UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS E. UNDERWOOD, individually and on behalf of all others similarly situated, Plaintiff, v. CARPENTERS PENSION TRUST FUND—DETROIT AND VICINITY, and TRUSTEES OF CARPENTERS PENSION TRUST FUND—DETROIT AND VICINITY, Defendants.	Case No. 13-cv-14464 Honorable Laurie J. Michelson

OPINION AND ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION TO DISMISS [7] AND DENYING IN PART AND GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [11]

In February 2013, Plaintiff Thomas Underwood began receiving disability retirement benefits from the Carpenters Pension Trust Fund—Detroit and Vicinity, a multiemployer pension plan ("the Plan") that is subject to the Employee Retirement Income Security Act ("ERISA"). In August 2013, the Plan's Trustees amended the Plan to address its underfunded status. The amendment significantly reduced Underwood's monthly disability payments. After his administrative appeal of the reduction in benefits was denied, Underwood filed this action on behalf of himself and a proposed class of all those similarly situated. The Court recently certified a class of "[a]ll persons who commenced receiving disability benefits from Carpenters Pension Trust Fund—Detroit & Vicinity Pension Plan on or after September 1, 2008, and who were receiving those disability benefits on August 1, 2013," ("Class") and appointed Underwood as their representative.

Defendants have filed a Motion to Dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted. (Dkt. 7.) Underwood requested that the motion be treated as one for summary judgment under Rule 56 (Dkt. 10 at 5) and filed his own Motion for Summary Judgment (Dkt. 11). In response, Defendants indicated that they believed they were entitled to summary judgment based on the arguments presented in their Motion to Dismiss. (Dkt. 15 at 4.) The Court will therefore treat the motions as cross-motions for summary judgment. The Court heard oral argument on the motions on September 9, 2014.

The Court finds that summary judgment is appropriate on two issues. As a matter of law, Underwood cannot prevail on his claim for violation of ERISA § 305. But as a matter of law, Defendants violated § 10.4 of the Plan when they amended the Plan to reduce Underwood's benefits. To the extent that the August 2013 Amendment reduced the disability benefits that Underwood was already receiving on the date the amendment became effective, it violates § 10.4 of the Plan and is not enforceable. Defendants' Motion to Dismiss (Dkt. 7), converted to a motion for summary judgment, is DENIED IN PART AND GRANTED IN PART. Underwood's Motion for Summary Judgment (Dkt. 11) is DENIED IN PART AND GRANTED IN PART.

I. FACTS

The following facts are not disputed.

The Carpenters Pension Trust Fund—Detroit & Vicinity Pension Plan is a multi-employer plan subject to ERISA. (Dkt. 10 at 1; Dkt. 15 at 4.) Underwood has been a participant in the Plan for more than twenty-five years. (Dkt. 10 at 1; *see* Compl. ¶ 9; Dkt. 7-5, Thirteenth

Amendment to the Plan § 5.2(d); Dkt. 15 at 4–5.) He began receiving disability benefits[1] under the Plan in February 2013. (Dkt. 10 at 2; Dkt. 15 at 4.) At the time, the Plan provided:

> A totally and permanently disabled Active Participant is one who is found by the Trustees, on the basis of medical evidence satisfactory to them, to have a physical or mental condition that is likely to be permanent and continuous during the remainder of his or her life, and which has rendered the Active Participant totally unable to continue working in the construction industry, including any field supervisory work that does not otherwise require any work with the traditional tools of that industry.

(Dkt. 10-4, Seventh Amendment to the Plan § 5.1.)

In May or June of 2013, as part of an "All Reasonable Measures Plan" under the Pension Protection Act of 2006 ("PPA"), the Plan Trustees voted to amend the Plan to set caps on the dollar amount of disability benefits participants could receive and to require that participants obtain a Social Security disability award by August 1, 2014, in order to continue receiving disability benefits from the Plan. (Dkt. 10 at 3; Dkt. 15 at 5; Dkt. 7-4, All Reasonable Measures Plan at 3–4; Thirteenth Amendment to the Plan §§ 5.1(a)(iv) & 5.2(d).) These changes applied to all participants who began receiving disability benefits on or after September 1, 2008, and took effect on August 1, 2013 ("August 2013 Amendment"). (Dkt. 10 at 3; All Reasonable Measures Plan at 3–4; Thirteenth Amendment to the Plan §§ 5.1(a)(iv) & 5.2(d).) The changes reduced the amount of Underwood's disability benefits. (Dkt. 10 at 4; Dkt. 15 at 5; Thirteenth Amendment to the Plan § 5.2(a)(iv).)

