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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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A PROBLEM FOR ERISA PRACTITIONERS WHO ARE ALSO SOCIAL SECURITY DISABILITY REPRESENTATIVES: THE REQUIREMENT TO SUBMIT ADVERSE EVIDENCE TO THE SOCIAL SECURITY ADMINISTRATION BY: D. SETH HOLLIDAY

If you are a frequent consumer of our newsletters, you know by now that ERISA disability claims live a strange legal world where there is no right to a jury trial, punitive damages are prohibited, discovery is limited to issues of conflict of interest and bias, 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 "ERISA administrative record." Because ERISA practitioners are dealing with private disability claims, many times they also happen to be denizens of an equally interesting place – the world of Social Security disability law. Like ERISA, Social Security disability law practice is in many respects quite different from the environment in which other advocates practice. For example, similarly to clients in an ERISA disability practice, Social Security claimants have serious medical conditions, financial distress, and may be poor historians. However, unlike ERISA, the administrative review process in the Social Security disability context is non-adversarial. This can cause problems for a practitioner who has a client with a private disability claim and a simultaneous Social Security disability claim.

The problem arises because, for a Social Security disability representative, the unique circumstances of a non-adversarial administrative review process require the representative to balance zealous advocacy against unmitigated candor to the tribunal. In other words, the Social Security disability representative has duties to both the client and the tribunal in what would otherwise be called an *ex parte* setting. The primary issue that highlights this tension is the duty to submit adverse evidence in a Social Security hearing.

Until fairly recently, the Social Security Administration (SSA) took the position that claimants only need to prove their disabilities, not their abilities. SSA had interpreted its regulations (at 20 C.F.R. §§ 404.1512(a) and 416.912(a)) to require only that claimants provide medical evidence establishing that he or she has an impairment. As the regulations only compel a claimant to provide evidence *supporting disability*, there was no affirmative obligation to submit all relevant or available evidence regarding *ability*. However, in July of 2005, the Commissioner announced a Proposed Rule that would have changed this substantially. The proposal made it necessary for claimants to submit evidence even if it was unfavorable, adverse or undermined their claim. (70 Fed Reg. 43,590, 43,607, 43,621 (July 27, 2005)). That proposal elicited a slew of comments hostile to the proposal such that on March 31, 2006, the Commissioner announced a rather different Final Rule.

This rule, effective nationwide August 1, 2006, requires claimants to provide evidence, without redaction, showing

how their impairments affect their functioning during the time they claim they are disabled, and to provide any other information that SSA needs to decide their claim. (Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,444 (March 31, 2006)). Consequently, SSA still lacks an express rule or affirmative duty to submit unfavorable or adverse evidence. However, the Final Rule did contain language that required claimants to submit any information that is material to their claim, i.e., that claimants must provide "information that SSA needs to decide their claim." This "needs" or "materiality" clause is in line with the Social Security Protection Act of 2004 (SSPA) which expanded the existing prohibition against actively making statements or representations that are false or misleading either because of what they say, or what they omit. (Pub. L. No. 108-203 § 201, 118 Stat. 507, amending Social Security Act §§ 1129, 1129A, 42 U.S.C. §§ 1320a(8), 1320a-8a). In a nutshell, while SSA may not expressly or affirmatively require representatives to submit adverse or unfavorable evidence, it does have specific rules that can penalize representatives, as well as their clients, for failure to do so.

Under its prior rule, SSA had interpreted its regulation to require only that claimants provide medical evidence establishing that he or she has impairment. Under the Proposed Rule, representatives were required to provide any information other than that having to do with disability which is necessary to decide their claim even if it was unfavorable, adverse or undermined their claim. However, the Final Rule requires representatives to provide any information other than that having to do with disability which is necessary to decide their claim.

The problem with the Final Rule is that it could be argued that information about a client's *ability* is always information *necessary* to decide that client's claim. It could also be argued that SSA needs all information – favorable or adverse – in order to justly decide any claim. In that case, does a representative have any right to filter out information adverse to a client before turning it over to SSA? Fortunately, SSA representatives at NOSSCR conferences have articulated a two-step analysis: representatives will need to determine (1) whether the unfavorable or adverse information they have or know about can reasonably be described as a "material fact" and if so, (2) whether their failure to disclose that information to SSA could be construed as false or misleading. The new issue arising from this two-step analysis is what is a "material fact" and when is failure to disclose such a material fact "misleading"? The answer is not at all well-settled. As you can imagine, this is a problem for the practitioner who only represents Social Security disability claimants. However, it is an even larger problem for those who do double duty as litigators of private ERISA disability claims.

