ERIC BUCHANAN & ASSOCIATES
DISABILITY INSURANCE ATTORNEYS

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ABOUT OUR FIRM

The Disability Insurance Team at Eric Buchanan & Associates helps individuals nationwide who have been denied disability insurance benefits and employee benefits. Our insurance and employee benefits team helps people apply for, or fight denials of, disability insurance benefits, life insurance, health insurance, and similar insurance benefits.

For more information, visit our website at www.buchanandisability.com.

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WHAT SHOULD BE INCLUDED IN THE ERISA RECORD? BY: AUDREY DOLMOVICH

A. INSURANCE PROVIDED THROUGH WORK FALLS UNDER ERISA, AND DIFFERENT RULES APPLY TO THOSE CLAIMS

Many people have insurance coverage through work, like health, long term disability ("LTD") or life insurance. Claims related to insurance provided through an employer fall under a federal law, the Employment Retirement Income Security Act of 1974 ("ERISA"). If the claim falls under ERISA, state law no longer controls the claim and ERISA has its own set of federal claims regulations. Unlike most other civil cases, in an ERISA benefits claim, there is no right to a what jury trial, there are limited damages, and often there is a deferential standard of review in favor of the ERISA decision maker. Another big difference is that the collection of documents the judge will review is limited. This article addresses the important question – Just what goes into that limited record in ERISA benefits cases?

B. AN ERISA RECORD CLOSES BEFORE THE CLAIM IS FILED IN COURT

The general rule is that the ERISA record[1] closes when the ERISA decision maker issues its final decision, although there are some very limited exceptions to that rule. When helping a claimant in an ERISA benefits case, where the benefits were offered at work, attorneys must submit the evidence to the insurance company at the appeal stage before a final denial is issued. This should ensure that the evidence will be in front of the judge during his/her review. Much of the usual "discovery" or "development" regarding the facts of an ERISA case is done at the appeals stage before the insurance company or ERISA decision maker. Submitting the evidence to the insurance company before the final denial is analogous to a plaintiff "putting on proof" in a civil trial.

C. ONCE THE RECORD IS CLOSED, WHAT SHOULD BE INCLUDED IN THE ERISA RECORD?

Nothing in the ERISA statute sets out a rule that the evidence in court is limited to a closed record. With no rules in the statute, each circuit has adopted its own general rules about the limited record, so, of course, the rules and guidelines from each circuit are different. The ERISA claims regulations at 29 C.F.R. § 2560.503-1 give some guidance on the issue of record by setting out what documents are considered

"relevant" to an ERISA benefits claim when the claim is being considered by an insurance company or ERISA decision maker.

The ERISA claims regulations state, at 29 C.F.R. § 2560.503-1(h)(2), as part of a "reasonable opportunity full and fair review of a claim and adverse benefit determination," the claims procedures shall:

> (h)(2)(iii) - Provide that a claimant shall be provided, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claimant's claim for benefits. Whether a document, record, or other information is relevant to a claim for benefits shall be determined by reference to paragraph (m)(8) of this section.

The referenced subsection, 29 C.F.R. § 2560.503-1(m)(8) further explains information is "relevant" if it,

> (i) Was relied upon in making the Benefit determination;
> (ii) Was submitted, considered, or generated in the course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination;
> (iii) Demonstrates compliance with the administrative processes and safeguards required pursuant to paragraph (b)(5) of this section in making the benefit determination; or
> (iv) In the case of a group health plan or a plan providing disability benefits, constitutes a statement of policy or guidance with respect to the plan concerning the denied treatment option or benefit for the claimant's diagnosis, without regard to whether such advice or statement was relied upon in making the benefit determination.

The documents in (m)(8)(iii), showing compliance with paragraph (b)(5), are those documents that show, "The claims procedures contain administrative processes and safeguards designed to ensure and to verify that benefit claim determinations are made in accordance with governing plan documents and that, where appropriate, the plan provisions have been applied consistently with respect to similarly situated claimants."

