

## ERISA &amp; 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](http://www.buchanandisability.com).

## VOLUME 2, ISSUE 5, JULY 2010



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.

## AWARDS OF ATTORNEY'S FEES UNDER ERISA BY: JEREMY L. BORDELON

One of the only advantages of ERISA over typical state law contract or insurance litigation is the possibility of having attorney's fees paid by the other side. This is incredibly important in ERISA litigation because other than interest, a potential award of attorney's fees is the only risk faced by plan administrators and insurers. Under the traditional "American Rule," each party pays his or her own attorney's fees, regardless of the outcome of the case. However, if a statute allows for it, fees may be awarded against one party according to the method described in the statute. These sorts of laws are known as "fee-shifting statutes," and ERISA § 502(g), 29 U.S.C. § 1132(g), is just such a statute.

***The basics – why fees are awarded, and how much money is awarded***

In an action to recover ERISA benefits by a plan participant, "the court in its discretion may allow a reasonable attorney's fee . . . to either party." 29 U.S.C. § 1132(g)(1). The statute grants the reviewing court (usually a United States District Court, although state courts do have concurrent jurisdiction over ERISA benefit claims) broad discretion in determining whether to award fees, to whom to award fees, and how much to award. On appeal, such an award (or refusal to make an award) can only be overturned for abuse of discretion by the lower court.

In order to give the lower courts some guidance in how to apply their nearly unfettered discretion in deciding whether to award attorney's fees, the Sixth Circuit Court of Appeals set out the following five factors:

- (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 in similar circumstances;
- (4) whether the party requesting fees sought to confer a common legal 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.

*Schwartz v. Gregori*, 160 F.3d 1116, 1119 (6th Cir. 1998). These five factors, worded slightly differently in places, are used across the country, as they have been adopted by most of the federal courts of appeals.

Even if fees are awarded, though, it is done according to the "lodestar method," and bears no direct relation to the party's contract with his attorney. Quite often, the plaintiff and his attorney will have contracted for a contingency fee, in which the attorney receives a percentage of the recovery he gets for his client. The lodestar method, on the other hand, provides a two step approach: the basic lodestar figure is calculated by determining the reasonable number of hours spent multiplied by a reasonable hourly rate for that type of litigation; the basic lodestar figure may then be subject to upward or downward adjustments as warranted by the particular circumstances of the case. In the end, the client may not have all of his attorney's fee paid by such an award.

***Prevailing party status and remand orders***

The statute does not require that the courts award fees to the prevailing party, but it also does not prevent an award of fees to a litigant who is not found to be a prevailing party, either. In practice, this distinction has been largely academic in many cases. Plaintiffs historically moved for fees only in cases

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where they were clearly the prevailing party (having been awarded benefits), and the traditional analysis of the five factors generally resulted in an award of fees for the plaintiff in those cases. In cases where the plaintiff had lost, and the ERISA plan's decision to deny benefits was upheld by the court, usually neither side moved for fees.

In addition to an outright "win" or "loss" for the plaintiff, though, there is a third option available to the courts; one which they have been using more and more in recent years. Instead of deciding that the denial was correct or incorrect, the court can also decide that there was a procedural error of some kind and remand the claim back to the original decision-maker for another go-around. Even a decision such as this, which does not directly result in an award of benefits, is a significant success for the plaintiff, as it normally requires a finding by the court that the denial decision was arbitrary and capricious. This gives the plaintiff another chance to prove his disability, and often results in an eventual award of benefits.

Because the ERISA attorney's fee statute does not require prevailing party status, and because a remand order constitutes at least some success on the merits of a plaintiff's case, many plaintiffs moved for an award of fees after remand orders. The courts have been very inconsistent in deciding these motions, some holding that fees were proper in the wake of a remand order and others holding the opposite. Faced with such a split in the courts, the Supreme Court took up the issue in the case of *Hardt v. Reliance Standard Life Insurance Company*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2149 (May 24, 2010).

#### ***Hardt v. Reliance Standard***

*Hardt* involved a plaintiff whose disability claim was denied by Reliance Standard. Bridget Hardt appealed that denial to the U.S.D.C. and moved for summary judgment. The court denied her motion, but found that there was "compelling evidence" in the record that she was, in fact, totally disabled. Finding that Reliance Standard failed to comply with ERISA guidelines in considering her claim, the court remanded the case back to the insurer to reconsider the evidence. On remand, Reliance Standard did find Ms. Hardt disabled and paid her the benefits it owed her.

Ms. Hardt then moved for an award of attorney's fees, on the theory that a remand wasn't a "win," but it was *something*. In other words, prior to the court's remand order, Ms. Hardt's claim was dead in the water – it had been denied and Reliance Standard had no further duty to consider whether she was disabled. After the remand order, she had not yet won her claim, but she had a fighting chance. Reliance Standard was required to review her claim again, and she might yet win her benefits. The District Court considered that argument within the framework of the five factors listed above and agreed. The court found that its remand order "sanctioned a material change in the legal relationship of the parties" and awarded the plaintiff attorney's fees.

Reliance Standard appealed that award of fees to the Court of Appeals for the Fourth Circuit, which found that because the remand order "did not *require* Reliance to award benefits to Hardt," it was not worthy of an award of fees. Hardt then ap-

pealed to the Supreme Court, which agreed to review her case.

