

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW CARNEY : CIVIL ACTION
 :
v. :
 :
INTERNATIONAL BROTHERHOOD :
OF ELECTRICAL WORKERS LOCAL :
UNION 98 PENSION FUND, et al. : No. 00-6270

MEMORANDUM AND ORDER

J. M. KELLY, J.

MAY , 2002

Presently before the Court are Cross-Motions For Summary Judgment filed by the Plaintiff, Andrew Carney and Defendants, International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link and William C. Rhodes (collectively “Defendants”). Plaintiff also seeks to strike two affidavits submitted by Defendants and urges this Court to grant sanctions on the basis that Defendants submitted these affidavits in bad faith. This lawsuit arises out of Defendants’ denial of Disability Retirement Benefits to Plaintiff who alleges Defendants violated various sections of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § § 1001-1276 (1994).

BACKGROUND

The Plaintiff has been a fully vested participant in the International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan (“Plan”) since 1962. In July of 1991, Plaintiff suffered a laceration of his right hand which prevented him from performing the duties of an electrician. He received workers compensation benefits as a result and has not

worked since then. On June 18, 1996, he submitted to the Defendants an application for Disability Retirement Benefits (“Benefits”) under the Plan. To satisfy an eligibility requirement under the Plan,¹ Plaintiff underwent a medical examination on August 30, 1996 with Dr. Michael H. LeWitt, M.D. (“Dr. LeWitt”), the physician designated by the Trustees of the Plan (“Trustees”) to examine participants applying for disability benefits. Dr. LeWitt concluded the Plaintiff was permanently disabled² and communicated his conclusions to the Trustees by letter, dated August 30, 1996. As a result, Plaintiff met all of the eligibility requirements under the Plan and awaited final approval by the Trustees.

The Trustees deferred review of Plaintiff’s application several times and so notified Plaintiff. While the application was pending, however, the Trustees amended the Plan on May

¹Section C. Eligibility for Disability Retirement Benefits states:

(1) An Employee who (a) is, in the opinion of at least one qualified physician (designated by the Trustees), totally and permanently disabled by bodily injury or disease, so as to be unable to engage in any employment of the type provided by a Covered Employer, that is the major or basic tasks performed by a competent journeyman electrician, or qualifies as disabled for purposes of receiving federal social security long-term disability benefits; and (b) is not engaged in regular employment or occupation for remuneration or profit in the electrical construction industry; and (c) has reached his thirtieth (30th) birthday; and (d) has earned a minimum of five (5) years of Credited Future Service and/or Credited Service for Vesting Pursuant to Section A of this Article II, shall be eligible to receive a disability retirement benefit.

² Dr. LeWitt wrote:

On examination, he has weakness of the right hand, with demonstrated loss of muscle, and neurologic damage to the right hand. Because of this injury and subsequent problems with his hand, he is disabled from working as a construction electrician. Based on the time interval since injury, and my findings at present, I believe he is permanently and totally disabled within the definition provided to me, by the [International Brotherhood of Electrical Workers].

22, 1997, revising the eligibility requirements for disability benefits (“Amendment ”). Under the amended Plan, Plan participants no longer had to be certified disabled by a Plan physician. Rather, Plan participants had to qualify for Federal Social Security Disability Insurance Benefits (“S.S. DIB”) in order to be eligible for Plan Benefits. On July 3, 1997, almost a year after the Plaintiff first applied for his Benefits, the Trustees denied his claim, citing the new requirement under the amended Plan. Plaintiff appealed the Trustees’ decision but they denied his appeal on December 12, 1997. Plaintiff subsequently applied for S.S. DIB as required under the amended Plan but was denied on August 19, 1999. On November 15, 1999, Plaintiff, through counsel, requested that the Trustees reconsider his denial. On June 19, 2000, the Trustees, through counsel, denied Plaintiff’s request, citing Plaintiff’s failure to qualify for S.S. DIB.

