

ERISA & DISABILITY BENEFITS NEWSLETTER

ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

For more Information about Eric Buchanan & Associates, PLLC, visit our website at www.buchanandisability.com.

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Eric L. Buchanan, R. Scott Wilson, and D. Seth Holliday are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization.

UPDATE ON ERISA ATTORNEYS' FEE RULES BY ERIC L. BUCHANAN

In our July, 2010, newsletter, (found on our website at: www.buchanandisability.com/docs/ERISA_Disability_Benefits_Newsletter_Volume_2_Issue_5.pdf), we discussed attorneys' fees under the ERISA statute, and the Supreme Court's decision that year, *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149 (2010). Lower courts have now had a year-and-a-half to interpret this decision, and address some of the questions left open by the Supreme Court. This article provides an update on those issues.

In *Hardt*, the Supreme Court held fees could be awarded to a plaintiff when a district court remands a case back to a Defendant ERISA administrator. The Court reasoned that the language of the ERISA attorneys' fee provision (ERISA § 502 (g)(1), 29 U.S.C. § 1132(g)(1)), did not require a party to be a "prevailing party" in order to be awarded attorneys' fees, however, a party must still obtain "some degree of success on the merits" before attorneys' fees should be awarded. *Id.*, at 2158. The Court also held that the old "five factor test" applied by most courts need not be followed by lower courts, but could be used by lower courts to guide their analysis of requests for fees.

Is a remand alone enough to support an award of fees?

The Supreme Court decision in *Hardt* left open several questions. The first question is whether a remand alone, without later success by a plaintiff, would be enough to support an award of fees. The Court explained that the facts of the *Hardt* case "establish that Hardt has achieved far more than 'trivial success on the merits' or a 'purely procedural victory.'" *Id.*, at 2159. The Court explained that, "[b]ecause these conclusions resolve this case, we need not decide

today whether a remand order, without more, constitutes 'some success on the merits' sufficient to make a party eligible for attorney's fees under § 1132(g)(1)." *Id.*

Since the *Hardt* decision was issued, one Court of Appeals has answered the question in the affirmative, approving an award of fees for a remand, even where the plaintiff ultimately lost his claim on the merits. In the Sixth Circuit, in a case that was remanded because a claims administrator failed to apply the correct version of the Plan, the Court of Appeals affirmed an award of attorneys' fees made by a district court before a final decision was made one way or the other, and ultimately the plaintiff lost his claim.

In *McKay v. Reliance Standard Life Ins. Co.*, 428 Fed. App'x 537, 546-547, (6th Cir. 2011, unpublished), the Plaintiff claimed he became disabled around the time his employer changed coverage from a Unum LTD policy to a Reliance Standard Policy. Both insurance companies denied the claim, essentially arguing that the Plaintiff became disabled, if at all, while the other company's policy was in place. The district court found that Unum's denial was not arbitrary and capricious, but that Reliance had made its decision using the wrong version of their Plan, and the court remanded to Reliance to reconsider under the correct plan. The Plaintiff petitioned for attorneys' fees, which were awarded by the district court.

The district court in *McKay*, and ultimately the Court of Appeals, found that neither insurance company's denial was unreasonable; however, the Court of Appeals affirmed the district court's award of attorneys' fees. The Court of Appeals explained,

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The district court outlined the applicable law and provided a thorough explanation of its conclusion that an award was appropriate. No abuse of discretion occurred here. See *Gaeth*, 538 F.3d at 528–29 (noting that “[a]n abuse of discretion exists only when the court has the definite and firm conviction that the district court made a clear error of judgment in its conclusion upon weighing relevant factors.” (citation omitted)).

Reliance argues in vain that the Supreme Court’s decision in *Hardt* supports its position. Reliance is correct that the Court in *Hardt* did not give unlimited authority to courts to award fees under § 1132(g)(1). *Hardt*, 130 S.Ct. at 2158 (reminding readers that a “judge’s discretion is not unlimited.” (citation omitted)). Instead, it found that § 1132(g)(1) requires a claimant to show “some degree of success on the merits,” and not merely a “trivial success on the merits” or a “purely procedural victory.” *Id.* (citations and quotation marks omitted). Here, the district court explicitly concluded that McKay’s receipt of “another shot” at his claimed benefits was a “success on the merits because his case was remanded for further consideration”; in other words, McKay “achieved some degree of success” by achieving a remand. Indeed, McKay was just like the *Hardt* claimant in that he “persuaded the District Court to find that the plan administrator ... failed to comply with the ERISA guidelines” and that, as a result, he “did not get the kind of review to which [he] was entitled under the applicable law.” *Hardt*, 130 S.Ct. at 2159 (internal citation and quotation marks omitted). Reliance’s reliance on *Hardt* is misplaced; *Hardt* supports McKay’s position.

