NO. 18A751 ORIGINAL

THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JAN 15 2019
OFFICE OF THE CLERK

TIMOTHY P. O'LEARY

Applicant-Plaintiff,

v.

AETNA LIFE INSURANCE COMPANY

Respondent-Defendant.

Application for an Extension of Time to File Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

To the Honorable Clarence Thomas
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eleventh Circuit

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APPLICATION FOR AN EXTENTION OF TIME TO FILE PETITION FOR A WRIT OF CERIORARI

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Pursuant to this Court's Rule 13.5, Application Timothy P. O'Leary respectfully requests a 59-day extension of time, to and including Friday, March 29, 2019, within which to file a petition for a writ of certiorari in this case. The judgement sought to be review is the decision of the United States Court of Appeals for the Eleventh Circuit in *O'Leary vs Aetna* (attached as Exhibit A). The Eleventh Circuit issued its decision, on October 1, 2018. The court denied a timely filed petition for rehearing and rehearing en banc, on October 31, 2018 (attached as Exhibit B). Pursuant to this Court's Rules 13.1, 13.3 and 30.1, a petition for certiorari would be due on January 29, 2019. This application is made a least 10 days before that date. This Court's jurisdiction would be invoked under 28 U.S.C. 1254(1).

SUMMARY

This case cleanly presents an exceptionally important issue of law under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1133 and 29 C.F.R. § 2560.503-1, which have divided the courts of appeals and caused confusion in lower courts across the nation.

Although the instant case is non-precedential, this Court has granted certiorari before on important unpublished opinions. In *Muhammad v. Close*, 540 U.S. 749 (2004), the **Supreme Court reversed an unpublished decision** that was flawed "as a matter of law" because the opinion took what the Supreme Court regarded as the wrong side of a circuit split. (Id. at 754) and "was flawed as a matter of fact" suggesting that the facts were neither clear nor straightforward. O'Leary asserts this Court will find these same flaws exist in the Opinion in the instant case also.

BACKGROUND

1. Under ERISA, administrators bear strict fiduciary duties of prudence. The ERISA 2000 final regulations that were issued on Nov. 21, 2000, recorded in 65 FR 70245, the Department of Labor (DOL) stated:

   "The proposal contained a provision setting forth the Department's view of the consequences that ensue when a plan fails to provide procedures that meet the requirements of section 503 as set forth in regulations...**The Department's intentions** in including this provision in the proposal were to clarify that the **procedural minimums of the regulation are essential** to procedural fairness and that **a decision made in the absence of the mandated procedural protections should not be entitled to any judicial deference.**" (emphasis added)

2. In the instant case, Applicant-Plaintiff Timothy P. O'Leary asserts the Respondent-Defendant Aetna failed to adhere and comply with ERISA statute and regulations textual requirements, such as, but not limited to, not providing a "full and fair review" of "all documents" that were "relevant" and submitted "by the claimant" to be reviewed by "a qualified healthcare professional", as required by 29 U.S.C. § 1133(2), 29 C.F.R. § 2560.503-

1(h)(2)(iv), 29 U.S.C. § 2560.503-1(h)(3)(iii) & 29 C.F.R. § 2560.503-1(m)(8).

a. Aetna's failure to adhere and comply with the textual requirements of ERISA statute and regulations resulted in violation of the protections Congress and the DOL intended to provide for participants and beneficiaries.

b. O'Leary asserts many compliance failures occurred. One example of these failures of not providing a "full and fair review" on "all documents" by a "qualified healthcare professional" is admitted by Aetna's own neurological peer review doctor (Dr. Heydebrand) report:

> "An assessment by R. Holloway, Ed.D. On 9/16/2015 for disability indicates administration of the Weschsler Memory Scale III. **Only 1 page of the report could be located in the file**; no test results or conclusions from the report were available for review". (emphasis added)

c. It is undisputed that Dr. Holloway's full neurological report is in the record and "relevant", which included test results and conclusions.

d. The Opinion states that this report did not support O'Leary's disability under the "Any Reasonable Occupation" because it only talked about his previous "Own Occupation".

e. O'Leary's arguments why the report was "relevant", important and how it supported disability under the "Any Reasonable Occupation" definition was not noted in the Opinion. O'Leary argued and quoted that Aetna researched and concluded that O'Leary would not be able to perform "Any Reasonable Occupation" (aka "alternate occupations") that were "associated" with his previous employment due to his

confirmed disabilities and his minimum salary requirement (which is undisputed to be $99,313.88 as of 2015) thus entitling him to benefits according to his disability contract terms.

f. The Eleventh Circuit concluded in its Opinion that there is evidence that supports O'Leary's claim of disabilities and "entitled to benefits", but further states that since Aetna had discretion over the claim, Aetna was "entitled to rely on the surveillance evidence and the assessments...by independent physicians who reviewed...medical files" making Aetna's decision "not arbitrary and capricious". The Eleventh circuit then supports its decision by quoting binding precedent. *Turner v. Delta-Care Disability & Survivorship Plan*, 291 F.3d 1270, 1274 (11th Cir. 2002):

> "concluding that administrator's decision that claimant was no longer eligible for benefits was not arbitrary and capricious when it relied on, among other evidence, surveillance reports."

g. With this decision, the Eleventh Circuit concluded that fiduciary discretionary authority and deference outweighed fiduciary adherence and compliance to ERISA statute and regulations textual requirements.