On August 21, 2013, Underwood submitted to the Plan Administrator his "Claim for reinstatement of pre 8/1/2013 DRB amount and to recover DRB shortfall caused by implementing the 'All Reasonable Measures Plan' on 8/1/2013." (Dkt. 10-9, Claim.) Underwood

[1] Underwood refers to the disability benefits he is receiving as "disability retirement benefits" or "DRB." Whether the disability benefits are properly characterized as "retirement benefits" is a contested issue in the motions. The Court therefore refers to them as "disability benefits."

stated that he believed the reduction and possible elimination (due to the Social Security requirement) of his disability benefits was unlawful because under section 305 of ERISA, "the benefits of DRB recipients in pay status may not be reduced or eliminated," and because "Section 10.4 of the Plan and Article XIII of the [Summary Plan Description ("SPD")] prohibit Plan amendments that reduce the benefits of persons in pay status on the effective date of the amendment." (*Id.*) He requested reinstatement of his disability benefit amount and reimbursement for the unpaid difference. (*Id.*)

Section 10.4 of the Plan provides: "The Trustees may, by majority vote, amend this Plan. Unless required by law, no amendment of this Plan shall be permitted to reduce the Accrued Benefit of any Participant or the benefits of any person who is already receiving benefits on the date the amendment is effective." (Dkt. 10-2, Plan § 10.4.) Article XIII of the SPD states: "The Board of Trustees have the right to amend the Plan and Trust at any time. In no event, however, can any amendment: . . . b. Cause any reduction in the benefit amount credited to you . . . ." (Dkt. 10-5, SPD Art. XIII.)

The Plan's legal counsel responded to Underwood's claim on September 3, 2013. (Dkt. 10-10, Initial Denial.) Their letter stated: "the disability provided by the Plan is not subject to ERISA anti-forfeiture provisions. In fact, disability benefits are treated as 'welfare benefits,' even when offered through a pension plan. As such they can legally be adjusted, as part of the Plan's PPA compliance." (*Id.*) The letter did not address Section 10.4 of the Plan or Article XIII of the SPD. (*Id.*)

Underwood submitted an "Appeal of Denial of Claim" on September 9, 2013. (Dkt. 10-11, Admin. Appeal.) He noted that the denial of his claim did not cite the ERISA anti-forfeiture provisions to which it referred, and stated that his claim "was not and is not based on ERISA

section 203," which "addresses the 'nonforfeitability' of an employee's right to his 'normal retirement benefit' upon the employee's 'attainment of normal retirement age.'" (*Id.* at 2.) Second, he argued that "[g]iven that the Plan documents explicitly deem the DRB to be a disability retirement benefit, there is no basis for concluding that it is a 'welfare benefit.'" (*Id.* (emphasis in original).) Regardless, he argued, "Section 10.4 of the Plan and Article XIII of the SPD do not distinguish between welfare benefits and non-welfare benefits," so "benefits in pay status, regardless of their character, may not be reduced." (*Id.* (emphasis in original).) And furthermore, Underwood said, "ERISA section 305 applies to multiemployer plans like the Plan and explains that disability benefits in pay status are **not** an adjustable benefit that may be reduced or eliminated." (*Id.* (emphasis in original).)

Underwood also argued that the new requirement that participants qualify for Social Security disability to receive disability benefits could violate ERISA section 305 by eliminating the disability benefits of a participant in pay status. (*Id.* at 3.) Underwood explained that the requirement could disqualify participants in pay status because Social Security laws require that an individual be disabled from performing any gainful activity, while the Plan formerly required that a participant be disabled only from performing his or her trade. (*Id.*)

A Pension Supervisor for the Plan wrote to Underwood on October 17, 2003, that the Board of Trustees had denied his Appeal. (Dkt. 10-12, Final Denial.) The letter stated:

> The changes made to disability benefits in the All Reasonable Measures Plan do not violate Section 10.4 of the Plan document or Article XIII of the SPD as they do not affect accrued benefits. Federal case law on ERISA supports this position. Your request to have the Social Security qualification requirement waived is premature as that requirement doesn't take effect until next year. Further, courts have upheld this requirement as reasonable.

(*Id.* (footnotes omitted).)

Underwood filed this action in October 2013.

II. SUMMARY JUDGMENT STANDARD

Defendants seek to dismiss claims for which they do not bear the burden of persuasion at trial. Therefore, they may discharge their initial summary-judgment burden by "pointing out to the district court . . . that there is an absence of evidence to support [Plaintiff's] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If Defendants do so, Underwood "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court must then determine whether the evidence presents a sufficient factual disagreement to require submission of Underwood's claims to a jury, or whether the evidence is so one-sided that Defendants must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In making this determination, the Court views the evidence, and any reasonable inferences drawn from the evidence, in the light most favorable to Underwood. *Matsushita*, 475 U.S. at 587.

Underwood's summary-judgment burden is greater. Because he seeks summary judgment on claims for which he has the burden of persuasion, Underwood's showing "must be sufficient for the court to hold that no reasonable trier of fact could find other than for [him]." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487–88 (1984)); *see also Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1056 (6th Cir. 2001) ("[I]f the moving party also bears the burden of persuasion at trial, the moving party's initial summary judgment burden is 'higher in that it must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it.'" (quoting 11 James William Moore et al., *Moore's Federal Practice* § 56.13[1], at 56–138 (3d ed. 2000))). In making this determination, the Court views the evidence, and any

reasonable inferences drawn from the evidence, in the light most favorable to Defendants. *Matsushita*, 475 U.S. at 587.

