

No. 19-A-_____

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS P. KELLY JR.,

Petitioner-Plaintiff

v.

THE PENN MUTUAL LIFE INSURANCE COMPANY, and
RELIANCE STANDARD LIFE INSURANCE COMPANY

Respondent(s)-Defendant(s)

**APPLICATION FOR EXTENSION OF TIME TO
FILE PETITION FOR A WRIT OF CERTIORARI**

Dated: June 13, 2019

KELLY LAW OFFICES, LLC
THOMAS P. KELLY III
3000 Atrium Way, Suite 291
Mount Laurel, NJ 08054
(609) 261-6100

tom@tpkelly.com

Attorneys for Applicant/Petitioner
Counsel of Record

**TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE
THIRD CIRCUIT:**

APPLICATION FOR AN EXTENSION OF TIME

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Thomas P. Kelly Jr. hereby requests a 60-day extension of time within which to file a petition for a writ of certiorari, up to and including Monday, August 26, 2019.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Thomas P. Kelly Jr. v. The Penn Mutual Life Insurance Company and Reliance Standard Life Insurance Company*, No. 18-1162 (February 28, 2019) (attached as Exhibit 1). The Third Circuit denied Applicant's motion for rehearing *en banc* on March 28, 2019 (attached as Exhibit 2). The judgment by the Third Circuit for which review is sought has created a split with the Second, Fourth, Sixth, and Eleventh circuits.

JURISDICTION

This Court will have jurisdiction over any timely filed petition for certiorari in this case pursuant to 28 U.S.C. §1254(1). Under Rules 13.1, 13.3 and 30.1 of the Rules of this Court, a petition for a writ of certiorari is due to be filed on or before June 26, 2019. In accordance with Rule 13.5, this application is being filed more than ten (10) days in advance of the filing date for the petition for a writ of certiorari.

REASONS JUSTIFYING AN EXTENSION OF TIME

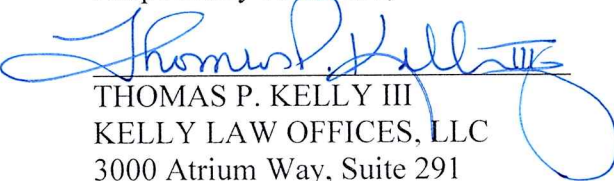
Applicant respectfully requests a 60-day extension of time within which to file a petition for a writ of certiorari seeking review of the Third Circuit Court of Appeals, up to and including Monday, August 26, 2019.

1. Applicant has requested assistance from alternate counsel located within the District of Columbia who has considerable experience handling matters before the United States Supreme Court.
2. The record in this case is voluminous, spanning more than a decade, and an extension of time is necessary to permit Applicant's new counsel to fully review the pleadings, familiarize themselves with the applicable legal issues, and to prepare a cogent and well-researched petition.
3. An extension of time is additionally necessary to accommodate new counsel's calendar as it related to other matters that are already subject to similar existing deadlines.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that this Court grant an extension of sixty (60) days, up to and including August 26, 2019, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,



THOMAS P. KELLY III
KELLY LAW OFFICES, LLC
3000 Atrium Way, Suite 291
Mount Laurel, NJ 08054
(609) 261-6100,
Attorneys for Applicant/Petitioner

Dated: June 13, 2019

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1162

THOMAS P. KELLY, JR.,
Appellant

v.

THE PENN MUTUAL LIFE INSURANCE COMPANY;
RELIANCE STANDARD LIFE INSURANCE COMPANY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:09-cv-02478)
District Judge: Honorable Katharine S. Hayden

Submitted Under Third Circuit L.A.R. 34.1(a)
February 12, 2019

Before: HARDIMAN, SCIRICA, and COWEN, *Circuit Judges*.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on February 12, 2019.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the District Court's orders entered December 22, 2011, May 29, 2015, and December 31, 2017 are AFFIRMED. Costs shall be taxed against Appellant. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: February 28, 2019

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1162

THOMAS P. KELLY, JR.,
Appellant

v.

THE PENN MUTUAL LIFE INSURANCE COMPANY;
RELIANCE STANDARD LIFE INSURANCE COMPANY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:09-cv-02478)
District Judge: Honorable Katharine S. Hayden

Submitted Under Third Circuit L.A.R. 34.1(a)
February 12, 2019

Before: HARDIMAN, SCIRICA, and COWEN, *Circuit Judges*.

(Filed: February 28, 2019)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

HARDIMAN, *Circuit Judge*.

