UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-30438

RAYMOND SELLARS,

Plaintiff-Appellant,

VERSUS

ASBESTOS WORKERS LOCAL 53
PENSION AND ANNUITY FUND,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana

(93-CV-1103-C)

(May 30, 1995)

Before WOOD[1], JOLLY and DEMOSS, Circuit Judges.

PER CURIAM:[**]

Raymond Sellars sued the Asbestos Workers Local 53 Pension and Annuity Fund under the Employee Retirement Income Security Act (ERISA), alleging that the Fund violated ERISA when it denied him

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[1] Circuit Judge of the Seventh Circuit, sitting by designation.

[**]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

certain disability benefits. The district court, inter alia, granted the Fund summary judgment, and Sellars appealed. Finding no genuine issue of material fact, we affirm.

I.

The Asbestos Workers Local 53 Pension & Annuity Fund offers its members a plan that provides pension, disability and death benefits. The plan generally calculates disability benefits by identifying the amount of retirement benefits to which the beneficiary would be entitled at the moment the disability arises. In the 1980s, the Fund amended the plan on two separate occasions to reduce the amount of disability benefits paid. Under the first amendment which was issued in February 1986, the Fund offsets the amount of workers compensation benefits the member has received thus far. And under the second amendment which was issued in November 1987, the Fund reduces the disability benefits by four percent for each of the first ten years before the member reaches his normal retirement age.

Raymond Sellars, a subscriber to the Fund's plan, suffered an on-the-job injury in March 1986. Over two years later in June 1988, he applied for disability benefits with the Fund. Based on its physician's finding that Sellars was not disabled, the Fund originally denied his application. The Fund's physician re-examined him in January 1989, this time concluding that Sellars was in fact disabled. Because the plan stated that disability benefits "be retroactive for no more than six (6) months prior to the date of the claimant's disability application," the Fund in March 1989

granted Sellars disability benefits retroactive to January 1988. In November 1992, Sellars filed a claim with the Fund for additional benefits, claiming that the workers compensation offset was improper. The Fund denied the claim in January 1993, and after Sellars appealed, the Fund again denied his claim in June 1993.

Having exhausted his administrative remedies, Sellars took his case to federal district court in September 1993. Sellars alleged the Fund improperly denied him benefits under (1) the workers compensation offset amendment, (2) the four percent actuarial reduction amendment, and (3) the six-month retroactivity limitation. In June 1994, after considering the parties' cross-motions for summary judgment, the district court made several findings. First, the court concluded that, because the six-month retroactivity limitation was not referred to in the plan's summary description, the Fund could not enforce it. The Fund has not appealed the court's ruling. Second, the court concluded that neither the workers compensation offset nor the four percent actuarial reduction offended ERISA's anti-forfeiture provisions because the plan involves disability -- and not retirement -- benefits. The court therefore remanded the case to the Fund for a re-calculation of benefits in light of its findings.

Rather than wait for the Fund's re-calculation, Sellars appealed the court's summary judgment for the Fund regarding the workers compensation offset and the four percent actuarial reduction. The Fund shortly thereafter re-calculated Sellars' benefits. In accordance with the district court's ruling, the

Fund re-established the effective date for the payment of disability benefits from January 1, 1988, to March 1, 1986. Because the plan as of March 1, 1986, did not include the actuarial reduction, the Fund further increased Sellars benefits by not enforcing the reduction.

Apparently still disgruntled, Sellars filed a Rule 60(b) motion to reconsider with the district court. Sellars asked the court to calculate the benefits owed him, reconsider its ruling regarding the four percent actuarial reduction, and order the Fund to reimburse his counsel directly. The court denied Sellars' motion, concluding (1) that the first and third claims were post-judgment actions by the Fund and therefore beyond the court's jurisdiction, and (2) that the second claim was moot given that the Fund had chosen not to enforce the four percent actuarial reduction. Sellars appeals.

II.

We begin by noting that, though the district court remanded Sellars' claim to the Fund for a recalculation, the court's order still constitutes a final order and therefore is appealable under 28 U.S.C. § 1291. A final order is described as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Budinich v. Becton Dickinson and Co., 486 U.S. 196, 199 (1988). We have additionally noted that an order's appealability "normally depends on its effect, not merely its language as such." Koke v. Phillips Petroleum Co., 730 F.2d 211, 216 (5th Cir. 1984), rev'd on other grounds, In re Air Crash

Disaster Near New Orleans, La., 821 F.2d 1147, 1163 n.3 (5th Cir. 1987) (en banc). Accordingly, if an order effectively removes a party from federal court, then the order is considered final. Frizzell v. Sullivan, 937 F.2d 254, 255 (5th Cir. 1991) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

The district court's order here has effectively removed Sellars from federal court and directed him to await the Fund's recalculation. The order left Sellars "no option to continue in that forum." Koke, 730 F.2d at 218. In fact, as the district court pointed out when it denied Sellars' Rule 60(b) motion, Sellars could not challenge the recalculation without filing a new claim. The court's order therefore is a final one, meaning we have jurisdiction to hear Sellars' appeal.

III.