III. ANALYSIS

The single count of Underwood's Complaint is brought under ERISA § 502(a)(1)(B), to recover benefits and enforce rights under the terms of the Plan. (*See* Compl. ¶ 95.) His claim is based on two theories. First, he asserts that the August 2013 Amendment violated § 10.4 of the Plan and Article XIII of the Summary Plan Document, which he says "explicitly prohibit Plan amendments that reduce the benefits of persons in pay status on the effective date of the amendment." (*Id.* at ¶ 96.) Second, he asserts that reduction of his benefits is prohibited by ERISA § 305, which he says "prohibits the reduction of disability benefits in pay status." (*Id.* at ¶ 98.) Before proceeding to the parties' arguments, the Court must address the nature of Underwood's claim and the standard of review that applies.

A. Relief Sought

Underwood's claim is brought under ERISA § 502(a)(1)(B), which authorizes a participant to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). But his claim is based on the premise that the August 2013 amendment of the Plan was unlawful, and that therefore he is due benefits under the terms of the Plan as it existed before the August 2013 amendment. (Compl. at ¶ 95.) The Court was initially concerned that the Supreme Court's decision in *CIGNA Corp. v Amara*, 563 U.S. __, 131 S. Ct. 1866, 179 L. Ed.2d 843 (2011), prevents this Court from awarding Underwood the relief he seeks under ERISA § 502(a)(1)(B).

In *Amara*, the beneficiaries of CIGNA's employee pension plan alleged that CIGNA's notices to them regarding significant changes it made to the plan were incomplete and misleading. *See* 131 S. Ct. at 1870–72. The district court agreed. *See id.* at 1872–75. As a remedy, the court first ordered the terms of the plan reformed and then ordered CIGNA to enforce the plan as reformed. *Id.* at 1876. The district court found that this relief was effectively authorized by ERISA § 502(a)(1)(B) (codified at 29 U.S.C. § 1132(a)(1)(B)), which states that "a civil action may be brought by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan." The parties cross-appealed, and the Second Circuit Court of Appeals summarily affirmed. *Id.* But the Supreme Court held that ERISA § 502(a)(1)(B) did not authorize the relief the district court awarded: "we have found nothing suggesting that the provision authorizes a court to alter those terms [of the plan], at least not in present circumstances, where that change, akin to the reform of a contract, seems less like the simple enforcement of a contract as written and more like an equitable remedy." *Id.* at 1877.

The Court went on to state that "the types of remedies the court entered here fall within the scope of the term 'appropriate equitable relief' in § 502(a)(3)." *Id.* at 1880. Section 502(a)(3) (codified at 29 U.S.C. § 1132(a)(3)) provides that "a civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the

plan." The Court vacated and remanded for the district court to determine whether an appropriate remedy could be imposed under ERISA § 502(a)(3).[2]

It appears Underwood is not due any benefits under the current version of the Plan. The Court was concerned that by awarding benefits under a different version of the Plan than the one now in effect, the Court would be awarding relief that the Supreme Court in *Amara* found was equitable in nature and could not be awarded under § 502(a)(1)(B). Specifically, the Supreme Court held that "[t]he power to reform contracts (as contrasted with the power to enforce contracts as written) is a traditional power of an equity court, not a court of law." *Amara*, 131 S. Ct. at 1879. In a related case before this Court, another participant of the Plan seeking restoration of his disability benefits on the grounds that amendment of the Plan was unlawful brought his claim under both ERISA § 502(a)(3) and ERISA § 502(a)(1)(B). *Schleben v. Carpenters Pension Trust Fund—Detroit and Vicinity et al.*, No. 13-cv-14464 (E.D. Mich.). As discussed in a separately issued Opinion and Order on Defendants' Motion to Dismiss in that case, the Court found the plaintiff could bring his claim under both provisions using the two-step procedure set forth in *Amara*.

At the hearing, Underwood declined to adopt that procedure in his case. Instead, he argued that § 10.11 of the Plan provides a mechanism to invalidate any part of the August 2013 Amendment found to be unlawful. That section states: "If any provision of this Plan is held invalid or unenforceable, such invalidity or unenforceability shall not affect any other provisions

[2] On remand, the district court found that reformation and surcharge were appropriate equitable remedies by which the court could award the relief under § 502(a)(3) that it had previously awarded under § 502(a)(1)(B). *Amara v. CIGNA Corp.*, No. 01-cv-2361, Memorandum of Decision on Remedies and Class Certification (D. Conn. Dec. 20, 2012). Amara appealed the decision and CIGNA cross-appealed. *Amara*, No. 01-cv-2361, Notice of Appeal (D. Conn. Feb. 1, 2013); *Amara*, No. 01-cv-2361, Notice of Appeal by CIGNA (D. Conn. Feb. 7, 2013). The Second Circuit Court of Appeals held oral arguments on February 10, 2014, and has not yet issued a decision. *Amara v. CIGNA Corp.*, No. 13-526, Docket (2d Cir.).

