.

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 REPLY BRIEF OF APPELLANT,
CONTINENTAL CASUALTY COMPANY

Bryan D. Bolton
Michael R. McCann
Hisham M. Amin

Funk & Bolton, P.A.
Twelfth Floor
36 South Charles Street
Baltimore, Maryland 21201
(410) 659-7700

Attorneys for Appellant,
Continental Casualty Company

Dated: February 2, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. ARGUMENT 1

 A. Mr. Smith’s Reliance On Pre-*Nord* Decisions Is Unavailing 1

 B. The Post-*Nord* Cases Cited By Mr. Smith Do Not Support
 The District Court’s Pain Analysis..... 3

II. CONCLUSION..... 5

TABLE OF AUTHORITIES

CASES	PAGE
<i>Austin v. Cont’l Cas. Co.</i> , 216 F. Supp. 2d 550 (W.D.N.C. 2002)	2, 3
<i>Barnes v. BellSouth Corp.</i> , No. 1:03CV16-T, 2003 WL 22231261 (W.D.N.C. Aug. 14, 2003).....	4, 5
<i>Black & Decker Disability Plan v. Nord</i> , 538 U.S. 822, 123 S. Ct. 1965 (2003)	2
<i>Conrad v. Cont’l Cas. Co.</i> , 232 F. Supp. 2d 600 (E.D.N.C. 2002)	2, 3
<i>DiCamillo v. Liberty Life Assurance Co.</i> , 287 F. Supp. 2d 616 (D. Md. 2003)	4
<i>Hawkins v. First Union Corp. Long-Term Disability Plan</i> , 326 F.3d 914 (7 th Cir. 2003)	1, 3
<i>Hyatt v. Sullivan</i> , 899 F.2d 329 (4 th Cir. 1990)	2
<i>McGuigan v. Reliance Standard Life Ins. Co.</i> , No. CIV. A. 02-7691, 2003 WL 22283831 (E.D. Pa. Oct. 6, 2003).....	4
<i>Napier v. Hartford Life Ins. Co.</i> , 282 F. Supp. 2d 531 (E.D. Ky. 2003)	4
<i>Reinking v. Phila. Am. Life Ins. Co.</i> , 910 F.2d 1210 (4 th Cir. 1990), <i>overruled in part by Quesinberry v. Life Ins. Co. of N. Am.</i> , 987 F.2d 1017 (4 th Cir. 1993) (en banc).....	1
<i>Rosen v. Provident Life & Acc. Ins. Co.</i> , No. CIV. A. 02-591, 2003 WL 22254805 (E.D. Pa. Sept. 30, 2003)	4
<i>Sabatino v. Liberty Life Assurance Co. of Boston</i> , 286 F. Supp. 2d 1222 (N.D. Cal. 2003)	4

I. ARGUMENT

Mr. Smith mistakenly claims Continental failed to address the third, fourth, and fifth factors in *Reinking v. Philadelphia American Life Insurance Co.*, 910 F.2d 1210 (4th Cir. 1990), *overruled on other grounds by Quesinberry v. Life Insurance Co. of North America*, 987 F.2d 1017, 1030 (4th Cir. 1993) (en banc), and, therefore, concedes these factors in his favor. (Appellee's Supp'l Br., pp. 14, 15, 16.) Mr. Smith errs on both points. (See Appellant's Supp'l Br., pp. 10, 11.)

Mr. Smith also mistakenly claims Continental failed to address his arguments that (i) the Coghill Study was mentioned in a footnote and was not substantive evidence, (ii) Continental was required to request a hearing on the district court's exercise of judicial notice, (iii) many ERISA cases cite Social Security law, and (iv) the Plan did not require objective evidence of his "symptoms." (Appellee's Supp'l Br., pp. 17-18.) Suffice it to say, Continental addressed these arguments and will not reiterate those points here. (See Appellant's Reply Br., pp. 2-3, 10-14; Appellant's Opening Br., pp. 29-31.)

A. Mr. Smith's Reliance On Pre-Nord Decisions Is Unavailing

Mr. Smith argues the pain analysis undertaken by the district court could have been anticipated by Continental because support for that analysis may be found in a "series of cases." (Appellee's Supp'l Br., p. 18.) Mr. Smith cites three cases, *Hawkins v. First Union Corp. Long-Term Disability Plan*, 326 F.3d 914 (7th

Cir. 2003), *Conrad v. Continental Casualty Co.*, 232 F. Supp. 2d 600 (E.D.N.C. 2002), and *Austin v. Continental Casualty Co.*, 216 F. Supp. 2d 550 (W.D.N.C. 2002), as supporting the district court's application of the pain standard in *Hyatt v. Sullivan*, 899 F.2d 329 (4th Cir. 1990). (*Id.*, pp. 18-19.)

Conrad and *Austin* were decided after Continental completed its administrative review of Mr. Smith's claim. (*See* J.A. 250.) Those decisions, therefore, could not have put Continental on notice of the district court's pain analysis, as Mr. Smith suggests.

Further, even if *Conrad* and *Austin*¹ were decided prior to Continental's administrative review of Mr. Smith's claim, and even if Continental was required to adhere to a standard adopted by federal courts in North Carolina, these cases do not support an award of attorney's fees. *Conrad* and *Austin* were effectively overruled by *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 123 S. Ct. 1965 (2003), in which the Supreme Court squarely rejected the notion that Social Security decision-making rules may be applied in an ERISA benefits case. 123 S. Ct. at 1970-72; (*see also* Appellant's Opening Br., pp. 22-26). The Social Security Ruling applied in *Conrad*, *Austin*, and *Hyatt*, like the treating physician rule in

¹ In *Conrad* and *Austin* the court applied the pain standard in *Hyatt*. *See Conrad*, 232 F. Supp. 2d at 604 (stating that the pain standard in *Hyatt* is "relevant and applicable in the context of an ERISA determination"); *Austin*, 216 F. Supp. 2d at 560-61 (holding that administrator abused its discretion in denying claim in a manner inconsistent with the pain standard in *Hyatt* and SSR 90-1p).

