No._____

In The

Supreme Court of the United States

SHIRLEY A. GRAHAM,

Petitioner,

v.

HARTFORD LIFE & ACCIDENT INSURANCE COMPANY

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Joseph F. Clark, Jr.
Counsel of Record for Petitioner
1622 South Denver
Tulsa, Oklahoma 74119
918-585-5600
Fax 918-585-5601

QUESTIONS PRESENTED

1. In an action for plan benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B), is a District Court's Order remanding the matter back to the Plan Administrator for a fair determination a final appealable decision under 29 U.S.C. § 1291 when the basis for the remand is that the decision to deny benefits was arbitrary and capricious and not supported by substantial evidence?

PARTIES

The Petitioner is Shirley A. Graham ("Graham").

The Respondent is Hartford Life & Accident Insurance Company ("Hartford")

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Graham respectfully submits that a writ of certiorari should issue to review the judgment of the Court of Appeals, Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is found at 501 F.3d 1153 and reprinted in the Appendix ("App.") at Page 1a. The opinion of the lower court is found at 2007 WL 160309.

JURISDICTION

The United States Court of Appeal's Order and Judgment was filed on August 24, 2007. This petition is being timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutes: 28 U.S.C. § 1291 and 29 U.S.C. § 1132 set forth at App. 23a to 32a.

STATEMENT OF THE CASE

A. INTRODUCTION

This case was originally filed in the United States District Court for the Northern District of Oklahoma under state court causes of action of breach of an insurance contract and insurance bad faith. The reason a state court cause of action was brought originally rather than an ERISA action is that the Plaintiff was a rural letter carrier with the United States Postal Service ("USPS") and had obtained her disability insurance through her union, the National Rural Letter Carriers Association ("NRLCA"), the Collective Bargaining Union for rural letter carriers. Membership in the Union and eligibility for the subject insurance required a person to be employed by the USPS and work in the rural carrier craft. Excluded from membership are temporary relief carriers. Further, the Plan provided that the premiums should be deducted from the rural letter carrier's U.S. Postal Service's wages. On April 22, 2005, more than two (2) years after the suit was filed, Senior United States District Court Judge James O. Ellison entered an Interlocutory Order determining the disability insurance Plan in question was subject to ERISA jurisprudence and that the Plan in question was not a governmental plan. Because this Order was interlocutory in nature, an appeal from that particular Order could not be taken but had to wait until the matter was fully resolved.

The action then proceeded as a normal ERISA action where the parties submitted an Administrative Record and then a briefing schedule was followed. The Court took the case under advisement and on January 20, 2006, United States District Judge Claire V. Eagan entered an Order finding that the Defendant failed to establish by substantial evidence that its denial was reasonable and concluding that the denial of benefits was arbitrary and capricious under the appropriate standard. However, rather than reinstating the benefits, the Trial Court ordered that the matter be remanded to the Plan Administrator "for a full and fair redetermination of the claim".

Graham appealed from the two (2) decisions. The first being whether or not ERISA applied to the matter at all and second, if ERISA applied, was a remand to the Plan Administrator an appropriate remedy.

Graham then filed for attorney fees which were denied and a second appeal was perfected on that issue.

The matters were consolidated and subsequently the United States Court of Appeals for the Tenth Circuit entered an Order stating that it did not have jurisdiction because the Order remanding was not a final appealable Order under 28 U.S.C. § 1291. Thus, almost seven (7) years after Graham left her job with the United States Post Office, and more

than four (4) years after she initiated this suit, she is no closer to obtaining her benefits than she was when she left her job on July 17, 2000, or when the United States Office of Personnel Management approved her for disability retirement less than six (6) months later, on December 1, 2000.

As will be discussed in more detail, the finding of the Trial Court that the denial of benefits was arbitrary and capricious was based upon the Court's conclusion that there was not substantial evidence to support the denial and, thus, the denial was arbitrary and capricious. At no time in the proceedings did Plaintiff allege any procedural defect in the administrative process. The record will reflect that the matter was fully addressed at the administrative level with two levels of appeal addressing the initial denial.

Nor did the Defendant Hartford ever request a remand but always asserted that its denial of benefits was supported by substantial evidence and was not arbitrary and capricious.

The temptation at this point is to argue that remanding a case such as this back to the Plan Administrator for a fair determination after the matter has been fully evaluated three times before in the administrative process is just one more obstacle that keeps deserving beneficiaries from receiving the benefits they are entitled to in a timely manner, if at all. If possible, this new wrinkle could be even

more offensive than the other impediments that beneficiaries face, like denial of right to trial by jury, inability to confront the witnesses against them, inability to conduct discovery, deference given to the decision by an insurance company to deny benefits and the lack of any compensatory or punitive damages. All of these are offensive to the rights of beneficiaries to receive their benefits, hinder beneficiaries' rights to receive a full, fair and complete adjudication of their claims, and most definitely encourages insurance companies and self-funded Plans to deny benefits on the skimpiest of reasons. As we will note, this case is a classic example.