On December 12, 2000, Plaintiff filed this Complaint under the following provisions of ERISA: (1) Count I, alleging breach of fiduciary duty under 29 U.S.C. § 1104(a); (2) Count II, alleging failure to provide requested documents under 29 U.S.C. § 1024(b); and (3) Count III, challenging the denial of his Benefits under 29 U.S.C. § 1132(a)(1)(B). Defendants answered and by way of defense, asserted that Plaintiff concealed relevant medical information during the initial examination by Dr. LeWitt. To support this defense, Defendants filed a Motion on June 20, 2001 seeking to compel Plaintiff to undergo a physical examination. On October 17, 2001 this Court denied Defendants’ Motion to compel and awarded reasonable attorney fees to Plaintiff. The parties now come before the Court seeking summary judgment on all counts.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether “the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant’s favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment “after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

DISCUSSION

Evidentiary Scope under Arbitrary and Capricious Standard of Review

Courts reviewing claims challenging the denial of benefits under ERISA are restricted to the “arbitrary and capricious” standard when the trustee has discretionary authority under the

plan to construe the terms of the plan or to determine the eligibility for benefits.³ Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 (1989). This is the same as an “abuse of discretion” standard. Id. The arbitrary and capricious standard of review applies to both plan interpretation and factual determinations. Mitchell v. Eastman Kodak Co., 113 F.3d 433, 438 (3d Cir. 1997). Where the trustee had discretion, a breach of fiduciary duty claim is also be determined under the arbitrary and capricious standard. Moench v. Robertson, 62 F.3d 553, 565-66 (3d Cir. 1995).

“Under the arbitrary and capricious standard, the court must defer to the administrator of an employee benefit plan unless the administrator's decision is clearly not supported by the evidence in the record or the administrator has failed to comply with the procedures required by the plan.” Abnathya v. Hoffman-La Roche, Inc., 2 F.3d 40, 41 (3d Cir. 1993). The court’s scope of review is narrow, and “the court is not free to substitute its own judgment for that of the [administrator] in determining eligibility for plan benefits.” Id. at 45 (citations omitted).

Given the deferential standard of review, district courts are to “look to the record as a whole,” which “consists of evidence that was before the [trustee] when he or she made the

³There is no dispute here that the Plan grants the Trustees discretion to administer and interpret the Plan. Article V, Section A(1) of the Plan provides:

The Trustees shall make [] rules and establish [] regulations for the administration of the Plan as they shall deem necessary and reasonable....the Trustees have the exclusive right and discretion to interpret the Plan, to construe the terms and decide all questions arising in the administration and operation of the Plan, including but not limited to all questions of eligibility and status under the Plan. Any such interpretations or decisions of the Trustees so made shall, be conclusive and binding on all persons; provided, however, that all such interpretations and decisions shall be applied in a uniform manner to all Employees similarly situated.

decision being reviewed” when determining whether the actions of the trustees were arbitrary and capricious. Mitchell, 113 F.3d at 440. This means evidence outside of the administrative record not considered by the trustees is inadmissible. The purpose of this so-called “whole record rule” is to encourage communication between the plan administrators and beneficiaries so that the parties will fully utilize the administrative process and attempt to resolve conflicts before initiating litigation. See Vega v. National Life Ins. Services, Inc., 188 F.3d 287, 299-300 (5th Cir. 1999).

Motion to Strike Affidavits of Dr. LeWitt and Sara Kelly

Before addressing the merits of each count, the Court will first address Plaintiff’s request to strike two affidavits Defendants submitted under Federal Rule of Civil Procedure 56(e). The first is an affidavit by Dr. LeWitt, the Plan Doctor who originally diagnosed Plaintiff as disabled and the second is an affidavit by Sara Kelly, a full-time employee of the service provider engaged to perform contract administrative services for the Fund. Plaintiff also seek sanctions, arguing these affidavits violate Rule 56(e), this Court’s October 17, 2001 Order, which denied Defendants’ Motion to compel, and this Court’s Scheduling Order.

Admissibility

Affidavits submitted with Rule 56 motions must be admissible. Rule 56(e) states, “affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence.” Dr. LeWitt’s affidavit is not admissible. First, the third statement contained in the affidavit is speculative and non-probative as to the Defendants’ fraud defense. Moreover, as discussed above and in this Court’s October 17, 2001 Order, the evidentiary scope of this case is clear. Under the arbitrary and capricious standard, the Court may only review the

record before the Trustees at the time they made their decision. There is no evidence that the statements contained in the affidavit were considered by the Trustees at the time of denial. Similarly, Defendants have provided no evidence that the Trustees relied on the facts attested to by Sara Kelly in making their decision. Sara Kelly's affidavit is therefore also stricken.