hereof, and this Plan shall be construed and enforced as if such provision had not been included." (Plan § 10.11.) Thus, the Court can proceed under ERISA § 502(a)(1)(B) to enforce Underwood's rights under the Plan by invalidating any part of the amendment it finds unlawful. The Court would not need to reform the Plan under ERISA § 502(a)(3). Unlike *Amara*, where the Court had to write a new plan to fulfill promises made by misleading notices, the rights Underwood seeks to enforce exist under the Plan if the amendment is invalidated. *Cf. Amara*, 131 S. Ct. 1875 ("To strike the new plan while leaving in effect the frozen old plan would not help CIGNA's employees."). The Court agrees with Underwood that his claim can be brought under ERISA § 502(a)(1)(B) in light of § 10.11 of the Plan.[3]

B. Standard of Review

In actions under ERISA, a de novo standard of review applies to decisions by benefit plan administrators unless "discretion has been expressly granted in the plan for the specific decision at issue." *Shy v. Navistar Int'l Corp.*, 701 F.3d 523, 529 (6th Cir. 2012). Defendants argue that a deferential standard of review applies to the Trustees' decisions here "[b]ecause the Plan gives the Board authority to interpret the terms of the Plan and make benefits determinations." (Mot. at 7.) More specifically, the Plan states: "The Trustees shall have discretionary authority to make any determination *concerning eligibility for participation and benefits* hereunder, including the interpretation of the Plan, Trust, or any other relevant document used in the administration of the Trust Fund." (Plan § 8.13 (emphasis added).)

The Sixth Circuit has explained that "discretion is *not* an all-or-nothing proposition. A plan can give an administrator discretion with respect to some decisions, but not others. A

[3] Underwood noted that although he did not reference § 10.11 of the Plan in his briefs on the motions, Defendants are familiar with all of the Plan provisions and were therefore not prejudiced by that omission. The Court agrees and notes further that Defendants had an opportunity to address § 10.11 of the Plan at the hearing.

fiduciary or administrator does not have discretion with respect to all aspects of a plan simply because the administrator has discretion to interpret some provisions." *Anderson v. Great W. Life Assur. Co.*, 942 F.2d 392, 395 (6th Cir. 1991) (emphasis in original); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) (relying on principles of trust law to hold that a de novo standard of review applies to benefit determinations under ERISA unless the plan confers discretion, and noting that discretion "depends upon the terms of the trust." (internal quotation marks and citation omitted)); *Shy*, 701 F.3d 523, 530 (6th Cir. 2012) (holding that a de novo standard applied where plan gave administrator authority "to construe and interpret" the plan and "decide all questions of eligibility" but did not say the authority was discretionary and made the administrator's decisions subject to review by a committee). The administrator "has exactly the amount and type of discretion granted by the plan, no more, and no less." *Anderson*, 942 F.2d at 395. Here, the discretion afforded by the Plan extends only to "determination[s] concerning eligibility for participation and benefits." (Plan § 8.13.)

Underwood asks the Court to review the Trustees' decision to amend the Plan. While the August 2013 Amendment had the effect of reducing Underwood's benefits, it was not itself a "determination concerning eligibility for participation and benefits." Thus, the Court need not defer to the Trustees' decision to amend the Plan, and a de novo standard will be applied. But if the Court invalidates part of the amendment and proceeds to determine whether Underwood and other class members are due any benefits, it will accord deference to the Trustees' previous decisions regarding their eligibility for benefits under the Plan as it existed before the amendment.

C. PPA Violation

Turning to the substance of Underwood's claims, Underwood argues that the Plan amendment and consequent reduction of his benefits violated the following provision of ERISA:

> (e) Rehabilitation plan must be adopted for multiemployer plans in critical status
>
> (8) Benefit adjustments
>
> (A) Adjustable benefits
>
> (i) In general
>
> Notwithstanding section 1054(g) of this title, the plan sponsor shall, subject to the notice requirements in subparagraph (C), make any reductions to adjustable benefits which the plan sponsor deems appropriate, based upon the outcome of collective bargaining over the schedule or schedules provided under paragraph (1)(B)(i).
>
> . . .
>
> iv) Adjustable benefit defined
>
> For purposes of this paragraph, the term "adjustable benefit" means—
>
> (I) benefits, rights, and features under the plan, including post-retirement death benefits, 60-month guarantees, disability benefits not yet in pay status, and similar benefits . . . .

29 U.S.C. § 1085 (codifying ERISA § 305). According to Underwood, this provision "prohibits the reduction of 'disability retirement benefits' 'under the plan' 'in pay status'" because it "unequivocally exclude[s]" such benefits from the "adjustable benefits" that may be reduced to address underfunded plans. (Dkt. 10 at 11.) "Pay status" is defined in the statute as follows:

> A person is in pay status under a multiemployer plan if—
>
> (A) at any time during the current plan year, such person is a participant or beneficiary under the plan and is paid an early, late, normal, or disability retirement benefit under the plan (or a death benefit under the plan related to a retirement benefit), or
>
> (B) to the extent provided in regulations of the Secretary of the Treasury, such person is entitled to such a benefit under the plan.