Although the denial of right to trial by jury offends our United States Constitution and, in particular, the seventh guarantee found in the Bill of Rights and lack of any compensatory or punitive damages seems to offends this legislation's stated intent and savings clause, the frustration that we now address may be the most offensive of all. The reason for this is that it seems to reward wrong doing. Obviously, from a practical standpoint, an insurer such as Hartford is benefitted when they avoid or defer payment of benefits under the terms of a disability contract.

In the case at bar, the Trial Court concluded that the denial of benefits was not supported by substantial evidence and, thus, the denial was arbitrary and capricious. Hartford could not even

muster enough evidence to support its denial under the deferential arbitrary and capricious standard where all they had to do was have evidence that is more than a scintilla but less than a preponderance. As this Court reviews this Petition for Certiorari, it will be more than seven (7) years since Shirley Graham first submitted her claim to Hartford and she is no closer to getting her benefits than she was in November 2000. As this Court considers whether or not it should grant certiorari, it will be close to five (5) years since the Plaintiff filed her initial Complaint at the District Court level and yet she is even farther away from getting an adjudication on her rights to receive these benefits than she was when she first filed that Complaint.

Moreover, Graham may never be entitled to a judicial determination of whether or not ERISA jurisprudence even applies to this situation or should her attorney be entitled to an attorney fee for "successfully" carrying her burden and proving that the denial of her initial claim was arbitrary and capricious. These would seem to be compelling reasons for this Court to take this matter up.

However, equally as important and probably more compelling to this Court is the fact that there is a division among the Circuit Courts of Appeal regarding when an ERISA remand order is a final appealable order and when remand to a Plan Administrator would be appropriate. In a Tenth Circuit case that preceded the present case and one

that was relied on by both parties before the Tenth Circuit, the Tenth Circuit Court of Appeals concluded "that district court orders remanding an issue to an ERISA plan administrator are not *per se* nonfinal. The decision should be made on a case-by-case basis applying well-settled principles governing final decisions.'" *Rekstad v. First Bank System, Inc.* 238 F.3d 1259, At 1263 (10th Cir. 2001).

We will see that the different Circuits disagree as to what well-settled principles regarding finality apply to an ERISA remand to the Plan Administrator and when it is appropriate to remand a case to a Plan Administrator. The Ninth Circuit has stated, "A plan administrator will not get a second bite at the apple when its first decision was simply contrary to the facts." *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, at 1163 (C.A. 9 2001). That appears to be precisely what happened in the case at bar. We will see that there is overwhelming evidence of Shirley Graham's disability in this administrative record. The denial was based on the jaundiced review of the administrative record by Hartford and its obvious cherry picking of the record to muster more than a scintilla of evidence to support its denial. Despite this attempt and the deferential review given the denial, it was determined to be arbitrary and capricious.

As we will see, there was a full and complete medical history of Shirley Graham's condition

chronicling its onset in February of 1994 and going through August 2002. This eight (8) year medical history bookends the December 1, 2000, decision by the United States Office of Personnel Management approving Shirley Graham for disability retirement. There was the initial investigation and denial and two levels of administrative review. The Order remanding the matter back to the Plan Administrator for a fair determination of Graham's entitlement to disability benefits did not find any procedural defect and, as stated earlier, none was asserted either by the Plaintiff Graham nor by the Defendant Hartford. Given the *Rekstad v. First Bank System, Inc., supra*, decision and the decision before this Court, it is hard to imagine what kind of case the Tenth Circuit would find appropriate for appellate review. This becomes particularly confusing when you see the expressions of other Circuit Courts of Appeal For these reasons as will be set out in more detail, Graham urges this Court to grant her Petition for Certiorari to the Tenth Circuit Court of Appeals ordering the Court to accept jurisdiction and decide the issues presented to the Court of Appeals.

B. FACTUAL BACKGROUND

Graham is not asking this Court to decide the issues it presented to the Tenth Circuit Court of Appeals regarding whether the subject Plan is a government Plan and, thus, not subject to ERISA preemption, whether Graham is entitled to disability

benefits under the Administrative Record and entitlement to attorney fees. However, it is felt that the factual underpinnings of these arguments are important to this Court's decision whether to grant certiorari. In the first section, we will review some of the facts that were presented to the Tenth Circuit on the issue of the status of the Plan as a government Plan and in the next section, we will set out the exact abstract of the Administrative Record that was initially presented to the Tenth Circuit Court of Appeals in our Brief In Chief. We feel that it is particularly important to do this second section as completely as we can as these facts would go to the propriety of remanding this matter back to the Plan Administrator and the jurisdiction of the Tenth Circuit to review that Order.