This appeal arises under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq.* The District Court held that Thomas P. Kelly, Jr. was entitled to 24 months' worth of disability benefits because he could not perform his own occupation. The Court later found that Kelly could perform some occupation, so it denied his request for more benefits. Kelly now appeals three orders entered by the District Court. We will affirm.

I¹

We begin by summarizing the facts and prolix procedural history of this case, which began in November 2005 when Kelly injured his spine in a car accident. About six months after his accident, Kelly applied for disability benefits under an ERISA plan (the Plan) sponsored by his employer, Penn Mutual Life Insurance Company, and funded and administered by Reliance Standard Life Insurance Company. *See Kelly v. Reliance Standard Life Ins. Co.*, 2011 WL 6756932, at *2 (D.N.J. Dec. 22, 2011).

Reliance used the Plan's definition of disability to evaluate Kelly's application. Under the Plan, to receive benefits for the first 24 months of disability, a participant must show he cannot perform his "regular occupation." App. 258. The standard then becomes harder to satisfy, as the participant must show he cannot perform "any occupation . . . that [his] education, training[,] or experience will reasonably allow." *Id.*

¹ The District Court had jurisdiction under 29 U.S.C. § 1132(e). We have jurisdiction under 28 U.S.C. § 1291. Our review of the District Court's summary judgment is plenary, and we apply the same standard as the District Court. *E.g., Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014).

Reliance denied Kelly's initial claim after determining that he was capable of performing his "regular occupation." Kelly appealed, and in the first of three remands to Reliance, the District Court held that Kelly could offer more information supporting his claim because Reliance's administrative record was deficient. *See Kelly Br. 15; Kelly v. Reliance Standard Life Ins. Co.*, 2015 WL 3448033, at *1 (D.N.J. May 28, 2015). Kelly then provided supporting information, but he also claimed for the first time that he was disabled under the more stringent "any occupation" standard, which applies only to those seeking more than 24 months' benefits.

Reliance denied Kelly's claim a second time, and on December 22, 2011, the District Court again found Reliance erred. *See Kelly*, 2011 WL 6756932, at *3, *5–12. This time, the Court held that Reliance had been arbitrary and capricious in reviewing medical evidence and analyzing Kelly's regular occupation. *Id.* at *5–11. So the Court awarded Kelly 24 months' benefits, but because Reliance had never evaluated whether Kelly was entitled to more benefits under the "any occupation" standard, it remanded that claim for further review. On this second remand, Kelly sought over 60 months' benefits. Reliance conceded it owed Kelly 24 months' benefits under the "regular occupation" standard but insisted it still needed to investigate whether Kelly satisfied the "any occupation" standard.

Kelly appealed to the District Court, arguing that the Court had already (in its December 22, 2011 order) found Reliance owed him benefits under the "any occupation" standard. In a May 29, 2015 order, the Court disagreed. *See Kelly*, 2015 WL 3448033, at *2–4. It said it had found no such thing and that, in any case, it would have been

powerless to do so. *Id.* at *2–3. The Court thus remanded Kelly’s claim to Reliance for a third and final time.

On this final remand, Reliance denied Kelly’s claim for more than 24 months’ benefits under the “any occupation” standard. And on cross-motions for summary judgment, the District Court granted summary judgment to Reliance and Penn Mutual on December 31, 2017.² App. 53–54. It held Reliance’s decision was not arbitrary and capricious because the record before Reliance supported the finding that Kelly could perform at least full-time sedentary work. App. 50.

II

In this appeal, Kelly challenges: (1) the District Court’s December 22, 2011 order awarding 24 months’ benefits and remanding to Reliance; (2) its May 29, 2015 order declining to award benefits under the “any occupation” standard; and (3) its December 31, 2017 order upholding Reliance’s denial of “any occupation” benefits. He makes essentially two arguments. First, he claims the District Court should have awarded him 55 months’ benefits instead of remanding. Second, he asserts that on remand, Reliance should have granted him benefits under the “any occupation” standard through the end of his coverage. We address each argument in turn.

A

Kelly first argues that once the District Court held that he could not perform his “regular occupation,” it followed that he could not perform “*any* occupation” through the

² Kelly did not oppose Penn Mutual’s motion for summary judgment, App. 53, and his arguments on appeal do not mention Penn Mutual.

date of its order (December 22, 2011). And if he was disabled through the order date, Reliance would owe him 55 months' benefits.

