No.

IN THE

Supreme Court of the United States

THOMAS P. KELLY, JR., PETITIONER,

v.

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

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Should this Court resolve the conflict among the Circuits about whether it would be futile to require an ERISA plan participant upon remand to retroactively seek benefits under the "any occupation" definition for total disability when the same decision maker had already denied him benefits under the less stringent "own occupation" standard?

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The unpublished Opinion of the Court of Appeals for the Third Circuit in *Thomas P. Kelly, Jr. v. Reliance Standard Life Insurance Company et al.*, Docket No. 18-1162, reported at 764 Fed. Appx. 160 (3rd Cir. 2019) and filed February 28, 2019, affirming the 2011 order of the District Court awarding petitioner 24 months of disability benefits and remanding his claims to respondent Reliance for "continued administration and payment of benefits;" its 2015 order declining to award petitioner benefits under the "any occupation" standard; and its 2017 order upholding Reliance's denial of "any occupation" benefits, is set forth in the Appendix hereto (App. 1-9).

The unpublished Opinion of the United States District Court for the District of New Jersey in *Thomas P. Kelly, Jr. v. Reliance Standard Life Insurance Company et al.*, Civil Action No. 09-2478 (KSH), reported at 2017 U.S. Dist. LEXIS 213643 (D.N.J. 2017) and filed December 31, 2017, upholding Reliance's denial of "any occupation" benefits to petitioner and granting respondent Penn Mutual summary judgment on petitioner's claim that it had breached its duty as a co-fiduciary, is set forth in the Appendix hereto (App.10-49).

The unpublished Order and Opinion of the United States District Court for the District of New Jersey in *Thomas P. Kelly, Jr. v. Reliance Standard Life Insurance Company et al.*, Civil Action No. 09-2478 (KSH), reported at 2015 WL 3448033; 2015 U.S. Dist. LEXIS 69590 (D.N.J. 2015) and filed May 28, 2015, declining to award petitioner benefits under the "any occupation" standard, remanding the claim to Reliance for further proceedings and denying petitioner's motion for

civil contempt sanctions, is set forth in the Appendix hereto (App.50-59).

The unpublished Order and Opinion of the United States District Court for the District of New Jersey in *Thomas P. Kelly, Jr. v. Reliance Standard Life Insurance Company et al.*, Civil Action No. 09-2478 (KSH), reported at 2011 WL 6756932; 2011 U.S. Dist. LEXIS 147133 (D.N.J. 2011) and filed December 22, 2011, awarding petitioner 24 months of disability benefits and remanding his claims to Reliance for "continued administration and payment of benefits," is set forth in the Appendix hereto (App.60-87).

The unpublished Order of the Court of Appeals for the Third Circuit in in *Thomas P. Kelly, Jr. v. Reliance Standard Life Insurance Company et al.*, Docket No. 18-1162, filed on March 28, 2019, denying petitioner's timely filed petition for panel rehearing and for rehearing *en banc*, is set forth in the Appendix hereto (App. 88-89).

JURISDICTION

The Opinion of the United States Court of Appeals for the Third Circuit affirming the three Orders and Opinions of the District Court was decided and filed on February 28, 2019; and its further Order denying petitioner's timely filed petition for panel rehearing and for rehearing *en banc* was issued and filed on March 28, 2019 (App. 1-9;88-89).

On June 18, 2019, Justice Alito granted petitioner's application for an extension of time to file a petition for a writ of certiorari, extending the time to do so up to and including July 26, 2019 (Application No. 18A1327). This

petition for writ of certiorari is filed within the time as extended by Justice Alito.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

ELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

29 U.S.C. § 1001(b) (ERISA declaration of policy):

> (b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries
>
> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of

employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1132(a)(1)(A) & (B) [§ 502 of ERISA]:

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) 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;

29 U.S.C. § 1132(e)(1):

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

STATEMENT

Petitioner Thomas P. Kelly, Jr. ("petitioner") was hired by respondent Penn Mutual Life Insurance Co. ("respondent" or "Penn Mutual") in December of 2002 and by 2005 he had become a management compliance officer. He coordinated and supervised recruiting, conducted continuing education courses, monitored new business for suitability issues and visited new agents throughout New Jersey whom he managed, trained and supervised. Penn Mutual furnished him with full lease reimbursement for his automobile for the amount of time his job required that he travel.