Sellars challenges the district court's summary judgment for the Fund regarding the enforceability of the two offsets, i.e., the workers compensation and four percent actuarial offsets. Sellars also appeals the court's denial of both his motion for pre-judgment interest and his Rule 60(b) motion. We will address each in turn.

A.

We agree with the district court that Sellars' claim relating to the actuarial offset is moot. The facts, viewed in a light most favorable to Sellars, indicate that the Fund on remand did not enforce the offset because as of March 1, 1986, the plan did not include the actuarial offset. Sellars has obtained the relief he sought, thereby mooting any claim involving the offset. Cf.

Northern Alaska Envtl. Ctr. v. Hodel, 803 F.2d 466, 469 (9th Cir. 1986); see also 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.2, at 238 & n.23 (2d ed. 1984).

B.

With regard to the enforceability of the workers compensation offset, Sellars makes three points. First, he claims that the offset was retroactively applied in violation of ERISA because the offset was actually adopted in January 1988, and not in March 1986. As proof, Sellars points to a January 1988 resolution from the Fund's trustees, wherein the trustees resolved that "this [workers compensation offset] is and shall be effective as of February 18, 1986. Signed this 6th day of January, 1988." Sellars reads this resolution as a blatant attempt to back-date the validity of the offset, in violation of ERISA's prospectivity requirement. Sellars further contends that February 1986 is significant only in that the trustees first considered the idea of a workers compensation offset at that time. He points to the minutes from a February 1986 meeting of the Fund's trustees, wherein the trustees stated that they intended to "study the possibility of a workmen's compensation reduction factor." Sellars misreads the record evidence. First, the proposed "study" refers to what eventually became the four percent actuarial reduction. Second, and more compelling, the minutes also show that the trustees later agreed to

> amend the trade and disability rules and regulations, effective February 18, 1986, to implement a worker's compensation reduction factor to provide a net benefit, after calculation of the workers compensation reduction, of an amount not less than the retirement benefit he/she

> would have been eligible for at the time of this disability application.

The minutes, which were a part of the summary judgment record, clearly indicate that the Fund adopted the workers compensation offset in February 1986, a month before Sellars' injury. Sellars' retroactivity claim therefore fails.

Second, Sellars argues that the workers compensation offset is impermissible under ERISA's anti-forfeiture provision because disability benefits closely resemble retirement benefits in that they are calculated like retirement benefits and they do not duplicate any other welfare benefit. And because ERISA proscribes plans from reducing accrued retirement benefits, the workers compensation offset is unenforceable under ERISA. Sellars relies on Harms v. Cavenham Forest Industries, Inc., 984 F.2d 686, 691-92 (5th Cir. 1993) in making this alternative point. Sellars reads Harms too generously. We concluded in Harms that a plan administrator, who had not reserved the authority to construe the terms of its plan, was precluded from restricting certain benefits. The benefits, we said, were offered in lieu of early retirement benefits and therefore were protected by ERISA's anti-forfeiture provision. Id. at 692. Harms does not apply here. First, unlike the administrator in Harms, the Fund specifically reserved the right to amend the terms of the plan. Second, the plan's disability benefits in no way resemble early retirement benefits; if Sellars were to recover tomorrow, payment would cease. The benefits, in other words, are properly viewed as part of a welfare benefit plan, see 29 U.S.C. § 1002(1), which ERISA specifically

exempts from the vesting and accrual requirements that apply to pension benefit plans. See id. §§ 1051, 1053. Thus, because the Fund has not otherwise contractually bound itself to provide the disability benefits, it is not precluded from reducing the benefits.

Third, Sellars argues that the Fund failed to properly notify him of the workers compensation offset amendment. We recently announced that "an amendment to a welfare benefit plan is valid despite a beneficiary's lack of personal notice, unless the beneficiary can show active concealment of the amendment, or `some significant reliance upon, or possible prejudice flowing from' the lack of notice." Godwin v. Sun Life Assurance Co., 980 F.2d 323, 328 (5th Cir. 1992) (quoting Govoni v. Bricklayers, Masons and Plasterers Int'l Local No. 5 Pension Fund, 732 F.2d 250, 252 (1st Cir. 1984)). Sellars distinguishes Godwin by pointing out that notice of the amendment in that case could be found in the plan's summary description, whereas the amendments in this case had yet to be incorporated in the summary description as of the date of Sellars' application for benefits. ERISA, however, affords plan administrators a significant period of time to update their plan summaries. 29 U.S.C. § 1024(b)(1). Thus, absent a showing of active concealment, prejudice or reliance, the Fund is not precluded from enforcing the offset simply because it did not immediately amend the summary description. Sellars has made no such showing.

C.

Finally, Sellars claims the district court erred when it denied him pre-judgment interest and when it denied his Rule 60(b) motion. We note that both of these matters are committed to the discretion of the district court, meaning we review the court's decisions only for abuse of discretion. Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir. 1988); Midland West Corp. v. FDIC, 911 F.2d 1141, 1145 (5th Cir. 1990). Sellars has failed to demonstrate any such abuse.

IV.

For the foregoing reasons, the district court is AFFIRMED.