In the Matter of:

U.S. DEPARTMENT OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION

Date: January 14, 2022

Complainant-Appellee

OALJ Case No. 2018-RIS-00053

v.

PLAN ADMINISTRATOR, ELIZABETH R. WELLBORN, P.A. 401(K) PLAN

Respondent-Appellant

DECISION AND ORDER AFFIRMING THE ADMINISTRATIVE LAW JUDGE DECISION AND ORDER DATED JANUARY 26, 2021

This proceeding is on appeal from the United States Department of Labor, Office of Administrative Law Judges ("OALJ"), and arises under the provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Sections 1001, *et seq.* ("ERISA") and the implementing regulations at 29 C.F.R. Parts 2520 (rules and regulations for reporting and disclosure), 2560 (rules and regulations for administration and enforcement), and 2570 (procedural regulations under ERISA).

BACKGROUND

The Elizabeth R. Wellborn, P.A. 401(k) Plan (the "Plan") is an ERISA-covered employee pension benefit plan established or maintained by employer Elizabeth R. Wellborn, P.A (the "Plan Sponsor") to provide retirement income to employees or resulting in the deferral of income to employees for periods extending to the termination of employment or beyond.

Respondent TAG Resources, LLC ("TAG Resources") was the plan administrator of the Plan within the meaning of ERISA Section 3(16) and was required to file the Plan's 2015 Form 5500 annual report ("Form 5500") including the report of an Independent Qualified Public Accountant ("IQPA"). Although TAG Resources filed the Plan's 2015 Form 5500 Annual Report on October 17, 2016, it did not include the required IQPA report.

ERISA Section 502(c)(2) provides for a civil penalty to be assessed by the Secretary of Labor for a plan administrator's failure or refusal to file the required Form 5500 annual report. The Department's regulations provide that the amount assessed under ERISA Section 502(c)(2) shall be determined by the Department of Labor (the "Department"), taking into consideration the degree and/or willfulness of the failure or refusal to file the annual report.[1]

On February 8, 2017, the Department's Employee Benefits Security Administration ("EBSA") issued a Notice of Rejection ("NOR"), which informed TAG Resources that the Department had rejected the Plan's 2015 Form 5500 because it did not contain an IQPA report. TAG Resources had 45 days to correct the deficiency, but did not file an amended 2015 Form 5500 containing the IQPA report within that period.

On May 1, 2017, EBSA issued TAG Resources a Notice of Intent to Assess a Penalty ("NOI") setting the proposed penalty amount of $41,100, calculated on the basis of $150 per day for 274 days. The NOI explained that the Plan's 2015 Form 5500 was deficient because an IQPA report was not attached and informed TAG Resources that it had 35 days to respond to the notice and submit a statement of reasonable cause supporting reduction or elimination of the penalty.

On June 5, 2017, TAG Resources submitted to EBSA a statement of reasonable cause, describing the steps it had taken that were intended to terminate its position as plan

[1] 29 C.F.R. § 2560.502c-2(b).

administrator. The statement indicated that on October 20, 2015, the Plan Sponsor informed TAG Resources in writing of its intent to terminate the Plan, effective December 31, 2015. After trying unsuccessfully to obtain the information needed to file a complete 2015 Form 5500, TAG Resources sent the Plan Sponsor a letter on August 4, 2016, titled "Notice of Potential Termination of Adoption Agreement," informing the Plan Sponsor that TAG Resources would proceed with terminating its adoption agreement and fiduciary agreement if it did receive a response within 15 days.[2]

EBSA issued a Notice of Determination ("NOD") to TAG Resources on March 19, 2018, assessing a $41,100 penalty for TAG Resources' continued failure to file an amended 2015 Form 5500 with an IQPA report. On or about April 17, 2018, TAG Resources filed an Answer and Request for Hearing, with attachments.