Nord, is a substantive rule of law that cannot be engrafted on an ERISA plan. *Conrad* and *Austin* are inapposite.

Mr. Smith's reliance on *Hawkins*, which also was decided before *Nord*, is equally unavailing. In that case, the Seventh Circuit did not discuss or adopt *Hyatt*. Rather, the Court addressed whether the treating physician rule could be applied in an ERISA case, and discussed the then extant split in the federal courts. Foreshadowing the Supreme Court's rationale in *Nord*, however, the Seventh Circuit declined to apply the treating physician rule. *See* 326 F.3d at 917.² *Hawkins*, therefore, provides no possible support for the district court's decision.

B. The Post-*Nord* Cases Cited By Mr. Smith Do Not Support The District Court's Pain Analysis

According to Mr. Smith, six post-*Nord* decisions applied a "similar analytical framework" to the *Hyatt* pain analysis adopted by the district court.³ (Appellee's Supp'l Br., pp. 19-21.) Mr. Smith misreads the cases.

In none of the cases cited by Mr. Smith did the court engage in a pain analysis remotely similar to that applied by the district court. The courts did not

² The courts in *Conrad* and *Austin* also addressed the now rejected treating physician rule but, unlike the court in *Hawkins*, applied that rule. *See Conrad*, 232 F. Supp. 2d at 605; *Austin*, 216 F. Supp. 2d at 559.

³ Mr. Smith incorrectly states he did not have the opportunity to "address the issue as it presented itself" because *Nord* was decided after briefing in the district court. (Appellee's Supp'l Br., p. 19.) Although *Nord* was decided after summary judgment briefing was completed in the district court, Mr. Smith had the opportunity to address the implications of *Nord* in his opening brief filed with this Court.

adopt a Social Security regulation or any other decision-making rule or standard from Social Security law. See *DiCamillo v. Liberty Life Assurance Co.*, 287 F. Supp. 2d 616, 624 (D. Md. 2003)⁴; *McGuigan v. Reliance Standard Life Ins. Co.*, No. CIV. A. 02-7691, 2003 WL 22283831 (E.D. Pa. Oct. 6, 2003)⁵; *Rosen v. Provident Life & Acc. Ins. Co.*, No. CIV. A. No. 02-591, 2003 WL 22254805, at *8 (E.D. Pa. Sept. 30, 2003)⁶; *Napier v. Hartford Life Ins. Co.*, 282 F. Supp. 2d 531 (E.D. Ky. 2003)⁷; *Sabatino v. Liberty Life Assurance Co. of Boston*, 286 F. Supp. 2d 1222 (N.D. Cal. 2003)⁸; *Barnes v. BellSouth Corp.*, No. 1:03CV16-T, 2003 WL

⁴ In *DiCamillo*, the court held the insurer's denial of benefits was supported by substantial evidence, specifically the opinions of independent medical examiners. 287 F. Supp. 2d at 623-24. Relying on *Nord*, the court found the insurer did not abuse its discretion by rejecting the opinion of the treating physician and "chos[ing] to base its decision on the evaluation of independent doctors and its own internal physician" *Id.* at 624.

⁵ In *McGuigan*, the court found the insurer's conduct arbitrary and capricious, but did not rely on any Social Security statute, regulation or decision-making rule. 2003 WL 22283831, at *7-12.

⁶ In *Rosen*, the court questioned the insurer's failure to review the Social Security Administration's determination that plaintiff was disabled, but did not find this failure to be controlling, or rely on any Social Security statute, regulation or decision-making rule. 2003 WL 22254805, at *10.

⁷ The court in *Napier*, on *de novo* review, concluded that the plan administrator improperly ignored the opinion of plaintiff's treating physician and the Social Security Administration's disability determination, but did not rely on any Social Security regulation or decision-making rule. 282 F. Supp. 2d at 538-39.

⁸ Mr. Smith cites *Sabatino* as a case in which "the use of medications (neurontin, vicodin) prevented a claimant from performing past work." (Appellee's Br., p. 20.) The court in *Sabatino* did not hold plaintiff's medications rendered him disabled; rather, the insurer "agreed [the medications] would cause disabling cognitive impairments." 286 F. Supp. 2d at 1231.

22231261 (W.D.N.C. Aug. 14, 2003).⁹ Indeed, no court, in a post-*Nord* ERISA case, has engaged in the analysis undertaken by the district court.

II. CONCLUSION

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

Respectfully submitted,

Bryan D. Bolton
Michael R. McCann
Hisham M. Amin

Funk & Bolton, P.A.
Twelfth Floor
36 South Charles Street
Baltimore, Maryland 21201-3111
410.659.7700 (telephone)
410.659.7773 (facsimile)

Attorneys for Continental Casualty Company

Dated: February 21, 2007

⁹ In *Barnes*, the magistrate judge concluded the plaintiff was capable of work notwithstanding his complaints of chronic and intense back pain, which was "always present but generally manageable with medication and frequent change in position." 2003 WL 22231261, at *16-17.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 2nd day of February 2004, two copies of Continental Casualty Company's Supplemental Reply Brief were mailed, first class, postage prepaid, to:

Scott B. Elkind, Esquire
Stephen F. Shea, Esquire
Elkind & Shea
801 Roeder Road, Suite 550
Silver Spring, Maryland 20910

Attorneys for Neal S. Smith

Hisham M. Amin