As a benefit of his job, petitioner was insured under Penn Mutual's long-term disability insurance policy issued by respondent Reliance Standard Life Insurance Company ("respondent" or "Reliance"). This disability policy is an employee welfare benefit plan governed by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). Under Reliance's policy, a plan participant like petitioner seeking long-term disability or LTD benefits must show "total disability" as the plan defines it.

Under Reliance's plan, in order to collect LTD benefits for an initial period of 24 months, petitioner must establish that his disability extends beyond 180 days after his last day of work. In addition, "total disability" for this 24-month period is defined as the inability to perform the substantial duties of petitioner's "regular occupation." If petitioner qualifies and receives 24 months of benefits, Reliance's plant calls for a *different* definition of "total disability" and a reevaluation of his claim.

Under this different definition of "total disability," a plan participant like petitioner must be unable to perform the substantial and material duties of "any occupation...that [his] education, training or experience will reasonably allow." Upon this showing, the plan administrator will pay benefits beyond the first 24-month period. Under the plan, petitioner would be considered totally disabled when he could perform his material duties only on a part-time basis or just part of his material duties on a full-time basis. Finally, petitioner's coverage under Reliance's plan for any purpose would end on his 66th birthday which occurred on August 24, 2012.

On November 7, 2005, petitioner was injured in an automobile accident, exacerbating a existing back injury he had sustained while snowmobiling in 1993. When he was first employed by Penn Mutual in 2002, petitioner told his agency manager about his residual disability resulting from this 1993 accident. In the wake of this new accident, petitioner could not return to work and sought medical treatment from an orthopedic surgeon, Dr. Walter Dearlorf. According to him, petitioner suffered from "radicular symptoms along with limited motion in his lumbar and thoracic spine, lumbar sprain and strain, lumbar radiculopathy and degenerative joint disease in his back." Dearlorf instructed petitioner "not to perform any work of any kind," prescribing steroid injections and physical therapy.

Petitioner visited Dr. Dearlorf four more times and participated in physical therapy sessions through June of 2006 with no significant improvement in his condition. In May of 2006, petitioner timely filed with Penn Mutual's claims department an application for LTD benefits. With this application in hand, it was the responsibility of Penn

Mutual to forward his claim to Reliance along with supporting documentation, including an accurate description of his job title and duties. While that documentation contained Dr. Dearlorf's treatment records of petitioner's five visits, notes from his physical therapy sessions and two letters from petitioner's physical therapist, it was later determined that Penn Mutual failed to provide Reliance with a correct job description for petitioner.

With this incorrect information, Reliance classified petitioner's occupation as "sedentary" and concluded that his medical records did not support the stated restrictions, denying his claim for LTD benefits in October of 2006. Petitioner timely appealed this decision, submitting an updated job description but no new medical records. Reliance upheld its denial on March 12, 2007. Two years later, on May 20, 2009, petitioner brought this civil action in the federal district court for the District of New Jersey pursuant to 28 U.S.C. § 1331 & 29 U.S.C. § 1132(e)(1) against Reliance and Penn Mutual alleging violations of ERISA and claiming under 29 U.S.C. § 1132(a)(1)(B) (§ 502 of ERISA) that Reliance's denial of benefits was arbitrary and capricious and that Penn Mutual had breached its fiduciary duties as a co-fiduciary of the plan.