On April 29, 2020, TAG Resources filed an amended 2015 Form 5500 for the Plan that attached an IQPA report dated April 2, 2020 prepared by Coulter & Justice, P.C. The IPQA report included the following disclaimer:

> We were not engaged as auditors of the Plan for the year ended December 31, 2015, until after the Plan terminated and the Plan sponsor dissolved. Due to our inability to obtain personnel files and other Plan information, including a sufficient understanding of internal controls, we were unable to perform certain compliance auditing procedures surrounding participant account data.... Because of the significance of the matters described in the Basis for Disclaimer of Opinion

[2] The letter stated that TAG Resources "made repeated attempts to contact and assist you with completing Internal Revenue Service (IRS) and DOL required 2015 Audit Documents and Signed Letters Regarding the Audit, as well as government reporting."

paragraph, we have not been able to obtain sufficient, appropriate audit evidence to provide a basis for an audit opinion. Accordingly, we do not express an opinion on these financial statements.

On January 26, 2021, Administrative Law Judge Paul C. Johnson, Jr., ("ALJ Johnson") issued his Decision and Order Denying Motions for Summary Decision/ Decision and Order Assessing Civil Money Penalty. ALJ Johnson found that (1) TAG Resources failed to file a compliant 2015 Form 5500 annual report on behalf of the Plan and was not excused from doing so under the circumstances of this case, and (2) the $41,100 penalty assessed by Department was warranted and reasonable.

TAG Resources timely appealed ALJ Johnson's Decision and Order to the Secretary of Labor on February 12, 2021, pursuant to 29 C.F.R. § 2570.69. The regulation provides that "[t]he review of the Secretary shall not be *de novo* proceeding but rather a review of the record established before the administrative law judge."[3] EBSA Order No. 20-05 delegated to the Director of the Office of Exemption Determinations (OED) the authority and responsibility to review decisions of an administrative law judge in connection with the Department's enforcement of civil penalty assessments under ERISA Sections 502(c) and (i).

On April 21, 2021, OED issued a briefing schedule that provided a May 28, 2021 deadline for TAG Resources to file its brief and a June 25, 2021 deadline for the Department to file its brief. On June 21, 2021, OED granted a one week extension to the Department to file its brief until July 2, 2021, without objection from TAG Resources. Both parties timely filed their briefs.

[3] 29 C.F.R. § 2570.70

At issue in this appeal is whether ALJ Johnson was reasonable in finding that TAG Resources did not file a compliant 2015 Form 5500 on behalf of the Plan and whether EBSA properly assessed the ERISA section 502(c)(2) penalty.

CONSIDERATION OF ISSUES ON APPEAL

TAG Resources' brief presents the following seven points of error in support of its request for reversal of ALJ Johnson's Decision and Order on Appeal:

1. The determination of EBSA, and the corresponding Decision and Order of the Court, is contrary to law and U.S. Department of Labor policy.
2. The Decision and Order of the Court incorrectly applies the holding in *Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.*, 93 F.3d 1171 (3d Cir. 1996) to the facts of the instant case.
3. The Decision and Order of the Court incorrectly fails to consider terms contained in the governing instruments of the Plan defining termination of TAG Resources' plan administrator delegation, which were in force and effect at the times relevant to this case, and submitted by TAG Resources in several filings of record, the most recent being an attachment designated as Exhibit "H" to its brief to the Court, dated December 11, 2020.
4. The Decision and Order of the Court, instead, incorrectly considered terms defining termination of TAG Resources' plan administrator delegation contained in a prior governing instrument applicable to an open multiple employer plan (of which the Plan was a part until 2012), designated as Exhibit "F" to TAG Resources' brief to the Court dated December 11, 2020.

5. The Decision and Order of the Court incorrectly applies 29 U.S.C. Section 1002(16) to the facts and circumstances evidenced in the record with regard to procedures contained in the governing instruments of the Plan regarding termination of TAG Resources' delegation and designation of the Plan Sponsor as plan administrator.
6. The Decision and Order of the Court fails to apply the holding in *Best v. Cyrus*, 310 F.3d 932 (6th Cir. 2002) to the facts and circumstances surrounding TAG Resources' unauthorized signing and filing of the Plan's 2015 Form 5500, designated as Exhibit "L" to TAG Resources' brief to the Court dated December 11, 2020.
7. EBSA's determination under 29 C.F.R. § 2560.502c-2(d) was arbitrary, ignored ample evidence of mitigating circumstances contained in the record, and constituted an abuse of discretion. The Decision and Order of the Court to affirm EBSA's arbitrary decision was in error.

Below I consider each of these seven points, and in each case conclude that ALJ Johnson did not err as TAG Resources claims.