Presumably, if these are the documents that are relevant and provided to a claimant, this is a starting point in describing what goes into a record, but, since ERISA does not, itself, limit a court review to a record, nothing in the regulation explicitly says this is the minimum or maximum list of what must be in an ERISA record in court.

D. WHO DECIDES WHAT SHOULD BE INCLUDED IN THE ERISA RECORD?

Most circuits have decided that the ERISA record contains only the information that the insurance company had while making its determination. For example, in *Perry v. Simplicity Engineering*, the Sixth Circuit stated that "this circuit's precedent limited the evidence considered by the federal court to that presented to the trustee at the time of its final decision" and the precedent "does not require district courts to hear and consider evidence not presented to the plan administrator in connection with a claim." 900 F.2d 963, 966 (6th Cir. 1990). Later, in *Wilkins v. Baptist Healthcare System, Inc.*, the Sixth Circuit again stated, "Although the district court reviewed the decision of the Plan Administrator *de novo*, the district court was confined to the record that was before the Plan Administrator." 150 F.3d 609, 615 (6th Cir. 1998). Even though the Sixth Circuit has laid out the rule that the ERISA record contains all of the information before the insurance company, what exactly does that include?

Other circuits have based their rules on whether the standard of review is arbitrary and capricious or *de novo*. For instance, the Seventh Circuit has held that under an arbitrary and capricious standard of review the court's review is based on the administrative record, while under a *de novo* review, the court can review new evidence. Specifically, in *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, the Seventh Circuit held that "Deferential review of an administrative decision means review on the administrative record" while it has "allowed parties to take discovery and present new evidence in ERISA cases subject to *de novo* judicial decisions, but never where

the question is whether a decision is supported by substantial evidence, or is arbitrary and capricious." 195 F.3d 975, 981-82 (7th Cir. 1999). This was also discussed in *Dorris v. Unum Life Ins. Co. of Am.,* a recent Seventh Circuit case which stated that in a *de novo* review "the court can limit itself to deciding the case on the administrative record but should also freely allow the parties to introduce relevant extra-record evidence and seek appropriate discovery." 949 F.3d 297, 304 (7th Cir. 2020). The Seventh Circuit also clarified that "By contrast, in ERISA benefits claims subject to arbitrary and capricious review because the plan gives the administrator discretion, we generally do not look to any evidence beyond what the administrator considered." *Id*.

Most circuits have decided that the court will review an ERISA record that is limited to what was in front of the insurance at the appeal stage, but, this is not a clear rule.

E. COURT RULES SETTING OUT WHAT SHOULD BE INCLUDED IN THE ERISA RECORD

While most circuits have followed the general rule that the ERISA record should include everything that was considered by the insurance company on appeal, some courts of appeal have explained that the record should include social security decisions, plan documents, and other forms and evidence.

F. ATTORNEYS NEED TO KNOW THESE RULES BECAUSE INSURANCE COMPANIES WILL ATTEMPT TO CONTROL THE INFORMATION AVAILABLE TO A COURT

Unfortunately for ERISA claimants, typically it is the insurance company, an interested party in the litigation, who is compiling the ERISA record for the court. With the limited guidance from the ERISA regulations, the insurance company can potentially decide to leave out information that might matter in a case. At a minimum, the ERISA record produced in court should include everything provided to a claimant during the appeal process, or that is considered "relevant" under the regulations. Also, when litigating an ERISA benefits case, attorneys should review the ERISA record filed in court to make sure that everything is included.

What other documents should be included in the ERISA record? What about emails, instant messaging, and other internal communications between claims handlers about a claimant's case? What about emails, instant messaging, etc., not about the claimant specifically, but about whether the claims department has targets or goals for denying a certain number of cases, generally? What about notes from internal meetings, like "round tables" and "file reviews" when insurance company claims personnel discuss a claim? What about electronic versions of the documents, so that a court can see whether a letter was really created on a certain date?

