

## ERISA &amp; DISABILITY BENEFITS NEWSLETTER

## 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](http://www.buchanandisability.com).

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 HOW COURTS APPLY THE MENTAL AND NERVOUS LIMITATION IN ERISA CASES WHERE THE CLAIMANT HAS BOTH PHYSICAL AND MENTAL IMPAIRMENTS - BY R. CHANDLER WILSON
 

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**Introduction**

Most ERISA LTD policies limit benefits payable due to mental disabilities (often referred to in policies as “mental and nervous disorders”) to a shorter time than the full duration of the policy. What happens when a claimant suffers from both mental and physical impairments? Often times, insurance companies try to limit benefits by attributing a claimant’s disability solely to the mental conditions, disregarding or minimizing the claimant’s physically disabling conditions. Are they allowed to do this? This article discusses how the various circuits have addressed this question.

**The “But For” Approach**

Multiple appellate circuits have adopted a “but for” approach when considering whether mental and nervous provisions apply to limit a claimant’s benefits. Generally, the “but for” approach holds that mental and nervous provisions do not apply unless it is shown that without the claimant’s mental condition, the claimant would not be disabled—but for the mental limitations, the claimant would not qualify for benefits at all.

The Third Circuit was the first to explicitly address this issue in *Michaels v. The Equitable Life Assur. Soc’y of U.S. Employees, Managers, & Agents Long-Term Disability Plan*, 305 F. App’x 896 (3d Cir. 2009). In *Michaels*, the Defendant attempted to argue that the plan’s mental limitation would apply if a mental condition was present,

even if a physical condition was disabling on its own. The Third Circuit harshly rejected this interpretation:

The view that this Plan’s limitation on benefits applies if a mental condition exists, notwithstanding the presence of a totally disabling physical condition, is plainly unreasonable and undermined by Equitable’s conduct. Equitable’s interpretation would lead to the absurd result of rendering Michaels’s physical condition completely irrelevant, as the presence of any mental condition would negate the effect of total physical disability.

*Id.* at 903-904. Under the terms of Equitable’s plan, the Third Circuit explained that for a claimant to overcome the mental and nervous limitation, the claimant would have to show that “by itself, his physical disability precluded him from engaging in any gainful occupation, regardless of any concurrent mental condition.” *Id.* at 904.

In *Krolnik v. Prudential Ins. Co. of Am.*, the Seventh Circuit similarly concluded:

The court needs to know whether depression ever disabled Krolnik. If the answer is no—either because his mental condition never was disabling, or because his physical impairments disa-

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bled him independent of his mental state—then the Plan's two-year bar does not apply.

570 F.3d 841, 843 (7th Cir. 2009). While not explicitly using the “but for” language, the court was clear that the mental and nervous limitation cannot apply in situations where the claimant is independently disabled by the physical impairment.

The Ninth Circuit subsequently took up the issue in *Gunn v. Reliance Standard Life Ins. Co.*, 399 F. App'x 147 (9th Cir. 2010). Prior to *Gunn*, the Ninth Circuit had not specifically addressed the standard for applying a mental and nervous limitation, but in *McClure v. Life Ins. Co. of N. Am.*, it had addressed the similar issue of how a preexisting condition exclusion clause applies where a claimant has comorbid conditions, with one of them being preexisting. In *McClure*, the Ninth Circuit held that the preexisting condition exclusion applies if the preexisting condition in question was the “proximate cause” of or “substantially contributed to” the claimant’s disability. *Id.* at 1136. However, in *Gunn* where the Ninth Circuit specifically considered a mental and nervous limitation, the Ninth Circuit appears to have shifted to the “but for” analysis used by the Third Circuit. In ruling for the defendant, the court held that Reliance’s denial was properly grounded on the basis that “Gunn’s multiple sclerosis alone was not disabling, and that, **but for** his psychiatric mental and nervous disorders, he would be able to work.” *Gunn*, 399 F. App'x at 153 (emphasis added). The Ninth Circuit has confirmed this “but for” standard in subsequent cases. See *Maurer v. Reliance Standard Life Ins. Co.*, 500 F. App'x 626, 627 (9th Cir. 2012) (“Defendant permissibly interpreted the ‘mental/nervous’ limitation to preclude coverage when, in the absence of a mental or nervous disorder, a beneficiary would be physically capable of working.”); *Doe v. Prudential Ins. Co. of Am.*, 245 F. Supp. 3d 1172, 1186 (C.D. Cal.), modified, 258 F. Supp. 3d 1089 (C.D. Cal. 2017) (“this Court construes the limitation here as applying only if Plaintiff’s mental illness was a but-for cause of his disability.”).

Like the Third, Seventh, and Ninth Circuits, the Fifth Circuit addressed the applicability of mental and nervous limitations in *George v. Reliance Standard Life Ins. Co.*, 776 F.3d 349 (5th Cir. 2015). Citing to *Gunn*, *Maurer*, and *Michaels*, the Fifth Circuit adopted the “but for” test as well:

This court has never considered the meaning of the phrase “caused by or contributed to by” in a similar exclusion clause, but other federal circuit courts have done so. Each of those courts has interpreted the “caused by or contributed to by” language to

exclude coverage only when the claimant’s physical disability was insufficient to render him totally disabled. In other words, those courts have asked whether the mental disability is a but-for cause of the total disability...We agree with this interpretation of the relevant language...Thus we consider whether George’s physical disabilities were independently sufficient to render him Totally Disabled.

*Id.* at 355–56 (citations omitted).