1. **The determination of EBSA, and the corresponding Decision and Order of the Court, is not contrary to law and U.S. Department of Labor policy.**

Neither the Department's determination nor ALJ Johnson's Decision and Order is contrary to law and U.S. Department of Labor policy. In his Decision and Order, ALJ Johnson emphasized the important role a fiduciary serves in ERISA's statutory scheme. TAG Resources' argument, however, would allow ERISA fiduciaries to abdicate their obligations without ensuring that an appropriate fiduciary is available to take over such fiduciary's ongoing duties. Specifically, TAG Resources argued that there is a difference between common law fiduciary obligations and ERISA's statutory requirements. In its brief, TAG Resources stated, "the Court and the Department have seriously conflated the statutorily imposed obligation to file the Form

5500 (and pay the attendant penalties for failure to file) with the common law fiduciary obligation of the professional plan fiduciary to protect plan participants in the unwinding of that role. Respondent [TAG Resources] fully accepts and has fulfilled its common law fiduciary obligations to participants in this matter."

The Department, however, is enforcing ERISA's statutory requirements, including the requirement to file a complete Form 5500. The Form 5500 is not just a requirement of law, but also an important part of protecting plan participants and beneficiaries. As described in the Department's brief:

> The Form 5500 Series is part of ERISA's overall reporting and disclosure framework, which is intended to assure that employee benefit plans are operated and managed in accordance with certain prescribed standards and that fiduciaries, participants and beneficiaries, as well as regulators, are provided and have access to sufficient information to protect the rights and benefits of participants and beneficiaries under employee benefit plans…. The IQPA report helps protect the financial integrity of the plan by detailing whether a plan's financial statements are fully corroborated and accurate and whether they provide reliable information to assess the plan's present and future ability to pay benefits. The IQPA report is therefore an indispensable means of ensuring that plan participants' retirement benefits are secure.

Enforcing ERISA's reporting requirements is fully consistent with the Department's policy and statutory obligation to protect plans, participants, and beneficiaries. As of the date of the NOI in this matter, ERISA regulations provided that the Department could have assessed a maximum penalty of up to $2,097 per day for each day TAG Resources was is in violation of

ERISA's filing requirements.[4] In this case, the Department assessed a penalty of $150 per day for 274 days. Applying a deferential standard of review, I find that ALJ Johnson appropriately determined that the Department properly and reasonably assessed the ERISA Section 502(c)(2) penalty in the instant case.

2. The Decision and Order of the Court is reasonable in applying the holding in *Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.* to the facts of the instant case.

In *Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.,* the Third Circuit Court of Appeals held that "once a fiduciary relationship exists, the fiduciary duties arising from it do not necessarily terminate when a decision is made to dissolve that relationship,"[5] and "an ERISA fiduciary's obligations to a plan are extinguished only when adequate provision has been made for the continued prudent management of plan assets."[6] I find that ALJ Johnson reasonably determined that the facts of this case did not support a finding that TAG Resources effectively terminated its fiduciary status.

TAG Resources' agreement with the Plan permitted the Plan Sponsor to discontinue or revoke its participation in the Plan at any time upon 60 days written notice. Therefore, TAG Resources argued that it was relieved from its fiduciary authority to administer the Plan on December 19, 2015 (60 days after the Plan Sponsor notified TAG Resources in writing on October 20, 2015 of its intention to terminate the Plan), which was before the Plan's deadline for the 2015 Form 5500. ALJ Johnson noted, however, that ERISA and its implementing regulations do not explicitly provide for termination of administrator status, and TAG Resources has not

[4] See 29 C.F.R. § 2560.502c-2 (providing for a penalty up to $1,100 per day adjusted for inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990).
[5] 93 F.3d 1171, 1183 (3d Cir. 1996)
[6] Id.

explained how a contractual provision for termination of the agreement alters that status. Relying on *Glaziers*, ALJ Johnson noted that fiduciary obligations can continue even after a relationship is terminated, and that a fiduciary will not be relieved of its duties until there is adequate provision for the continued prudent management of plan assets.