> "We must first consider whether we have jurisdiction. Circuit Courts generally have jurisdiction only over "final decisions of the district courts." 28 U.S.C. § 1291; cf. id. § 1292 (describing circuit courts' jurisdiction over interlocutory decisions). In *Rekstad v. First Bank System, Inc.*, 238 F.3d 1259, 1263 (10th Cir.2001), we held that a district-court order remanding a case to an ERISA plan administrator for a determination of LTD benefits was not a final appealable decision over which we had jurisdiction. Accord *Graham v. Hartford Life & Accident Ins. Co.*, Nos. 06-5054 & 06-5142, 2007 WL 2405264 (10th Cir. Aug.24, 2007) (**dismissing for**

lack of jurisdiction when the district court had concluded that substantial evidence did not support a denial of benefits and remanded the claim to the plan for redetermination)." *Garner v. U.S. West Disability Plan* 2007 WL 2989460, ___F3d___(10th Cir. 2007) (emphasis added).

C. TRIAL COURT PROCEEDINGS

Graham filed her Complaint on February 27, 2003, alleging state court causes of action for breach of an insurance contract and Oklahoma insurance bad faith. Graham alleged that jurisdiction was with the Federal Court because of diversity.

Hartford answered alleging that ERISA applied to this matter and at a Scheduling Conference held on April 15, 2004, Senior Judge James O. Ellison entered a discovery and briefing schedule to address the issue of the application of ERISA to the case. The briefing on that issue was completed on August 17, 2004, and on April 22, 2005, Judge Ellison entered an Order determining that the subject Plan was not a government Plan and that ERISA applied. Subsequently, the Administrative Record was submitted to the Court, the parties briefed the issue of entitlement to benefits and on January 20, 2006, Judge Claire V. Eagan entered her Order that the Defendant's final decision to deny Plaintiff's claim for LTD benefits was not supported by substantial evidence, was arbitrary and capricious and

remanded the case back to the Plan Administrator for a full and fair redetermination of the claim. On that same date, Judge Eagan entered a Judgment remanding the case to the Plan Administrator, dismissing/terminating the case (terminates case).

After the Court's decision finding the denial arbitrary and capricious, Graham filed an Application for Attorney Fees pursuant to 29 U.S.C. § 1132(g)(1). The attorney fee application was timely filed and was referred to the Magistrate for a Report and Recommendation. Magistrate Judge Sam A. Joyner entered a Report and Recommendation to deny the attorney fees and a timely objection to that Report and Recommendation was filed. On June 28, 2006, United States District Court Claire V. Eagan overruled the Plaintiff's objection to the Report and Recommendation.

D. APPELLATE PROCEEDINGS

Graham initially appealed the Interlocutory Order finding that the Plan was not a government Plan and, thus, subject to ERISA, as well as the Order remanding the case to the Plan Administrator under Appeal Case No. 06-5054. Later a second appeal was perfected under Case No. 06-5142 on the issue of entitlement to attorney fees.

In Case No. 06-5054, the Plaintiff filed her Initial Brief and then the Defendant Hartford filed its

Response Brief. By virtue of the allegation in the Response Brief filed by Hartford that the January 20, 2006, Order and separate Judgment did not constitute a final appealable decision under 28 U.S.C. § 1291, the United States Court of Appeals for the Tenth Circuit entered an Order on June 1, 2006, tolling the briefing on the merits and directing Graham to file a separate jurisdictional memorandum brief within twenty-one (21) days of that Order. On August 14, 2006, the Appellate Court entered an Order reserving judgment on the Appellate jurisdictional issue of finality raised by Hartford and ordered that the jurisdictional issue be submitted to the panel selected to handle the appeal. Of course, further granting Graham the opportunity to file a Reply Brief within fourteen (14) days of that Order.

The Tenth Circuit denied an Application to Consolidate the two (2) appeals but did subsequently consolidate the two (2) appeals for oral argument which was held on March 5, 2007. On August 24, 2007, the Court filed its opinion that there was no appellate jurisdiction.

REASONS THE PETITION SHOULD BE GRANTED

1. THERE IS A DIVISION AMONG THE CIRCUITS REGARDING THE FINALITY OF A RULING SUCH AS THE ONE BEFORE THIS COURT

We have set out the extensive abstract of the Administrative Record above because we feel it is important for this Court to understand the basis of the Trial Court's ruling and why we believe a ruling such as this should be considered a final, appealable order. It is clear from the Tenth Circuit Court of Appeals' Opinion, as well as the Trial Court's Opinion, that the finding that the denial of benefits was arbitrary and capricious and not supported by substantial evidence went to the merits of the claim rather than some sort of procedural defect. In finding the denial arbitrary and capricious, the Trial Court made the following observations regarding the Administrative Record:

