ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

ERISA & DISABILITY BENEFITS NEWSLETTER

ABOUT OUR FIRM

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Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

For more Information about Eric Buchanan & Associates, PLLC, visit our website at www.buchanandisability.com.

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PITFALLS FOR THE UNWARY: HOW TO RUIN AN ERISA LONG TERM DISABILITY INSURANCE CASE BY: R.SCOTT WILSON

ERISA-governed long term disability insurance cases are hard enough to win. As in any insurance case, there is a serious imbalance of resources, with the insurer having far greater capacity to hire experts and generate evidence to defend a case than an out-of-work claimant does to prove a case. And this is then dramatically compounded by use of an "arbitrary and capricious" standard of review that seriously tilts the playing field in favor of the insurer. Under this standard, to survive judicial review, a decision need only have "a reasoned explanation," and result from "a deliberate, principled reasoning process." *Davis v. Kentucky Fin. Cos. Ret. Plan*, 887 F.2d 689, 693 (6th Cir. 1989).

Anecdotally, we have heard judges (or their clerks) say—off the record, at a scheduling conference—"oh, this is one of those ERISA cases where the insurer always wins." And I will periodically do a Westlaw search for all ERISA long term disability cases decided by courts within Tennessee over the past five years; amongst cases picked up by Westlaw, insurers are winning sixty percent of the time or more.

However, notwithstanding the legal considerations that aid the insurer once the case is in court, there are a number of common pitfalls in the claims process, before the case ever gets to court, that can greatly influence the outcome.

1. Any litigation is on a closed record.

The number one thing that can be done to ruin an ERISA LTD claim is to fail to provide the insurer with complete evidence of disability when appealing to the insurer after an initial denial of benefits. This might be done by an unrepresented claimant, who sends in a hand-written "I appeal" letter without supportive medical documentation. Or it might be done by an attorney, more used to dealing with state law insurance matters and who assumes that expert (or other) evidence might be introduced at trial.

The problem is, there is no trial. As a matter of black letter law, the court's review in an ERISA benefits case is strictly limited to that evidence contained in the administrative record. As articulated by the Sixth Circuit:

> A primary goal of ERISA was to provide a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously. Permitting or requiring district courts to consider evidence from both parties that was not *presented* to the plan administrator would seriously impair the achievement of that goal. If district courts heard evidence not *presented* to plan administrators, employees and their beneficiaries would receive less protection than Congress intended.

Perry v. Simplicity Engineering, 900 F.2d 963, 967 (6th Cir. 1990) (citations omitted).

ERISA LTD policies typically allow (and require) one appeal to the insurer after an initial decision. Unless a particular policy provides differently, however, there will be no other opportunity to submit proof of disability. Everything must be submitted as part of the appeal.

At a bear minimum, "everything" includes:

- Complete medical records documenting the injuries and illnesses resulting in disability.
- Opinions from treating sources about the restrictions and limitations (i.e., how long the claimant can sit, stand, and walk; how much the claimant can lift; other areas of physical or psychological deficits) that result from the medical conditions. The more specific these restrictions and limitations, the better.

Additionally, you might consider, as reasonable expenses in light of the value of the case permit:

- The sworn statement of the treating physician explaining how the medical condition works and where the restrictions and limitations come from.
- An evaluation by a vocational expert explaining how the restrictions and limitations result in disability or preclude certain jobs.
- Technical or medical journal articles refuting assumptions made by an insurer.

2. The definition of disability may not be what you expect.

Definitions of disability do vary somewhat from policy to policy. It is also common that within a policy, the definition of disability may be inability to perform one's own occupation for a period of time (typically two years), then changes to inability to perform any occupation.

Sometimes there are unusual provisions like the one we came across stating that you are automatically "not disabled" if you "can work part time but choose not to." This provision turned a treating physician's assessment form—that added up to about a four-hour day--from very strong evidence into very awkward evidence in a hurry.

Because the definition of disability changes from policy to policy, and situation to situation, always check. Don't end up submitting evidence that you think is good for your client, only to find out it is actually damning.

3. Certain medical conditions may have limited pay periods.

An increasingly common feature of long term disability policies is that certain medical conditions may have limited pay periods.

