

ERISA & DISABILITY BENEFITS NEWSLETTER

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.

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A PLEASANT SURPRISE: STUMBLING ACROSS A LINE OF PLAINTIFF FRIENDLY ERISA CASE LAW - BY: R. SCOTT WILSON

In general, a plaintiff's attorney won't go too far wrong assuming that the case law on any given issue underlying ERISA-governed long term disability insurance policies will be problematic or difficult. I was surprised, therefore, when drafting a recent brief, to stumble across a surprisingly friendly line of cases addressing "self reported symptoms" limitations.

A far from universal, yet not uncommon LTD policy provision limits the length of time for which benefits are payable for "self reported symptoms." A typical example reads:

WHAT DISABILITIES HAVE A LIMITED PAY PERIOD UNDER YOUR PLAN?

Disabilities, due to sickness or injury, which are primarily based on self-reported symptoms, and disabilities due to mental illness have a limited pay period up to 12 months.

In turn, "self-reported symptoms" are defined as:

SELF-REPORTED SYMPTOMS means the manifestations of your condition which you tell your physician, that are not verifiable using tests, procedures or clinical examinations standardly accepted in the practice of medicine. Examples of self-reported symptoms include, but are not limited to headaches, pain, fatigue, stiffness, soreness, ringing in ears, dizziness, numbness and loss of energy.

While not stated explicitly, this language seems intended to limit the insurer's exposure to disability claims for such conditions as fibromyalgia and chronic fatigue syndrome. Surprisingly, across a series of cases, this language has not had the intended effect.

In *Weitzenkamp v. Unum Life Ins. Co. of Am.*, 661 F.3d 323, 330 (7th Cir. 2011), the court concluded that "disabilities, due to sickness or injury, which are primarily based on self-reported symptoms" was ambiguous. The clause "based on self-reported symptoms" could be read to modify "disabilities," such that the focus is on whether the limitation on function is primarily based on self-reported symptoms. Alternately, the clause "based on self-reported symptoms" could be read to modify "sickness or injury," such that the focus must be on whether the diagnosis of the disease itself is primarily based on self-reported symptoms.

Perhaps surprisingly, the *Weitzenkamp* court concluded that the second interpretation, focusing on diagnosis, not limitation, was the correct one: "the only viable conclusion is that the self-reported symptoms limitation applies to disabling illnesses or injuries that are *diagnosed* primarily based on self-reported symptoms rather than to all illnesses or injuries for which the *disabling symptoms* are self-reported." The court reasoned:

The contrary interpretation advanced by Unum would sweep within the limitation virtually all diseases, leaving only a small subset for coverage beyond that time period. For most illnesses or injuries, the disabling aspect is not the disease itself,

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but the pain, weakness, or fatigue caused by that illness or injury. Even diseases that are extremely likely to cause an inability to work, such as stage IV cancer or advanced heart disease, are disabling because of the pain, weakness or fatigue . . . Although we must give deference to the administrator's interpretation of the plan terms, we cannot conclude that Unum's interpretation is reasonable.

661 F.3d at 330-31. The *Weitzenkamp* court then held that because the plaintiff was diagnosed with fibromyalgia using the 18-point trigger test, which it noted "can more or less objectively establish the disease where the findings of the test are consistent with fibromyalgia," the diagnosis was on the basis of objective evidence and the self-reported symptom limitation did not apply.

Weitzenkamp is not a single, rogue holding; other courts have agreed. See *Chronister v. Baptist Health & UNUM Life Ins. Co.*, 442 F.3d 648, 656 (8th Cir. 2006) ("the eighteen point 'trigger test' performed by Dr. Lipsmeyer qualifies as a 'clinical examination standardly accepted in the practice of medicine,' and thus, Chronister's fibromyalgia is not subject

to Unum's self-reported symptoms limitations"). See also *McCardle v. UNUM Life Ins. Co. of Am.*, 2001 U.S. Dist. LEXIS 20541 (D.Minn. September 26, 2001); *Russell v. UN-UM Life Ins. Co. of America*, 40 F.Supp.2d at 750-51 (D.S.C. 1999).

This line of cases is not a panacea that will universally shepherd a fibromyalgia case past a self-reported symptoms limitation. Other cases deem fibromyalgia to be inherently subjective, and focus instead on whether the limitations as a result of the condition can be objectively verified, by functional capacities evaluation or some other means. See *Boardman v. Prudential Insurance Co. of America*, 337 F.3d 9, 16 n.5 (1st Cir. 2003); *Huffaker v. Metro. Life Ins. Co.*, 271 Fed. Appx. 493 (6th Cir. March 25, 2008). Where economically feasible, an attorney would be wise to obtain objective testing in order to be able to argue that physical limitations as well as diagnosis are based upon more than just self-report. An FCE (especially a two-day FCE that could demonstrate the impact of fatigue) or manual dexterity testing (to demonstrate impaired ability to write and type, thereby precluding most sedentary jobs) could still be invaluable. However, with all the case law that's unfriendly to plaintiffs out there, it's nice to sometimes stumble across a line of helpful cases.

UPCOMING SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the American Conference Institute 15th Annual Convention scheduled for January 24 – 25, 2013 in New York City. He will be speaking on the recovery of attorneys fees in the ERISA and Non-ERISA context .

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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- Private Disability Insurance
- ERISA Benefits
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- Social Security Disability
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- Long-Term Care Claims

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

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