> "The Court finds that Hartford's decision to deny plaintiff's claim for LTD benefits was arbitrary and capricious. Hartford has not met its burden of proving the reasonableness of its decision by substantial evidence. Hartford referenced, as the basis for its determination, the 1997 accommodation for plaintiff's disability and Dr. Emel's January 23, 2001 statement that plaintiff's medical condition 'does not' restrict her from work. By relying on the 1997 USPS accommodation to justify the denial, Hartford suggests that once an individual requests and receives accommodation for a disability, she foregoes future eligibility for LTD benefits. Hartford undertook no independent medical review of

changes in plaintiff's condition between the accommodation in 1997 and her retirement in 2000. Absent additional evidence, prior accommodation does not amount to substantial evidence on which to base a denial of LTD benefits. *See Hawkins v. First Union Corp. Long-Term Disability Plan,* 326 F.3d 914, 918 (7th Cir.2003) ("A disabled person should not be punished for heroic efforts to work by being held to have forfeited his entitlement to disability benefits should he stop working").

Further, Hartford's reliance on Dr. Emel's January 23, 2001 statement, which favors their decision, ignores his July 26, 2000 statement that plaintiff is disabled and his March 7, 2001 statement that she is incapable of sitting for more than one hour. The record suggests that Hartford gave undue weight to the January 23, 2001 statement. *See Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 834, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) ("Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence ..."). In addition, while independent medical examinations are not required to establish reasonableness, "[w]here, as here, a conflict of interest may impede the plan administrator's impartiality, the administrator best promotes the purposes of ERISA by obtaining an independent

> evaluation." *Fought,* 379 F.3d at 1015; *see Gaither v. Aetna Life Ins. Co.,* 388 F.3d 759, 773 (10th Cir.2004) ("fiduciaries cannot shut their eyes to readily available information when the evidence in the record suggests that the information might confirm the beneficiary's theory of entitlement and when they have little or no evidence in the record to refute that theory."). *Graham v. Hartford Life & Accident Ins. Co.,* 2006 WL 160309, P. 3-4 (N.D. Okla. 2006)

After making the above observations, the Court ordered "that defendant's November 27, 2001 final decision to deny plaintiff's claim for LTD benefits is hereby **REMANDED** to the Plan administrator for a full and fair redetermination of the claim." *Graham v. Hartford Life & Accident Ins. Co.,* at P.4.

It is important to point out that the Court is not telling the Defendant to accept any new evidence or reconsider the matter in light of the Court's interpretation of contract language or based upon any other finding or instruction that the Court is giving the Plan Administration. The Court is simply saying look at the same evidence you have, but this time look at it fully and fairly.

The Tenth Circuit has recognized that there is a split of authority over whether an order remanding a matter to an ERISA administrator is final.

"Circuit courts have split over whether an order remanding a matter to an ERISA plan administrator is final. The First, Sixth, and Eleventh Circuits have held that such orders are non-final. *See Bowers v. Sheet Metal Workers' Nat'l Pension Fund,* 365 F.3d 535, 537 (6th Cir.2004); *Petralia v. AT & T Global Info. Solutions Co.,* 114 F.3d 352, 354 (1st Cir.1997); *Shannon v. Jack Eckerd Corp.,* 55 F.3d 561, 563 (11th Cir.1995). The Seventh Circuit, however, considers ERISA remand orders to be final and appealable. *See Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan,* 195 F.3d 975, 977-80 (7th Cir.1999). In *Hensley v. N.W. Permanente P.C. Ret. Plan & Trust,* the Ninth Circuit employed an approach similar to our 'practical finality rule' and held that an ERISA remand order is final when 'appellate jurisdiction is necessary to ensure proper review of an important legal question which a remand may make effectively unreviewable.' 258 F.3d 986, 994 (9th Cir.2001) (*overruled on other grounds by Abatie v. Alta Health & Life Ins. Co.,* 458 F.3d 955, 966 (9th Cir.2006))." *Metzger v. UNUM Life Ins. Co. of America* 476 F.3d 1161, *1165 (10th Cir. 2007).

We first do not necessarily agree with the statement above regarding the First Circuit. The Tenth Circuit cites the case of *Petralia v. AT & T Global Info. Solutions Co.,* 114 F.3d 352, 354 (1st Cir. 1997). In that case, there was a procedural defect and not a full administrative review of the beneficiary's claim. The Order was that the Plan was to afford Ms. Petralia a full opportunity to establish her continued eligibility for short term benefits. We believe there is a difference between an order remanding a matter to the administrator for acceptance of further evidence and an order simply remanding the matter back for a fair determination. It appears that the Seventh Circuit would treat these type of remand orders differently. At this point, however, we would point out that we do not believe that the First Circuit as a matter of course believes all such remand orders are not subject to appeal. In a later case, the Circuit states that they review a district court's choice of remedy for an ERISA violation for an abuse of discretion.