Upon cross-motions for summary judgment, the district court ruled on December 14, 2010, that the administrative record was deficient; that Reliance had relied upon an incorrect definition of petitioner's occupation which Penn Mutual had mistakenly provided; and that petitioner had not been helpful in providing information during the claims process (App. 19-20;67). It remanded petitioner's claim back to Reliance and directed

it to make a "decision on the merits" while permitting petitioner to supplement the administrative record (App. 20;67).

Petitioner then supplemented the administrative record in order to rectify Penn Mutual's incorrect and misleading description of his job title and job duties, some of which mandated at least 45% travel duties as well as other travel requirements for his position (App. 20-21;67-68). He also submitted a supplemental letter from Dr. Dearlorf and photocopies of the MRI scans of his back (App. 20;68). He further claimed for the first time that his inability to perform the material and required duties "*of any occupation* had been further exacerbated by the onset and increase of chronic cardiac symptoms" (App. 21-22;53;68) (emphasis supplied).

Supporting petitioner's claims, Dr. Dearlorf wrote that petitioner's "left-sided disc herniation at L5-S1," among other injuries, prevented him from sitting or standing for any prolonged period of time such that he was "unable to perform sedentary and non-sedentary duties associated with his regular occupation *or with any occupation* at this time...[and that] his symptoms are unlikely to improve over time" (App. 21) (emphasis supplied). In addition, petitioner certified that the symptoms associated with his chronic atrial fibrillation "are routinely severe enough to stop [him] from performing even sedentary activities;" and the fatigue caused by his cardiac symptoms "is debilitating and generally long-lasting and prevents [him] from performing *most activities*" (App. 22) (emphasis supplied).

Reliance, duly noting in writing petitioner's new claim for "any occupation" benefits under the plan beyond

the 24-month period, subjected his submissions to paper review by both an orthopedic surgeon *and* a cardiologist (App. 22-23;53). The orthopedic surgeon found no objective evidence for restrictions or limitations on petitioner's regular occupation as a managing agent for Penn Mutual (App. 23). The cardiologist concluded that petitioner had "stable" coronary artery disease which entailed "no limitations on sitting, walking, standing, pushing, conversing, phone use, computation, or paperwork" (*Id.*). On February 18, 2011, Reliance again denied petitioner LTD benefits, but characterized his "total disability" only in terms of whether petitioner could perform the substantial and material duties *of his own regular occupation* (App. 23-24;53-54;68-69).

Petitioner appealed this decision by Reliance to federal district court and the parties cross-moved for summary judgment (App. 24;69). On December 22, 2011, the federal district court, Hayden, J., issued a decision determining that Reliance's denial of benefits upon remand was arbitrary and capricious because it selectively reviewed the medical evidence placing undue emphasis on doctors who had never treated petitioner (App. 24;54;62-87). Confining herself to petitioner's claim based upon his back injuries, the district judge ruled that Reliance's "apparent wholesale rejection of [petitioner's] description of his job duties was unreasonable and led to the additional unreasonable failure to countenance the existence of any restrictions or limitations during the Elimination Period" (App. 84). Moreover, its "failure to consider the duties [petitioner] was actually performing prior to the accident and whether [he] was physically capable of performing those duties after the accident was unreasonable and demonstrates [that] Reliance's exercise of discretion in denying petitioner's claim was arbitrary

and capricious" (App. 85).

Judge Hayden granted petitioner summary judgment on his ERISA claim against Reliance, denied the motion as it applied to Penn Mutual, and ordered Reliance to "immediately provide all benefits consistent with the rulings set forth in the Court's opinion," remanding the matter to Reliance again "for continued administration and payment of benefits...." (App. 24;60-61). By this time, the 24-month period for paying petitioner his LTD benefits was long past and his 66th birthday on August 24, 2012, the cut-off date for paying him any benefits under the plan, was approaching.

