

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. Eric Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the National Board of Social Security Disability Advocacy. For more information, visit our website at www.buchanandisability.com.

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NFL AND DISABILITY: WHEN LIFE AFTER FOOTBALL IS PAINFUL

BY VALERIE NORWOOD

The NFL has been in the news with notice that the class action NFL Concussion Litigation has reached the settlement phase. *In re: National Football League Players' Concussion Injury Litigation* No. 2:12-md-02323 (E.D.Pa.). What is not as well publicized is that just like many desk-bound employees, these athletes are covered by an employer sponsored ong-term disability policy - the Bert Bell/Pete Rozelle NFL Player Retirement Plan. In part because the sport has so much physical contact and rampant injuries, the average NFL career is only three to four seasons long. It might appear that it would be easy for an injured former player to show that he is "disabled," but a long string of federal cases proves that this is not the case. It was not until 2005 when the first appellate ruling against the NFL Player Retirement Plan was decided. *Jani v. Bell*, 209 Fed. Appx. 305, 306 (4th Cir. 2006)(unpublished).

The NFL Plan, like most employer long-term disability plans, is governed by ERISA. So when a disabled former player is denied benefits and litigation ensues, he and his representative will face two of the most common ERISA evidence challenges in proving

disability, the carrier's reliance on the opinions of independent medical examiners over a treating physician's opinion and the impact of a Social Security Administration (SSA) award of disability benefits.

The NFL Plan has two main disability categories, "Line of Duty" and "Total and Permanent." A player cannot receive both at the same time, but will receive the greater benefit and can receive Total and Permanent benefits after Line of Duty benefits end.

Line of Duty is fairly straight forward. A player incurs a "substantial disablement arising out of NFL football activities" generally as defined by a percentage loss of body parts according to the AMA Guides to the Evaluation of Permanent Impairment or a 50% or greater loss of speech or sight; 55% or greater loss of hearing; primary or contributory cause of the surgical removal of a vital bodily organ or central nervous system. Line of Duty disablement is determined by Medical Advisory Physicians and payments are made as long as a "substantial disablement" exists but not longer than 90 months. The benefit amount is "100% of benefit credits for Credited Seasons" or \$1,000 per

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month. Applications must be received within the same number of years of Credited Seasons. Often, this is the type of injury that is incurred while on the field.

“Total and Permanent” or “T&P” disability currently has four classification categories and each category pays a substantially higher benefit.

Active Football: Benefit provided if a player is disabled as a result of “NFL football activities” and “shortly thereafter” (defined as within 6 months but generally not longer than a year) results in a “total and permanent disability,” (defined as unable to work at any occupation).(\$265,000 per year effective January 1, 2016).

Active Non-football: Benefit provided if disability does not result from football activities but does arise while an active player and “shortly thereafter” results in a “total and permanent disability.” (\$165,000 per year effective January 1, 2016).

Inactive A: Benefit provided if a vested player whose disability results from “football activities” and results in a “total and permanent disability” “before 15 years after” the last Credited Season. (\$135,000 per year effective January 1, 2016).

Inactive B: Benefit provided if a vested player whose disability results from “football activities” and this results in a “total and permanent disability” “after 15 years after” the last Credited Season. (\$60,000 per year effective January 1, 2016).

Briefly, to receive benefits, a player first applies to the Disability Initial Claims Committee. If a player is denied, he may appeal to the Board, which consists of three members representing the owners and three members representing the players. When all appeals are exhausted, a player may file suit in federal court. This process is similar in an ERISA LTD matter: appeal, exhaust, file suit.

Disabled players may apply to move to a different classification within T&P if there is “clear and convincing evidence” of “changed circumstances.” A change in classification can result in a substantially higher benefit. Whether it is on initial application or later

re-classification, most disputes arise over whether or not a former player meets the definition of T&P disabled; whether the disability can be medically traced to football activities; and the date a former player became totally disabled-based on the classifications of within 15 years or after 15 years since the last Credited Season.

The T&P Disability Benefit is available when the Plan “determines that you are substantially prevented from or substantially unable to engage in any occupation or employment or remuneration for profit.” The most recent version of the Plan includes a revision that the award of social security disability benefits is proof of T&P disability. Some cases still in litigation were based on older versions of the Plan that did not have that provision and these plans have different names for the classifications.

The NFL Plan, like most long-term disability policies, has a provision that if requested, a claimant must undergo an Independent Medical Exam by a “neutral physician.” Often these physicians will determine that a player is capable of some type of sedentary work and therefore is not T&P disabled. Courts in NFL and LTD cases have ruled that a report based on this one time examination by a physician is adequate to overrule the opinions of physicians with long term relationships with a player. *See Boyd v. Bert Bell/Pete Rozelle NFL Players Ret. Plan*, 410 F.3d 1173, 1180 (9th Cir. 2005) (“[E]ven a single persuasive medical opinion may constitute substantial evidence upon which a plan administrator may rely in adjudicating a claim.”); *see also Johnson v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 468 F.3d 1082, 1087 (8th Cir.2006) (noting that it was reasonable for the Retirement Board to give greater weight to a particular medical opinion because “[t]he Board, as plan administrator, had the authority to weigh the conflicting testimony and come to a reasonable conclusion”).

LTD claimants and players have long argued that a one-time examination by a “neutral” or “independent” physician who does not know the individual’s vocational or medical history, cannot accurately assess the extent of disability. Because these physicians so often find in favor of the Plan or LTD carrier and are hired and paid by the Plan for their services, there is an on-going argument that these physicians operate under a conflict of interest. *Dimry v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 16-CV-01413-JD, 2016 WL

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7971198, at *1 (N.D. Cal. June 14, 2016). Mr. Dimry sustained cervical injuries while playing and required several surgeries. After receiving Line of Duty benefits, he applied for T&P benefits, however the “neutral physician” determined he could work at a sedentary occupation. In one of his claims, later dismissed by the court, Mr. Dimry alleged that the physicians were used by the Plan to deny benefits to former players nationwide.

