**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

No. 94-30465
Summary Calendar

JERRY L. HARRISON,

Plaintiff-Appellee
Cross-Appellant,

VERSUS

PAUL REVERE LIFE INSURANCE COMPANY, THE,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-93-1824-I Mag-3)

(March 3, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Plaintiff Jerry L. Harrison ("Harrison") initiated this declaratory judgment action against defendant, The Paul Revere Life Insurance Company ("Paul Revere"), alleging entitlement to the maximum disability benefits under a long-term disability policy

[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

issued by Paul Revere to Harrison's employer, Kroll Associates, Inc.

The Paul Revere long-term disability policy constitutes an employee welfare benefit plan and is governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq*. ("ERISA"). The Paul Revere policy replaced Kroll Associates' previous long-term disability policy ("the CIGNA policy"), which provided a maximum disability benefit of $7,500 per month payable within 180 days after the onset of disability. Under the Paul Revere policy, the maximum benefit for long-term disability is greater than that of the CIGNA policy -- $10,000 per month payable within 90 days after the onset of disability.

There is no dispute that Harrison is totally disabled as the result of coronary artery disease and is entitled to benefits. Paul Revere is currently paying Harrison $7,500 per month based on its determination that (1) Harrison's disability was caused by a pre-existing condition because he took prescription drugs for coronary artery disease during the three months prior to the effective date of the policy, and (2) under the "Exception to Pre-Existing Conditions Limitation" provision in the policy, the benefits payable during the entire period of Harrison's disability are limited to the monthly benefits that would have been payable under the CIGNA policy ($7,500), rather than the greater benefits payable under the Paul Revere policy ($10,000). Harrison's position is that the "Exception" provision, which limits payments to the lesser amount payable under the CIGNA policy, applies only for a

12-month period, rather than for the entire length of his disability. After the 12-month period, Harrison argues, the greater amount payable under the Paul Revere policy should apply.

The district court determined, in favor of Paul Revere, that Harrison's disability was due to a pre-existing condition, but determined in favor of Harrison that the "Exception to Pre-Existing Conditions Limitation" provision of the Paul Revere policy limits benefits to those payable under the prior CIGNA policy only for a period of 12 months after the effective date of the policy, rather than for the entire period of Harrison's disability. After the 12-month period, the district court ruled, the benefits are to be paid in the amount available under the Paul Revere policy.

ISSUES

In this appeal, defendant-appellant Paul Revere argues that the district court erred in its interpretation of the "Exception to Pre-Existing Conditions Limitation" provision. Paul Revere asserts that Harrison should receive only the lower CIGNA benefit for the life of his disability. Paul Revere also argues that the district court did not give proper deference to Paul Revere's interpretation of the policy terms.

In response to Paul Revere's appeal, plaintiff-appellee Harrison argues that the district court reached the correct result when it determined that Harrison's benefit was limited to the lower CIGNA amount for only 12 months. Harrison brings a cross-appeal, however, arguing that (1) the district court erred in stating the proper standard of review as "abuse of discretion" rather than "de novo"; and (2) the district court erred in not awarding attorney's fees to Harrison. Harrison does not appeal the district court's determination that his coronary artery disease is a pre-existing condition.

## DISCUSSION

### A: Standard of Review

Harrison correctly points out in his cross-appeal that the district court recited the wrong standard of review. The district court reviewed Paul Revere's construction of the policy terms under an abuse-of-discretion standard, stating that "the plan gives the administrator discretion to determine eligibility for benefits and construe terms of the plan." See Haubold v. Intermedics, Inc., 11 F.3d 1333, 1336-37 (5th Cir. 1994)(holding that an administrative denial of benefits challenged under 29 U.S.C. 1132(a)(1)(B) is generally reviewed by the district court *de novo*, but if the benefit plan language gives the administrator discretionary authority, its decision is reviewed for abuse of discretion)(citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109-15 (1989).). We have reviewed the policy at issue in this case, and we conclude that the policy clearly does not contain any language giving Paul Revere general discretion to construe the terms of the plan. See Cathey v. Down Chemical Co. Medical Care Program, 907 F.2d 554, 558 (5th Cir. 1980), cert. denied, 111 S. Ct. 964 (1991)(holding that discretionary authority cannot be implied; it must be specifically conferred). Therefore, the correct standard of review for the district court was a de novo standard. In any case, as we explain in this opinion, we hold that the district court reached the correct result despite its misunderstanding of the standard of review.

