

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.

For more Information about Eric Buchanan & Associates, PLLC, visit our website at www.buchanandisability.com.

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INTENTIONAL SELF-CONTRADICTION BY: D. SETH HOLLIDAY

Intentional Self-Contradiction: the Position of ERISA Decision-Makers on Decisions by the Social Security Administration

The Employment Retirement Income Security Act of 1974 or ERISA applies to any "employee welfare benefit plan" established or maintained "by any employer engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C. § 1003(a). An "employee welfare benefit plan" is defined in the statute as being any "plan, fund or program. . . established or maintained by an employer or by an employee organization. . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise. . . benefits in the event of. . . disability. . ." 29 U.S.C. § 1002 (1). Consequently, if someone has a problem getting his or her medical insurance to cover a claim, or is covered for life insurance or long-term disability ("LTD") insurance at work, and has been denied benefits, the claim is likely covered by ERISA.

As you might expect, many individuals who have ERISA claims also have claims for Social Security Disability benefits. Indeed, many insurance companies require LTD claimants to file for Social Security disability. This is done because most plans offset the LTD benefit by the Social Security disability benefit and this reduction is considered by the insurers to be one of the most important cost containment features of their LTD contracts (and is usually termed "recovery of an overpayment"). In fact, insurance companies that issue LTD plans will commonly direct an insured to contact a specific representative to assist him or her in obtaining Social Security disability benefits. What you might not expect, however, is that when the

Social Security Administration finds favorably for a claimant the insurance company will commonly reject the analysis of the Administration. It is as bad as it sounds. In other words, it is not unusual for an insurer to require that an insured file for Social Security disability benefits, suggest a specific representative to hire, recover the "overpayment" from their insured once the Social Security Administration finds in the claimant's favor, and then deny the LTD claim though it is based on nearly identical arguments that the suggested representative made in front of the Administration.

Insurance companies can get away with doing this because under the law an ERISA decision-maker is not automatically bound by the findings of the Social Security Administration that a person is disabled. See, e.g., *Whitaker v. Hartford Life and Acc. Ins. Co.*, 404 F.3d 947, 949 (6th Cir. 2005). However, the ERISA decision-maker is not free to ignore the decision of the Social Security Administration, and the fact that a person has been found disabled by that Agency is a factor a court should consider, in the context of the record as a whole. *Calvert v. Firststar Finance, Inc.*, 409 F.3d 286, 295 (6th Cir. 2005). Moreover, when a court is determining just how much weight should be given to the Social Security decision, when looking at the decision in the context of the record as a whole, a court should apply increasing amounts of skepticism to the insurance company's decision-making, depending on such factors as whether the it required the claimant to apply for Social Security, whether it benefited financially from the favorable Social Security decision, and, as occurs in some cases, whether it took an active role in assisting the claimant in applying for Social Security. See, e.g., *Darland v. Fortis Benefits Insurance Com-*

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pany, 317 F.3d 516, 530 (6th Cir. 2003), *Calvert v. Firststar Finance, Inc.*, 409 F.3d 286, 294-295 (6th Cir., 2005).

Significantly, in a case decided recently, *DeLisle v. Sun Life Assur.Co of Canada*, 2009 FED App. 0082P (6th Cir. March 4, 2009), the court explained that while a Social Security award does not automatically mean the claimant is entitled to benefits under a private disability plan, the court cited *Bennett v. Kemper Nat'l Servs.*, 514 F.3d 547, 554 (6th Cir. 2008) for the proposition that "[i]f the plan administrator (1) encourages the applicant to apply for Social Security disability payments; (2) financially benefits from the applicant's receipt of Social Security; and then (3) fails to explain why it is taking a position different from the Social Security Administration on the question of disability, the reviewing court should weigh this in favor of a finding that the decision was arbitrary and capricious." *DeLisle*, 2009 FED App. 0082P at 5-6.

Arguably, where an insurance company actually hires a representative to help its insured apply for Social Security disability benefits, to appeal denials by the Social Security Administration, and eventually obtain his or her benefits, then judicial estoppel should apply. Regrettably, this too is not an uncommon practice. A guiding principle of the

doctrine of judicial estoppel is that it should apply when a litigant is "playing fast and loose with the courts and when intentional self-contradiction is being used as a means of obtaining unfair advantage. . ." *GE HFS Holdings, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 520 F.Supp.2d 213, 233 (D.Mass.2007)(quoting *Patriot Cinemas, Inc. v. General Cinemas Corp.*, 834 F.2d 208, 212 (1st Cir. 1987)). And that, of course, is precisely what insurance companies do.

In summary, it is common for an insurance company to practice intentional self-contradiction by having its agent or quasi-agent (in the case of a suggested representative) argue that its insured was disabled for purposes of Social Security disability and then reject nearly identical arguments when brought by the insured in his or her LTD claim. While the law indicates that an ERISA decision-maker is not automatically bound by the findings of the Social Security Administration, a court should be skeptical when an insurance company requires the claimant to apply for Social Security, benefits financially from the favorable decision of the Administration, and especially, if it takes an active role in helping the claimant obtain those benefits.

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING ARTICLES

The Social Security Administration Has Created a New Malpractice Trap for Attorneys Who Handle Worker's Compensation Cases - By: Eric Buchanan - Published in TTLA 2009

ERISA Subrogation and Recoveries - By: Eric Buchanan - A new chapter to be added to the upcoming addition of Thomson West's Auto Tort Litigation Manual

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will speaking at the Memphis Bar Association CLE, "Navigating the ERISA Mine Field: How to avoid or limit ERISA subrogation in PI cases and how to litigate an ERISA insurance claim" in Memphis, TN on September 11, 2009.

Eric Buchanan will be speaking at the American Association for Justice's Conference on Social Security Disability to be held at the Venetian in Las Vegas, NV September 24-25, 2009.

Eric Buchanan will be speaking at the Tennessee Association for Justice Seminar on ERISA and Subrogation claims in Johnson City, TN on December 11, 2009.

Eric Buchanan will be speaking at the NOSSCR Social Security Disability Spring Conference on ERISA LTD claims to be held in New Orleans, LA May 12-15, 2010.

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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