CAMILLA KOCHENDERFER, Plaintiff, vs. RELIANCE STANDARD LIFE INSURANCE COMPANY; GROUP LONG TERM DISABILITY INSURANCE PLAN FOR ANESTHESIA SERVICE MEDICAL GROUP, Defendants.

CASE NO. 06-CV-620 JLS (NLS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 41330

April 21, 2010, Decided
April 21, 2010, Filed

PRIOR HISTORY: *Kochenderfer v. Reliance Std. Life Ins. Co., 2009 U.S. Dist. LEXIS 112954 (S.D. Cal., Dec. 4, 2009)*

COUNSEL: [*1] For Camilla Kochenderfer, an individual, Plaintiff: Susan Lee Horner, Thomas M Monson, LEAD ATTORNEYS, Miller Monson Peshel Polacek and Hoshaw, San Diego, CA.

For Reliance Standard Life Insurance Company, an Illinois corporation, - Group Long Term Disability Insurance Plan For Anesthesia Service Medical Group, -, a group welfare plan under ERISA, Defendants: Dennis J Rhodes, LEAD ATTORNEY, Wilson Elser Moskowitz, San Francisco, CA; Russell H. Birner, LEAD ATTORNEY, Wilson Elser Moskowitz Edeman & Dicker, Los Angeles, CA.

JUDGES: Honorable Janis L. Sammartino, United States District Judge.

OPINION BY: Janis L. Sammartino

OPINION

ORDER: GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

Presently before the Court is Plaintiff's motion for Attorney Fees and Costs. (Doc. No. 79.) Also before the Court are the respective Opposition and Reply to this motion. (Doc. Nos. 87 & 90.) For the following reasons, Plaintiff's motion is **GRANTED IN PART** and **DENIED IN PART.** [1]

1 Both Plaintiff and Defendants filed evidentiary objections. (Doc. Nos. 88 & 90-1.) None of these objections are meritorious. They are therefore **OVERRULED.**

BACKGROUND

This action was originally filed on March 21, 2006. (Doc. No. 1.) On April [*2] 30, 2009, the parties filed cross motions for summary judgment. (Doc. Nos. 50 & 51; *see also* Doc. No. 23.) After full consideration of these motions and their attendant evidence, on December 4, 2009, the Court granted Plaintiff's motion for summary judgment and denied Defendants' motion for summary judgment. (Doc. No. 76.) The parties then jointly agreed to the proper measure of damages and the Court entered judgment. (Doc. Nos. 77 & 78.) Plaintiff filed the present motion on February 16, 2010. (Doc. No. 79.) Defendants opposed this motion on March 5, 2010 and Plaintiff replied on March 12, 2010. (Doc. Nos. 87 & 90.)

LEGAL STANDARD

The Ninth Circuit has recognized that "[l]awyers must eat, so they generally won't take cases without a reasonable prospect of getting paid." *Moreno v. City of Sacremento, 534 F.3d 1106, 1111 (9th Cir. 2008)*. In recognition of this need to be compensated for work performed the Employee Retirement Income Security Act of 1974 (ERISA) grants the Court discretion to "allow a reasonable attorney's fee and cost of action to either party." *29 U.S.C. § 1132(g)(1)*; *see also Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 452 (9th Cir. 1980)*.

The Ninth Circuit has instructed [*3] that there are five factors for a district court to consider when determining whether to exercise its discretion under *section 1132*: "(1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions." *Hummell, 634 F.2d at 453* (citations omitted). However, "[o]rdinarily, if a plan participant or beneficiary prevails in an action to enforce his rights under the plan, recover of attorneys' fees is appropriate, absent special circumstances making an award unjust." *Canseco v. Constr. Laborers Pension Trust for S. Cal., 93 F.3d 600, 609-10 (9th Cir. 1996)*.

