ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

ERISA & DISABILITY BENEFITS NEWSLETTER

VOLUME 4, ISSUE 1, JANUARY 2012

ABOUT OUR FIRM

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.



Eric L. Buchanan, R. Scott Wilson, and D. Seth Holliday are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization.

HOW DISABLED IS DISABLED? BY JEREMY L. BORDELON

People often do not realize that in the legal world, "disability" is a term of art, with a very specific meaning. In fact, it has several different specific meanings, depending on the context. "Disabled" has one meaning for the purposes of the Americans with Disabilities Act, another for the purposes of worker's compensation, still another when talking about things like exemptions from jury duty or from testifying in court, and there are probably a dozen others. Not surprisingly, "disabled" has a very specific meaning in the context of a Social Security disability or Long Term Disability benefits claim. In most circumstances, though, in order to be considered "disabled," and entitled to disability benefits, a person need not be comatose, or bed-ridden, or entirely unable to care for themselves. A disabled person, for the purposes of disability benefits, may be able to live a relatively normal life – he is just unable to work – sometimes not at all, sometimes just at his or her last job.

In some cases, the question of just "how disabled" someone needs to be gets even narrower. What about part time work? Some jobs are available part time, others aren't. Even if a disabled person could, theoretically, do his old job on a part time basis, could he keep it up for the long term? Could he live on what he earns part time? How many hours per week do you need to be able to do before you are "not disabled?" These are often questions that come up in disability benefits cases, especially for people who are right on the cusp – they aren't able to work enough to support themselves, but they aren't completely incapable of work, either.

Social Security has its own definition of disability and its own set of regulations detailing the disability process, which I won't discuss here. But many people have purchased short-term and long-term disability insurance, either through an employer or through a private insurance broker, in an attempt to protect their income from disability even more. That is what insurance is designed to do, after all. Insurance protects something. If the insured thing ever fails, the insurance pays you money. If you get in a car crash, auto insurance pays. If your house burns down or is damaged in a storm, homeowner's insurance pays. If something happens to your body, medical insurance pays. And if something happens to your ability to earn a livelihood, and your working income disappears or significantly drops, then disability insurance should pay.

Most group disability insurance policies (the ones people typically sign up for at work) will pay 60% of a disabled person's pre-disability income if they are unable to work. Most policies contain a definition of disability that states that, at some point during the claim (either in the beginning or after a few years of benefits) the claimant must be disabled from "any occupation." I.e., you must be "unable to perform any occupation" to receive your disability benefits. If that is the case, and the claimant is theoretically capable of some part-time work, then what happens? Should someone be denied all of their 60% LTD benefit because they could still theoretically earn 10% of their pre-disability income? No, of course not. That would be contrary to the purpose of the insurance plan, which was designed to protect 60% of the person's income. It would be similar to your car insurance carrier refusing to pay for

any repairs to your car after an accident if it is "still driveable."

The disability insurers themselves do not always agree. Many times, a person will be denied benefits in just the manner I described above – e.g., a former lawyer who suffers a traumatic brain injury is no longer able to work as a lawyer, but might be able to work as a parking lot attendant. Since he can still do *something*, the insurer might say that he is not disabled from "any occupation," and might refuse to pay anything. Similarly, consider the example of an airplane mechanic who can still do his job, but can only do it for a few hours per week. He might also be denied by his disability insurer because he can still do *something*. Both denials would be wrong, because they are contrary to the purpose behind the insurance plan – protecting a certain amount of income.

When faced with these types of cases, the courts have intuited that "any occupation" is not a literal term. For example, in *Helms v. Monsanto Co., Inc.*, 728 F.2d 1416 (11th Cir. 1984), the plan stated that a person was disabled when she "is prevented from engaging in any occupation or employment for remuneration or profit." *Id.* at 1419. Analyzing this language, the *Helms* court held that the "any occupation" standard should not be interpreted in an excessively literal manner, but must mean an occupation that allows the claimant to earn a reasonable income:

> Analogous insurance cases consistently agree that the term "total disability" does not mean absolute helplessness on the part of the insured. The insured can recover benefits if he is unable to perform all the substantial and material acts necessary to the prosecution of some gainful business or occupation. Gainful has been defined by these courts as profitable, advantageous or lucrative. Therefore, the remuneration must be something reasonably substantial rather than a mere nominal profit.

Helms, 728 F.2d at 1420.