Even when a physician hired by the Plan finds that a player is disabled, the Plan will often not abide by that decision. *Stewart v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, CIV. WDQ-09-2612, 2012 WL 122362, at *1 (D. Md. Jan. 12, 2012). The Plan informed Mr. Stewart that he was “required to be evaluated by a neutral physician.” Dr. Robert Meek examined Stewart and concluded that Stewart was “genuinely disabled.” The Plan then hired another physician to do a medical file review. The second physician found that Mr. Stewart was not disabled. Due to the conflicting opinions, the Plan’s Medical Director offered his opinion that Mr. Stewart was not disabled and the Plan denied Mr. Stewart’s appeal. The court denied both motions for summary judgment stating that the Board’s decision was not the product of a “deliberate, principled reasoning process” and that Stewart’s evidence was not “so overwhelming that he [was] entitled to judgment as a matter of law.”

A consistent argument regarding the treating physician’s opinion is that the Plan ignored important evidence in favor of the player and therefore did not make a reasonable decision. “However, while administrators do not bear the ‘discrete burden of explanation when they credit reliable evidence that conflicts’ with a claimant’s evidence, they cannot ‘arbitrarily refuse to credit a claimant’s reliable evidence, including the opinions of a treating physician.’” *Solomon v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, CV MJG-14-3570, 2016 WL 852732, at *7 (D. Md. Mar. 4, 2016). (quoting *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003)). In this case, the court found that Mr. Solomon presented unopposed substantial evidence, including a social security disability award, that he was T&P disabled prior to 2010, and this onset date of disability was determinative of a higher level of benefits—“before 15 years after last Credited Season.” The social security award helped to determine only the onset date of disability: Mr. Solomon’s injuries were already established as “football related.”

Under the current Plan, an award of social security disability benefits can determine that a player is T&P disabled. See *Giles v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 925 F. Supp. 2d 700, 721 (D. Md. 2012). But the Plan argued that even though the SSA found him disabled (here under the SSA age and vocational rules- he is over 50 years of age, cannot perform his past relevant work, and does not have skills transferable to sedentary work), Mr. Giles also needed to prove he was T&P disabled under the Plan’s General Standard in order to receive a higher level of benefits. The court did not agree. “As I see it, the provisions of the Plan make clear that there are two alternative methods—the General Standard under Plan § 5.2(a) and the Social Security Awards standard under Plan § 5.2(b)—by which a player may demonstrate that he is totally and permanently disabled.”

Disabling impairments may arise many years after a player’s career has ended. Because the impairments may not have been diagnosed at the time of the injury, the issue becomes whether the impairment can be traced to NFL activities and therefore, football related. Impairments that first appeared to be behavioral later have been shown to stem from concussion. The etiology may not be diagnosed until some years later. Players have been paid benefits under a section of the Plan based on “depression and cognitive impairments” and have later appealed or sued to have their impairment classified as football related. *Christopher Hudson v. Retirement Board, as the Administrator of The Bert Bell/Pete Rozelle NFL Player Retirement Plan*; N.D. Miss.; Civil Action No.: 3:15-cv-00128-MPM-SAA, 2016 U.S. Dist. LEXIS 151115. Mr. Hudson submitted his social security disability award opinion that stated that traumatic brain injury was the basis for the SSA’s decision to award him benefits.

Unfortunately for LTD litigants, an SSA award of disability benefits is not determinative. LTD carriers are only required to acknowledge the award. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008). Whether it is against the NFL or an LTD carrier, ERISA litigants need to fully develop the record and argue that treating physicians’ opinions and the information found in SSA opinions are substantial evidence of disability.

Eric Buchanan was one of three attorneys asked by the NFL Alumni Association to be a member of the Disability Advisory Panel for the NFL Alumni Association, along with Mark Debofsky of Chicago, and John Hogan of Atlanta.

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MEET THE AUTHOR: VALERIE NORWOOD



Valerie Norwood joined Eric Buchanan and Associates, PLLC in January 2017. While in law school, Valerie worked for a law firm that focused on disability law and realized what an impact an attorney can have on the lives of the disabled and injured. She has been licensed 8 years in Texas and has extensive litigation experience in ERISA and non-ERISA short-and long-term disability, accident, occupational and health insurance policies, at the administrative appeal, trial and appellate levels in both federal and state court. She has authored motions, summary judgments and appellate briefs in multiple federal jurisdictions and has presented oral argument before the Second Circuit Court of Appeals. Valerie enjoys navigating complex legal hurdles to win benefits for social security and long term disability clients.

Valerie graduated cum laude from the University of Texas at Austin with a degree in Television, Radio and Film. She worked in the advertising and entertainment industry as a producer before attending law school and earning her J.D. at South Texas College of Law Houston in 2007.

ERIC BUCHANAN & ASSOCIATES, PLLC: UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the following events:

- Tennessee Trial Lawyers Association's 2nd Annual Paralegal Seminar in Nashville, TN on May 5th, 2017
Topic: Subrogation Seminar
- AAJ Annual Convention in Boston, MA on July 24th, 2017
Topic: Recent ERISA decisions and how to use them in your practice

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates, PLLC 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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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.

Eric's disability and benefits team can help!



- ERISA Long-Term Disability
- Group Long-Term Disability
- Private Disability Insurance
- ERISA Benefits
- Denied Health Insurance Claims
- Life Insurance Claims
- Long-Term Care Claims
- Social Security Disability

**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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