B: Interpretation of Plan

The plan provisions regarding pre-existing conditions state in pertinent part as follows:

> "PRE-EXISTING CONDITIONS LIMITATION
> Any period of disability due to a pre-existing condition is not covered.
>
> PRE-EXISTING CONDITION means a disability which:
> 1. is caused by an injury or sickness; and
> 2. requires an employee, during the three months just before becoming insured, to:
>    a. consult a doctor; or
>    b. seek diagnosis or advice or receive medical care or treatment; or
>    c. undergo hospital admission or doctor's visits for testing or for diagnostic studies; or
>    d. obtain services, supplies, prescription drugs or medicines.
>
> This limitation does not apply to disabilities which begin after the employee has been insured for a period of twelve consecutive months. ...
>
> EXCEPTION TO PRE-EXISTING CONDITIONS LIMITATION
> The pre-existing conditions limitation does not apply to any insured employee who:
> 1. was insured by the prior group policy on the day before this Policy takes effect; and
> 2. would have either been:
>    a. covered for the condition under the prior plan if that plan remained in force; or
>    b. has been insured for twelve consecutive months under:
>    1) the prior group policy; or
>    2) a combination of the prior group policy and this Policy.
>
> If these conditions are met, we pay benefits. However, during the time period when any pre-existing conditions limitation would have applied, no monthly benefit will be greater than the lesser of:
> 1. the monthly benefit payable under this Policy; or
> 2. the monthly benefit which would have been paid under

the prior group policy."

Harrison has been under treatment by Dr. William A. Rolston since April 1981 for symptomatic coronary artery disease and related complications. The Paul Revere policy became effective on July 1, 1992. Four months later, on October 29, 1992, Harrison was admitted to the hospital with a diagnosis of unstable angina due to coronary artery disease. On that date he underwent a coronary angiogram which revealed the presence of "essentially total occlusion of all native coronary arteries with significant and progressive disease in each saphenous vein graft, as well as the distal native coronary circulation." Dr. Rolston recommended that Harrison seek total and permanent disability from any sort of occupation due to his coronary artery disease.

The district court determined that Harrison was disabled due to a pre-existing condition. (Harrison does not appeal this issue). Pursuant to the "Exception to the Pre-Existing Conditions Limitation" provision, however, the existence of a pre-existing condition does not preclude coverage if the employee was insured under a prior group disability policy. Harrison was so insured, under the CIGNA policy. The parties' dispute centers on the following language found in the Exception to Pre-Existing Conditions Limitation:

> "If these conditions are met, we pay benefits. However, **during the time period when any pre-existing conditions limitation would have applied**, no monthly benefit will be greater than the lesser of:
> 1. the monthly benefit payable under this policy; or
> 2. the monthly benefit which would have been paid under the prior group policy." (Emphasis added).

The parties disagree as to the length of time that Harrison should receive the lower amount payable under the CIGNA policy. Paul Revere interpreted the policy language "during the time period when any pre-existing conditions limitation would have applied" to mean "any period of disability due to a pre-existing condition." In other words, Paul Revere decided that benefits in the lesser amount payable under the CIGNA policy should be paid to Harrison for the life of his disability. Harrison maintains -- and the district court found -- that the language in question limits Harrison to the lesser CIGNA amount only for the first 12 months after becoming insured with Paul Revere, after which benefits should be paid to him in the greater amount payable under the Paul Revere policy.

The district court found that the provision "during any time period when any pre-existing conditions limitation would have applied" has only one logical meaning. The court reasoned:

> "The language of the policy clearly provides that the pre-existing conditions limitation does not apply to disabilities which begin after the employee has been insured for a period of twelve consecutive months. Thus, the pre-existing conditions limitation period is the first twelve months after becoming insured, and the limitation to the amount payable under the CIGNA policy applies only for the first twelve-month period after becoming insured. To give the clause the meaning urged by Paul Revere would render the clause meaningless, because the policy section would have the same meaning regardless of whether the clause in question were included."

Accordingly, the district court found as a matter of law that Paul Revere's construction of the "Exception to the Pre-Existing Conditions Limitation" is without reasonable basis and is in conflict with the plain meaning of the policy language. We agree.

We hold that the district court was correct in determining that the "Exception" provision applies to limit Harrison's payments only for a 12-month period, rather than the entire length of his disability.

Therefore, for the reasons stated by the district court in its order of July 19, 1994, we are satisfied that the district court's interpretation of the policy language was correct.

C: Attorney's Fees

Finally, Harrison claims that the district court should have awarded him attorney's fees, and complains that the court did not make an explicit ruling on his request for fees. Award of attorney's fees in an ERISA action is permitted by 29 U.S.C. § 1132(g). The decision whether to award such fees is governed by the five factors set out in Harms v. Cavenham Forest Ind., Inc., 984 F.2d 686, 694 (5th Cir.), cert. denied, 114 S. Ct. 382 (1993). Harms held that requests for attorney's fees should be considered in the light of (1) the degree of the opposing party's culpability or bad faith; (2) the ability of opposing parties to satisfy an award of attorney's fees; (3) whether an such an award would deter others acting under similar circumstances; (4) whether the party requesting attorney's fees sought to benefit all participants and beneficiaries in an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. Id. at 694.

We agree with the district court's implicit decision not to award attorney's fees to Harrison in this case. We hold that neither party acted in bad faith; they merely advanced conflicting interpretations of the plan. Harrison sought to protect only his own rights, not those of other employees or plan participants. Furthermore, it is not clear that an award of fees in this case would deter other persons acting under similar circumstances.

Accordingly, we deny relief on both the defendant's appeal and the plaintiff's cross-appeal, and we AFFIRM the judgment of the district court.