> "An appellate court reviews a district court's choice of remedy for an ERISA violation for abuse of discretion. *Zervos v. Verizon New York Inc.,* 277 F.3d 635, 648 (2d Cir.2002); *Grosz-Salomon v. Paul Revere Life Ins. Co.,* 237 F.3d 1154, 1163 (9th Cir.2001). Once a court finds that an administrator has acted arbitrarily and capriciously in denying a claim for benefits, the court can either

remand the case to the administrator for a renewed evaluation of the claimant's case, or it can award a retroactive reinstatement of benefits. *See Welsh v. Burlington N., Inc., Employee Benefits Plan,* 54 F.3d 1331, 1340 (8th Cir.1995) (recognizing that a district court has power to calculate and award unpaid benefits).

Liberty cites the familiar proposition that ERISA 'provides no authority for a court to render a *de novo* determination of an employee's eligibility for benefits' in support of its argument that the district court could not award Cook retroactive benefits. *Peterson v. Cont'l Cas. Co.,* 282 F.3d 112, 117 (2d Cir.2002). Important though it is in many other contexts, this axiom underlying the principle of ERISA deference does not deprive a court of its discretion to formulate a necessary remedy when it determines that the plan has acted inappropriately. "[R]etroactive reinstatement of benefits is appropriate in ERISA cases where, as here, 'but for [the insurer's] arbitrary and capricious conduct, [the insured] would have continued to receive the benefits' or where 'there [was] no evidence in the record to support a termination or denial of benefits.' "

Grosz-Salomon, 237 F.3d at 1163 (modifications in original) (quoting *Quinn v. Blue Cross & Blue Shield Ass'n.,* 161 F.3d 472, 477 (7th Cir.1998)); *see also Zervos,* 277 F.3d at 648 ('**[A] remand of an ERISA action seeking benefits is inappropriate where the difficulty is not that the administrative record was incomplete but that a denial of benefits based on the record was unreasonable.**') (internal quotation marks omitted); *Levinson v. Reliance Standard Life Ins. Co.,* 245 F.3d 1321, 1330 (11th Cir.2001) ('We do not agree, however, that a remand to the plan administrator is appropriate in every case.'); *Grosz-Salomon,* 237 F.3d at 1163 ('[A] plan administrator will not get a second bite at the apple when its first decision was simply contrary to the facts.').

We acknowledge that several of these quotations may overstate the matter. We have no doubt that in some situations a district court, after finding a mistake in the denial of benefits, could conclude that the question of entitlement to benefits for a past period should be subject to further proceedings before the ERISA plan administrator.

This might be true, for example, if the denial is less flagrant than in this case and if there were good reason to doubt that a reassessment would justify benefits for some or all of the past period. However, the variety of situations is so great as to justify considerable discretion on the part of the district court and, in this instance, it has not been abused.

Liberty argues that there is no evidence of Cook's disability status after October 1998, when it terminated her disability benefits, and hence no basis for awarding her disability benefits past that date. However, the absence of information about Cook's disability status resulted directly from Liberty's arbitrary and capricious termination of her benefits. As a recipient of disability benefits, Cook was under a continuing obligation to adduce proof of her disability pursuant to the long-term disability plan. Once Liberty terminated her benefits, she was no longer obliged to update Liberty on her health status. It would be patently unfair to hold that an ERISA plaintiff has a continuing responsibility to update her former insurance company and the court on her disability during the pendency of her

internal appeals and litigation, on the off chance that she might prevail in her lawsuit. Moreover, as the district court notes in its decision, reconstruction of the evidence of disability during the years of litigation could be difficult for a recipient of long-term disability benefits wrongly terminated from a plan.

This is not to say that Liberty cannot terminate Cook's benefits in the future. Once she is reinstated to the plan, she will again be obligated to prove that she is disabled under the 'any occupation' definition listed in the plan documents. If she cannot do so, or if Liberty acquires sufficient evidence to contradict her doctor's opinion, it could pursue termination of her eligibility for benefits at that time.

The district court also awarded Cook attorney's fees, as it has discretion to do under 29 U.S.C. § 1132(g)(1). An appellate court reviews an award of attorney's fees solely for abuse of discretion. *Cottrill v. Sparrow, Johnson & Ursillo, Inc.,* 100 F.3d 220, 223 (1st Cir.1996). We find no abuse of discretion in that award." *Cook v. Liberty Life Assur. Co. of Boston* 320

F.3d 11, *24 -25 (1st Cir. 2003)
(emphasis added)

It goes without saying that the District Court's Order remanding the case back to the Plan Administrator for a fair determination is an equitable remedy. Thus, it appears that the First Circuit reviews such an order as a final appealable order and subject to appellate review under an abuse of discretion standard.

Moreover, despite the Tenth Circuit's analysis in the case of *Metzger v. UNUM Life Ins. Co. of America, supra,* it also appears that the Ninth Circuit Court of Appeals would likewise review such an order for an abuse of discretion.

