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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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ERISA LITIGATION AND JUDICIAL NOTICE: DO THE FEDERAL RULES OF EVIDENCE APPLY? - BY: RACHAEL PAS

Litigating long-term disability claims subject to ERISA can be a complex and confusing process. One of the most frustrating aspects of ERISA litigation is that the federal courts' review of evidence in these cases is very limited. Courts' application of this rule is sometimes confusing and conflicting, leaving attorneys perplexed as to how to navigate the ERISA landscape. This paper will explain more about the limitations in ERISA discovery and when courts can take judicial notice of facts not in the record.

A well-established rule governing ERISA litigation is that reviewing courts may not consider any evidence on the merits of the case outside of the "ERISA record," often referred to by courts as the "administrative record." *Wilkins v. Baptist Healthcare Sys., Inc.,* 150 F.3d 609, 618 (6th Cir. 1998) (holding that it was proper for the district court to refuse to consider an affidavit by a treating physician because that affidavit was not included in the record upon which the plan administrator made its decision to deny benefits). Typically, the ERISA record includes only that evidence which was before a plan administrator when the decision was made to either deny or terminate disability benefits. *Perry v. Simplicity Engineering, a Div. of Lukens General Industries, Inc.*, 900 F.2d 963, 966 (6th Cir. 1999).

However, sometimes courts allow for discovery into the conflict of interest of the decision maker, procedural irregularities by the decision maker, or may take judicial notice of facts outside the record. For example, in *Myers v. Prudential Ins. Co. of America*, 581 F.Supp.2d 904, 913 (E.D. Tenn. 2008),[1] the district court allowed some discovery and held that there is nothing in the ERISA statute that precludes the application of the Federal Rules of Civil Procedure or Federal Rules of Evidence.

The rule limiting a court to review of the ERISA record seemingly conflicts with the authority on judicial notice. The Federal Rules of Evidence allow for judicial notice of certain, adjudicative facts. Under the evidentiary rules, the court *may* take judicial notice on its own; or *"must* take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c) (emphasis added).

In fact, the courts have readily treated judicial notice of facts not in the ERISA record, and they have done so in reliance on Federal Rule of Evidence 201. It seems the courts have deferred to the Federal Rules of Evidence, allowing judicial notice of adjudicative facts, just as in any other normal civil proceeding in federal court. Those that have requested judicial notice of an adjudicative fact in an

[1]The District Court unequivocally held that the Federal Rules of Civil Procedure applied to ERISA cases, and allowed for at least some discovery, stating that "the parties must rely on the well-established, time tested procedures and tools provided by the Federal Rules of Civil Procedure to investigate an alleged procedural defect, and the Courts must exercise the discretion granted them by these same Rules to define the appropriate parameters of discovery in cases such as this one."

ERISA case have met with the typical resistance, in the form of the objection "that's not in the record!" The courts, however, have been intolerant of this objection, and swift to point to the Federal Rule of Evidence 201, and to take judicial notice where appropriate.

A recent Sixth Circuit Court of Appeals decision exemplifies the importance of taking judicial notice of facts not in the ERISA record. In *Neaton v. Hartford Life & Acc. Ins.*, Hartford based its decision to deny benefits on a demonstrably erroneous finding by its in-house vocational expert. 2010 WL 1149683 at *10 (6th Cir. 2013). The Plaintiff suffered from a rare and progressive skin condition, requiring him to undergo extensive surgeries at least bi-monthly, that would require him to be frequently absent from work. *Id.* at *8. Hartford based its decision to deny Mr. Neaton's claim, in large part, on the assertion that Mr. Neaton would not need to be absent as much as he claimed, but Hartford did so by averaging the number of absences while he was still working, before he claimed his disability began. *Id.* at *10.

Further, Hartford's vocational expert opined that employers would allow a significant number of absences, so that Mr. Neaton's absences would not preclude work. The Court of Appeals found that Hartford was unreasonable to rely on that opinion because the expert pointed to no authoritative source to support his contention that Mr. Neaton's particular occupation would be able to accommodate the number of absences he opined Mr. Neaton would need. In fact, he cited only to "the common practice of employers." *Id.*

The most problematic aspect of the expert's opinion in *Neaton* was that his conclusion could be definitively demonstrated as flawed with a simple reference to a survey conducted by the Bureau of Labor Statistics, which showed that full time workers with one year of service are, on average, allowed 8 days of paid sick leave. *Id.* at *9. The Sixth Circuit Court of Appeals, relying on Federal Rule of Evidence 201, took judicial notice of the survey, ignoring Hartford's objection that judicial notice of evidence not in the administrative record was inappropriate in ERISA cases. *Id.* at *10. As a result, Mr. Neaton prevailed and was able to receive long-term disability benefits from Hartford under the plan.

The Court of Appeals decision in *Neaton* is consistent with other ERISA cases allowing for the use of judicial notice. For example, in *Evans v. Metropolitan Life Ins. Co.*, the Sixth Circuit Court of Appeals also took judicial notice of the definition of "sedentary work" as set forth in the Dictionary of Occupational Titles (DOT). 190 Fed.Appx. 429, 436 n.7 (6th Cir. 2006) Although the court seemed to support its action by emphasizing that the definition had been adopted by the Social Security Administration in 20 C.F.R. §404.1567(a), it nevertheless did not hesitate to take the requested judicial notice pursuant to the Federal Rules of Evidence. *Id.*

The Sixth Circuit Court of Appeals further clarified its position on judicial notice in *Osborne v. Hartford Life & Acc. Ins. Co.* by holding that, even where the plan administrator has not cited the DOT as part of its basis for denying a Plaintiff's claim for benefits, it will be appropriate for the courts to take judicial notice of the DOT when reviewing benefits determinations. 465 F.3d 296, 299-300 (6th Cir. 2006).

Courts in other circuits have similarly followed Rule 201 to take judicial notice. For example, in *Wible v. Aetna Life Ins. Co.*, the United States District Court for the Central District of California considered an ERISA disability benefits case in which both parties requested judicial notice of a plethora of facts outside of the record. 375 F.Supp.2d 956, 966 (C.D. Cal. 2005). Among other facts, one party requested and received judicial notice of an opinion letter written by the California Department of Insurance. *Id.* The district court also took judicial notice of the Amazon web page for *The Lupus Book: A Guide for Patients and Their Families*, written by a nationally recognized Lupus expert, to whom the Plaintiff had been referred for treatment. *Wible*, 375 F.Supp.2d at 965.

In conclusion, the courts have consistently relied on Federal Rule of Evidence 201 to take judicial notice of facts not already contained in the ERISA record. This contrasts sharply with the courts' approach to discovery in ERISA cases - evidence outside the record is only admitted when the court, in its discretion, determines that the evidence is necessary to make a conflict of interest finding. These divergent approaches to ERISA litigation have left attorneys confused as they navigate an already complex field of statutory and case law in ERISA disability benefit cases. Representatives may take a modicum of comfort in the fact that, as far as judicial notice is concerned, the Federal Rules of Evidence seem to trump the most common argument in ERISA litigation. "That's not in the record" is a losing argument when the courts are determining whether to take judicial notice of an adjudicative fact outside of the ERISA record.