29 U.S.C. § 1085(i)(6) (codifying ERISA § 305).

Before addressing Underwood's arguments, some background on the statute at issue may be helpful. Section 305 was added to ERISA by the Pension Protection Act of 2006. The PPA was intended to address "a confluence of economic circumstances—including the actual or forecasted termination of various large pension plans and the erosion of many employees' retirement savings" that "threatened ERISA's system for federally insuring multiemployer pension plans." *Trustees of Local 138 Pension Trust Fund v. F.W. Honerkamp Co. Inc.*, 692 F.3d 127, 130 (2d Cir. 2012) (rejecting a challenge to an employer's withdrawal from a pension fund). The PPA "introduced a number of mechanisms aimed at stabilizing pension plans and ensuring that they remain solvent." *Id.* The relevant mechanism for this case was ably summarized in a recent Ninth Circuit opinion:

> [ERISA] generally prohibits pension plan amendments that reduce certain accrued pension benefits, including early retirement benefits under the "anti-cutback" rule. 29 U.S.C. § 1054(g); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 741, 124 S.Ct. 2230, 159 L.Ed.2d 46 (2004). The PPA, which amended ERISA, contains certain exceptions to this rule. Underfunded plans in "critical status" as defined by the PPA, 29 U.S.C. § 1085(b)(2), are required, among other things, to adopt a "rehabilitation plan" to ensure the viability of the fund. 29 U.S.C. § 1085(a)(2)(A). As part of such a rehabilitation plan, subject to qualifications set forth within the PPA, a pension plan may cut "adjustable benefits," 29 U.S.C. § 1085(e)(1)(B), including early retirement benefits otherwise protected by the "anti-cutback" rule, 29 U.S.C. § 1085(e)(8)(A)(i), (iv)(II).

Arendt v. Harris, 539 F. App'x 813 (9th Cir. 2013) (remanding to dismiss for lack of standing a constitutional challenge to the PPA). In other words, the PPA allows some amendments that were previously prohibited by ERISA's anti-cutback rule, § 1054(g).

ERISA's anti-cutback rule states that in general, "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . ." 29 U.S.C. § 1054(g). ERISA also contains a "non-forfeiture" provision that sets out specific "[m]inimum vesting standards" and requires that "[e]ach pension plan shall provide that an employee's right to his

normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." 29 U.S.C. § 1053. Both the anti-cutback rule and the non-forfeiture provision are in a part of ERISA titled "Participation and Vesting." 29 U.S.C. §§ 1051–61. That part provides at the outset: "This part shall apply to any employee benefit plan . . . other than— (1) an employee welfare benefit plan . . . ." 29 U.S.C. § 1051. An "employee welfare benefit plan" is defined by ERISA to include "any plan . . . maintained for the purpose of providing . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, *disability*, death or unemployment, ..." 29 U.S.C. § 1002(1)(A) (emphasis added).

So the PPA carved out certain exceptions to ERISA's protections in order to help underfunded pension plans, but those protections never applied to a disability benefit plan. Defendants focus on how ERISA's protections have always been limited. They cite several cases holding that disability benefits, even if they are in pay status, are not protected by ERISA. (*See* Dkt. 7 at 10–14.) These cases generally reason that disability benefits are "welfare-type" benefits that are expressly carved out from ERISA's non-forfeiture and anti-cutback provisions. *See Price v. Bd. of Trs. of the Ind. Laborer Pension Fund* (*Price I*), 632 F.3d 288, 292 (6th Cir. 2011); *McBarron v. S & T Indus.*, 771 F.2d 94, 97 (6th Cir. 1985).

Underwood argues that these cases are inapposite because they do not address § 305. (Dkt. 10 at 20–21.) Underwood is correct that the case law interpreting ERISA's anti-cutback and non-forfeiture provisions do not directly address the section of ERISA that he alleges was violated. But these cases support Defendants' argument that Underwood's interpretation of ERISA § 305 is contrary to the purpose of the statute. Section 305 created an exception to the protection of ERISA's anti-cutback provision in order to help troubled pension plans remain

solvent. It did not need to expand protection to benefits that the non-forfeiture and anti-cutback provisions did not protect. (*See* Dkt. 7 at 12; Dkt. 15 at 10.)

Regardless, the plain language of § 305 does not support Underwood's argument. Section 305 *authorizes* "reductions to adjustable benefits." It does not prohibit anything. The parties argue at length over whether Underwood's disability benefits are "adjustable benefits" as defined in § 305. (Dkt. 7 at 9–14; Dkt. 10 at 11–18; Dkt. 14 at 3–5; Dkt. 15 at 9–13; Dkt. 19 at 1–2, 4–5.) But the issue is not material. "In any case of statutory construction, . . . analysis begins with 'the language of the statute.' . . . And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, and citing *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). There is nothing in § 305 that affirmatively prohibits the Plan from amending Underwood's benefits. Because the plain language of ERISA § 305 does not prohibit anything, Underwood cannot state a claim for its violation. As to this basis for Underwood's claim, therefore, Defendants are entitled to summary judgment.

