ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

ERISA & DISABILITY BENEFITS NEWSLETTER

ABOUT OUR FIRM

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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. Eric Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization. For more information, visit our website at www.buchanandisability.com.

Jeremy Bordelon, R. Scott Wilson, Rachael Pas, Eric Buchanan & Hudson Ellis.

VANDERKLOK: AN IMPORTANT EXCEPTION TO THE CLOSED ERISA RECORD IN THE 6TH CIRCUIT BY HUDSON T. ELLIS

One of the crucial steps in every ERISA Long-Term Disability case is gathering and submitting all relevant and supportive evidence to the ERISA Administrator before it makes a final decision on the claim because once the last appeal has been denied, most Circuits are generally firm in ruling that the ERISA record is closed and you are stuck from that point forward with whatever is found in the record. While ERISA attorneys should always aim at getting all necessary information in the record before the last denial, the evidence is not always identified, in your control, or available before the hammer falls. That being the case, it is good to know that, in the Sixth Circuit and with the right set of facts, your case may meet the limited exception created by *VanderKlok v. Provident Life & Accident Ins. Co*. and its progeny. 956 F.2d 610, (6th Cir. 1992).[1]

As this newsletter has covered before, the Code of Federal Regulations provides specific required pieces of information an ERISA denial letter must contain in order to provide claimants with some measure of due process:[2]

> (i) The specific reason or reasons for the adverse determination;
>
> (ii) Reference to the specific plan provisions on which the determination is based;
>
> (iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary;
>
> (iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claim ant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review […]

29 C.F.R. § 2560.503-1(g)). The *VanderKlok* court keyed in on the first and third requirements, finding that a failure to provide the mandated information is a violation of the ERISA process and requires that the case be remanded. 956 F.2d at 616-617.

Moreover, while ERISA attorneys are often faced with overcoming an unfavorable abuse of discretion standard of review in litigating the main issue of whether the claimant is entitled to benefits (due to the plan's grant of

[1]Similar exceptions are found in several other circuits, however, for the sake of brevity, this article will address only the Sixth Circuit's interpretation of the exception.
[2]Issue 6, Volume 4, Julie E. Moya, "What is Supposed to be in an ERISA Denial Letter? What Can I do with this Information?" (June 2012).

discretion to the claims administrator), a court will decide whether the insurance company followed the appropriate procedure under a *de novo* standard. *Kent v. United of Omaha Life Ins. Co*., 96 F.3d 803, 806 (6th Cir. 1996).

More good news is that, when a court finds that the ERISA Administrator has failed to give appropriate due process to the claimant, the court can likewise find that the ERISA Administrator has forfeit its claims to the protection provided under ERISA. *VanderKlok*, 956 F.2d at 617. Based on such a finding, the *VanderKlok* court found the appropriate remedy was to remand the case for the district court to review the additional evidence and render a claims decision *de novo*, instead of remanding it all the way back to the ERISA Administrator for a second review.[3] *Id*.

That being said, the Sixth Circuit has clarified, and limited, the *VanderKlok* holding by finding that the procedural defect identified must be more than a mere technicality. *Kent*, 96 F.3d, at 807. The *Kent* court found that the crucial issue is "whether the purpose of Section 1133--that the claimant be notified of the reasons for the denial of the claim and have a fair opportunity for review--is fulfilled." *Id*. The *Kent* court went beyond the actual denial letter itself and reviewed the entirety of the claims communication between the ERISA Administrator and the claimant, finding that, combined together, this body of communication "substantially complied" with Section 1133's purpose.

Additionally, the Sixth Circuit has clarified that a court must find that a remand would be more than a "useless formality." *Id*. In practical terms, the additional evidence must be: 1) favorable to the claimant; and 2) substantial enough to call into question the ERISA Administrator's decision under the applicable standard of review.[4] *Id*.

Nevertheless, after clearing the above hurdles, the *VanderKlok* rule helps protect claimants from ERISA Administrators who are all too happy to play "hide the ball" with claimants by never letting them know exactly why their claim was denied. See, *McCartha v. Nat'l City Corp*., 419 F.3d 437 (6th Cir. 2005). You can recognize the opportunity to use this exception where the denial contains either no information about what additional evidence would prove the claim, or includes essentially boilerplate language such as, "[p]lease provide clinical evidence in the form of office notes, lab results, diagnostic testing and current restrictions and limitations that would prevent you from a return to work." This boilerplate statement contains no specific information about what additional evidence claimants could reasonably submit to show that they are still disabled, but we see this type of language pop up in denial letters regularly.

