ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

# ERISA & DISABILITY BENEFITS NEWSLETTER

VOLUME 2, ISSUE 2, FEBRUARY 2010

## 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.

Eric L. Buchanan, R. Scott Wilson, and D. Seth Holliday are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization.

## SOCIAL SECURITY DECISION AS PROBATIVE OF DISABILITY IN ERISA LTD CASES BY: ERIC L. BUCHANAN

In many long-term disability cases under ERISA, LTD insurance companies require disabled plaintiffs to file claims for Social Security Disability benefits. If the Plaintiff is found disabled by the Social Security Administration, the insurance company is usually allowed to offset the benefits it owes under the ERISA policy. A question that frequently comes up in ERISA LTD cases is, if the Plaintiff is found disabled by the Social Security Administration, how much weight should the disability insurance company give to that finding of disability?

Because I practice in the Sixth Circuit, this article explains what weight a disability insurance company or ERISA plan administrator should give to a favorable decision by the Social Security Administration in this Circuit. Basically, LTD insurance companies must always consider a favorable social security decision, but, where the insurance company requires the person to apply and offers assistance in the social security application, courts have been even more skeptical of an insurance company's denial of disability benefits to a person who has been found disabled by the Social Security Administration. Lastly, I submit that if the insurance company actually hires a representative to help the disabled person seek social security benefits, this meets the Sixth Circuit's test for judicial estoppel.

In *Darland v. Fortis Benefits Insurance Company,* 317 F.3d 516 (6th Cir. 2003), the Court of Appeals found that Fortis' decision to deny benefits was arbitrary and capricious on several grounds, including holding the insurance company should not ignore a favorable social security decision when the same insurance company requires a claimant to apply for social security benefits, and reaps the benefit of a favorable social security decision which reduces the amount of benefits that the insurance company must pay out of its own funds. *Id*, at 530. While the adoption of a treating physician rule similar to the one used by the Social Security Administration has been rejected by a more recent Supreme Court case, *Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003), *Darland* is still valid law for the proposition that a court should consider a favorable social security decision as evidence that an insurance company acted arbitrarily and capriciously by requiring a claimant to apply for social security, then ignored the favorable social security decision. The Court explained:

> it is totally inconsistent for Fortis to request that Darland apply for social security disability benefits, yet avail itself of that social security determination regarding disability to contend, at the same time, that he is not disabled. ... Though not directly applicable in this case, the principles of judicial estoppel certainly weigh against Fortis taking such inconsistent positions.

*Id*, at 530. The Court of Appeals again addressed the question of "what an insurance company should do with a favorable social security decision?" in the case of *Whitaker v. Hartford Life and Acc. Ins. Co.*, 404 F.3d 947 (6th Cir. 2005). In *Whitaker*, the Court of Appeals explained that, in light of the fact that the Social Security Administration's decisions often rely on a treating physician rule, which is no longer applicable in ERISA cases after *Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) (holding that there is no treating physician rule in ERISA cases, such as there is in social security

cases), and considering the Sixth Circuit's unpublished case of *Hurse v. Hartford Life & Acc. Ins. Co.,* 77 Fed. Appx. 310 (6th Cir.2003) (unpublished), the Court explained:

> In *Darland,* this court recognized a unique situation where it would be inconsistent for a plan administrator to ignore the SSA's favorable determination, after the administrator had expressly requested the claimant to apply for SSA benefits. Nothing similar occurred in this case. Moreover, *Darland* predates *Nord,* and was clearly based on application of the treating physician rule.

*Whitaker*, 404 F.3d at 949. Thus, after *Whitaker*, it is clear that a plan administrator is not automatically "bound" by a favorable social security decision, and describes the facts in *Darland* as a "unique situation" where the plan administrator expressly required the claimant to apply for social security benefits.

However, the Court of Appeals was not finished with its analysis of this issue. Next, in *Calvert v. Firstar Finance, Inc.*, 409 F.3d 286 (6th Cir., 2005), the Court acknowledged that the part of the holding in *Darland* adopting a treating physician rule was overruled by the Supreme Court in *Nord*. Id, at 293-4. However, the Court of Appeals went on to explain that did not mean that administrator were free to ignore a favorable decision by the Social Security Administration. The Court of Appeals explained:

> This is not to say, however, as Liberty argues, that the SSA determination is meaningless and should be entirely disregarded. … As the Court said in *Black & Decker,* a plan administrator may not arbitrarily disregard the medical evidence proffered by the claimant, including the opinions of her treating physicians. 538 U.S. at 834, 123 S.Ct. 1965. Here, the SSA determination, at a minimum, provides support for the conclusion that an administrative agency charged with examining Calvert's medical records found, as it expressly said it did, objective support for Dr. Hester's opinion in those records.

Id, at 294. In footnote 4 of the *Calvert* decision, the Court of Appeals also explained that the Supreme Court's decision in *Black & Decker,* "like [the] decision in *Whitaker,* was premised on the concern that it would be improper for courts *automatically* to impose the same standards on a plan administrator which they impose on the SSA, because the definitions of 'disability' employed by those decision-makers might differ." Id, at 294, n. 4. Thus, while a social security decision is not automatically binding on one hand, on the other hand, administrators may not ignore favorable social security decisions that are in the record.