Sanctions under 56(g)

Plaintiff seeks sanctions under Federal Rule of Civil Procedure 56(g) in connection with Defendants' attempt to submit the above discussed affidavits. Rule 56(g) states:

Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Although this Court's October 17th 2001 Order outlined the proper standard of review and the applicable evidentiary scope of this case, the Court will allow the Defendants the benefit of doubt and decline to award attorney fees as it is not entirely clear that Defendants submitted these affidavits in bad faith.

Count III - Denial of Benefits

Plaintiff challenges the denial of his Benefits under 29 U.S.C. § 1132(a)(1)(B), which allows beneficiaries to bring civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." In determining whether the Trustees' decision to deny benefits was arbitrary and capricious, the Court must begin with the Plan itself, since an ERISA plan

administrator must "discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." Mitchell, 113 F.3d at 439.

The essential facts of this case are not in dispute. Plaintiff met all of his eligibility requirements under the Plan at the time he applied for his Benefits in June 1996, waiting only final approval by the Trustees. The Trustees deferred reviewing Plaintiff's application and while Plaintiff's application was pending, the Trustees amended the Plan to require future applicants to successfully obtain S.S. DIB. It is undisputed that Plaintiff failed to obtain S.S. DIB, making him ineligible under the amended Plan.

Subject to the limitation under ERISA, the Trustees had the discretionary authority⁴ to amend the Plan.⁵ Plaintiff does not challenge the Trustees' right to amend the Plan nor the

⁴ Article VI Section A of the Plan states:

The Trustees may at any time or times modify, alter, or amend the Pension Plan in any respect, retroactively or otherwise; provided, however that the intent of the Pension Plan is that at all times the Trust Fund will conform to all applicable laws, including, but not limited to, the requirements of ERISA and of the Labor Management Relations Act of 1947...) No modification, alteration or amendment shall adversely affect any retirement benefit being paid to any Retired Employee...

⁵ Defendants cite as a reason for deferring review of Plaintiff's claim, their concerns with the liberal requirements of the Plan as it existed at the time of Plaintiff's initial application. The evidence tends to show that Defendants did in fact have such concerns and these concerns did motivate the discussions during the Trustees meetings on amending the Plan and the ultimate decision to amend the Plan. Based on the belief that Dr. LeWitt seemed to certify all applicants sent to him as disabled, the Defendants claim they deferred review of Plaintiff's claim because Dr. LeWitt's recommendation was unreliable. Although such concerns may be legitimate reasons for amending the Plan or even perhaps appointing a new physician, the decision to amend the Plan is distinct and separate from the Trustees' decision to defer review of an application that plainly met the eligibility requirements under the Plan in effect at the time of application. As discussed more fully below, the Defendants should have

validity of the Amendment. The issues are whether the Trustees abused their discretion by deferring review of an application, which plainly met all of the eligibility requirements at time of application, and whether the denial of benefits resulting from the Trustees's retroactive application of a new eligibility requirement to the applicant violates ERISA.

The Deferral

The Trustees violated ERISA and failed to abide by their own Plan Procedures while deferring review of Plaintiff's claim. Section H(1) of the Plan which governs the Claims Procedure, states that Trustees are to review the application "[w]ithin 90 days . . . or notify the claimant that additional time is needed, explain the reason for the extension, and indicate when a decision on the claim will be made, which must be within 180 days of the date claim is filed." The Trustees, therefore, were under a duty to timely review claims for benefits. Section H(2) further provides:

A denial by the Trustees of a claim for benefits shall be stated in writing and delivered or mailed to the claimant, written in a manner calculated to be understood by the claimant without benefit of legal or actuarial counsel. The notice shall include specific reference to the Plan provisions on which the denial is based and a description of any additional material or information necessary to perfect the claim, an explanation of why this material or information is necessary, and the steps to be taken if the claimant wishes to submit his claim for review.

Section H of the Plan is consistent with the requirements under ERISA and the guidelines which provide that a claim of denial is to be in writing which sets forth the specific reasons for denial.

See Skretvedt v. E.I. Dupont de Nemours and Co., 268 F.3d 167, 178 n.8 (3d Cir. 2001) (citing

further investigated Dr. LeWitt's medical conclusions if they felt his opinions were unreliable. Instead, they merely relied on their suspicions. Defendants' failure in this regard is particularly peculiar considering that Dr. LeWitt is the Plan's chosen physician.

