IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Woolsey,

Plaintiff,

v.

Aetna Life Insurance Company, et al.,

Defendants.

No. CV-18-00578-PHX-SMB

ORDER

Pending before the Court is Plaintiff Michael Woolsey's Motion for Attorneys' Fees and Related Non-Taxable Expenses.[1] (Doc. 93, "Motion".) Defendant Aetna Life Insurance Company responded, (Doc. 96), and Plaintiff replied, (Doc. 99). The Court considers the Motion, its supporting memorandum and enters the following Order:

I. BACKGROUND

The relevant factual background for Plaintiff's motion relates to this Court's assessment of Plaintiff's earlier motion for summary judgment. (*See* Doc. 87.) That motion, (Doc. 73), concerned Plaintiff's denial of long-term disability ("LTD") benefits. In short, Plaintiff received short-term disability benefits ("STD") from Aetna after his attending physician, Physician's Assistant Benjamin E. Kuhlman, supported Plaintiff's claims of debilitating migraines and related depression. (Doc. 87 at 1.) Plaintiff received STD benefits for six months. During that time, he also filed a LTD claim. But, having hardly sought, much less received, specialist treatment for his claimed disabilities over that six

[1] Plaintiff's memorandum in support of the motion complies with LRCiv. 54.2. (*See* Doc. 93.)

month period, Aetna found "disability not supported" and terminated Plaintiff's STD benefits. (*Id.* at 2.) Although Plaintiff sought some additional care to support his LTD claim, Aetna found the records inadequately supported Plaintiff's claim and denied both Plaintiff's initial LTD claim and subsequent appeal. (*Id.*) At summary judgment, Plaintiff: (1) argued that Aetna had a conflict of interest that required a more exacting standard of review; and (2) identified a host of procedural irregularities showing Aetna breached its fiduciary duties to Plaintiff and abused their discretion in processing his LTD claim. Plaintiff's arguments had mixed success. While acknowledging Aetna, by both funding and administering the Plan, had a structural conflict of interest, the Court found that, "aside from basic money-saving incentives inherent in any business, Plaintiff points to no credible evidence that financial incentives influenced the claims process[.]" (*Id.* at 12.) The Court's careful review of the record did not reveal "wholesale and flagrant violations of the procedural requirements of ERISA that necessitate de novo review." (*Id.* at 13.) Success in Plaintiff's allegations of procedural irregularities was also uneven. The Court found Aetna's denial of Plaintiff's LTD well supported as the medical record supporting Plaintiff's LTD claim was "shockingly thin." (*Id.* at 15.) Despite finding that Aetna's determinations were generally on solid ground, the Court recognized a few irregularities—Aetna's assessment of Plaintiff's LTD claim on appeal was made without a specialist's initial consultation clinical notes, Aetna failed to address Plaintiff's specific vocational requirements or communicate in sufficient detail how Plaintiff could perfect his claim on appeal, and Aetna's reviewers failed to consider the cumulative effects of his claimed conditions. (*Id.* at 18-24.) But, having acknowledged the sparseness of support for Plaintiff's claim, the Court declined to grant summary judgment in full as Plaintiff requested and instead remanded the case to Aetna to remedy the identified inadequacies and reassess Plaintiff's claim. (*See id.* at 24-25.)

II. LEGAL STANDARD

The Employee Retirement Security Act of 1974 ("ERISA"), permits district courts discretion to award reasonable attorney's fees and costs to either party. *See* 29 U.S.C. §

1132(g)(1). "A[n] [ERISA] plan recipient who prevails in an action to enforce rights under the plan is ordinarily entitled to a reasonable attorney's fee if the participant 'succeed[s] on any significant issue of litigation which achieves some of the benefit . . . sought in bringing the suit' and if no special circumstances make an award unjust." *Barnes v. Independent Auto. Dealers of Cal. Health & Welfare Benefit Plan*, 64 F.3d 1389, 1397 (9th Cir. 1995) (quoting *Losada v. Golden Gate Disposal Co.*, 950 F.2d 1401 (9th Cir. 1991)). Thus, a district court may exercise its discretion and grant attorneys' fees pursuant to § 1132(g)(1) only when a fees claimant shows "some degree of success on the merits." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010). In *Hardt*, the Supreme Court explained this standard more fully: "A claimant does not satisfy that requirement by achieving 'trivial success on the merits' or a 'purely procedural victory,' but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a 'lengthy inquiry into the question whether a particular party's success was substantial or occurred on a central issue.'" 560 U.S. at 255, 130 S.Ct. 2149 (citing *Ruckelshaus v. Sierra Club*, 463 U.S.680, 688 n.9, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983) (internal citations omitted)).

