UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JANICE HANNON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**CAUSE NO. 1:12-cv-992-WTL-TAB**
UNUM LIFE INSURANCE COMPANY OF AMERICA and PITT COUNTY MEMORIAL HOSPIAL, INC. GROUP LTD PLAN,	)	
	)	
Defendants.	)	

ENTRY ON MOTION FOR ATTORNEYS' FEES

Before the Court is the Plaintiff's Motion for Attorneys' Fees and Costs (dkt. no. 64). The motion is fully briefed, and the Court, being duly advised, now **GRANTS** the Plaintiff's motion for the reasons, and to the extent, set forth below.

The facts of this case are set forth in the Court's summary judgment Entry (dkt. no. 62) and are incorporated herein.

According to 29 U.S.C. ' 1132(g)(1), in a civil action for benefits "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." However, "a fees claimant must show 'some degree of success on the merits' before a court may award attorney's fees under ' 1132(g)(1)." *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2158 (2010) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)). If a fee claimant has achieved some success, then the court considers whether a fee award is appropriate.

The Defendants first argue that Ms. Hannon is not entitled to an award of attorneys' fees because the Court remanded this case rather than award her benefits; the Defendants argue that "[t]his is not a case in which Plaintiff has achieved a 'total victory.'" Defs.' Br. at 5. The Court

disagrees. The fact that Ms. Hannon was not awarded benefits by this Court does not mean that she did not achieve some degree of success on the merits. Rather, she established an ERISA violation and forced Unum to review her application for benefits with the proper care. Accordingly, she has achieved some success on the merits. *See Young v. Verizon's Bell Atl. Cash Balance Plan*, 748 F. Supp. 2d 903, 909 (N.D. Ill. 2010) (noting that success can be measured in terms other than dollars). Accordingly, the Court turns to whether a fee award is appropriate.

In making this inquiry, a court considers whether the losing party's position was substantially justified and whether any special circumstances make a fee award unjust.[1] *E.g.*, *Harris Trust & Sav. Bank v. Provident Life & Acc. Ins. Co.*, 57 F.3d 608, 616-117 (7th Cir. 1995). The ultimate question is whether "the losing party's position [was] substantially justified and taken in good faith, or [whether] that party [is] simply out to harass its opponent." *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592-93 (7th Cir. 2000) (quotations omitted). "'Substantially justified' means that the losing party's position is "more than merely not frivolous, but less than meritorious." *Harris Trust*, 57 F.3d at 617, n. 4 (quoting *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 830 (7th Cir. 1984)). In addition, the references to good faith and harassment do not mean that a party must actually show bad faith to justify a fee award. *Prod. & Maint. Emps.' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1405 (7th Cir. 1992); *Loomis v.*

[1] The Seventh Circuit has articulated two tests district courts may use when determining whether to award fees in ERISA cases. The first, used by the Court here, is the "substantial justification" test. The second test considers five factors: (1) the degree of the losing party's culpability or bad faith; (2) the ability of the losing party to satisfy an award of fees; (3) whether an award of fees against the losing party would deter others from acting under similar circumstances; (4) whether the party 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. The Court has explained that these "formulations are simply alternative ways of making the same basic point." *Central States, Southeast & Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 272 F.3d 1000, 1004 (7th Cir. 2001).

Exelon Corp., 658 F.3d 667, 674-75 (7th Cir. 2011) ("A district judge need not find that the party ordered to pay fees has engaged in harassment or otherwise litigated in bad faith."). Rather, there is a "modest presumption" in favor of awarding attorney's fees, and the inquiry is whether the losing party's position had a reasonable or "solid" basis in law and fact. *E.g.*, *Harris Trust*, 57 F.3d at 616-17.

A review of the facts makes clear that the Defendants' position was not substantially justified. After paying Ms. Hannon long-term disability benefits due to her Ehlers-Danlos syndrome for ten years, they terminated those benefits by arbitrarily selecting only those treatment notes that supported their termination decision. They cherry-picked phrases that indicated Ms. Hannon received *temporary* pain relief, while ignoring hundreds of pages of medical evidence illustrating her widespread, persistent pain. They also questioned whether Ms. Hannon had Ehlers-Danlos syndrome at all, despite the fact that her diagnosis was sufficient for the Defendants to pay benefits to Ms. Hannon for ten consecutive years. The Defendants also abused their discretion in determining that because Ms. Hannon was able, for example, to wash her clothes and vacuum her floors, she was thus capable of sustaining full-time employment. For these reasons, the Defendants' position was not justified by the facts of their underlying review decisions. Because the Defendants have not argued that there is any special circumstance at work here that would otherwise make a fee award unjust, Ms. Hannon is entitled to a fee award under ERISA.