29 U.S.C. § 1133(1) and 29 C.F.R. § 2650.503-1(g)(2001)).⁶

The purposes behind these rules dealing with notice are to encourage prompt review of claims and communication between the applicants and the plan administrator which will facilitate rational decision-making. See Booton v. Lockheed Med. Benefit Plan, 110 F.3d 1461, 1463 (9th Cir. 1997) (explaining that ERISA regulations call for a “meaningful dialogue” and that if “more information is needed to make a reasoned decision, [the plan administrators] must ask for it”) . Here, the Trustees’ actions defeated all of these purposes, ultimately resulting in an arbitrary and capricious decision to deny Plaintiff his Benefits.

Carney’s June application was presented to the Trustees on November 7, 1996. At this time, the Trustees decided to defer review of Carney’s application. The first notice of deferral, dated December 20, 1996, simply stated the need for “further review.” No specific grounds for the deferral were indicated nor did the Trustees ask Plaintiff for more information. On May 7, 1997, the Trustees sent another letter of deferral, citing “review by the Trustees of the Plan’s procedures regarding disability pension applications.” On May 22, 1997, the Trustees amended the Plan and made the decision to retroactively apply the Amendment to pending applications, including Carney’s. These notice letters do not come close to the specificity required under ERISA. Moreover, the Defendants failed to review Carney’s claim in a reasonably timely manner, finally making a decision almost a year after Carney’s initial application.

Defendants offer as a reason for the deferrals, their fiduciary duty to investigate

⁶ The claims procedure and ERISA sections referring to denial notices are equally applicable to deferral notices because the deliberate deferral of Carney’s application ultimately led to the denial of his benefits.

suspicious applications. The Court agrees with Defendants that as fiduciaries of the Plan, they should have further investigated Plaintiff's applications if they had concerns about its legitimacy.⁷ It is precisely one of the reasons ERISA requires Trustees to specifically spell out the reasons for their decisions. An applicant who is under the impression that he or she has met all the eligibility requirements under the Plan is not likely to provide further information unless the Trustees specifically ask for it. Only with the necessary information can the Trustees make a rational decision. Unfortunately, the Defendants here failed to communicate with Plaintiff and as a result, failed to properly investigate the merits of Carney's claim in a timely manner. Instead, they waited to amend the Plan and summarily rejected Plaintiff's claim, citing the new requirement under the Amendment.

The Decision to Deny

In effect, by retroactively applying the Amendment to Carney's pending claim, the Trustees changed the eligibility requirements on Carney after he put in an application which clearly satisfied the eligibility requirements for disability benefits at the time of his application. This type of action violates ERISA. See Brug v. Pension Plan of Carpenters, 669 F.2d 570 (9th Cir. 1982). Because the retroactive application of the Amendment to Carney's pending claim violates ERISA, the Court will review Carney's claim under the original plan requirements which were in effect at the time of his initial application in June of 1996.

⁷ Defendants did not communicate or investigate any of their suspicions. During the period of deferral, Defendants never once asked Plaintiff for more information nor acted to gather more information from Dr. LeWitt, whose diagnosis they now attempt to discredit. In fact, on March 6, 2000, after the Amendment and during the final appeal, the Defendants finally asked for medical releases from Plaintiff. There is, however, no evidence the Defendants actually sought out any more medical records before making the final decision to deny Carney his disability benefits.

The general rule is that where there was an appeal, the whole record is at time of final denial. Mitchell, 113 F3d at 440. Here, however, because of the change in the eligibility requirements between the time of initial application and the final denial, the record changed to include a S.S. DIB Report (“Report”) by an administrative judge which denied Plaintiff’s application for S.S. DIB. The Court will exclude this Report from its review because the Defendants improperly based their final decision to deny, partly on this Report. The only reason this Report is part of the administrative record is because of the Defendants’ arbitrary delay in reviewing the merits of Carney’s claim.⁸

The Trustees admit that Carney met all of the eligibility requirements pre-Amendment. They argue, however, that even when all of the eligibility requirements are met, the Trustees have the discretion to deny benefits. The Trustees do have discretion, but not unfettered discretion which results in an arbitrary and capricious decision. Rather, their decisions must be grounded on some evidence, not mere unfounded suspicions. Vega, 188 F.3d at 302. Furthermore, the Defendants will not be excused by offering post hoc reasons never communicated to Plaintiff. See Skretvedt, 268 F.3d at 177 (finding justifications to be post hoc because they were never offered to applicant following the denial of his initial claim or his appeal).⁹

⁸ In the alternative, even if it was proper to consider the facts contained in the S.S. DIB Report, the Trustees should have granted Carney his disability benefits under the original Plan. The administrative judge denied Carney S.S. DIB because Carney also suffers from drug and alcohol problems and bipolar disorder. The judge, however, found that Carney could not perform the job of an electrician which, rather than contradicting the opinion rendered by Dr. LeWitt in 1996, supports a finding of disability under the Plan.