The Sixth Circuit most recently adopted the “but for” test in *Okuno v. Reliance Standard Life Ins. Co.*, 836 F.3d 600 (6th Cir. 2016). Citing to the Third, Fifth, and Ninth Circuits the Sixth Circuit held:

We follow the analyses of our sister circuits and apply the but-for inquiry to the Mental and Nervous Disorders Limitation as did the Fifth Circuit in *George*, as well as the Ninth and Third Circuits. Thus, an application is not appropriately denied on the basis that a mental or nervous disorder “contributes to” a disabling condition; rather, the effect of an applicant’s physical ailments must be considered separately to satisfy the requirement that review be reasoned and deliberate.

*Id.* at 609 (citations omitted).

### The “Contributes to” Approach

Thus far, only the First Circuit has held that a mental disorder merely contributing to a claimant’s disability is enough to trigger the Mental Disorder limitation:

The Limitation applies if a mental disorder, regardless of its own cause, “caused or contributed” to a claimant’s disability. It is clear from *Dutkewych*’s own evidence that mental disorders, regardless of cause, continue to contribute to his disability. This is sufficient to trigger the Mental Disorder Limitation based on the facts of this case and the wording of this Plan.

*Dutkewych v. Standard Ins. Co.*, 781 F.3d 623, 635 (1st Cir. 2015). Notably, *Dutkewych* deals with a claimant who has Lyme disease and suffers from cognitive limitations as a result, rather than a claimant who has independent

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mental and physical limitations. The court therefore held that the claimant's disability was subject to the mental disorder limitation due to the symptoms regardless of the cause. So, while this case may not be exactly on point with a situation where the claimant has comorbid mental and physical impairments, it appears the First Circuit utilizes a "contributes to" test until it more clearly addresses the issue in a future case.

### Circuits with Unclear Case Law

The remaining circuits have cases at the district court level applying the "but for" test, but the circuit courts themselves have not yet addressed the issue.

Several district courts in the Second Circuit have applied the "but for" test. See *Tritt v. Automatic Data Processing, Inc. Long Term Disability Plan*, No. 3:06-CV-2065 RNC, 2012 WL 3309380, at \*11 (D. Conn. Aug. 13, 2012), aff'd on other grounds, 531 F. App'x 177 (2d Cir. 2013) ("In other words, if a claimant's mental or emotional illness is a but for cause of her total disability—if her physical illness, by itself, is not totally disabling—then her benefits are capped at 24 months."); *Kruk v. Metro. Life Ins. Co.*, No. 3:07-CV-1533 CSH, 2013 WL 993998, at \*17 (D. Conn. Mar. 13, 2013) ("To be entitled to disability benefits after January 18, 2003, Kruk must prove that her physical disease, in and of itself and entirely disregarding her mental and emotional disease, was totally disabling."); *Sheehan v. Metro. Life Ins. Co.*, 368 F. Supp. 2d 228, 264 (S.D.N.Y. 2005) (Found for Defendant because Plaintiff failed to prove that his cardiac condition "in and of itself is totally disabling."). However, until the Second Circuit itself addresses the issue, some level of uncertainty still exists.

The Eighth Circuit is fairly silent on the issue, but the "but for" test was applied in *Brewer v. Reliance Standard Life Ins. Co.*, No. 4:09CV1356, 2010 WL 3843625 (E.D. Mo. Sept. 27, 2010) ("[W]hile she may in fact be unable to work as a result of her post-traumatic stress, anxiety, panic attacks, and depression, under the policy terms Plaintiff had

to be totally disabled based solely on her physical condition in order to continue to receive benefits after the initial twenty-four months.") *Id.* at 13.

The Tenth Circuit does not have much case law on the issue, but the District of Kansas appears to apply the "but for" test in *Randles v. Galichia Medical Group, P.A.*... No. 05-1374 WEB, 2006 WL 3760251, at \*12 (D. Kan. Dec. 18, 2006) (Ruled in favor of the Defendant because Plaintiff did not show that his physical problems would have been disabling absent his mental disorder.)

Finally, the Eleventh Circuit contains a few district court cases where the "but for" test was applied. See *Nevitt v. Standard Ins. Co.*, No. CIVA 108CV-3641-TWT, 2009 WL 4730316, at \*5 (N.D. Ga. Dec. 3, 2009) ("The Court... finds that the mental disorder limitation applies only to the extent that Nevitt is not independently disabled by migraine headaches, cervical injuries, and post-concussive syndrome."); See also *Miller v. Prudential Ins. Co. of Am.*, 625 F. Supp. 2d 1256, 1265 (S.D. Fla. 2008) ("[The] provision applies to cut off benefits after 24 months in cases where a claimant's disability is attributable solely to a mental condition, and also where a claimant's disability is attributable in part to a physical condition and in part to a disabling mental condition that spanned the entire 24 month period.")

### Conclusion

The Third, Fifth, Sixth, Seventh, and Ninth Circuits have all explicitly adopted some variation of the "but for" test when determining whether a disability policy's "mental and nervous" limitation can apply. The other circuits have not yet addressed the issue, but the case law shows (with the possible exception of the First Circuit) that they appear to be trending in the direction of the "but for" test as well. However, until these circuit courts address the applicability of mental and nervous provisions, some ambiguity exists.

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### ERIC BUCHANAN & ASSOCIATES, PLLC: UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the following event:

- AAJ Annual Convention in Denver, Colorado on July 7-10, 2018  
**Topic:** Identifying ERISA Claims in Your Auto Cases

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### 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.

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**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.

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- Long-Term Care Claims

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**We appreciate the opportunity to work with you on any of these cases.  
Contact our Intake Team at [intaketeam@buchanandisability.com](mailto:intaketeam@buchanandisability.com).**

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