Settlement negotiations ensued but eventually broke down because of the unresolved issue of whether the district judge's ruling in December of 2011 required Reliance to pay LTD benefits to petitioner because he was unable to work at "any occupation" or, for the just 24-month period, because he was unable to work at his "regular occupation" (App. 28-29;54-55). Petitioner asserted that regardless of how Reliance framed its denial of benefits on remand, it received and considered his claims for LTD benefits under *both* standards, subjecting his claim for "own occupation" benefits to paper review by an orthopedic surgeon while reviewing his "any occupation" benefit claim to separate paper review by a cardiologist (App. 54-55).

Thus petitioner contended that when Reliance decided in 2011 on remand to deny him LTD benefits because he was not disabled from performing the duties of his "own occupation" for the 24-month period from 2006-2008, it also carried with it on this administrative record the tacit determination by Reliance that he was

also not disabled from performing the duties of "any occupation" for that period of time beyond this 24-month period until the date of the district judge's ruling in December of 2011, or for the ensuing 31 months.

As petitioner argued, Reliance's denial of his "own occupation" claim was itself a denial of his "any occupation" claim because by insisting in 2011 that he could perform the duties of his own job, Reliance was tacitly deciding that he was also able to perform the duties of "any occupation" for which his skill, training, and experience would reasonably allow, a decision making it futile for him to retroactively seek LTD benefits from Reliance under the "any occupation" standard for disability. Moreover, he argued that once the district judge ruled in late 2011 that Reliance's decisionmaking process on remand was so arbitrary and capricious that it violated ERISA, he was entitled to disability benefits not only for the 24-month period when he could not perform the duties of his "own occupation" but also for the ensuing period of time (from 2008 until 2011) for which Reliance had tacitly determined that he was not disabled under the "any occupation" standard.

Because the parties disagreed on these issues, the district court decided to forego further settlement negotiations and revert to motion practice (App. 28-29). In August of 2014, Reliance asked petitioner for additional information to supplement the administrative record so that it could administer his claim based on his inability to work at "any occupation;" in October of 2014, it notified petitioner that it would be issuing to him payment of $180,127.52 on his "regular occupation" claim for 24 months of disability benefits; and it moved to remand the matter so that it could administer petitioner's

"any occupation" claim (App. 29-31). Petitioner filed a cross motion to hold Reliance in contempt for its "unlawful refusal to comply with the Court's 2011 Order" because the district judge "rejected [Reliance's] current position and awarded [him] more than five years' worth of disability payments, most of which have not been paid" (App. 31).

On May 28, 2015, Judge Hayden issued an opinion granting Reliance's motion to remand and denying petitioner's motion for civil contempt sanctions (App. 51-59). She agreed with Reliance that petitioner had failed to exhaust his administrative remedies with regard to his claim for LTD benefits under the "any occupation" standard (App. 32;55). The district judge noted that her 2011 holding extended only to those claims Reliance had already considered, i.e., petitioner's claim for benefits based on his inability to perform the duties of his "regular occupation;" and the matter of whether petitioner was entitled to benefits under the "any occupation" standard must be administered by Reliance in the first instance (App.56;57).

In denying petitioner's motion for reconsideration, Judge Hayden wrote:

> [Petitioner] contends that Reliance did "*consider*" his claim for benefits under the "any occupation" standard, and the Court's finding that he was "entitled to receive LTD benefits owed to him under the Plan" therefore encompassed such relief. This argument...goes too far. Was [petitioner's] claim for "any occupation" benefits presented to Reliance, along with his claim for "regular occupation" benefits? Yes. Did Reliance

> *decide* whether [petitioner] was entitled to benefits under the "any occupation" standard? No, it indisputably did not.

(App. 32-33) (emphasis in original).