⁹In footnote 8, the Skretvedt Court strongly disapproved of post hoc rationales, stating: The Board's failure to provide Skretvedt with reasoned explanations for why it denied his disability claims or information on what evidence he could present to

The Defendants offer the following reasons for their decision to defer and ultimately deny Carney his benefits: (1) the inadequacy of Dr. LeWitt's medical conclusions due to Plaintiff's alleged failure to provide complete medical information; (2) the Trustees' belief that Plaintiff's disability could be cured by surgical procedure based on knowledge of others who had carpal tunnel, had surgery and were able to return to work; and (3) one Trustee's suspicion that Plaintiff could work because he saw Carney at some point working as a pusher. None of these reasons, however, were ever communicated to Plaintiff, neither in his deferral notice letters nor in his denial letters. Moreover, Defendants did not investigate these matters nor ask Plaintiff for more information to ascertain whether in fact Plaintiff could be cured by surgery. Therefore, the Court finds Defendants' proffered reasons to be post hoc rationalizations.

Lastly, the Defendants' request for a remand to the Trustees is denied. The Trustees had more than four years to gather the relevant information instead of relying on mere suspicions.

improve his claims raises policy concerns that underlie the notice requirements that ERISA places on pension and benefit review boards. Specifically, the review boards must give reasons to applicants for denying their claims so that: (1) applicants may clarify their application on appeal; and (2) federal courts may exercise an informed and meaningful review of the pension boards' decisions.

The Third Circuit went on to agree with the Sixth Circuit, citing University Hosp. of Cleveland v. Emerson Elec. Co., 202 F.3d 839 (6th Cir. 2000) where the court explained:

it strikes us as problematic to, on one hand, recognize an administrator's discretion to interpret a plan by applying a deferential "arbitrary and capricious" standard of review, yet, on the other hand, allow the administrator to "shore up" a decision after-the-fact by testifying as to the "true" basis for the decision after the matter is in litigation, possible deficiencies in the decision are identified, and an attorney is consulted to defend the decision by developing creative post hoc arguments that can survive deferential review.... To depart from the administrative record in this fashion would, in our view, invite more terse and conclusory decisions from plan administrators, leaving room for them--or, worse yet, federal judges--to brainstorm and invent various proposed "rational bases" when their decisions are challenged in ensuing litigation.

See Vega 188 F.3d at 302 n. 13 (remand denied where the administrator relied on unfounded suspicions and failed to gather relevant information for the record before litigation). Because the Trustees acted in an arbitrary and capricious manner in delaying Plaintiff his Benefits for over four years, the Trustees' decision to deny Carney his Benefits is reversed.¹⁰

Count I - Breach of Fiduciary Duty

Plaintiff also asserts a breach of fiduciary duty claim against the individual Trustees under Count I. See 29 U.S.C. § 1104(a) (describing fiduciary duties of ERISA plan trustees). Relief for § 1104 violations, however, is equitable. Under 29 U.S.C. § 1132(a)(3), a participant may bring suit "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." In certain cases, equitable relief may include monetary recovery. See Ream v. Frey, 107 F.3d 147, 152-153 n.5 (3d Cir. 1997). The Third Circuit, however, cautioned that "[w]here Congress otherwise has provided for appropriate relief for the injury suffered by a beneficiary, further equitable relief ought not to be provided. See Ream, 107 F.3d at 147 (discussing Varity Corp. v. Howe, 516 U.S. 498 (1996) where the Supreme Court specifically noted the catch-all nature of § 1132(a)(3) and cautioned against its expansion). The Ream Court further opined, in "a

¹⁰ Section C of the Plan further provides, "An employee who has qualified for such disability retirement benefit shall submit such evidence of continuing and total and permanent disability as may be required by the Trustees from time to time, but, after the first full year of disability, not more frequently than annually." The Court expresses no views on whether Carney could have shown evidence of continuing permanent disability during the last four years nor whether he will be able to show evidence of continuing permanent disability in the future. The Court trusts that the Trustees will fulfill their fiduciary duties by acting in good faith and applying the terms of the Plan in a fair and rational manner in light of this opinion.

case which an individual plan beneficiary charges a fiduciary with a breach of fiduciary duties with respect to a functioning plan . . . it might be inappropriate to permit a beneficiary to seek personal relief” under 1132(a)(3). Id.