> "When a district court's remedy takes the form of an equitable order, we review that order for an abuse of discretion. We find no such abuse here. Contrary to Paul Revere's assertion, retroactive reinstatement of benefits is appropriate in ERISA cases where, as here, 'but for [the insurer's] arbitrary and capricious conduct, [the insured] would have continued to receive the benefits' or where 'there [was] no evidence in the record to support a termination or denial of benefits.' In other words, a plan administrator will not get a second bite at the apple when

> its first decision was simply contrary to the facts. This court's decision in *Saffle v. Sierra Pacific Power Company Bargaining Unit Long Term Disability Income Plan* does not counsel to the contrary. *Saffle* stands for the proposition that 'remand for reevaluation of the merits of a claim is the correct course to follow when an ERISA plan administrator, with discretion to apply a plan, has misconstrued the Plan and applied a wrong standard to a benefits determination.' This proposition is both unremarkable and inapposite. First, as discussed above, the operative plan documents do not confer discretion on Paul Revere. Second, even if they did, Paul Revere did not misconstrue the definition of 'disabled,' or apply the wrong standard to evaluate Grosz-Salomon's claim. It applied the right standard, but came to the wrong conclusion. Under these circumstances, remand is not justified. Retroactive reinstatement of benefits was proper. *Grosz-Salomon v. Paul Revere Life Ins. Co.* 237 F.3d 1154, *1163 (9th Cir. 2001)

Perhaps the most comprehensive and certainly the best reasoned approach is that of the Seventh Circuit. After the Court determined that the

judgment was not too uncertain to be enforced and that the District Court did not plan to enter any further orders, the Court then turned to whether or not the nature of the relief ordered was a non-final order. In doing so, the Court also recognized the split of authority between the various Circuits.

> But the nature of the relief, a remand to UNUM, may do so. Although it is doubtful as an original matter that a district court may 'remand' ERISA claims, as if to administrative agencies, we have held that courts may treat welfare benefit plans just like administrative law judges implementing the Social Security disability-benefits program. *Quinn v. Blue Cross & Blue Shield Ass'n*, 161 F.3d 472, 476-78 (7th Cir.1998); *Schleibaum v. Kmart*, 153 F.3d 496, 503 (7th Cir.1998). That makes it necessary to determine whether a remand is appealable as a final decision under 28 U.S.C. § 1291.
>
> One court of appeals has answered 'yes' without analysis. *Snow v. Standard Insurance Co.*, 87 F.3d 327, 332 (9th Cir.1996). Two courts have answered 'no,' analogizing the remand to a district court's order setting the case for a new trial. *Petralia v. AT&T Global*

> *Information Solutions Co.*, 114 F.3d 352 (1st Cir.1997); *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir.1995). *Petralia* thought it implicit in a remand that the parties may return to the district court without filing a new complaint following the plan's fresh decision, and if so then the district court's decision cannot be called final. A more recent decision of the ninth circuit called *Petralia*' s assessment persuasive, *Williamson v. Unum Life Insurance Co.*, 160 F.3d 1247, 1252 (9th Cir.1998), though because the judgment in *Williamson* was not final by any standard (the district court had resolved a few disputed issues but had not awarded *any* relief) *Snow* was not overruled. A fourth court of appeals has noticed the conflict without taking a stand. *Crocco v. Xerox Corp.*, 137 F.3d 105, 108 (2d Cir.1998). Now it is our turn." *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan* 195 F.3d 975, *978 (7th Cir. 1999)

After recognizing a split of authority, the Court then took its stab at the issue. It is this writer's belief that this is the best and most well reasoned approach. The Seventh Circuit likened the remand of an ERISA matter back to the Plan Administrator like a remand of a matter back to a

Social Security Administrative Judge. Although the purpose of this Petition is simply to point out to the Court that there appears to be a split of authority between the Circuits, we would opine that this approach seems to be the best and the most well reasoned. In cases where additional evidence is needed or where a Plan Administrator needs to reevaluate evidence in light of a Court's direction where it is anticipated the Court will then make additional rulings based upon the expanded record, that certainly is not a final, appealable order. But where the Court makes a judgment affirming, modifying or reversing the decision, with or without remand, that would be an appealable order. Obviously, that is what we have in the case at bar. There is no direction or request that the Plan Administrator expand the Administrative Record but simply an order reversing the denial. There really is no additional evidence available. All of the relevant medical records of Shirley was before the Plan Administrator in the three tiered decision making process. An independent medical evaluation most certainly would tell us what Shirley Graham's condition is now but not what it was seven (7) years ago when she made application for her benefits. In any event, the analysis by the Seventh Circuit is certainly instructive but at this particular point it simply points out that there is at least a third way of reviewing whether or not an order remanding a claim for further proceedings before the Plan Administrator is a full and final appealable Order.