On September 15, 2015, Reliance denied petitioner's claim for LTD benefits under the "any occupation" standard, determining that he was capable of at least full-time sedentary work (App. 33). Petitioner appealed this determination to the district court and upon cross motions for summary judgment, Judge Hayden granted summary judgment in favor of Reliance and Penn Mutual and denied petitioner's motion (App. 10-49). She found substantial evidence to support Reliance's denial of "any occupation" LTD benefits despite the conclusion of Dr. Dearlorf (App. 42). She noted that "[petitioner's] failure, whether through refusal or inability, to obtain additional medical documentation, and the absence of any clinical examinations or diagnostic tests after June 2006, lend credence to Reliance's assertion that [petitioner] has not met his burden under the plan" (*Id.*).

Petitioner appealed asserting *inter alia* that the district court committed legal error in deeming itself helpless to award disability benefits beyond the 24th month of the claimed disability after ruling in the 55th month of his disability that Reliance had violated ERISA. As he argued, the unlawful denial by Reliance of his claim under the "own occupation" standard in the 55th month of his disability constituted a tacit denial of his claim under the more stringent "any occupation" standard that applied after the 24th month. Thus he asserted that it was error to demand that he exhaust his administrative remedies in 2012 in order to retroactively seek benefits

for 2008-2011 under the "any occupation" definition for total disability when the same decisionmaker (Reliance) had already denied him benefits under the less stringent "own occupation" standard.

In an opinion dated February 28, 2019, and authored by Hardiman, J., the court of appeals disagreed and affirmed all the orders of the district court, including its order remanding petitioner's "any occupation" claim to Reliance for administration (App.1-9). Finding that ""[e]xhaustion is not at issue here" (App. 8), it determined that just because the district court found that petitioner could not perform his *regular* occupation does not mean it found that he could perform *no* occupation; and while Reliance was arbitrary and capricious in deciding that petitioner could perform his regular job, "it does not follow that Reliance also erred when it determined that [petitioner] failed to show he could not perform 'any occupation'" (App. 5) (emphasis in original).

On March 28, 2019, the court of appeals denied petitioner's timely filed petition for rehearing and for rehearing *en banc* (App. 88-89). On June 18, 2019, Justice Alito granted petitioner's application for an extension of time to file a petition for a writ of certiorari, extending the time to July 26, 2019 (Application No. 18A1327).

REASONS FOR GRANTING THE PETITION

The Court Should Resolve The Conflict Among the Circuits About Whether It Would Be Futile To Require An ERISA Plan Participant Upon Remand To Retroactively Seek Benefits Under The "Any Occupation" Definition For Total Disability When The Same Decision Maker Had Already Denied Him Benefits Under The Less Stringent "Own Occupation" Standard.

The court of appeals' refusal to recognize that it would be futile to make petitioner exhaust his administrative remedies by requiring him to retroactively seek ERISA benefits from Reliance under the "any occupation" standard of disability after it had already denied him benefits under the less demanding standard of his "own occupation" creates an important split of authority among the Circuits about the remedies available to ERISA plan participants when a plan administrator arbitrarily and capriciously denies benefits.

The exhaustion of administrative or plan remedies is not mandated by ERISA; it is not jurisdictional; and it is never required when resort to it would be futile. Four sister Circuit courts of appeal have recognized that it would be futile and unnecessary to remand a claim seeking the retroactive payment of disability benefits under the "any occupation" standard when the plan administrator had already denied benefits under the less demanding "own occupation" standard. See *Smith v. Metropolitan Life Ins. Co.*, 274 Fed. Appx. 251, 257-258 (4th Cir. 2008); *Oliver v. Coca Cola Co.*, 497 F.3d 1181, 1200-1201 (11th Cir. 2007), *vacated in part on other grounds*, 506 F.3d 1316 (11th Cir. 2007) (*en banc*); *Dozier v.*

Sun Life Assurance Co. of Canada, 466 F.3d 532, 535 (6th Cir. 2006); and *Paese v. Hartford Life Accident Ins. Co.*, 449 F.3d 435, 448-449 (2nd Cir. 2006). The Third Circuit's decision is at odds with these Circuits; it deprives plan participants within its jurisdiction of the important remedy of a retroactive award of benefits; and it is contrary to the will of Congress and the language of ERISA.