This holding has been expressly adopted by the Sixth Circuit Court of Appeals, as well. *Vanderklok v. Provident Life and Accident Ins. Co.*, 956 F.2d 610, 614-15 (6th Cir. 1992). And in *Tracy v. Pharmacia & Upjohn Absence Payment Plan*, 195 Fed. App'x 511 (6th Cir. 2006), the Plan defined total disability as the inability "to be gainfully employed anywhere." *Id.* at 514. Following *Helms*, the Court held this required a "reasonably substantial income":

> We now further adopt the holding in *Helms* that gainful employment is that employment from which a claimant may earn a reasonably substantial income rising to the dignity of an income or livelihood, even though the income is not as much as he earned before the disability.

Tracy, 195 Fed. App'x at 519. *See also Demirovic v. Building Service 32 B J Pension Fund*, 467 F.3d 208, 215 (2nd Cir. 2006) ("any gainful employment" means employment allowing a claimant to earn a reasonably substantial income from it, rising to the dignity of an income or livelihood, though not necessarily as much as she earned before the disability"); *Torix v. Ball Corp.*, 862 F.2d 1428 (10th Cir. 1988) (same).

When interpreting plan terms, courts should "construe an ERISA plan with a view toward effectuating its general purpose." *See Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368, 1374 (6th Cir. 1994). *See also Kolkowski v. Goodrich Corp.*, 448 F.3d 843, 850 (6th Cir. 2006) ("where the terms of a plan are ambiguous, we look to extrinsic evidence to discern the purpose of the plan as the average employee would have reasonably understood it").

As an example, assume a plan is designed to replace 60% of a worker's pre-disability income if she is no longer able to work. A worker files a claim under that plan, and her doctor says that she might be able to work up to two hours per day at her old job, but could not sustain full-time work. Two hours per day is one quarter of a full eight hour work day, so the worker might be able to earn up to 25% of her pre-disability income, assuming her doctor is correct about her abilities, and assuming she could actually find a job that would allow her to work that schedule for the same hourly wage she used to earn. The LTD policy requires her to be disabled from "any occupation," and the terms of the policy do not delve deeper into nuances of partial disability and part-time work. Nevertheless, it would be wrong for the insurer to deny her the 60% disability benefit under the policy just because she has a theoretical capability to earn 25% of her pre-disability income. That would make no sense, and would defeat the purpose of the insurance.

"Any occupation," in the context of a disability benefits plan, is not literal, but implies an occupation providing a reasonably substantial income under the circumstances. *Tracy, supra*. An ERISA plan in particular must be construed "with a view toward effectuating its general purpose." *Wulf, supra.* When a long-term disability insurance plan is designed to protect, for example, 60% of a worker's pre-disability income, it is contrary to the purpose of the plan to deny benefits because the worker could earn 10%, 20%, or even 50% of her pre-disability income. The insured interest – the thing the insurance was designed to protect – was 60% of the worker's income. If she is unable to earn that much, then an ability to engage in part-time work should be insufficient to render her "not disabled" under the LTD plan. Just "how disabled" does she need to be? Look to the terms of the plan to find out.

ERISA & DISABILITY BENEFITS NEWSLETTER

UPCOMING SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the ACI Annual Convention scheduled for January 26-27, 2012 in New York City. He will be speaking on the following topics: "Innovative Pre-Trial Strategies for Disability Insurance Claims: Settlement, Mediation, Attorney's Fees and More" and "The Details and Nuances of Drafting a Protective Order to Combat the Discovery of Proprietary and Confidential Information". To register for this conference contact (888)224-2480 or register online at www.americanconference.com/disabilityinsurance.

Eric Buchanan will be speaking at the Bayside Fibromyalgia Women's Support Group at the Bayside Baptist Church in Harrison, Tennessee on Tuesday, February 21, 2012 at 6:00 pm regarding filing a claim for social Security and/or long term disability benefits.

Eric Buchanan will be speaking at the Southern Trial Lawyers scheduled for February 15-18, 2012 in New Orleans. He will be speaking on discovery and protective orders in disability cases.

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.

Representing disabled policy holders and people seeking disability benefits nationwide. Eric's disability and benefits team can help your clients!

- ERISA Long-Term Disability
- Private Disability Insurance
- ERISA Benefits
- Life Insurance Claims
- Group Long-Term Disability
- Social Security Disability
- Denied Health Insurance Claims
- Long-Term Care Claims

We appreciate the opportunity to work with you on any of these cases.

"*We are very honored to receive this recognition for the hard work that our disability and benefits team has put into helping our clients move forward in their lives. We thank all our clients who nominated us for the 2012 Seal of Satisfaction Award in the attorney category for Chattanooga." – Eric L. Buchanan*

www.servicesselect.com

Eric Buchanan & Associates, PLLC
414 McCallie Avenue • Chattanooga, Tennessee 37402
telephone (423) 634-2506 • fax (423) 634-2505 • toll free (877) 634-2506
www.buchanandisability.com