The Supreme Court first considered whether "prevailing party" status was required for an award of attorney's fees under ERISA. The plain language of the ERISA attorney's fee statute, § 502(g), contains no such requirement. However, many courts considered it as a factor in awarding ERISA attorney's fees because it is a required factor in so many other fee-shifting statutes, even though Congress did not include it in ERISA. This requirement was one of the primary reasons the Court of Appeals had reversed the award of attorney's fees in *Hardt*. The Supreme Court found that Congress knew how to require "prevailing party" status when it so desired (and in fact, it did so in another part of the ERISA fee-shifting statute). Because such a requirement was not found in the relevant statute, § 502(g)(1), the Court struck down that requirement.

Which left the question: if prevailing party status is not required for an award of ERISA attorney's fees, what is? The statute itself is silent on the issue, leaving the entire matter to the court's discretion. The Supreme Court held in *Hardt* that although prevailing party status was not required, a litigant claiming fees must still show "some degree of success on the merits" before a court can award fees. Under the specific facts of the *Hardt* case, where the outcome of the remand was already known, the Supreme Court found that Ms. Hardt had, in fact, achieved far more than "trivial success on the merits" or a "purely procedural victory." Unfortunately, the Supreme Court avoided the question of whether a remand order *alone*, without a subsequent award of benefits after the remand, was sufficient to support an award of attorney's fees.

#### ***What's next?***

It remains to be seen how the courts will handle motions for attorney's fees on the basis of remand orders in the future. Doing away with the fallacious requirement of "prevailing party" status certainly helps matters. However, because the Supreme Court avoided the question of whether remand orders alone can support fee awards, it is possible that the lower courts may avoid the question as well, setting aside the issue of fees in remand cases until after the remanded claim is decided again by the insurer or administrator.

On the other hand, if the courts decide that remand orders "sanction[] a material change in the legal relationship of the parties," as the District Court did in *Hardt*, and that such a material change constitutes "some degree of success on the merits," then an award of fees could be available immediately following a remand order. This would help plaintiffs and their attorneys offset the cost of years of administrative appeals and litigation, lengthened again by a remand order. ERISA attorneys will have to watch closely and litigate carefully over the next months and years to find out what happens next in the field of ERISA attorney's fees.

(For a more in-depth look at ERISA attorney's fees, see also Eric Buchanan's article on the subject, available on our website in the "Resources and Articles" section.)

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### INTRODUCING OUR NEW ASSOCIATE ATTORNEYS



**Jeremy L. Bordelon** has worked for Eric Buchanan & Associates since 2004, first as the firm's litigation paralegal while earning his Legal Assistant Studies degree from the University of Tennessee at Chattanooga, and continuing part-time while enrolled in law school. Jeremy graduated from the University of Tennessee College of Law in 2009, magna cum laude, where he earned an Academic Excellence award in the field of Administrative Law and was granted the three-year William M. Leech, Jr. Memorial Scholarship. In addition to Social Security disability hearings, his duties over the years have included research and writing on many other aspects of the firm's practice, including Social Security EAJA fees, ERISA discovery, ERISA motions for judgment, and bad faith insurance claims. Jeremy has attended national CLEs on Social Security and disability insurance. Jeremy spent eight years in the U.S. Navy before law school as an enlisted Cryptologic Technician, achieving the rank of Petty Officer First Class.



**Julie E. Miller** is a former Assistant State Attorney for Miami-Dade County. As an Assistant State Attorney, she was responsible for hundreds of cases, and co-lead prosecution in two courtrooms. Ms. Miller also ran a solo criminal defense practice in Chattanooga, Tennessee, before joining the office of Eric Buchanan and Associates. In law school, Ms. Miller was one of the few students to complete three student legal practice programs at the University of Tennessee College of Law. She worked in the Pro-Bono Clinic, Domestic Violence Clinic, and as a Kolwyck Public Interest Fellow in the capacity of an Assistant District Attorney. Ms. Miller also competed in the Advocates Prize and Jenkins Prize Competitions, which include trial work, appellate briefs, and appellate argument. Ms. Miller also has an extensive list of internships from institutional development to the Office of a United States Senate Majority Leader.

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### NEWS

Elections were held at the Tennessee Association for Justice annual convention in Murfreesboro on Friday, June 25, 2010 and Eric Buchanan was elected Secretary.

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### A SPECIAL THANKS

Eric Buchanan & Associates, PLLC opened on July 1, 2003 and we are very happy to be celebrating our 7th Anniversary this year. We just want send out a special thank you to our friends and colleagues for their referrals and their support. We will be holding a Meet & Greet on August 5th at Maggiano's Little Italy in Nashville from noon til 7pm. We would love to see you there. Please RSVP to [mhaynes@buchanandisability.com](mailto:mhaynes@buchanandisability.com) by August 3, 2010.

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### UPCOMING SPEAKING ENGAGEMENTS

R. Scott Wilson will be speaking at the Association for Justice Social Security Success! Seminar in Las Vegas. Conference dates are August 19-20, 2010. Eric Buchanan is the program coordinator.

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### 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. Contact Molina Haynes, Office Manager at (423) 634-2506 or via email at [mhaynes@buchanandisability.com](mailto:mhaynes@buchanandisability.com)

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