The Court should accordingly resolve this important conflict in authority and remand the matter to the court of appeals for the entry of a judgment which retroactively awards petitioner disability benefits for the *entire* period up to and including the date of judgment of December 22, 2011, a judgment which found that Reliance had arbitrarily and capriciously denied him benefits, a period of time which encompasses both his claims for benefits under the "own occupation" standard as well as the "any occupation" standard for defining "total disability" under the plan.

A district court under 29 U.S.C. § 1132(a)(1)(B), has the power to fashion an appropriate remedy which would make the plan participant whole by returning him to the status quo had the plan administrator given the participant's evidence of disability full and fair consideration. *Cook v. Liberty Life Assur. Co. of Boston*, 320 F.3d 11, 24 (1st Cir. 2003). *Carney v. Int'l Brotherhood of Electrical Workers Local Union 98 Pension Fund*, *Nos. 02-2679*, *02-3488*, 66 Fed. Appx. 381-385-387 (3rd Cir. 2003). Once the district court makes a finding, as it did here, that Reliance arbitrarily and capriciously denied petitioner's claim for LTD benefits, it could either remand the case to the administrator for a renewed evaluation of the claim or it could retroactively award benefits. *Cook*,

supra, citing *Welsh v. Burlington N., Inc., Employee Benefits Plan*, 54 F.3d 1331, 1340 (8th Cir. 1995). See *Schneider v. Sentry Long Term Disability*, 422 F.3d 621, 629-630 (7th Cir. 2005).

Informing this decision is the way in which Reliance denied benefits, the time it took for it to do so, the elapsed time for petitioner to proceed through Reliance's several administrative layers in order to finally achieve a decision by the district court in 2011 that Reliance had unfairly denied him benefits, and whether the test for "total disability" under the plan had changed during this intervening time frame. See, e.g., *Miller v. Am. Airlines, Inc.*, 632 F.3d 837, 856-857 (3rd Cir. 2011) (improper termination of benefits already received); *Cook*, *supra* ("unreasonable" denial of benefits); *Zervos v. Verizon N.Y., Inc.*, 277 F.3d 635, 648 (2nd Cir. 2002) (administrative delay gave defendants "time to retool a defective system."); *Addis v. Limited Long-Term Disability Program*, 425 F. Supp.2d 610, 621 (E.D. Pa. 2006) (plan administrator's delay took advantage of change in test of disability from "own occupation" to "any occupation").

After Reliance had in 2006 and 2007 twice erroneously denied petitioner's claim of total disability benefits for the purposes of the plan's 24-month period under its "own occupation" standard, his suit in federal court produced a remand of the case to Reliance in 2010 for yet another "decision on the merits," with petitioner submitting updated documentation and now claiming for the first time disability benefits for the period beyond the plan's initial 24-month period on the basis that he was unable to perform the required duties of "any occupation," a claim supported by Dr. Dearlorf and his

own certification of chronic atrial fibrillation.

Reliance noted in writing petitioner's new claim for LTD benefits beyond the 24-month period under the "any occupation" standard; it subjected his claims in this regard to its own experts' paper review; but on February 18, 2011, concluding that he could perform the duties of his "own occupation," it denied petitioner's claim for benefits *only for the 24-month period*, a decision which Reliance reached in the hope that it would force petitioner to start the administrative process all over again in order to collect continuing benefits beyond the 24-month period under the more rigorous "any occupation" standard for defining "total disability."

By the time the district judge on December 22, 2011, ruled that Reliance's denial of benefits was egregiously unfair, arbitrary and capricious, more than five years had passed since petitioner first claimed disability benefits; Reliance had denied his claims on three separate occasions, once following a remand; the 24-month period for paying his LTD benefits had long since passed; the time window for collecting benefits beyond this 24-month period was closing; and his 66th birthday on August 24, 2012, the cut-off date for paying him any benefits under the plan, was approaching.