This argument suffers from a logical flaw. Just because the District Court found Kelly could not perform his *regular* occupation does not mean it found Kelly could perform *no* occupation. Kelly's regular job is merely one of many jobs that his "education, training[,] or experience [would] reasonably allow." App. 258. Similarly, while Reliance was arbitrary and capricious in deciding Kelly could perform his regular job, it does not follow that Reliance also erred when it determined that Kelly failed to show he could not perform "any occupation." *See Conkright v. Frommert*, 559 U.S. 506, 517–19 (2010); *Miller v. Am. Airlines, Inc.*, 632 F.3d 837, 856 (3d Cir. 2011) ("[W]here benefits are improperly denied at the outset, it is appropriate to remand to the administrator for full consideration of whether the claimant is disabled."). Thus, the District Court properly remanded Kelly's "any occupation" claim to Reliance.³

B

Kelly next argues that even if the latest remand were valid, Reliance should have awarded him benefits under the "any occupation" standard. This argument proceeds in two parts. First, Kelly requests a heightened standard of review because Reliance not only has a financial conflict of interest (as both funder and administrator of the Plan), but is also procedurally biased against him. Second, Kelly asserts that under this heightened

³ Contrary to Kelly's argument, *McCann v. Unum Provident*, 907 F.3d 130 (3d Cir. 2018), does not hold otherwise. *McCann* excused a claimant's failure to exhaust administrative remedies. *See id.* at 151–52. Exhaustion is not at issue here.

standard, Reliance's evaluation of the medical evidence was haphazard and incorrect. He claims Reliance cherry-picked evidence and erred in finding Kelly could work a job that his "education, training[,] or experience [would] reasonably allow." App. 258.

Neither part of this argument is persuasive. We review benefit denials under the deferential "arbitrary and capricious" standard where, as here, a plan grants its administrator discretionary authority. *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 121 & n.2 (3d Cir. 2012); App. 163 (Reliance Plan). Conflicts of interest, whether financial or procedural, are merely a factor *within* our deferential analysis. *See Dowling v. Pension Plan for Salaried Emps. of Union Pac. Corp. & Affiliates*, 871 F.3d 239, 250–52 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 1032 (2018).

We see no reason to reject Reliance's assessment of Kelly's medical condition. The record contains ample evidence that Kelly could perform an occupation allowed by his education, training, or experience. Four independent doctors conducting three separate reviews of Kelly's file have concluded Kelly is not totally disabled. Most recently, as part of its appeals process on remand, Reliance referred Kelly's file to a physician specializing in internal medicine. After reviewing 110 pages of exam reports and laboratory results, she determined Kelly has had "no physical limitations or restrictions" since May 2008. App. 936. Indeed, as Reliance notes, public records show Kelly earned admission to the New Jersey bar and co-founded a law firm during his time

of purported total disability. Thus, Reliance was not arbitrary and capricious in declining to find Kelly disabled under its “any occupation” standard.⁴

Kelly suggests that his receipt of Social Security Disability Insurance (SSDI) benefits proves otherwise. But while an SSDI benefits decision might be relevant to an ERISA plan administrator, a plan’s benefits policies may differ from those that govern Social Security disability benefits. *See generally* 42 U.S.C. §§ 416(i), 423(d); 20 C.F.R. § 404.1505. Thus, Kelly concedes that SSDI decisions do not bind Reliance because Reliance has not incorporated SSDI policies into its Plan. Reply Br. 21; *see Moats v. United Mine Workers of Am. Health & Ret. Funds*, 981 F.2d 685, 689 (3d Cir. 1992). And even on its face, Kelly’s SSDI decision hardly helps his ERISA case, because the Social Security Administration found Kelly can perform some sedentary work. App. 1022.

* * *

For the reasons stated, we will affirm the orders of the District Court.

⁴ To the extent there are gaps in the record, they result from Kelly sandbagging Reliance. Kelly evaded Reliance’s repeated requests for updated medical records, information from his successful SSDI hearing, and more. *See, e.g.*, App. 902–04 (Reliance’s June 5, 2015 letter to Kelly); App. 957–58 (Reliance’s July 22, 2015 follow-up); App. 960–63 (Kelly’s September 4, 2015 response).

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v.

THE PENN MUTUAL LIFE INSURANCE COMPANY;
RELiance STANDARD LIFE INSURANCE COMPANY

(D. N.J. No. 2-09-cv-02478)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., KRAUSE, RESTREPO, BIBAS, PORTER,
SCIRICA* and COWEN*, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in

* Judge Scirica and Judge Cowen's votes are limited to panel rehearing

regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Thomas M. Hardiman
Circuit Judge

Dated: March 28, 2019
Lmr/cc: Thomas P. Kelly, III
Joshua Bachrach