III. DISCUSSION

The threshold question is whether Plaintiff is entitled to fees. To be eligible for award of attorneys' fees under § 1132(g)(1) a party must achieve "some degree of success on the merits." *Hardt*, 560 U.S. at 255, 130 S.Ct. 2149. "Only after passing through the 'some degree of success on the merits' door is a claimant entitled to the district court's discretionary grant of fees under § 1132(g)(1)." *Simonia v. Glendale Nissan/Infiniti Dis. Plan*, 608 F.3d 1118, 1121 (9th Cir. 2010) (citation omitted). As previously discussed, Plaintiff's claim was remanded to Aetna for further consideration. In some cases, a remand alone may constitute adequate success on the merits to consider awarding fees under § 1132(g)(1). But given the particular circumstances here, Plaintiff's claim constitutes no more than "purely procedural victory" that falls short of what *Hardt* requires. *See Hardt*, 560 U.S. at 255.

Plaintiff relies primarily on *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255-56, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010) to support his request.[2] In *Hardt*, the Supreme Court determined that a remand order *could*, and in that case did, constitute "some success on the merits" sufficient to make a party eligible for fees under § 1132(g)(1). 560 U.S. at 256. That does not mean a remand establishes eligibility in every instance. The Supreme Court expressly shied away from such a rule. Finding the specific facts of the *Hardt* plaintiff's claim demonstrated "far more than trivial success on the merits or a purely procedural victory," *Hardt* explained that "[b]ecause . . . [factual] conclusions resolve this case, we need not decide today whether a remand order, without more, constitutes 'some success on the merits' sufficient to make a party eligible for attorney's fees under § 1132(g)(1)." *Id.*

Unlike in *Hardt*, the particular circumstances of Plaintiff's claim here do not compel the conclusion that Plaintiff achieved "some success on the merits." The *Hardt* plaintiff satisfied that standard for several reasons. There, the district court found the plan administrator's failure to comply with ERISA denied a full and fair review of the plaintiff's claim. *Id.* at 255. Not only did the district court find compelling evidence of the *Hardt* plaintiff's disability, it was also "inclined to rule in [the plaintiff's] favor." *Id.* at 256. And, making plain its positive assessment of the *Hardt* plaintiff's claim, the district court required the insurer reconsider the claim promptly (within thirty (30) days), while warning that "[o]therwise, judgment will be entered in [the plaintiff's] favor." *Id.* at 256. Here, by contrast, this Court made no such pronouncements. As discussed below, its assessment of Plaintiff's claim cuts against a fee award.

[2] For the first time in his reply, Plaintiff baldly claims that he is "the prevailing party" without support or citation. (Reply at 3.) Confusingly, this claim runs contrary to Plaintiff's earlier citation to *Hardt*, a case which addressed a different question under § 1132(g)(1)—whether a party who is not a "prevailing party," but still achieves "some degree of success on the merits," can obtain a fee award. Regardless, the Court generally declines to consider "[a]ny arguments raised for the first time in [a party's] reply brief", especially when, as here, the argument is both conclusory and inconsistent. *Beckhum v. Hirsch*, No. CV07-8129-PCT-DGCBPV, 2010 WL 582095, at *8 (D. Ariz. Feb. 17, 2010) (citing *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003); *see also Dilley v. Gunn*, 64 F.3d 1365, 1367 (9th Cir. 1995) ("Issues not raised in the opening brief usually are deemed waived.").