The *VanderKlok* rule will also be useful where an ERISA Administrator tries the "bait and switch" tactic; dealing out an initial denial based on one issue, then, after you address that issue in your appeal, denying again while citing a completely different rationale. For example, in *Houston v. UNUM*, Unum denied the claim initially because it had mistakenly determined that the claimant's job was sedentary. 246 F. App'x 293, 300 (6th Cir. 2007). When the claimant appealed and provided evidence his job duties exceeded sedentary exertional levels, Unum denied the claim again, informing him he did not provide appropriate specialist medical evidence backing up his diagnosis. *Id.* The court found that "Unum failed to provide an opportunity for Houston to respond, with argument or action, to Unum's revised rationale for terminating her benefits." *Id*. This was a violation of Section 1133, and as such a remand was required to give the claimant an opportunity to respond to Unum's revised denial rationale.

Several "best practices" can be gleaned from these cases for attorneys attempting to use *VanderKlok*'s exception:

- Allege in the complaint that the ERISA Administrator failed to comply with the procedural requirements of Section 1133;
- Articulate how the non-compliance kept your clients from being able to adequately prove their claims;
- Explain why the new evidence you want to introduce is substantial enough to overturn the

[3]However, some district courts have since found that remand to the plan administrator is generally proper, but consideration of new evidence by the district court is appropriate where the administrator's procedures are shown to be suspect. See e.g., *Walsh v. Metro. Life Ins., Co*., 2009 LEXIS 17810, 26 (M.D. Tenn. 2009).

[4]Under an abuse of discretion standard, the additional evidence must be of a nature to show the ERISA Administrator's decision was an abuse of discretion, rather than merely showing, as would be sufficient under a *de novo* review, that the ERISA administrator was wrong.

claims decision under the applicable standard of review;

- Show the court why the ERISA Administrator's non-compliance is indicative of continued bias or some other refusal to provide due process.

Knowledge of this procedural exception, the ability to recognize when it may be applicable, and experience in using it can be a powerful tool in getting clients the benefits they need.

INTRODUCING OUR NEW ASSOCIATE ATTORNEYS

Rachael V. Pas graduated from the Walter F. George School of Law at Mercer University in 2012. During law school she participated in the Wagner National Moot Court Competition and earned the Cali Award for Excellence in Labor and Employment Law. She completed the Legal Writing Certificate Program and earned a Cali Award for Excellence in Advanced Legal Writing. She also interned at the Monroe County, Georgia District Attorney's Office and was licensed to practice criminal law in Georgia during her third year of law school.

Prior to law school, Ms. Pas attended Agnes Scott College and graduated *cum laude* in 2009 with a major in political science and a minor in history. She was a gymnast for nearly 10 years, and coached competitive gymnastics throughout college.

After attending school in Georgia, Ms. Pas, her husband, and two year old son returned home to Chattanooga. She spends her free time with her family – fishing and biking. Since retiring from gymnastics, she has taken up long-distance running and hopes to complete a marathon one day.

Hudson T. Ellis joined Eric Buchanan & Associates PLLC as an associate in 2013. Before joining the firm, Hudson cut his legal teeth at Stokes, Williams, Sharp & Davies, a respected civil litigation and trial practice firm in Knoxville, TN. While there, he enjoyed significant success acting as lead counsel in jury, bench and Claims Commission trials for both claimants and defendants. He also acted as lead brief-writer for numerous multifaceted appeals, including a successful appeal to the Tennessee Supreme Court that led to major changes to Tennessee's insurance law (Allstate Ins. Co. v. Tarrant, 363 S.W.3d 508 (Tenn. 2011)). Additionally, Hudson was heavily involved in several high profile cases involving highly complex legal and factual issues and many millions of dollars.

Hudson is excited to now be able to focus his whole attention to fighting for individual claimants, which gives him the opportunity to be more personally involved with his clients and make a discernible and significant positive difference in their daily lives.

In addition to his job, Hudson enjoys spending time with his family and friends, playing hockey or other competitive sports, reading, and playing practically any game that involves strategy.

Hudson attended Bryan College, in Dayton, Tennessee, and received his Bachelor of Arts degree, Summa Cum Laude, in 2006. While at Bryan, he was a scholarship baseball player and played as both starting pitcher and starting third baseman. He completed his formal education at the University of Tennessee College of Law, where he obtained his Doctor of Jurisprudence degree in 2009.

Eric Buchanan & Associates, PLLC is happy to announce that July 1, 2013 marked our 10th Anniversary as a firm. We want to thank our referral sources for the opportunity to review disability cases they sent our way.

Go to **buchanandisability.com** and check out our new website.

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