In making an attorney's fee award, the Court must apply "the hybrid lodestar/multiplier approach used by the Supreme Court in *Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*." *Van Gerwen v. Guarantee Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000)*. [*4] This "approach has two parts. First, a court determines the 'lodestar' amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. The party seeking an award of fees must submit evidence supporting the hours worked and the rates claimed. A district court should exclude from the lodestar amount hours that are not reasonably expended because they are 'excessive, redundant, or otherwise unnecessary.' Second, a court may adjust the lodestar upward or downward using a 'multiplier' based on factors not subsumed in the initial calculation of the lodestar. The lodestar amount is presumptively the reasonable fee amount, and thus a multiplier may be used to adjust the lodestar amount upward or downward only in 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts that the lodestar amount is unreasonably low or unreasonably high." *Id.* (citations and certain internal quotation marks omitted).

ANALYSIS

I. SPECIAL CIRCUMSTANCES DO NOT WARRANT A DENIAL OF PLAINTIFF'S FEE REQUEST

Defendants first argue that special circumstances warrant a wholesale denial of Plaintiff's motion. (Opp. at 2.) [*5] They claim that because "Plaintiff repeatedly refused Reliance Standard's requests that she undergo an independent physical examination as required under the terms of the Policy and, thus, failed to cooperate with Reliance Standard's review and investigation of her claim," that her "own actions triggered the denial of her claim and the subsequent lawsuit." *(Id.)* Thus, a fee award "would likely have the perverse effect of encouraging participants to refuse to attend validly requested independent medical examinations as well as rewarding them for such refusal." *(Id.)*

The Court is unpersuaded that this is the type of unusual circumstance that would warrant a denial of all of the requested fees. Although the Court rejected Plaintiff's arguments regarding her obligation to attend the IME, that was insufficient grounds for Defendants' denial of her claim. *(See* Doc. No. 76 at 19.) Defendants still had volumes upon volumes of factual information indicating Plaintiff's disability. *(Id.)* Plaintiff has not engaged in such wrongful behavior that it would be unjust to grant fee here. And, given the particular circumstances of this case, it is highly unlikely that perverse consequences will flow [*6] from this particular fee award.

II. THE *HUMMELL* FACTORS REQUIRE A FEE AWARD IN THIS CASE

Next the Court finds that the *Hummell* factors require a fee award. As stated above, *Hummell* requires the Court to assess: "(1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a

significant legal question regarding ERISA; and (5) the relative merits of the parties' positions." *Hummell, 634 F.2d at 453* (citations omitted).

The first factor, bad faith or culpability, favors Plaintiff. Although there is no evidence that Defendants were malicious in denying Plaintiff's claim, their work was fraught with a lack of diligence and other miscues, such as failing to consider all of the available evidence. *(See, e.g.,* Doc. No. 76 at 8-9.) The second factor is uncontested. Defendants acknowledge that they "ha[ve] the financial ability to satisfy a fee award." (Opp. at 3.)

The third factor also [*7] favors Plaintiff. Although the Court agrees that "ERISA plan fiduciaries should not be deterred from defending against claims they legitimately believe are precluded from coverage," that is not the relevant inquiry. (Opp. at 4.) Rather, the Court must determine "whether an award of fees . . . would deter others from acting under similar circumstances." In this case, an award serves to deter future fiduciaries from denying claims based on an inadequate and lopsided review of a clamant's medical information.

The fourth factor is neutral. Plaintiff's suit did not seek to benefit all participants and beneficiaries of her plan or to resolve a significant legal question regarding ERISA.

The final factor favors Plaintiff. Although Defendants' position was not plainly without merit, the Court is evaluating "the *relative* merit of the parties' positions." Here, Plaintiff's position was more meritorious than Defendants'.

Therefore, since four of the five *Hummell* factors support an award of fees, the Court finds that an attorney's fee is warranted in this case.