D. Plan Violation

Turning to the other basis for Underwood's claim, the Court finds that Underwood is entitled to summary judgment.

Underwood alleges that Defendants violated the Plan itself when they amended it to reduce his benefits. (*See* Compl. ¶ 99.) The Plan's amendment procedure provision states: "Unless required by law, no amendment of this Plan shall be permitted to reduce the Accrued Benefit of any Participant or the benefits of any person who is already receiving benefits on the date the amendment is effective." (Plan § 10.4.) According to Underwood, "[t]he disjunctive 'or' after the term 'Accrued Benefit' and the uncapitalized term 'benefits' . . . means that §10.4

applies to all Plan benefits, not just the 'Accrued Benefit,' which the Plan defines as the benefit payable at the Participant's Normal Retirement Age of 65." (Dkt. 10 at 9, citing Plan at §§1.1, 1.14). Underwood further argues that "the clause 'or the benefits of any person' broadens the scope of possible recipients and necessarily includes all recipients of any benefit paid under the Plan. And the 'already receiving benefits' language can only mean one thing: Plan benefits in pay status may not be reduced." (*Id.*)

Defendants argue that "[t]he provision regarding 'any person who is already receiving benefits on the date the amendment is effective' contemplates *pension* benefits, not welfare benefits, which are legally forfeitable." (Dkt. 7 at 15.) But Defendants offer no support for this assertion. The plain language of the Plan contains no such limit on the word "benefits." *See Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997) (holding that federal common law governs the interpretation of ERISA plans, citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987), and "the plain language of an ERISA plan should be given its literal and natural meaning").

To support their position on § 10.4, Defendants rely on *Price v. Bd. of Trustees of Indiana Laborer Pension Fund* (*Price II*), 707 F.3d 647 (6th Cir. 2013), which they contend "contained an amendment provision very similar to the Pension Fund provision at issue in the instant matter." (Dkt. 7 at 14.) In *Price*, the Plan stated: "no amendment shall be made which results in reduced benefits for any Participant *whose rights have already become vested* under the provisions of the Plan on the date the amendment is made." *Price II*, 707 F.3d at 649 (emphasis added). After Price began receiving disability benefits under the plan, the trustees amended the plan, causing the discontinuation of Price's benefits. *Id.* The court found that the trustees' decision to discontinue Price's benefits was not arbitrary and capricious because the plan

provision that gave them authority to amend the plan was ambiguous and the trustee's interpretation was reasonable. *Id.* at 652. The court reasoned:

> If Plan Section 15.1 had slightly different language so that it read, "Any amendment to the Plan may be made retroactively, *and that is true even with respect to disability benefits after the disability occurs*, by the majority action . . . ," then there would be no doubt that the Board could terminate Price's benefits. Absent language elsewhere in the Plan that contradicted the right to amend disability benefits, it would be nonsensical to think that disability benefits had vested with this clear reservation of the right to terminate disability benefits after the disability occurs.
>
> The fact that Plan Section 15.1 lacks the specificity of the hypothetical Plan described above does not render the Board's interpretation of the Plan unreasonable. Indeed, the lack of specificity merely creates ambiguity, which renders Section 15.1 capable of multiple interpretations, including an interpretation that permits amendment of disability benefits after the disability occurs. Without stretching the language of the Plan, the Board, exercising its authority to interpret the plan, could reasonably conclude that "Any amendment" included amendments to disability benefits after the disability occurs. The Plan has no other language that would render the Board's interpretation unreasonable. *Price*, 632 F.3d at 296–98. To the contrary as shown in *Price I*, the term "vesting" in the Plan plainly refers to retirement-related, not disability-related, benefits. For these reasons, the Board's interpretation was reasonable, and as a result, the decision was not arbitrary and capricious. Therefore, the Board is entitled to judgment as a matter of law.

Id. at 651–52 (footnotes omitted; emphasis in original). In *Price I*, the court found that "an analysis of the context in which the word is used shows that it applies to retiree benefits and not disability benefits." *Price I*, 632 F.3d at 297. After reviewing the relevant provisions of the plan, the court said: "Reading all of these provisions together, it would not seem unreasonable for the Board to determine that Price's Occupational Disability Benefits were not 'Accrued Benefits' and therefore did not vest." *Id.*

First, in *Price II*, unlike this case, there were two potentially conflicting provisions that created ambiguity. The Plan said that "[a]ny amendment to the Plan may be made retroactively by the majority action . . . ," but then in the next paragraph: "no amendment shall be made which

results in reduced benefits for any Participant whose rights have already become vested under the provisions of the Plan on the date the amendment is made." *Price II*, 707 F.3d at 649. Secondly, the language of the amendment provision in *Price* differs from that in this case in a crucial way: it uses the term "vested." Thus, the court determined that "review of the Board's decision necessarily entails looking to the terms of the Plan to determine if Price's disability benefits vested, as it is the Plan itself that sets forth the terms by which benefits are conferred, vested, or terminated." *Price I*, 632 F.3d at 296. The court concluded that the term "vested" was synonymous with the term "accrued," and that disability benefits were not included in "Accrued Benefit." In contrast here, the Plan specifically broadens the scope of the amendment provision's protection beyond "Accrued Benefit" to add "the benefits of any person who is already receiving benefits."