The Supreme Court's holding in *Hardt* rested on the specific facts of Bridget Hardt's claim. *Id.* at 256; *see also Gross v. Sun Life Assur. Co. of Canada*, 763 F.3d 73, 77 (1st Cir. 2014) (identifying "whether the particular circumstances of the remand in this case" as the central eligibility question raised by *Hardt*). The facts surrounding the remand in this case are not as compelling as those in *Hardt*. Weighing in Plaintiff's favor, the record revealed a handful of procedural irregularities that occurred primarily during the handling of Plaintiff's LTD claim appeal. This is the strongest support for finding "some success on the merits" but even that finding weighs only slightly in Plaintiff's favor and certainly does so with less force than an *Hardt*. While the cumulative effect of otherwise "largely inconsequential", (Doc. 87 at 25), procedural irregularities convinced the Court to remand the claim, the Court emphasized that fault regarding the most concerning of those irregularities was evenly shared. (*See* Doc. 87 at 22 (recognizing that both parties bore responsibility for the physician's notes from an August 29, 2016 neurological consultation escaping Aetna's review on appeal).) More tellingly, whereas the lower court in *Hardt* court found "compelling evidence" of disability, here "Aetna's initial LTD benefits denial is on solid ground." (Doc. 87 at 12.) Casting further doubt on the merits of Plaintiff's claim, the Court explained that Plaintiff's failure to seek care for the [allegedly] disabling conditions afflicting him," (*id.* at 17), rendered the medical records supporting Plaintiff's LTD claim "shockingly thin," (*id.* at 15), and leaving Aetna "little evidence that [could] possibly justify claim approval." (*Id.* at 17.) What the Court did not say is also noteworthy. The Court did not see Aetna's conduct as an abuse of discretion. Finding Plaintiff's arguments largely wanting, the Court rejected Plaintiff's core requests: declining to impose the higher standard of review Plaintiff sought; finding clear justification for Plaintiff's claim denial; affirming that Aetna's independent reviewers were competent, properly considered possible pharmacological effects in their review, and were not so conflicted as to require de novo review of their findings. While identifying procedural irregularities for Aetna to redress, the Court saw no need to impose strict measures on Aetna's remand proceedings, much less warn Aetna that an adverse determination could follow. *Cf. Hardt*,

560 U.S. at 256. By remanding the case to Aetna, the Court directly rejected one of Plaintiff's fundamental positions: "Because the record is fully developed, a remand is not warranted."[3] (Doc. 71, "MSJ" at 30.)

Plaintiff's cited cases do not disturb this analysis.[4] Instead, they reinforce the conclusion that the particular circumstances of Plaintiff's claim—circumstances that differ meaningfully from those in *Hardt*—fall just shy of "some success on the merits". Proceeding from *Hardt*'s baseline that fee eligibility under § 1132(g)(1) requires an assessment of the "particular circumstances of the remand," the First Circuit in *Gross v. Sun Life Assur. Co. of Canada* identified the plaintiff's success in "securing a ruling on the standard of review" as the type of "concrete gain for the claimant . . . readily distinguishable from interim, procedural victories[.]" 763 F.3d 73, 80 (1st Cir. 2014) (identifying "the panel's standard of review holding [as] a significant, substantive success"); *see also Gross v. Sun Life Assur. Co.*, 734 F.3d 1, 11-16 (1st Cir. 2013) (subjecting the administrator's rejection of benefits to de novo review). So too with *Manriquez v. Abbott Laboratories Extended Disability Plan*, a case heard in this district which Plaintiff holds up as a direct rejection of Aetna's current arguments that also based its holding on an interpretation of plan language "expressly forbidden by the Ninth Circuit." No. CV-09-00099-PHX-GMX, 2010 WL 3023260, at *5 (D. Ariz. Jul. 30, 2010).[5] Plaintiff achieved no such success here.

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[3] Only "in the alternative" did Plaintiff "seek a remand to Aetna if the Court is unable to grant his motion for summary judgment." (Doc. 71 at 30.) But Aetna also sought that outcome. (*See* Doc. 81 at 24 ("At A Minimum, [Plaintiff's] Claim Should Be Remanded.").) Aetna acknowledged (without accepting blame) that some of Plaintiff's medical records were not included in its review of Plaintiff's LTD claim on appeal, Aetna asked to "be permitted to consider [the missing records] . . . in the first instance." (*Id.*)

[4] Plaintiff blithely dismisses Aetna's cases as out-of-circuit. (Reply at 4-5.) Whether as a closer factual analog, *see Vivas v. Hartford Life & Acc. Ins. Co.*, No. 10-22992-CIV; 2013 WL 5226720, at *2-3 (S.D. Fla. Jun. 17, 2013) (denying fees and finding "the only similarity between this matter and *Hardt* is that this case was remanded to the plan administrator for full and fair review"), or generally supportive of Plaintiff's substantive analysis, *see Yates v. Bechtel Jacobs Co., LLC*, No. 3:09-CV-51, 2011 WL 2462840, at *2 (E.D. Tenn. May 5, 2011) (determining that a remand, "without more, does not qualify as success on the merits"), the cases are not determinative, but add some weight to Aetna's position as persuasive authority.