III. PLAINTIFF'S REQUESTED HOURLY RATE

Next the Court evaluates the hourly rate requested for each individual who worked on this motion. For [*8] attorney Thomas M. Monson, Plaintiff requests $ 495.00 per hour for work performed prior to January 1, 2009 and $ 525.00 per hour for work performed on or after January 1, 2009. *(See* Memo. ISO Motion at 9.) For attorney Susan L. Horner, Plaintiff requests $ 450.00 per hour for work performed prior to January 1, 2009 and $ 500.00 per hour for work performed on or after January 1, 2009. *(See id.)* For paralegal Nancy Smith, Plaintiff requests $ 90.00 per hour for work performed prior to January 1, 2009 and $ 125.00 per hour for work performed on or after January 1, 2009. *(See id.)* For paralegal Karen Gassaway, Plaintiff requests $ 160.00 per hour. *(See id.* at 10.) And for paralegal Linda M. Collier, Plaintiff requests $ 75.00 per hour. *(See id.)*

Plaintiff bears the burden of establishing that the hourly rates requested by her attorneys are reasonable. *See Welch v. Metro. Life Ins. Co., 480 F.3d 942, 946 (9th Cir. 2007)*. To meet that burden, she submits declarations from eleven other attorneys who handles ERISA matters. *(See* Doc. No. 83.) Each of these declarants opine that the rates requested are reasonable.

At the outset, the Court finds that the paralegal rates requested by Plaintiff [*9] are reasonable. Defendants have not objected to this request so the Court will not delve into its reasoning in detail.

With respect to the attorney time, Defendants object that Mr. Monson's and Ms. Horner's rates are unsupported by the evidence presented. (Opp. at 8-9.) The Court agrees. The relevant question is whether a "private attorney[] of an ability and reputation comparable of that of prevailing counsel charge their paying clients for legal work of similar complexity." *Davis v. City & County of San Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992)*, vacated in part on other grounds by *984 F.2d 345 (1993)*. "Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits." *Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 979 (9th Cir. 2008)*.

Although Plaintiff submits numerous attorney declarations, those declarations fail to carry Plaintiff's burden. First, having reviewed all of the declarations, the Court finds that they do not establish that a paying client would pay Ms. Horner or Mr. Monson their requested rate for legal work of similar complexity. Neither Ms. Horner's declaration nor Mr. Monson's declaration states that [*10] a paying client has ever paid them their requested rate for this type of work. As to the other declarations, they either do not offer evidence of what a paying client would actually pay, *(see, e.g.,* Fleishman Decl.) or they do not indicate that a paying client had paid this rate for comparable work, *(see, e.g.,* Dean Decl. P 5) or they do not indicate that these rates are reasonable within the Southern District of California. *(See, e.g.,* Padway Decl.)

Second, the value of these declarations is questionable because they are both self-serving and self-perpetuating. Each of these attorneys works on ERISA matters and claiming that the rates charged by Plaintiff's counsel, no matter how high, is in their own interest. A high award in this case would support the declarants' own high hourly rate requests in the future. Ultimately, the rates Plaintiff's attorneys request appear to have little basis in what an arms-length agreement with a paying client would produce.

Third, the Court agrees with Defendants that a bump in rates on January 1, 2009 is unjustified. (Opp. at 12.) At that time the American economy was struggling, to say the least. The legal market has been no better off with substantial [*11] downward pressure on lawyers' hourly rates. The suggestion that a paying client would accept a fee hike during the midst of the most difficult economic period in recent memory is frankly absurd.

In light of the above, the Court finds that the reasonable rate for this type of work in the Southern District of California for Mr. Monson is $ 425.00 per hour and the reasonable rate for Ms. Horner is $ 400.00 per hour.

IV. NUMBER OF HOURS EXPENDED BY PLAINTIFF'S COUNSEL

Finally the Court reviews the number of attorney hours spent on this matter. Plaintiff claims that Mr. Monson spent 87.8 hours on Plaintiff's case, Ms. Horner worked 904.9 hours, Ms. Smith worked 88.9 hours, Ms. Gassaway worked 0.4 hours, Ms. Collier worked 3.3 hours, and an unidentified paralegal worked 0.5 hours. *(See* Horner Decl. P 73; Supp. Horner Decl. P 42.) In reviewing Plaintiff's request, the Court must determine whether the number of hours listed were "reasonably expended on the litigation." *Welch, 480 F.3d at 945*. However, the Ninth Circuit has cautioned that "[b]y and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he [*12] won, and might not have, had he been more of a slacker." *Moreno, 534 F.3d at 1112*.