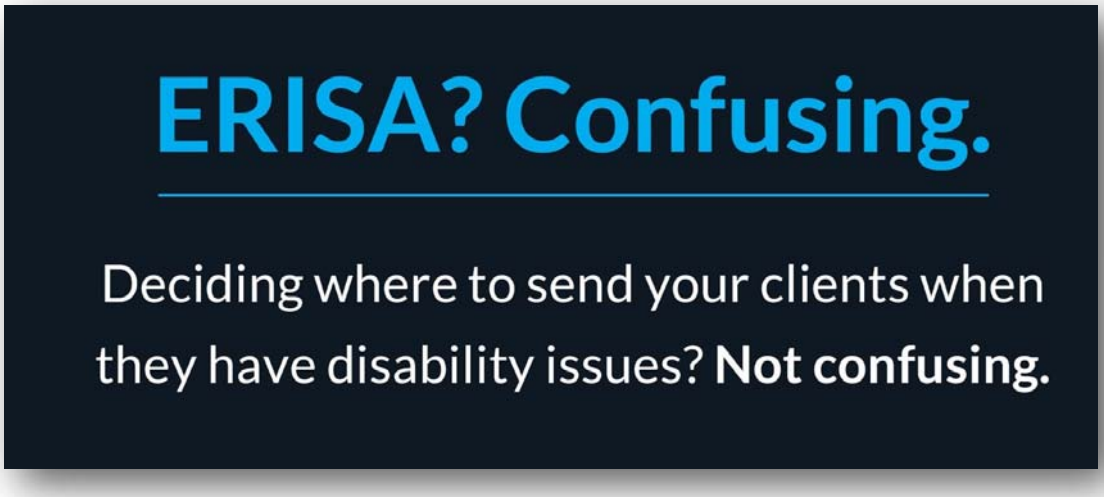
Insurance companies like to perpetuate the myth that is that there is some "official" guidance as to what goes into the ERISA record and that the record is compiled in some sort of neutral manner. Insurance companies' attorneys like to refer to the record as an "Administrative Record" rather than the ERISA record. Calling the record an "Administrative Record" infers that the record was compiled like it would be by an independent administrative government agency, where the record is compiled after a due process hearing, typically in accordance with fair procedures. This is not the case in most ERISA claims. The insurance company is not a third party who is uninterested in the outcome; rather, the insurance company is most likely the one that will be paying the benefits if the claim is approved. By calling the record an "Administrative Record," the insurance company might influence a judge to forget that the record was not a compiled by an impartial party. Calling the record and "ERISA Record" will help the judge in remembering that the record was composed by the insurance company who has an interest in the outcome of the claim.

Always review the ERISA record to look for missing pieces of evidence or to look for additional documents that have been added. Also, continue to call the record an "ERISA Record" instead of an "Administrative Record" so that the court understands that this is not a record composed by an impartial third party.

In an upcoming newsletter, we will discuss special rules and guidelines each circuit has developed in reviewing the ERISA record.

End Notes:

[1]Courts borrowed concepts from administrative law and historically referred to this limited collection of documents as an "administrative record," while the modern trend is to refer to it as an "ERISA administrative record," or simply, an "ERISA record."



The Disability and Benefits Team at Eric Buchanan & Associates can help!

Eric Buchanan & Associates, PLLC is a boutique plaintiffs' firm located in Chattanooga, Tennessee. We help individuals nationwide obtain disability insurance benefits and other ERISA employee welfare benefits (such as life, health or disability benefits offered through work). Attorneys are our number one source of cases. If you have a client who could use our help, we would appreciate your referral.

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates, PLLC are available to speak to your organization regarding ERISA long term disability, group long term disability, private disability insurance, ERISA benefits, denied health insurance claims and life insurance claims.

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

Contact our Intake Team at intaketeam@buchanandisability.com.

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