Here, Plaintiff has obtained full relief under § 1132(a)(1)(B) for the wrongful denial of his Benefits. Therefore, although the Trustees in this case have clearly breached their fiduciary duties, relief under § 1132(a)(3) is unnecessary. Accordingly, Count I is dismissed.

Count II - Failure to Provide Documents

Plaintiff also seeks statutory penalties¹¹ under Count II, alleging failure to provide requested documents¹² in violation of 29 U.S.C. § 1024(b), § 104 of ERISA. Section 104(b)(4)

¹¹ 29 U.S.C. § 1132(c) provides that the penalty for failure to comply with § 104 is:

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

¹² The Plaintiff seeks the following maximum statutory penalties as a result of Defendants' delay in forwarding some documents and complete failure to forward others. The Trust agreement was provided 22 days late which results in a maximum statutory penalty of \$2,200.00. The delay in providing minutes of trustee meetings, requested on 9/3/98 and provided during discovery on 5/24/01, was calculated at 993 days, resulting in a maximum penalty of \$99,300. The actuarial reports were never provided.

states, “The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.” Defendants do not dispute the essential elements of Plaintiff’s § 1024 claim. Rather, Defendants argue the Court should not award penalties because: (1) Defendants responded in good faith; (2) Plaintiff failed to vigorously pursue the document requests; and (3) Plaintiff was not harmed or prejudiced by the lateness or failure to receive the documents.

The court has discretion whether to award statutory penalties for § 1024(b) violations. Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1148 (3d Cir. 1993). Although no harm need be shown, courts have either reduced the amount of penalty or declined to award penalties where no prejudice or intentional misconduct was shown. See Conowall v. General Instrument Corp. Pension Plan, Civ. A. No. 87-7976, 1989 WL 79800 *3-4 (E.D. Pa. July 7, 1989); Ahern v. Kencor, Inc., Civ. A. No. 97-295, 1998 WL 47272 *3 (E.D. Pa. Feb. 5, 1998). The facts show Plaintiff did not vigorously pursue his request for the documents at issue. Moreover, Plaintiff alleges neither harm nor prejudice from Defendants’ § 1024(b) violations. Accordingly, the Court declines to award statutory fines in this case.

IN THE UNITED STATES DISTRICT COURT
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ANDREW CARNEY : CIVIL ACTION
v. :
INTERNATIONAL BROTHERHOOD :
OF ELECTRICAL WORKERS LOCAL :
UNION 98 PENSION FUND, et al. : No. 00-6270

ORDER

AND NOW, this day of May, 2002, in consideration of the Cross-Motions For Summary Judgment filed by the Plaintiff, Andrew Carney (Doc. No. 19), and Defendants, International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link and William C. Rhodes (Doc. No. 20), and the responses thereto, it is **ORDERED**:

1. Plaintiff's Motion to strike Affidavit of Dr. LeWitt and Sara Kelly is **GRANTED**. The Affidavits are **STRICKEN**.
2. Plaintiff's Motion for Sanctions under Federal Rule of Civil Procedure 56(g) is **DENIED**.
3. Defendants' Motions for Summary Judgment as to Count I and II of the Complaint are **GRANTED**. Plaintiff's Motions for Summary Judgment as to Count I and II of the Complaint are **DENIED**.
 - A. Judgment is **ENTERED** in favor of Defendants, Scott Ernsberger, John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link and William C. Rhodes and against Plaintiff on Count I and II of the Complaint.

4. Plaintiff's Motion for Summary Judgment as to Count III is **GRANTED**. Defendants' Motion for Summary Judgment as to Count III is **DENIED**.

A. Judgment is **ENTERED** in favor of Plaintiff and against Defendant International Brotherhood of Electrical Workers Local Union 98 Pension Fund on Count III of the Complaint.

B. Defendant International Brotherhood of Electrical Workers Local Union 98 Pension Fund is **ORDERED** to commence payment of Disability Retirement Benefits to the Plaintiff, Andrew Carney. Defendant is further **ORDERED** to pay Plaintiff all back due and owing Disability Retirement Benefits, plus interest, based on his application of June 1996.

5. The Clerk of the Court is **DIRECTED** to mark this case as **CLOSED**.

BY THE COURT:

JAMES MCGIRR KELLY, J.