ALJ Johnson also considered the facts and circumstances of TAG Resources' actions after it claimed its plan administrator status had been terminated. As stated above, TAG Resources argued that it ceased to be the plan administrator 60 days after it received written notice from the Plan Sponsor of its intention to terminate the Plan. Therefore, according to TAG Resources, even if it continued to act as a plan fiduciary, it was no longer responsible for the Plan's 2015 Form 5500 filing. However, ALJ Johnson determined that even after December 19, 2015, TAG Resources continued to act as though it were responsible for filing the Plan's Form 5500. As ALJ Johnson stated in his Decision and Order, TAG Resources "continued for many months to attempt to obtain the documentation necessary to file a complaint [sic] Form 5500 for 2015, filed that form, continued to try to obtain an IQPA report, and filed an amended 2015 Form 5500 for the Plan. Respondent did not, at the relevant times, regard itself as being relieved from the responsibility to file a complete Form 5500…."

TAG Resources also asserts that any residual responsibilities it had for administering the Plan ended 60 days after it gave formal written notice of termination of the appointment to Plan Sponsor in a notice dated August 4, 2016. However, TAG Resources' August 4, 2016 notice. titled "A Notice of Proposed Termination," would not have triggered the 60-day deadline for termination of the agreement even if it could have been terminated. By its terms, the notice provides the Plan Sponsor with a 15-day grace period to renew the contractual relationship before TAG Resources would proceed with terminating the Plan adoption agreement and

fiduciary agreement. Taking into account the grace period, the earliest date the 60-day notice period would begin is August 19, 2016 (15 days after the August 4, 2016 notice) and such period would end on October 18, 2016 (60 days after August 19, 2016), which is after the due date for the Plan's 2015 Form 5500. As ALJ Johnson stated in his Decision and Order, "[o]nce again, [TAG Resources'] actions speak louder than its words: it clearly believed itself required to file the Form 5500, attempted to obtain the necessary information, and indeed filed it."

Based on the foregoing, I find that ALJ Johnson's reliance on *Glaziers* was reasonable in determining that TAG Resources had not been relieved of the obligation to file a compliant 2015 Form 5500 on behalf of the Plan.

3. The Decision and Order of the Court appropriately considered terms contained in the governing instruments of the Plan defining termination of TAG Resources' plan administrator delegation, which were in force and effect at the times relevant to this case.

ALJ Johnson did not err in determining that the Plan's governing instruments did not provide for effective termination of TAG Resources' fiduciary status. TAG Resources argued that its contract with the Plan allowed TAG Resources to terminate the Plan and distribute its assets if it determined that the adopting employer had abandoned the Plan. However, it was reasonable for ALJ Johnson to determine that this language did not provide for effective termination of TAG Resources' fiduciary status under ERISA. As described in the Department's brief "TAG [Resources] could not be certain that any fiduciary would step up to protect the interests of the participants and beneficiaries of the plan. In fact, TAG [Resources] had every reason to assume that no fiduciary would be protecting the Plan after TAG [Resources] resigned." Thus, I find that it was reasonable for ALJ Johnson to determine that TAG Resources' attempt to resign as plan administrator was ineffective.

4. The ALJ's quotation from a prior governing instrument does not change our analysis.

As noted in number 3, above, ALJ Johnson did not err in determining that the Plan's governing instruments did not provide for effective termination of TAG Resources' fiduciary status. ALJ Johnson's Decision and Order included a quotation from a prior governing document that was in effect until 2012, designated as Exhibit "F" to TAG Resources' December 11, 2020 brief. The quoted language stated that the employer may "discontinue or revoke its participation in the Plan at any time upon 60 days written notice." The agreement in effect stated: "Either party may terminate this Responsibilities Agreement, and the delegation of authority hereunder, upon 60 days prior written notice to the other, unless otherwise agreed by the parties, or where 60 days' notice would be clearly imprudent." This document was designated Exhibit "H" to TAG Resources' December 11, 2020 brief.

The result would have been the same if ALJ Johnson instead had quoted language from the agreement that was in force and effect at the times relevant to this case, because ALJ Johnson reasonably concluded that the issue on the law was whether the contractual terms of agreement between the Plan Sponsor and TAG Resources effectively provided for termination of TAG Resources' fiduciary status under ERISA. Therefore, as discussed above, I find that it would have been reasonable for ALJ Johnson to determine that TAG Resources' attempt to resign as plan administrator was ineffective based on the language in the document designated as Exhibit H.