Given these circumstances of administrative delay, the serial denials by Reliance under the less restrictive "own occupation" standard for defining "total disability," the passage of time to petitioner's detriment, Reliance's unfair refusal to consider on remand petitioner's new claim for benefits beyond the 24-month period, and the certainty that Reliance would not come to a different conclusion about petitioner's disability under the more

rigorous "any occupation" standard, the district judge and the court of appeals, consistent with four other Circuits who have addressed the issue, should have recognized the futility in requiring petitioner to now exhaust his administrative remedies seeking benefits under the "any occupation" standard of the plan. Instead, they should have awarded petitioner retroactive benefits pursuant to 29 U.S.C. § 1132(a)(1)(B), for the entire period of time up to and including the date of the 2011 judgment with a remand being proper only for *continued* future eligibility under the plan.

In recognizing that exhaustion of administrative remedies was futile in these circumstances, the four Circuit courts of appeal all made the common sense, realistic observation that once a plan administrator, however erroneously, had consistently determined that a claimant was able to perform the essential functions of his *own* occupation, there "is no rational reason" for supposing that he could then argue on remand "with a straight face" to the same decision maker that he was unable to perform the material and substantial duties of *any* occupation. See *Dozier*, 466 F.3d at 535-536 (exhaustion "utterly pointless"); *Oliver*, 497 F.3d at 1201; *Smith*, 274 Fed. Appx. at 258; *Paese*, 449 F.3d at 449. In fact, all these decisions indicate that a claimant as a practical matter would be precluded from making such an argument.

Underlying this observation is "simple logic," *Paese*, *supra*, i.e., Reliance's decision made consistently through the years and by its serial denial of benefits to petitioner that was not disabled from performing the duties of his "own occupation" necessarily implies a decision that he was not disabled from performing the

duties of "any occupation." *Id.* In reality and in fact, Reliance had *already* decided that petitioner was not disabled from performing the duties of "any occupation" and requiring him to return to Reliance's administrative process to argue otherwise is a futile gesture demonstrably doomed to fail. See *Duperry v. Life Ins. Co. of N. Am.*, 2009 U.S. Dist. LEXIS 138975 at **4-5 (E.D.N.C. 12/22/2009) ("[G]iven defendant's consistent denial of plaintiff's claims through April 2008, it would have been futile for plaintiff to return to the plan administrator and seek benefits under the more restrictive any occupation standard after October 2008.").

Stated another way, Reliance most certainly *did* make a decision about petitioner's disability which extended beyond the first 24-month period of his disability by deciding, in the 55th month of petitioner's claim for disability benefits, that he was fully capable of performing the material duties of his *own* occupation from the time of his injury in November of 2005 until a judgment entered in December of 2011. That decision, albeit made in violation of ERISA, necessarily and tacitly meant that Reliance had *already* determined that petitioner was capable of performing the duties of *any* occupation that his education, training and experience would allow. Because Reliance decided in 2011 that petitioner had never been disabled from performing his own occupation, it was also saying that he was not disabled under the more stringent "any occupation" standard which would have applied from May 2008 through 2011.

In any event, for all practical purposes, petitioner *did* exhaust his administrative remedies with regard to his claim for benefits based upon his disability from

performing the duties of "any occupation." His supporting supplemental documentation to Reliance on remand in 2010 made clear his claim for benefits after the 24-month period based upon the "any occupation" standard; and Reliance duly noted in writing that he was making such a claim. That Reliance consciously avoided making a decision on his claim in order to force petitioner to start the administrative process all over again in order to collect continuing benefits beyond the 24-month period does not dilute the fact on this record that petitioner could reasonably have believed that Reliance was considering *both* types of disability claims. See *McCann v. Unum Provident*, 907 F.3d 130, 152 (3rd Cir. 2018); *Carey v. United of Omaha Life Ins. Co.*, 633 Fed. Appx. 478, 479 (9th Cir. 2016) ("a person in Carey's position would have thought that [the insurer] had reviewed the substance of his case and decided anew that he was not entitled to benefits.").