McKay, 428 Fed. App’x at 546-547. Similar reasoning has been used in at least one lower court. See *Olds v. Retirement Plan of Intern. Paper Co., Inc.*, 2011 WL 2160264, *3 (S.D. Ala. 2011) (Awarding the full amount of attorneys fees requested by Plaintiff following a remand back to the plan to conduct a full and fair review. The court noted, “That the relief the plaintiff received on this meritorious claim is a full and fair administrative review rather than a guaranteed award of benefits . . . does not convert his substantial success on that claim into failure or trivial success.”)

How does the “five-factor” test apply if a party has obtained “some success on the merits,” where the prevailing party is the defendant?

Another question left open by the Supreme Court was, where

a party achieves victory in the case, does that automatically entitle a party to fees, or can the five-factor¹ test still be used to determine if fees should be awarded at all. Lower courts have addressed this question since *Hardt*, often in the context of a prevailing defendant ERISA administrator seeking fees. Several courts have held that, in those types of cases, the “five-factor” test may still be used to determine that fees should not be awarded.

For example, in *Toussaint v. JJ Weiser, Inc.*, 648 F.3d 108, 111 (2d Cir. 2011), a successful Defendant sought attorneys’ fees, and argued that, because the Defendant achieved “some success on the merits,” the court abused its discretion by not awarding attorneys’ fees. The Court of Appeals disagreed, and explained that the “five factor” test should still be used where those factors are applicable. The Second Circuit had previously adopted the five factor test in *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987). The Second Circuit found that *Hardt*

does not disturb our observation that “the five factors very frequently suggest that attorney’s fees should not be charged against ERISA plaintiffs.” *Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000) (internal quotation marks omitted). This “favorable slant toward ERISA plaintiffs is necessary to prevent the chilling of suits brought in good faith.” *Id.* For this reason, when determining whether attorney’s fees should be awarded to defendants, we focus on the first *Chambless* factor: whether plaintiffs brought the complaint in good faith. After a thorough review of the record, we conclude that the district court did not abuse its discretion in denying fees in the present case

Toussaint, 648 F.3d at 111. See, also, *Tomlinson v. El Paso Corp.*, 2011 WL 1158637, *4 (D. Colo. 2011) (Finding that *Hardt* did not mandate an award of fees simply by achieving “some success on the merits,” but rather, when considering the five factors previously adopted by the Tenth Circuit in *Graham v. Hartford Life & Acc. Ins. Co.*, 501 F.3d 1153, 1162 (10th Cir. 2007), the court denied Defendant’s motion for approximately \$1.5 million in attorneys’ fees).

Are fees available for time spent before the administrator after the court remands a case?

The general rule is that attorneys’ fees are available for work before the district court and during appellate litigation. *Secretary of Dep’t of Labor v. King*, 775 F.2d 666, 670 (6th Cir. 1985). Even though, in almost all ERISA benefits cases, a plaintiff must exhaust her administrative remedies before filing a case in court, most courts have held that the time spent exhausting administrative remedies, before the case is filed, is not compensable time under the ERISA fee shifting provision. See, e.g., *Peterson v. Continental Cas. Co.*, 282

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F.3d 112, 121, (2d Cir. 2002). However, another question left open after *Hardt* is whether fees may be awarded for the time spent before the administrator, for that time spent before the administrator after remand, when the claim is remanded by the Court subject to the Court's jurisdiction.

The difference between time spent on the administrative appeals before going to the court the first time, and the time spent after a remand, is that a remand back to the administrator is may still be subject to the court's jurisdiction. Several Circuits have held that, if a district court remands a claim back to the administrator, the decision is not a final appealable order. See, e.g., *Bowers v. Sheet Metal Workers' Nat'l Pension Fund*, 365 F.3d 535, 537 (6th Cir. 2004) and *Shannon v. Jack Eckerd Corporation*, 55 F.3d 5612 (11th Cir. 1995) (relying on since-overturned principle that Social Security remand orders are non-appealable). Therefore, when a court remands, it has not issued a final decision; it has retained jurisdiction over the case.

In addressing the same issue in the administrative law context, the Supreme Court has held that time spent on administrative remand, while a court maintained jurisdiction, was "court time" and that attorneys' fees may be awarded for the time spent on further administrative proceedings while a court retained jurisdiction over the matter. *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989) (attorneys' fees awarded under the Equal Access to Justice Act for time spent on remand to Commissioner of Social Security while a court maintained jurisdiction.)

In *Sullivan*, the Supreme Court held that "administrative proceedings may be so intimately connected with judicial proceedings as to be considered part of [a] civil action for purposes of a fee award." The Court explained that this intimate connection exists where a party has brought a suit which remains within the court's jurisdiction and "depends for its resolution upon the outcome of the administrative proceedings." 501 U.S. at 97. See also *Melkonian v. Sullivan*, 111 S. Ct. 2157, 2162 (1991) (Explaining that *Sullivan v. Hudson* "stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative level" even though such fees are normally only available for work done in court.); *Pennsylvania*

v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 561 (1986) (attorneys' fees awarded under Clean Air Act for time expended pursuing enforcement of consent decree); *Johnson v. US*, 554 F.2d 632, 633 (4th Cir. 1977) (attorneys' fees awarded during remand of case to Civil Service Commission) ("In a sense this remanded administrative proceeding was ancillary to [the plaintiff's] initial action in the district court.")