If the justification for a remand to an ERISA plan's administrator is that the plan makes the same kind of decisions as the Social Security Administration, then it is important to know the jurisdictional consequences of a remand in a Social Security case. Two sentences of 42 U.S.C. § 405(g) authorize remand in different situations. Sentence four authorizes the district court to enter 'a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.' Sentence six allows the court to remand for the receipt of new evidence, but without entering a judgment determining the propriety of the decision previously rendered. *Sullivan v. Finkelstein*, 496 U.S. 617, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990), holds that a sentence-four remand, which depends on a finding of error in the Commissioner's decision, is appealable under § 1291 as a final decision, while a sentence-six remand is not final or appealable because no adjudication has taken place. See also *Forney v. Apfel*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998). A sentence-four remand concludes the

litigation in the district court; any protest about the Commissioner's decision on remand requires a new suit. But a sentence-six remand works like a yo-yo; once the record has been enlarged, the district court finally decides whether the administrative decision is tenable. Remands to plan administrators serve the same functions as remands to the Commissioner, which implies the same jurisdictional treatment for purposes of § 1291. If the district court finds that the decision was erroneous and enters a judgment wrapping up the litigation, that decision is appealable even if extra-judicial proceedings lie ahead; but if the court postpones adjudication until after additional evidence has been analyzed, then it has not made a final decision. The Supreme Court drew this line in *Finkelstein* in part because it was concerned that it would otherwise be impossible for the Commissioner to obtain review of an adverse decision by a district court. If the court directs the Commissioner to apply a specific rule, or accept specific evidence, and the Commissioner carries out that directive and awards benefits, the case may never return to court. Unum may say the same about the remand ordered

here. *Petralia* assumed that the case was bound to come back to the district court, but as this example shows it need not do so. At all events, the Court added in *Forney*, an appeal under § 1291 does not depend on who won in the district court or whether the remand is likely to prevent renewed litigation. The rule is mechanical: all sentence-four remands are appealable. *Forney* holds that the claimant is as entitled to appeal a remand as is the Commissioner. Forney contended that she was entitled to immediate victory without the need for a remand, and the Supreme Court held that Forney could present this claim to the court of appeals before the remand occurred. Perlman occupies Forney's position, and unum occupies the Commissioner's position in *Finkelstein*, for the district court's remand is based on a finding of error (parallel to sentence four) rather than new evidence (sentence six). Just as in *Finkelstein* and *Forney*, the district court entered a Rule 58 judgment indicating that the decision to deny benefits was in error, and that the court is done with the case. "*Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan* 195 F.3d 975, *978 -979 (7th Cir. 1999)

In addition to analyzing cases dealing with Social Security remands, the Court also went on to analyze the issue of whether such orders are appealable comparing them to a remand to an arbitrator. In its analysis, it came to the same conclusion that such an order is subject to appellate jurisdiction.

> "Before concluding that ERISA remands are just like Social Security remands, we must consider a second possibility: that an ERISA remand is most similar to a remand to an arbitrator. Like an arbitrator, the administrator of an ERISA plan is a private dispute resolver. It therefore may be instructive to explore whether an order declining to enforce an award but directing additional arbitral proceedings is appealable.Our court first considered that question in *Shearson Loeb Rhoades, Inc. v. Much*, 754 F.2d 773 (7th Cir.1985). Recognizing that the circuits then were divided on the question, we came down firmly on the side of no appellate jurisdiction. Contemporaneously with *Much*, another circuit adopted a contrary view, *United Steelworkers v. Adbill Management Corp.*, 754 F.2d 138, 140 & n. 1 (3d Cir.1985) (equating a remand to an

order requiring arbitration in the first place), but we reaffirmed *Much* in *United Steelworkers v. Aurora Equipment Co.*, 830 F.2d 753 (7th Cir.1987). *Much* and *Aurora Equipment* give a common reason for their conclusion: that remands to arbitrators should be treated just like remands to administrative agencies, which at the time of *Much* and *Aurora Equipment* were widely thought to be non-final. Three years after *Aurora Equipment*, that premise was undermined by *Finkelstein*, and *Forney* has completed the process of making administrative remands generally appealable. So if we adhere to the rationale of *Much* and *Aurora Equipment*, the comparison of ERISA remands to arbitration remands does not lead in a new direction; it leads right back to the administrative-law analogy, and thus (today) to appellate jurisdiction. Neither *Much* nor *Aurora Equipment* has been cited since *Finkelstein*, but for a reason that does not reflect a change of heart about the classification of arbitral remands under § 1291. In 1988 Congress changed the rules for appeals from decisions concerning arbitration. Under 9 U.S.C. § 16(b) any order by a district court directing the parties to arbitrate is non-