In their response to Underwood's Motion for Summary Judgment, Defendants focus on the definition of "Accrued Benefit," stating conclusorily in a footnote that "[t]he provision regarding 'receiving benefits on the date the amendment is effective' only applies to receiving 'Accrued Benefits.'" (Dkt. 15 at 7 n.2.) This is a strained reading of the provision. The plain language of the Plan does not contain any indication that "the benefits of any person who is already receiving benefits" only applies to "Accrued Benefits." Defendants' reading might be plausible if the provision stated that no amendment was permitted to reduce "the Accrued Benefit of any Participant or person who is already receiving benefits." But that is not what it says. The placement of the "or" creates two separate categories: (1) "the Accrued Benefit of any Participant," and (2) "the benefits of any person who is already receiving benefits." Moreover, if the word "benefits" in the phrase "the benefits of any person who is already receiving benefits" were intended to refer back to the defined term "Accrued Benefit," then surely it would likewise

be capitalized. *Cf. Kay v. Minacs Grp.*, No. 13-1974, 2014 WL 4375980, at *2 (6th Cir. Sept. 5, 2014) (finding it significant that "Policies and Procedures" was capitalized in an arbitration provision but not capitalized elsewhere in the employee handbook). The Court sees no reason to read one alternative as a limit on the other, and Defendants do not offer any. The Court concludes that Underwood's claim does not depend on the definition of "Accrued Benefit."

Another court in this district came to a similar conclusion in *Williams v. Target Corp.*, No. 12-cv-11775, 2013 WL 5372877, 2013 U.S. Dist. LEXIS 137276 (E.D. Mich. Sep. 25, 2013) (attached to Plaintiff's Response as Ex. G, Dkt. 9-8). There, the plan provided: "The Company . . . reserves the right to amend, discontinue, or terminate the Plan at any time . . . . Any change or cancellation would not effect [sic] benefits of an established claim." 2013 WL 5372877 at *5. The defendants argued that the provision should be read to mean that "no amendment would require a claimant to return benefits already received or alter benefits for which payments have become due," citing *Hackett v. Xerox Corporation Long-Term Disability Income Plan*, 315 F.3d 771, 774 (7th Cir. 2003) (holding that a plan provision stating no amendment could "diminish any rights accrued for the benefit of the participants prior to the effective date of the amendment" meant only that that no amendment could require a participant "to return benefits he has already received or alter benefits for which the payments have become due"). The *Williams* court rejected the defendants' proposed reading:

> Unlike the plan language at issue in *Hackett*, the provision at issue in the instant case states that "[a]ny change or cancellation would not effect benefits of an established claim"—it does not state that "[a]ny change or cancellation would not effect accrued benefits of an established claim." In other words, where the *Hackett* provision prohibited the application of amendments that would affect accrued benefits, the provision at issue here prohibits the application of amendments that would affect all "benefits of an established claim." Therefore, interpreting the phrase "benefits of an established claim" to mean "benefits that have already been paid or become due" would read into the phrase a limitation that is not present in its plain language. Absent explicit language indicating that

> this limitation on the right to amend is confined to plan amendments that would affect already-accrued benefits (such as the language at issue in *Hackett*) the Court will not read this limitation on the reservation-of-rights clause so narrowly."

Id. at *7. The court noted that this interpretation, "which enforces the plain language of the provision at issue," best aligns with the purpose of the ERISA statute "to protect contractually defined benefits." *Id.* Similarly here, the Court will not adopt a reading that distorts the plain language of the Plan.[4]

Defendants make a second argument about § 10.4: "that provision's restriction on plan amendments is subject to an exception, namely 'unless required by law.'" (Dkt. 14 at 2; *see also* Dkt. 15 at 7–8.) They argue that "the Pension Protection Act required the Trustees to adopt a rehabilitation plan under the so-called 'red zone' rules (see 29 U.S.C. § 1085(e)(3)(A)(i)) and failing that, to go with the 'All Reasonable Measures' version (29 U.S.C. § 1085(e)(3)(A)(ii)), which is exactly what they did here." (Dkt. 14 at 2). "In short," Defendants argue, "the adoption of the All Reasonable Measures Plan, that included the reduction of ancillary disability benefits was in the Trustees' view, a necessary step required by the law, and thus, in keeping with that provision of the Plan document." (Dkt. 15 at 8 (emphasis in original).)