Many courts have applied this logic to award attorneys' fees for time spent on "remand" in ERISA cases. See, e.g., *Peterson v. Continental Cas. Co.*, 282 F.3d 112, 121 (2d Cir. 2002) ("The fact that a court orders additional fact finding or proceedings to occur at the administrative level does not alter the fact that those proceedings are part of the 'action' as defined by ERISA."); *Rote v. Titan Tire Corp.*, 611 F.3d 960, (8th Cir. 2010) (allowing attorney fees during administrative remand); *Seal v. John Alden Life Ins. Co.*, 437 F. Supp. 2d 674, 685 (E.D. Mich. 2006); and *Lindbergh v. UT Medical Group*, 2006 WL 42174 at *4, n. 7 (W.D. Tenn. 2006) (unpublished).

In one informative case, *Richards v. Johnson & Johnson*, 2010 WL 3219138, *8 (E.D. Tenn. 2010), the Plaintiff was denied fees for time spent on remand, but only because the Plaintiff sought fees for that time while the claim was still pending on remand, and the Plan had not made a decision yet, so the court did not yet know whether the remand would result in some success for the Plaintiff. The court² in *Richards* noted that, "[e]ach of the district courts [in the Sixth circuit] that has addressed the applicability of *Anderson* to post-suit fees has concluded that fees incurred after a remand are recoverable," citing *Seal, supra*; *Delisle v. Sun Life Assur. Co. of Canada*, 2007 WL 4547884, at *5 (E.D. Mich.2007) (holding that post-remand fees were recoverable); and *Smith v. Bayer Corp. Long Term Disability Plan*, 2006 WL 3053472, at *7 (E.D. Tenn. 2006) (same). The *Richards* court noted that in all those cases, the benefits had been awarded on remand or after the claim returned to the court. *Id.* at *8. So, while the *Richards* court denied fees for the remand, the court explained that this decision "should not be construed to express an opinion as to whether, assuming Plaintiff wins her benefits on remand (as in *Seal*) or in a second suit (as in *Delisle*), she is entitled to fees she incurs during administrative remand." *Id.* at n. 7.

¹The "five factors" to be considered are:

(1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Secretary of Department of Labor v. King, 775 F.2d 666, 669 (6th Cir.1985). See also *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir.1987); *Quesinberry v. Life Ins. Co. of North Am.*, 987 F.2d 1017, 1029 (4th Cir. 1993), *Schwartz v. Gregori*, 160 F.3d 1116, 1119 (6th Cir. 1998), *Lain v. UNUM Life Ins. Co. of America*, 279 F.3d 337, 347-348 (5th Cir. 2002) (listing the same five factors with slightly different wording), and *Hummell v. Rykoff & Co*, 634 F.2d 446, 453 (9th Cir. 1980) (applying essentially the same factors in the Ninth Circuit.)

²This analysis is found in the Magistrate Judge's Report and Recommendation, which was subsequently accepted and adopted in its entirety by the district court. *Richards v. Johnson & Johnson* 2010 WL 3219133, *10 (E.D. Tenn. 2010).

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UPCOMING SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the ACI Annual Convention scheduled for January 26-27, 2012 in New York City. He will be speaking on the following topics: "Innovative Pre-Trial Strategies for Disability Insurance Claims: Settlement, Mediation, Attorney's Fees and More" and "The Details and Nuances of Drafting a Protective Order to Combat the Discovery of Proprietary and Confidential Information". To register for this conference contact (888)224-2480 or register online at www.americanconference.com/disabilityinsurance.

Eric Buchanan will be speaking at the Bayside Fibromyalgia Women's Support Group at the Bayside Baptist Church in Harrison, Tennessee on Tuesday, February 21, 2012 at 6:00 pm regarding filing a claim for social Security and/or long term disability benefits.

Eric Buchanan will be speaking at the Southern Trial Lawyers scheduled for February 15-18, 2012 in New Orleans. He will be speaking on discovery and protective orders in disability cases.

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates are available to speak to your organization regarding Social Security Disability, ERISA Long-term Disability, Group Long-term Disability, Private Disability Insurance, ERISA Benefits, Denied Health Insurance Claims and Life Insurance Claims.

Representing disabled policy holders and people seeking disability benefits nationwide. Eric's disability and benefits team can help your clients!

- ERISA Long-Term Disability
- Private Disability Insurance
- ERISA Benefits
- Life Insurance Claims
- Group Long-Term Disability
- Social Security Disability
- Denied Health Insurance Claims
- Long-Term Care Claims

We appreciate the opportunity to work with you on any of these cases.



Wishing you all a wonderful holiday season and a happy new year!

From all of us at Eric Buchanan & Associates



Eric Buchanan & Associates, PLLC
414 McCallie Avenue • Chattanooga, Tennessee 37402
telephone (423) 634-2506 • fax (423) 634-2505 • toll free (877) 634-2506
www.buchanandisability.com