The district court in *Addis v. Limited Long-Term Disability Program*, 425 F. Supp.2d at 621, accurately describes the result of Reliance's strategy on this record:

> When a plan administrator has a contested claim under review, it knows that the claimant contends that she was and is disabled, and must anticipate that she contends the disability is continuing. *The plan must undertake the review using different eligibility standards when the disability test changes on a particular date during the administrative process.* To do otherwise enables an insurer to benefit from an early termination of benefits while awaiting the outcome of litigation, forcing the claimant to start the administrative process anew in order to collect continuing

> benefits.
> ....
> [The insurer] should have considered the plaintiff's eligibility for both "own occupation" benefits for the appropriate period and [for] "any occupation" benefits thereafter.

Id. (emphasis supplied).

Instead of considering on remand in 2010 petitioner's eligibility under both the "own occupation" and "any occupation" standards----when it well knew that petitioner was claiming both kinds of benefits----Reliance consciously avoided making a decision on his "any occupation" claim to force petitioner to start the administrative process all over again in order to collect continuing benefits beyond the 24-month period. It is in these circumstances that the decisional law of the four sister Circuit courts of appeals is triggered, invoking the power of this court of appeals and the district court to apprehend the utter futility of exhausting administrative remedies as well as the patent propriety of awarding retroactively benefits to petitioner based upon his disability from performing the duties of "any occupation" from 2008 up to and including the date of judgment.

Any other result rewards the plan administrator for his strategic indifference to petitioner's timely, authentic disability claims, undermines the will of Congress in enacting ERISA and ignores the purposes of the exhaustion requirement. ERISA was enacted by Congress "to promote the interests of employees and their beneficiaries in employer benefit plans" as well as "to protect contractually defined benefits." *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101, 113 (1989)

quoting *Shaw v. Delta Airlines, Inc.*, 85, 90 (1983); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985); and citing 29 U.S.C. § 1001 (congressional findings and declarations of policy regarding ERISA). Its central purpose is to protect the security of employee pension funds and to insure that benefits which have vested are predictably paid to employees. *Conkright v. Frommert*, 559 U.S. 506, 516-517 (2010). None of these congressional goals is promoted by countenancing Reliance's administrative foot-dragging; its unfounded, arbitrary, and repeated denials of petitioner's disability claims; and a remand to a dead-end administrative process where the employee's claims cannot possibly succeed.

Nor does the result here jibe with the purposes for the exhaustion requirement, i.e., to "help reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a nonadversarial method of claims settlement; and to minimize the costs of claims settlement for all concerned." *Kennedy v. Empire Blue Cross and Blue Shield*, 989 F.2d 588, 594-595 (2nd Cir. 1993) quoting *Amato v. Bernard*, 618 F.2d 559, 567 (2nd Cir. 1989). As the Sixth and Eleventh Circuit courts of appeals expressly found, because it would have been futile for the claimant to seek benefits from the insurer under the "any occupation" definition of disability where those same decision makers had already denied benefits under the "own occupation" standard, *none* of these purposes for the exhaustion requirement would have been advanced. *Oliver*, 497 F.3d at 1201 citing *Dozier*, 466 F.3d at 536.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to the United States Court of Appeals for the Third Circuit in order to review and vacate its decision and, ultimately, to remand the matter to the District Court for the District of New Jersey for the entry of a judgment which aligns the Third Circuit with the four other sister Circuits which have considered the question of exhaustion in these circumstances, i.e., to award petitioner retroactive benefits pursuant to 29 U.S.C. § 1132(a)(1)(B), for the entire period of time up to and including December 22, 2011, the date of the judgment, with a remand being proper only for *continued* future eligibility under the plan; or provide petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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