However, the Court of Appeals in *Calvert* did not stop there. The Court went on to explain, that in some circumstances, where the insurer requires the claimant to apply for social security benefits for the purpose of reducing the amount of benefits it has to pay, a court should take that into account, when considering the record as a whole, as a factor in determining if the administrator's decision to deny benefits was arbitrary and capricious. The Court explained:

> the Court concludes that, contrary to Calvert's contention, the SSA's disability determination does not, standing alone, require the conclusion that Liberty's denial of benefits was arbitrary and capricious. The SSA determination to award benefits to Calvert is, instead, just one factor the Court should consider, in the context of the record as a whole, in determining whether Liberty's contrary decision was arbitrary and capricious.

*Calvert*, 409 F.3d at 294-5. The Court of Appeals reached the same conclusion in the unpublished opinion of *Wical v. Int'l Paper Long-Term Disability Plan*, 2006 U.S. App. LEXIS 18342 (6th Cir., July 20, 2006) (the Social Security Administration's finding of disability was not binding on the ERISA plan, but it was evidence that could be presented to show the Plaintiff was disabled.)

Then, in *Glenn v. MetLife*, 461 F.3d 660, 666-669 (6th Cir. 2006), *Affirmed*, *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 2352 (2008), the Court of Appeals addressed the issue again, when it found in favor of a Plaintiff. The Court noted that MetLife assisted the Plaintiff in her claim for disability benefits, and benefited financially from the favorable social security decision, because MetLife was allowed to reduce the benefits owed by offsetting for the social security disability benefits. The Court explained, "That MetLife apparently failed to consider the Social Security Administration's finding of disability in reaching its own determination of disability does not render the decision arbitrary *per se,* but it is obviously a significant factor to be considered upon review." *Id*, at 669.

More recently, the Court of Appeals explained in, *DeLisle v. Sun Life Assur.Co of Canada,* 2009 FED App. 0082P (6th Cir. March 4, 2009), 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.

In sum, this line of cases from the Sixth Circuit Court of Appeals stands for the following propositions: An ERISA decision-maker is not automatically bound by the findings of the Social Security Administration that a person is disabled. *See, Whitaker, supra*, at 949. On the other hand, the ERISA decision-maker is not fee 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 the Court should consider, in the context of the record as a whole. *Darland,* 317 F.3d at 530; 516 *Calvert*, 409 F.3d at 295; *Wical,* 2006 U.S. App. LEXIS 18342; and *Glenn*, 461 F.3d at 666-669. In those cases where the insurance company encourages the applicant to apply for social security disability payments and financially benefits from the applicant's receipt of social security, then the LTD insurance company is acting arbitrarily and capriciously if it fails to adequately explain why it is taking a position different from the Social Security Administration on the question of disability. *DeLisle*, 2009 FED App. 0082P at 5-6.

Lastly, in those cases where the insurance company actually hires the representative who helps the Plaintiff obtain her social security benefits, then courts should go farther, and consider whether actual estoppel should apply. When an insurance company actually hires a representative to help the person recover social security benefits, this meets the criteria for actual judicial estoppel. *See, e.g. Pennycuff v. Fentress County Bd. of Educ.*, 404 F.3d 447, 452-3, (6th Cir. 2005), *rehearing and rehearing en banc denied* (Jun 23, 2005), wherein the Court of Appeals for the Sixth Circuit set out a three part test to determine if judicial estoppel should be applied:

> "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* (quoting *United States v. Hook,* 195 F.3d 299, 306 (7th Cir.1999)). Second, we may consider whether the party had successfully persuaded a court to accept his previous position, "so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that the first or the second court was misled.' " *Id.* (quoting *Edwards,* 690 F.2d at 599). Finally, we may consider "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751, 121 S.Ct. 1808. We have placed particular emphasis on the second factor, stating that "judicial estoppel governs a dispute only if the first court 'adopted the position urged by the party, either as a preliminary matter or as part of a final disposition.' " *Warda,* 15 F.3d at 538 (quoting *Teledyne Indus. v. National Labor Relations Bd.,* 911 F.2d 1214, 1218 (6th Cir.1990)).

Thus, in cases where an insurance company hires a representative for the disabled plaintiff, the representative becomes the agent of the insurance company. Through their agent, the insurance companies represent to the United States government's Social Security Administration that the person is disabled. Once the Social Security Administration finds a person disabled, in reliance on the representations of the insurance company's agent, then this meets the Sixth Circuit test for actual judicial estoppel under *Pennycuff*.

## ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the Chronic Pain & Depression Support Group Meeting on filing for disability benefits at the Faith Promise Church in Knoxville, TN on February 18, 2010 at 12:00 pm.

Eric Buchanan will be speaking at the NOSSCR Social Security Disability Spring Conference on ERISA LTD claims in New Orleans, LA on 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. Contact Molina Haynes, Office Manager at (423) 634-2506 or via email at mhaynes@buchanandisability.com