Defendants cite no supporting case law for this argument. Instead, they cite the PPA's description of the rehabilitation plan that is required of a plan in critical status:

> A rehabilitation plan is a plan which consists of—
>
> (i) actions, including options or a range of options to be proposed to the bargaining parties, formulated, based on reasonably anticipated experience and

[4] The Court has found that a de novo standard of review applies. But even if the Plan gave the Trustees discretion to interpret § 10.4, the plain language of the Plan is not reasonably subject to any other interpretation. It was arbitrary and capricious for the Trustees to conclude that "[t]he changes made to disability benefits in the All Reasonable Measures Plan do not violate Section 10.4 of the Plan document . . . as they do not affect accrued benefits." (Dkt. 10-12, Final Denial.)

> reasonable actuarial assumptions, to enable the plan to cease to be in critical status by the end of the rehabilitation period and may include reductions in plan expenditures (including plan mergers and consolidations), reductions in future benefit accruals or increases in contributions, if agreed to by the bargaining parties, or any combination of such actions, or
>
> (ii) if the plan sponsor determines that, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, the plan can not reasonably be expected to emerge from critical status by the end of the rehabilitation period, reasonable measures to emerge from critical status at a later time or to forestall possible insolvency (within the meaning of section 1426 of this title).

29 U.S.C. § 1085(e)(3)(A). Defendants' argument appears to be not that the PPA expressly required the reduction in Underwood's benefits, but that the Trustees reasonably decided it was necessary. The Court has determined that the Plan does not require deference to the Trustees regarding the amendment of the Plan. And the Court sees nothing on the face of the cited PPA provision that *requires* the disability benefit caps that reduced Underwood's benefits. Defendants have not shown that the amendment was required by law.

Underwood's Motion for Summary Judgment asked the Court to decide "the single narrow legal issue of whether the Trustee lawfully amended the Plan." (Dkt. 10 at 1.) The Court finds that the amendment was unlawful because it violated § 10.4 of the Plan. To the extent that the August 2013 Amendment reduced the disability benefits that Underwood and other Class members were already receiving on the date the amendment became effective, it violates § 10.4 of the Plan and is not enforceable.

E. Social Security Requirement

Defendants argue briefly that the requirement that participants obtain a Social Security award to continue receiving disability benefits under the Plan is not ripe for review because it does not take effect until August 2014. (Dkt. 7 at 16.) But they also note that Underwood's argument that this requirement is unenforceable is "essentially derivative" of Underwood's other

arguments. (*Id.* at 15.) Underwood argues that the requirement is ripe for review because the amendment is already in effect, and disability benefits recipients must have applied for and received a Social Security disability award before the August 2014 deadline. (Dkt. 10 at 24.)

Whether a dispute is ripe for review depends on three factors: "(1) the likelihood that the harm alleged by the party will ever come to pass; (2) the hardship to the parties if judicial relief is denied at this stage in the proceedings; and (3) whether the factual record is sufficiently developed to produce a fair adjudication of the merits." *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 561 (6th Cir. 2008). "[S]ince ripeness is peculiarly a question of timing, it is the situation now . . . that must govern." *Syron v. ReliaStar Life Ins. Co.*, 506 F. App'x 500, 503 (6th Cir. 2012) (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974)) (holding that the appellate court's ripeness inquiry should focus on the present rather than the time of the district court's decision regarding ripeness).

The Court agrees with Underwood that this requirement is ripe for review. The requirement went into effect in August 2013. Underwood was required to apply for Social Security benefits before August 2014 to ensure that he could obtain an award by that date. And, since August 2014 has come and gone, the injury to Underwood, if any, can now be ascertained. Defendants' motion for summary judgment on Underwood's challenge to the Social Security disability eligibility requirement is denied. To the extent that the Social Security disability eligibility requirement in the August 2013 Amendment reduced the disability benefits that Underwood and other Class members were already receiving on the date the amendment became effective, that requirement violates § 10.4 of the Plan and is not enforceable.

IV. CONCLUSION AND ORDER

For the reasons stated, the Court finds that as a matter of law, Underwood cannot prevail on his claim for violation of ERISA § 305. But as a matter of law, Defendants violated § 10.4 of the Plan when they amended it to reduce Underwood's and other Class members' benefits. To the extent that the August 2013 Amendment reduced the disability benefits that Underwood and other Class members were already receiving on the date the amendment became effective, it violates § 10.4 of the Plan and is not enforceable. Defendants' Motion to Dismiss (Dkt. 7), converted to a motion for summary judgment, is DENIED IN PART AND GRANTED IN PART. Underwood's Motion for Summary Judgment (Dkt. 11) is DENIED IN PART AND GRANTED IN PART.

SO ORDERED.

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

Dated: September 15, 2014

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served on the attorneys and/or parties of record by electronic means or U.S. Mail on September 15, 2014.

s/Jane Johnson
Case Manager to
Honorable Laurie J. Michelson