Virtually all policies seem to have a two-year limitation on how long an individual can receive benefits for a "mental and nervous" condition. "Mental and nervous" typically means psychiatric, and does not include organic brain damage. Dementia, schizophrenia, and sometimes bipolar disorder might also be excepted from the mental and nervous limitation depending on the particular policy.

Another increasingly common feature is an attempt to limit benefits due to musculoskeletal conditions to two years unless certain objective medical findings are present. A MetLife policy that seems to be becoming more and more prevalent states that disability is only covered for 24 months for "a soft tissue disorder including, but not limited to, any disease or disorder of the spine or extremities and their surrounding soft tissue . . . unless the Disability has evidence of . . . Radiculopathies." It goes on to state that "Radiculopathies means disease of the peripheral nerve roots supported by objective clinical findings of nerve pathology." *Id.*

Practitioners must look out for policies that limit pay periods for certain medical conditions, or that require specific medical findings to pay beyond a certain period of time, and make sure that during the appeals process that the necessary evidence is obtained and submitted.

4. Positions taken—and evidence gathered—in claims for other benefits may adversely affect the LTD claim.

LTD claimants frequently have other benefit claims: Social Security, workers' compensation, or personal injury claims are common. However, different benefit claims may have different disability requirements, and evidence that is good for one case is not necessarily good for another.

For example, a Social Security claimant who is over 50 years old may be found disabled under the "Grid Regulations" if limited to sedentary exertion. However, the same physical finding could result in LTD benefits being denied after the "any occupation" transition.

Likewise, it may be easier for a Social Security ALJ to find disability on the basis of psychological limitations in a particular case. Only being disabled due to psychological limitations might limit LTD benefits to two years.

Practitioners should be aware that arguments they make in favor of their clients in one forum might be used against their clients by the LTD carrier.

5. Deadlines and statutes of limitation.

Deadlines and statutes of limitation as pitfalls are hardly unique to ERISA LTD claims, and an exhaustive list of all the possible deadlines is beyond the scope of this article. However, a few points bear mentioning.

Current ERISA claims regulations provide that a claimant must be afforded 180 days to appeal an unfavorable initial decision by an insurer. Further, ERISA plaintiffs are required to exhaust all administrative appeals before filing suit in federal court. *E.g., Perrino v. Southern Bell Telephone & Telegraph Co.*, 209 F.3d 1309, 1315-16 (11th Cir. 2000). Failure to timely appeal the insurer's initial decision could effectively lose the case before a lawsuit is even filed.

As a general rule, there is not a statute of limitations for suits brought under ERISA § 502(a)(1)(B) to recover benefits. Thus, courts borrow the most closely analogous state limitations period, usually that for contract disputes. *See, e.g., Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F.3d 1347, 1356 (11th Cir. 1998).

ERISA plans will often include contractual periods of limitations, and these are typically enforced. *E.g., Northlake Regional Medical Center v. Waffle House System Employee Benefit Plan*, 160 F.3d 1301, 1303-04 (11th Cir. 1998). Contractual periods of limitations contained in LTD policies are most commonly three years, but may vary widely. In *Northlake*, the court upheld use of a 90-day contractual period of limitations in a healthcare claim. Policies should therefore be scoured carefully for the presence of a contractual period of limitations.

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING ARTICLES

The Social Security Administration Has Created a New Malpractice Trap for Attorneys Who Handle Worker's Compensation Cases - By: Eric Buchanan - Published in TTLA 2009

ERISA Subrogation and Recoveries - By: Eric Buchanan - A new chapter to be added to the upcoming addition of Thomson West's Auto Tort Litigation Manual

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will speaking at the Memphis Bar Association CLE, "Navigating the ERISA Mine Field: How to avoid or limit ERISA subrogation in PI cases and how to litigate an ERISA insurance claim" in Memphis on September 11, 2009.

Eric Buchanan will also be speaking at the American Association for Justice's Conference on Social Security Disability to be held at the Venetian in Las Vegas September 24-25, 2009

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates are available to speak to your organization regarding Social Security Disability, ERISA Long-term Disability, Group Long-term Disability, Private Disability Insurance, ERISA Benefits, Denied Health Insurance Claims and Life Insurance Claims.

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