

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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THE CONCEPT OF RELIABILITY AND ITS RELATIONSHIP TO A COHERENT THEORY OF DISABILITY BY: D. SETH HOLLIDAY

As examined in previous newsletters, ERISA disability claims live in a strange legal world where there is no right to a jury trial, punitive damages are prohibited, discovery is likely to be limited to only certain issues, and evidence that was not considered or at least made available to the claim decision-maker during the claim process is not likely to be admitted by the court. Indeed, the court's review is limited to the "administrative record." See, *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 986 (6th Cir. 1991); *Perry v. Simplicity Engineering*, 900 F.2d 963 (6th Cir. 1990); *McMahon v. New England Mut. Life Ins. Co.*, 888 F.2d 426, 431 N.1 (6th Cir. 1989). However, before one enters this bizarre legal landscape it is imperative to obtain a solid understanding of its most basic principle: disability.

Most people, ERISA disability attorneys included, think about "disability" as defining a state of affairs where an individual cannot provide an income for him or herself; that is, he or she cannot work. Indeed, in most instances disability does mean an individual is unable to work, although in the context of ERISA disability claims, there are policies which pay benefits when an individual cannot perform his or her "own occupation" and others which pay benefits for "partial disability." However, for most policies, eventually the person must prove he or she cannot perform any occupation. For the purposes of discussing a coherent theory of disability, it is best to over-simplify the issue and concede that, for the most part, to be found disabled under a policy of insurance an individual must not be able to work. The question then arises: what is it that makes an individual unable to work?

There are, of course, lots of things that might prevent a person from not working: physical problems, mental problems, side-effects from taking potent medications for a medical condition, and so on. But just what is it about such things that affect a person's ability to do work? Does a person have to be in a permanent comatose state to be

entitled to receive benefits under a disability insurance policy? The answer to that question is usually a resounding "no," though it is advisable to keep in mind that there are a few, bizarre and practically worthless "catastrophic" disability policies out there that come close to saying this. In any case, keeping to our intentionally primitive concept of disability, a person is disabled if they are unable to do work on a regular, sustained basis. In other words, if a person is not reliable because of their physical or mental problems they are considered to be disabled.

Indeed, "reliability" is a primary concept within any coherent theory encompassing disability. If a person was asked what physical problems might cause someone to be an unreliable employee, a ready answer would be that pain, physical restrictions/limitations and fatigue interfere with job performance. Similarly, if invited to articulate what types of mental issues constrain a person's ability to sustain employment, an appropriate response would be that problems with concentration, persistence, anger and so on affect reliability. But the question still remains: what is it about these physical and mental issues that "interfere with" job performance and "affect" reliability? Moreover, is it enough that a person's medical condition simply interferes with or affects his or her ability? Doesn't there have to be something more?

There does have to be something more. It is important to know why physical problems (e.g., pain, restrictions/limitations, fatigue) and mental problems (e.g., concentration, persistence, anger, etc.) constrain a person's ability to be reliable, i.e., to do work on a regular, sustained basis. Ultimately, the question as to whether a person with medical issues can be a reliable employee depends fundamentally upon three things: (1) the severity or intensity of the medical condition; (2) the frequency with which the issue arises; and (3) the predictability of the problem.

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The concept of reliability, or rather, the lack thereof, is perhaps most useful in cases where a client's medical condition is disabling but not so extreme or chronic as to completely obliterate functionality. This is, of course, the condition in which most of our clients find themselves. The attendant argument finds its source in a synonym of unreliability. It is a word that should be used rather frequently in medical source statements (such as written or oral opinions obtained from a treating physician) and vocational expert reports: "unpredictability." What if an individual's medical issues are neither extreme nor constant but significant enough such that they preclude consistent task performance when they do arise? The answer depends on the predictability of the symptoms which impair reliability. That is, if an individual's particular medical condition is so volatile that she is required to control her own environment such that she has an opportunity to take unscheduled breaks or to be completely absent from work in an unforeseeable manner then it is easy to see how such a person

would be unable to sustain work in a competitive work environment even if they could obtain a job in the first instance. Such a person is unreliable precisely because the medical problems affect her in an unpredictable manner.

Reliability, or rather, the lack thereof, is a primary component of any coherent theory of disability. Moreover, it helps to tease out answers to the question as to how physical problems (e.g., pain, restrictions/limitations, fatigue) and mental problems (e.g., concentration, persistence, anger, etc.) constrain a person's ability to do work on a regular, sustained basis. If an individual is unreliable due to the unpredictability of her symptoms – whatever they may be – then a reasonable argument can be made that such a person is required to control her own environment such that she is unable to sustain work in a normal work setting. Accordingly, the concept of reliability is an essential tool in the successful prosecution of just about any ERISA disability claim.

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING SPEAKING ENGAGEMENTS

D. Seth Holliday will be speaking at the Arkansas Trial Lawyers Conference on social security disability in Eureka Springs, AR on April 29, 2010.

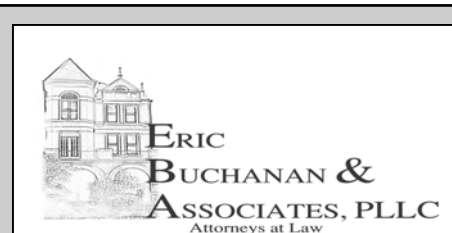
Eric Buchanan will be speaking at the NOSSCR Social Security Disability Spring Conference on ERISA LTD claims in New Orleans, LA on May 12-15, 2010.

Eric Buchanan will be speaking at the Kentucky Trial Lawyers Conference on subrogation and offsets in disability cases in Louisville, KY on June 11, 2010.

D. Seth Holliday will be speaking at the Kentucky Trial Lawyers Conference on subrogation and offsets in disability cases in Northern KY on June 25, 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



- Long-Term Disability Insurance
- Social Security Disability
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Denied disability benefits? Call Eric's Team.

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