Defendants do not object to the number of hours spent on this case by the paralegals. Therefore, finding these hours reasonable, the Court awards Plaintiff the requested hours.

As to Mr. Monson's and Ms. Horner's hours, Defendants have three criticisms. First, they argue that Plaintiff's counsel simply took too much time in the various tasks of this case. *(See* Opp. at 13-16.) They label the number of hours required to draft the complaint "mindboggling," and also complain about the time taken to amend that complaint, to oppose a motion for summary judgment, to file a cross motion for summary judgment, to review a second motion for summary judgment, and to file a reply brief. *(Id.* at 14.) Defendants argue that this Court should expect "efficiency" from Plaintiff's attorney's experience and knowledge of the case law. *(Id.)* The Court disagrees. This case contained numerous significant issues and several legal developments occurred during its pendency. Although the number of hours billed is high, it is not so high that the Court can find it unreasonable in light of the circumstances of this case. Moreover, [*13] as the Ninth Circuit has suggested that courts keep "in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee." *Moreno, 554 F.3d at 1112*.

Second, Defendants accuse Plaintiff of "block billing." (Opp. at 16-17.) They claim that this "mak[es] it difficult to determine how much time was spent on a particular task and likely leading to a fee inflation of at least 30%." *(Id.* at 16.) They also claim that the Court should not give creedence to certain billing entries where Plantiff's attorney worked "all day" or "straight through" because they are "neither accurate nor contemporaneous." *(Id.* at 17.) Again, the Court must disagree. The tasks that Plaintiff lumps together are not the type of disparate activities that make it difficult to determine whether the time spent was reasonable. Instead they are all elements of a single larger task. Given the consonance of the acts, the Court does not find that the few instances which Defendants claim constitute block billing are unreasonable or require a reduction.

Finally, Defendants request that this Court deny [*14] attorney fees "for work performed related to entirely unnecessary and unsuccessful pleadings." (Opp. at 17.) They argue that certain declarations which included information outside the administrative records were unnecessary to the Court's decision and were not reasonably spent. *(Id.)* Again, the Court finds no need for a reduction in hours. The declarations cited by Defendants were not frivolous or lacking an arguable

basis in the law. The fact that the Court ultimately did not consider them does not make their preparation unreasonable. Nor can the Court find that it was unreasonable for Plaintiff to respond to objections raised by Defendant. Plaintiff's attorneys should not be penalized for doing their best to protect Plaintiff's interests and prevail in this case, so long as the time spent was reasonable.

As such, the Court finds that the number of hours requested by Plaintiff were reasonable.

CONCLUSION

For the reasons stated above, Plaintiff's motion is **GRANTED IN PART** and **DENIED IN PART.** The Court awards Plaintiff $ 37,315.00 for Mr. Monson's work, (87.8 hours x $ 425.00 per hour) $ 361,960.00 for Ms. Horner's work, (904.9 hours x $ 400 per hour) $ 10,010.00 for Ms. Smith's work, [*15] (31.5 hours x $ 90.00 per hour + 57.4 hours x $ 125.00 per hour) $ 64 for Ms. Gassaway's work, (0.4 hours x $ 160.00 per hour) $ 247.50 for Ms. Collier's work, (3.3 hours x $ 75.00 per hour) and $ 50 for paralegal work on the fee reply brief. (0.5 hours * $ 125.00 per hour discounted by 20%) The total fee award is therefore $ 409,646.50.

IT IS SO ORDERED.

DATED: April 21, 2010

/s/ Janis L. Sammartino

Honorable Janis L. Sammartino

United States District Judge