[5] *Manriquez* also suffered from additional violations not present in the instant case, including the administrator's decision "to consult with unqualified medical personnel." *Manriquez v. Abbott Laboratories Extended Disability Plan*, No. CV-09-00099-PHX-GMX, 2010 WL 3023260, at *7 (D. Ariz. Jul. 30, 2010).

Aetna's interpretation of plan language was both reasonable and well supported and Plaintiff's request for review de novo unsuccessful. (Doc. 87 at 15-16, 12-13.) *Dimry v. The Bert Bell/Pete Rozelle NFL Player Retirement Plan* is much more similar to *Hardt* than to this case. No. 3:16-cv-01413-JD, 2018 WL 6726963, at *1 (N.D. Cal. Dec. 22, 2018) (awarding attorneys' fees); *see also* No. 16-cv-01413-JD, 2018 WL 1258147, at *4-5 (N.D. Cal. Mar. 12, 2018) (granting summary judgment). In *Dimry*'s the Court found a Retirement Board abused its discretion in denying benefits and the facts are much more aggregious than those found here. In *Dimry*, The board relied soley on an expert chosen by them, used by the board in many cases, completely ignored records from treating physicians and a decision by SSA finding Dimry disabled. If faced with a similar "abandonment of discretion" and an obviously meritorious claim, this Court too would be hard pressed to characterize remand as purely procedural. *See Dimry v. The Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 2018 WL 1258147, at *4. Plaintiff's last case, *Gorbacheva v. Abbott Labs. Extended Dis. Plan*, could present a closer question[6] but, as an unpublished memorandum disposition, is not precedent and ultimately provides insufficient guidance for studied analysis. 794 Fed.Appx. 590, 594 (9th Cir. 2019) (affirming the award of fees); *see also* Fed. R. App. P. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.").[7]

IV. CONCLUSION

Hardt left open the question of whether a remand, without more, comprises some success on the merits sufficient to compel a fee award under 29 U.S.C. § 1132(g)(1). There may be cases where a remand order alone may indicate some success on the merits. *See*

[6] While the underlying determinations in *Gorbacheva v. Abbott Labs. Extended Dis. Plan*, 309 F.Supp.3d 756, 778 (N.D. Cal. 2018) (rejecting de novo review, finding no abuse of discretion and granting summary judgment) reflect similar conclusions in the present case, (*see* Doc. 87), the sparse medical record supporting Plaintiff's claim pales in comparison to the *Gorbacheva* plaintiff's. *See also Gorbacheva v. Abbott Labs. Extended Dis. Plan*, No. 5:14-cv-02524, 2018 WL 2387852, at *2-4 (N.D. Cal. May 25, 2018) (awarding fees but denying costs).

[7] Attempting to apply *Gorbacheva*, issued in 2019, for factual purposes to support "entitlement to attorneys' fees," Plaintiff improperly cites Fed. R. App. P. 36-3(c) which governs unpublished dispositions issued before January 1, 2007.

e.g., Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 963 F.Supp.2d 950, 91-63, 966 (N.D. Cal. 2013) (finding fee eligibility due to a violation of ERISA notice requirements and because claimant's suit was catalyst for a beneficial change in the defendant's plan interpretation); *Olds v. Ret. Plan of Int'l Paper Co.*, No. 09-0192, 2011 WL 2160264, at *1 (S.D. Ala. June 1, 2011) (finding "gross violation" of regulations safeguarding ERISA's "full and fair review" requirement). But this is not one of them. Simply put, the facts of this case fall short of demonstrating "some degree of success on the merits" as contemplated by *Hardt*.

Accordingly,

IT IS ORDERED DENYING Plaintiff's Motion for Attorney Fees and Related Non-Taxable Expenses (Doc. 93).

Dated this 4th day of August, 2020.

Honorable Susan M. Brnovich
United States District Judge