h. The Opinion failed to mention O'Leary's conflicting arguments and conflicting binding precedent that proved Aetna's decision was "arbitrary and capricious". *Oliver v. CocaCola Company*, 497 F.3d 1181, 1199 (11th Cir.), vacated in non-pertinent part 506 F.3d 1316 (11th Cir. 2007):

"An ERISA defendant acts arbitrarily and capriciously when it "rel[ies] on [a] flawed peer review as a basis for denying [plaintiff's] benefits claim" and "fail[s] to review relevant medical evidence that support[s] [plaintiff's] claim."

i. To be sure, in making this decision the Eleventh Circuit exposed a circuit split when it went contrary to every other circuit that has addressed this situation. See: *Michaels v. The Equitable Life Assurance Soc'y of the United States Employees, Managers, and Agents Long-Term Disability Plan*, 305 F. App'x 896 (3d Cir. 2009), *Salley v. E. I. DuPont de Nemours & Co.*, 966 F.2d 1011 (5th Cir. 1992), *Spangler v. Lockheed Martin Energy Systems, Inc.*, 313 F.3d 356, 362 (6th Cir. 2002), *Moon v. Unum Provident Corp.*, 405 F.3d 373, 379 (6th Cir.2005), *Hess v. Hartford Life & Acc. Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001), *Taft v. Equitable Life Assur. Soc.* (9th Cir. 1993) 9 F3d 1469, 1472, *Caldwell v. Life Insurance Co. of North America*, 287 F.3d 1276, 1282 (10th Cir. 2002).

j. The Eleventh Circuit decision also went against guidance from this Court: *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 385 (2002) & *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)):

"[I]n determining whether state procedural requirements deprive plan administrators of any right to a uniform standard of review, it is worth recalling that ERISA itself provides nothing about the standard. It simply requires plans to afford a beneficiary some mechanism for internal review of a benefit denial, 29 U.S.C. § 1133(2), and provides a right to a subsequent judicial forum for a claim to recover benefits, § 1132(a)(1)(B). **Whatever the standards for reviewing benefit denials may be, they cannot conflict with anything in the text of the statute,** which we have read to require a uniform judicial regime of categories

of relief and standards of primary conduct, **not a uniformly lenient regime of reviewing benefit determinations.**" (emphasis added)

k. The Second Circuit enforces fiduciaries to comply with ERISA statute and regulations, with consequences on failure to comply. *Halo v. Yale Health Plan*, 2016 WL 1426291 (2d Cir. Apr. 12, 2016):

"...deviations should not be tolerated lightly. Accordingly, we hold that, when denying a claim for benefits, **a plan's failure to comply with the Department of Labor's claims-procedure regulation, 29 C.F.R. § 2560.503-1, will result in that claim being reviewed de novo in federal court**, unless the plan has otherwise established procedures in full conformity with the regulation and can show that its failure to comply with the claims-procedure regulation in the processing of a particular claim was inadvertent and harmless." (emphasis added)

l. Due to the Eleventh Circuit Opinion basing its decision on the panel's precedent, O'Leary filed a Petition for Rehearing & Petition for Rehearing En Banc on 10/19/2018 hoping to resolve the conflict between the two conflicting binding precedents. Instead of rehearing the case to straighten out this matter internally, the panel denied the Petition for Rehearing & Petition for Rehearing En Banc on 10/31/2018 (attached as Exhibit B). O'Leary asserts that this denial confirms that the Eleventh Circuit and panel believed that its Opinion was correct and that the panel's precedent (based on discretionary authority and deference reasoning) was prevailing over O'Leary's argument and precedent (based on compliance with statute and regulations reasoning).

m. The Eleventh Circuit has accordingly diverged from its sister circuits on this critical question. It has thereby undermined the national uniformity of law in ERISA cases.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicant respectfully requests a 59-day extension of time, to and including Friday March 29, 2019, to prepare a petition for a writ of certiorari on the important question presented by this case.

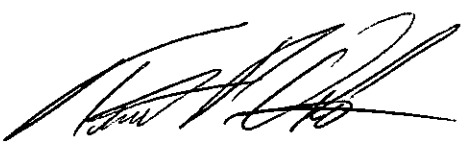
1. An extension of time is warranted because Applicant is disabled and is filing *pro se* with these additional considerations, which include:
    a. Pursuant to Judicial Conference policy, federal courts provide reasonable accommodations to persons with communications disabilities. In the spirit of that policy, O'Leary asks that his neurological disability be considered and that the Court consider this extension of time as a "reasonable accommodation".
    b. Volunteers (which O'Leary refers to as his "disability support group" in previous filings) assist O'Leary in research and the creation of documents, including this filing. Their assistance is necessary to create filings acceptable for this Court, but their time and availability is limited.

2. No prejudice would arise from granting this extension. If this Court ultimately grants the petition, it will in all likelihood hear oral arguments and issue its opinion in the October 2019 term regardless of whether an extension is granted.
3. Under these circumstances, the requested extension is warranted to allow O'Leary to proceed as *pro se* with his volunteer group of helpers to adequately and properly prepare a petition on the important question presented by this case.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests a 59-day extension of the time to file a petition for certiorari, to and including March 29, 2019.

Respectfully Submitted,



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January 15, 2019