

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ROBERT H. CRITCHFIELD, JR.

PLAINTIFF

v.

CIVIL ACTION NO. 3:02CV-183-S

CONTINENTAL CASUALTY COMPANY

DEFENDANT

MEMORANDUM OPINION

This matter is before the court on motion of the plaintiff, Robert H. Critchfield, Jr., for an award of attorney's fees and costs in this action.

On July 18, 2003, the court entered summary judgment in favor of the plaintiff, Robert H. Critchfield, Jr., finding that the decision of the defendant, Continental Casualty Company, to terminate his long-term disability benefits was arbitrary and capricious. The court held that even under this deferential standard, the decision of Continental was not rational in light of the plan provisions and the medical evidence before it. This was not a "close case," as suggested by Continental. We need not reproduce our memorandum opinion granting Critchfield summary judgment in order to make our point. A thorough evaluation is contained in that opinion of the steps which were taken, or more importantly, not taken, in the decision to terminate Critchfield's long term disability benefits. Suffice it to say that the court finds sufficient culpability to justify an award of attorney fees in Continental's failure to *ever* request an IME or have a physician review Critchfield's medical records to determine his current functional capabilities despite numerous reviews and appeals, submission of an MRI, treating physician reports and, ultimately, a lengthy social security disability award finding him totally disabled. As noted in *Pelchat v. UNUM Life Insurance Company of America*, 2003 WL 21479170 (N.D. Ohio 2003), "culpability," as a *King*

factor¹ in assessing a request for attorney fees, is something less than bad faith, but rather is akin to blameworthiness. For the reasons articulated in our earlier memorandum opinion, we do not find that this case involved an “honest mistake,” or an “incorrect decision,” but rather blameworthy conduct on the part of Continental.

The ability of Continental to pay an award of attorney’s fees is not in question. An award of attorney’s fees might encourage Continental to evaluate its current practices in reviewing claims for long term disability benefits. However, an evaluation as to whether such an award would have any deterrent effect or would confer a common benefit on other plan participants would be pure speculation by this court. This case does not resolve significant questions of law concerning ERISA, so this *King* factor does not apply in our analysis. The relative merit of the parties’ positions clearly weighs, in our estimation, in favor of Critchfield.

We conclude, upon consideration of the matters discussed in *Secretary of Dep’t of Labor v. King*, 775 F.2d 666 (6th Cir. 1985), to award Critchfield attorney’s fees and costs of the action under 29 U.S.C. § 1132(g)(1). A separate order will be entered this date in accordance with this opinion.

IT IS SO ORDERED this ____ day of _____, 2003.

CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

¹In the case of *Secretary of Dep’t of Labor v. King*, 775 F.2d 666 (6th Cir. 1985), the United States Court of Appeals for the Sixth Circuit set out five factors which should be considered by the court in determining whether to exercise its discretion to award attorney’s fees under 29 U.S.C. § 1132(g)(1): (1) the degree of the opposing party’s culpability or bad faith; (2) the opposing party’s ability to satisfy an award of attorney’s fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties’ positions. This court has substantial discretion in determining whether to make an award. The *King* factors are mere guides, not all factors will be relevant in a given case, and no single factor is necessarily dispositive. *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir. 1987).

cc: Counsel of Record