appealable, but § 16(a)(1)(E) provides that any order 'modifying, correcting, or vacating an award' may be appealed immediately. Courts of appeals routinely assume, though without discussion, that an order vacating an arbitrator's decision but remanding for additional arbitration is appealable under § 16(a)(1)(E), rather than non-appealable under § 16(b). See, e.g., *Aircraft Braking Systems Corp. v. Automobile Workers*, 97 F.3d 155 (6th Cir.1996). *Aurora Equipment* supports the conclusion that a remand should not be treated like an original order to arbitrate, so this circuit, too, presumably will entertain jurisdiction under § 16(a)(1)(E) when the time comes. Thus whether we think of remands to arbitrators as equivalent to remands to agencies (the rationale of *Much* and *Aurora Equipment*) or as orders vacating awards, the remands would today be appealable, which offers further support for the conclusion that § 1291 permits appeal of a remand to an ERISA administrator.

Permitting appeals from remand orders does carry a cost-not only because it sets the stage for successive appeals if the decision on remand should be contested,

> but also because it causes the attorneys' fees dispute to come to a head prematurely. How is one to tell whether Perlman is a 'prevailing party' entitled to fees until we know the final outcome? It is tempting to treat the remand as non-final simply in order to postpone the fee question until the outcome is known. *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan* 195 F.3d 975, *979 -980 (7th Cir. 1999)

We thus see that there is a definite split of authorities between the various Circuits and this split of authority substantially affects the rights of beneficiaries and, in some instances, even Plan Administrators. Graham asserts that it is reasonable to believe that had this appeal been brought in the First, Fourth, Seventh or Ninth Circuit Court of Appeals she would now have an order addressing the merits of her appeal and, in all likelihood, would now be receiving her court ordered benefits and perhaps even preparing for her state court cause of action for insurance contract benefits and/or insurance bad faith. Even if our assessment is wrong on what the final appellate resolution would be, we feel we would at least have an end to the ERISA litigation and if nothing more, closure. These distinctions between the Circuits effect substantive rights and not for merely differing approaches to a complex legal decision. In one court, you get

resolution of your lawsuit. In another court, the beneficiary gets thrown back into the rabbit hole. The compelling reason for this Court to grant certiorari is that in some Circuit Courts you get to have your matter heard and in other Courts you do not even get resolution of your claim. It is difficult to imagine a situation where the different approaches of the Circuit Court of Appeals produces such a dramatic impact on the outcome of a matter.

2. MAKING REMAND ORDERS SUCH AS THE ONE BEFORE THIS COURT NON-APPEALABLE VIOLATES THE PURPOSE AND INTENT OF THE ERISA STATUES AND VIOLATES BENEFICIARIES' DUE PROCESS RIGHTS.

In the 1974 U.S. Code and Administrative News, in its final report the Committee stated as follows:

> "The enforcement provisions have been designed specifically to provide the secretary and the participants and their beneficiaries with broad remedies for redressing or permitting violation of the Retirement Income Security for Employees Act as well as the amendments made to Welfare Pension Disclosure Act. **The intent of the committee is to provide the full range of legal and equitable**

> **remedies available both in state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants."** 1974 U.S. Code and Administrative News, Page 4655.

As an attorney who has represented insureds and beneficiaries over the last seventeen (17) years, I yearn for the procedural obstacles which in the past appeared to have hampered enforcement of fiduciary responsibilities for the recovery of benefits due to the participants. That being said, it appears that nothing more than a legislative modification of ERISA would address much of the problems that we encounter at this particular point. However, this Court seems to be in a unique position regarding this particular issue. We are talking about what type of order would be an appealable order and who better to address question than this Court. Particularly in light of the fact that the various Circuit Courts seem to struggle mightily with this question and have developed different approaches which substantially and significantly affect the rights of the litigants depending on what circuit they live in.

Unquestionably, remand back Plan Administrators who can not muster enough evidence

to support their initial denial encourages wrongful denial and delays receipt of deserved benefits. Allowing remands such as this, does nothing more than to thwart and totally defeat the stated purposes of ERISA. This Court has the unique opportunity to breathe some life back into ERISA and its legislative intent.

CONCLUSION

Graham and her counsel obviously believe that there are strong public policy and fairness issues which would warrant a grant of certiorari and a consideration by this Court.

However, the strongest argument for certiorari is simply the fact that there is varying approaches to whether or not an order remanding a matter back to a Plan Administrator is a final and appealable order. These differences result in substantial and significant differences in the rights of litigants to have their matter fully, fairly and efficiently resolved. Regardless of how this Court would eventually come down on this issue of appealability of an order such as the one before this Court, it is essential that there be uniform and consistent handling of this issue throughout the Circuits.

Respectfully Submitted,

Joseph F. Clark, Jr. OBA #1706
Counsel of Record for Petitioner
Clark & Warzynski, P.A.
1622 South Denver
Tulsa, Oklahoma 74103
918-585-5600
Fax 918-585-5601