5. The Decision and Order of the Court appropriately applies 29 U.S.C. Section 1002(16) to the facts and circumstances evidenced in the record regarding termination of TAG Resources' delegation and designation of the plan sponsor as plan administrator.

ERISA Section 3(16) provides that the plan administrator of an ERISA-covered plan is the "person specifically so designated by the terms of the instrument under which the plan is operated." The Plan documents provided clearly demonstrate that TAG Resources was the plan administrator of the Plan.

TAG Resources argued that enforcing the obligation to file the Form 5500 would undermine recent Congressional efforts to expand retirement plan coverage. TAG Resources pointed to the 2019 SECURE Act, under which non-employer professional plan fiduciaries may be responsible for filing the Form 5500, and stated "Any party serving as a professional plan administrator in either of these schemes, as well as those serving under other '3(16)' arrangements, will not be willing to accept such obligations under the circumstances imposed by the Court and the Department." However, TAG Resources did not address the ways in which its own argument would undermine Congressional efforts regarding ERISA's reporting requirements.

I find that the documents provided in the record are consistent with ALJ Johnson's determination that TAG Resources, as plan administrator, was obligated to file a fully compliant 2015 Form 5500 on behalf of the Plan.

6. The Decision and Order of the Court did not fail by not applying the holding in *Best v. Cyrus*, 310 F.3d 932 (6th Cir. 2002) to the facts and circumstances surrounding TAG Resources' signing and filing of IRS Form 5500 for Plan year 2015, designated as Exhibit "L" to Respondent's brief to the Court dated December 11, 2020.

ALJ Johnson did not err by not relying on the holding or analysis in *Best v. Cyrus*.[7] The facts of *Best* are reasonably distinguishable from the facts of the instant case. In *Best*, the trustee was not the named plan administrator, and the plan documents did not impose the filing

[7] 310 F.3d 932 (6th Cir. 2002).

obligation on the plan trustee. In contrast, at the time the 2015 Form 5500 was due, TAG Resources was (1) the named plan administrator, (2) under contract to act as the plan administrator, (3) assigned plan administrator duties by the Plan's governing documents, and (4) continued to function as the plan administrator, even though TAG Resources asserts the relationship was terminated. I find that these facts support ALJ Johnson's reasonable determination that TAG Resources retained the obligation to file a timely and compliant 2015 Form 5500 on behalf of the Plan.

7. EBSA's determination under 29 C.F.R. § 2560.502c-2(d) was not arbitrary, did not ignore evidence of mitigating circumstances contained in the record, and did not constitute an abuse of discretion. The Decision and Order of the Court were not in error.

For the reasons discussed above, I find that ALJ Johnson was reasonable in finding that TAG Resources failed to file a compliant Form 5500 for the 2015 plan year on behalf of the Plan, and that the civil penalties should not be adjusted.

DECISION

ALJ Johnson's Decision and Order included findings of fact and conclusions of law and was based upon the whole record. The penalty was limited to the penalty expressly provided for in ERISA Section 502(c)(2), and supported by reliable and probative evidence.[8]

In EBSA Order No. 20-05, the Secretary of Labor delegated authority and assigned responsibility to the Director of OED for the review of ALJ decisions under regulations implementing the Department's authority to assess civil penalties under ERISA Section

[8] 29 C.F.R. § 18.57.

502(c)(2). Here, I find that ALJ Johnson reasonably determined that TAG Resources failed to meet its obligation to file an IQPA report for plan year 2015 on behalf of the Plan.

Having concluded that ALJ Johnson committed none of the errors that TAG Resources alleges, I find no fault with ALJ Johnson's Decision and Order. Consequently, ALJ Johnson's Decision and Order is affirmed in whole. I hereby order the Respondent-Appellant, TAG Resources, to pay the penalty amount of $41,100 to the U.S. Department of Labor within thirty (30) days from the date of service of this Decision and Order. Amounts not paid by that time shall be subject to penalties and interest provided for by ERISA and its implementing regulations.

SO ORDERED

G. Christopher Cosby

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G. Christopher Cosby
Acting Director, Office of Exemption Determinations
U.S. Department of Labor
Employee Benefits Security Administration