The only issue remaining is the amount of that award. In determining a reasonable fee, the Court applies the lodestar method. *E.g.*, *Anderson v. AB Painting & Sandblasting Inc.*, 578 F.3d 542, 544 (7th Cir. 2009) (multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate). Attorney Bridget O'Ryan avers that her hourly rate is

$350 and she spent 136.5 hours[2] representing Ms. Hannon. Attorney Nicholas Lavella avers that his hourly rate is $195 and he spent 80.9 hours on this matter. Fees for paralegal work and costs are also requested. To this end, the Defendants make two objections.[3]

First, they argue that the number of hours billed for summary judgment briefing is excessive; they surmise that a more appropriate figure would be sixty hours, thirty hours each for Attorneys Lavella and O'Ryan. It appears that the Defendants ask for such a drastic cut because they believe many of the entries are redundant, as Attorney O'Ryan spent some time reviewing and editing Attorney Lavella's work. However, as Attorney O'Ryan aptly notes, "Unum has been benefitted greatly by the time spent by Mr. Lavella on this case given his substantially reduced hourly rate." Reply at 12. The Court concurs—had Attorney O'Ryan worked on this case without the assistance of Attorney Lavella, the amount of fees requested would be much greater. The Court notes that the briefs filed on behalf of Ms. Hannon were thorough and well-reasoned and it appreciates the time and thought that went into their drafting.

That said, in reviewing the billing records, the Court is inclined to reduce the amount of hours billed to some degree. Attorney Lavella spent 53.6 hours[4] reviewing medical records and drafting and editing the statement of the facts. *See* dkt. no. 64-2. The Court recognizes that Ms. Hannon's medical history was lengthy; however, spending over fifty hours on a part of a

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[2] This includes the 9.3 hours Attorney O'Ryan spent on the Reply brief filed in support of the motion for attorneys' fees. The Seventh Circuit recognizes that fee awards should include time that attorneys reasonably spend on fee disputes. *See Stark v. PPM America, Inc.*, 354 F.3d 666, 674 (7th Cir. 2004).

[3] In addition to the Defendants' arguments addressed herein, they also argue that the amount of fees awarded should be reduced because Ms. Hannon "did not prevail on all issues." Response at 7. The Court will not reduce the amount of fees for this reason. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("[T]he court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.").

[4] This does not include the hours Attorney O'Ryan and the paralegal also spent editing the statement of the facts.

summary judgment brief that does not address the merits of the case seems excessive, especially when performed by an attorney billing at a rate of close to $200 per hour. Further, Attorney Lavella billed 1.6 hours for filing two briefs; the Court agrees with the Defendants that this time spent on clerical tasks should not be compensated. The Court thus reduces the compensable time for Attorney Lavella by 27.6 hours.[5] This reduces Attorney Lavella's compensable time to 53.3 hours.

Similarly, Attorney O'Ryan's time needs to be adjusted. There are five entries noted on her Billing Log for reviewing and calendaring certain items that took more than .1 hour. The Court does not believe that it should take Attorney O'Ryan more than six minutes for such routine tasks. The Court thus reduces each of these "calendaring" entries to .1 hour. Accordingly, 0.9 hours are reduced for those entries on 10/3/2012, 11/19/2012, 11/19/2012, 5/17/2013, and 5/22/2013.[6]

Next, Attorney O'Ryan requests 21.7 hours for preparing her attorneys' fees motion and reply brief. The Court finds this amount to be excessive. Most of the initial seven-page motion is standard language that Attorney O'Ryan likely uses—appropriately so—in all of her attorneys' fees motions. Similarly, much of the Reply brief simply quotes portions of the Court's summary judgment Entry. The Court thus reduces the amount spent on the fee motion and corresponding briefs by 11.7 hours. This reduces Attorney O'Ryan's compensable time to 123.9 hours.

Finally, the Defendants object to the hourly rate requested by Attorney Lavella—$195 per hour—arguing that it is unreasonable. Here too, the Defendants suggest a more appropriate

[5] 26 hours represents roughly half of the amount of time Attorney Lavella spent reviewing medical records and drafting and editing the statement of facts.

[6] There are other entries that indicate Attorney O'Ryan billed for "calendaring"; however, these are lumped together with, for example, "conference[ing] with client." *See, e.g.*, dkt. no. 64-1 (entry on 11/19/2012).

figure: $145 per hour "based on his level of experience." Defs.' Response at 8. It is unclear to the Court where the $145 per hour figure comes from, as the Defendants have submitted no evidence that other third-year attorneys charge $145 per hour, or some other lower rate for similar type work. That said, in 2013, two courts found hourly rates of $185.45 and $186.03 respectively to be reasonable for Attorney Lavella's work in two social security cases. *See Jamerson v. Colvin*, No. 1:12-cv-01147-RLY-TAB, 2013 WL 6119245 (S.D. Ind. Nov. 21, 2013); *DeHart v. Colvin*, No. 1:12-cv-00861-MJD-SEB, 2013 WL 6730736 (S.D. Ind. Dec. 19, 2013). Accordingly, the Court finds $185 per hour to be a reasonable hourly rate for Attorney Lavella for the work he performed in 2013 on Ms. Hannon's case.

For the foregoing reasons, the Plaintiff's Motion for Attorney Fees and Costs (dkt no. 64) is **GRANTED** in the amount of $54,880.27: $43,365[7] for work performed by Attorney O'Ryan; $9,860.50[8] for work performed by Attorney Lavella; $1,150.50 for work performed by the paralegal, Maribeth Essig; and $504.27 in costs. **The award shall be paid within thirty days of this Entry.**

SO ORDERED: 08/06/2014

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Copies to all counsel of record via electronic notification

[7] 123.9 hours times the hourly rate of $350.
[8] 53.3 hours times the hourly rate of $185.