The problem, from one perspective, is that with respect to Social Security disability claims, it is clear that a representative must err on the side of full disclosure – even if that means turning over evidence that is arguably unfavorable to his or her client. The reasons for this have to do with the radically different environment under which Social Security representatives practice. In that capacity, a representative wears many different hats in an environment which requires him or her to balance zealous advocacy with candor towards the tribunal.

Consider the different hats that Social Security disability representatives must don from time to time. First of all, they are investigators – as representatives they are the de facto investigative arm of SSA (i.e., the procurement of medical records). Secondly, they are confidants and keepers of their client's medical (including psychological) information. Note that Federal Regulations impose a duty on the representative to keep information about a claim confidential. The representative must not "divulge, without the claimant's consent, except as may be authorized by regulations prescribed by SSA or as otherwise provided by Fed law, any information SSA furnishes or discloses about a claim or prospective claim." 20 C.F.R. §§ 404.1740(c) and 416.1540(c). The result of this is that unless the information is available by Privacy Act request, and information about a specific claim is generally not so available, the representative cannot relay info to 3rd parties without the client's permission. For instance, the claimant's attorney cannot divulge information relating to the disability claim to the defense attorney in a workers' compensation matter without the client's consent (which should be in writing).

Moreover, the environment in which a Social Security disability representative investigates is generally non-adversarial, that is, in an administrative review process that some have argued is practically *ex parte* (i.e., no attorney for the federal government is present at the hearing). Accordingly, consider Tennessee's "*ex parte rules*": Rule 3.3(a)(3) of Tennessee's Rules of Professional Conduct, which reads: "A lawyer shall not knowingly, in an *ex parte* fail to inform the tribunal of all material facts known to the lawyer that will enable the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." Comment 2 to Rule 3.3 states "The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty to refrain from assisting a client to perpetrate a fraud upon tribunal." Likewise, Comment 5 states: The lawyer…has the correlative duty to make disclosure of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision." However, a representative must also be zealous advocates of his or her client's disability claim.

It gets more even more complex. On top of this, a Social Security disability client may be a poor historian because of a lack of concentration, focus or good memory. This, in turn, may relate to a client's poor education, financial stress (*i.e.*, bankruptcy, creditors calling, under foreclosure or even homelessness), and an impairing medical condition (*i.e.*, such a condition usually causes some type of mental incapacitation because of severe pain, medication side effects or mental instability). Moreover, many Social Security clients view their representatives as an integral part of a system which they believe is being unjust to them and so they may have severe distrust issues with their representatives and withhold information on their own. Finally, there are often significant gaps in what is essentially the most important record – the medical record – because many clients have poor or no insurance and have no money to pay doctors out of their own pocket. In other words, a representative must be both a zealous advocate for claimants who are often poor historians with significant trust issues as well as a competent investigator for SSA and a trusted advisor to the ALJ in a judicial context not unlike an ex parte hearing.

That's a tall order for representatives who only practice in the field of Social Security disability law. For those of us who have a client with a private disability claim and a Social Security disability claim, it's an order that can be filled only by very careful and competent representation. The admonition to be careful starts very early – at the intake process. Because of SSA's requirement that representatives must provide any information other than that having to do with disability which is necessary to decide their client's claim, if you have a prospective client who has both a private disability claim and a Social Security disability claim, you must discover early on whether any of the treating physicians take an unfavorable view of the prospect's disability claim. If you find this to be the case and decide to take both the Social Security disability and ERISA cases anyway, then you must develop the medical evidence of record with a keen understanding that any unfavorable evidence may end up in the Social Security Administration's claim file and, by extension, the ERISA claim file. That, in turn, means you must proactively attempt to mitigate any damaging evidence which may make it into the claim file – you can't wait until the ALJ hearing to make your case that the unfavorable evidence is not credible or is otherwise outweighed by the favorable evidence in the record. Instead, you must develop written evidence that directly challenges and undermines the credibility of any data harmful to the disability claim so that if and when it ends up in the ERISA claim file it has already been refuted in writing.

UPCOMING SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the Spring NOSSCR Social Security Disability Law Conference on May 13, 2011 in Baltimore, MD. He will be speaking on ERISA LTD Claims for Beginners Part I and ERISA Part II.

Eric Buchanan will be speaking at the Association for Justice Conference on July 10, 2011 in New York, NY. He will be speaking on Is your Client's Insurance Claim Preempted by ERISA.

Eric Buchanan will be speaking at the Southern Trial Lawyers Association on February 16, 2012 in New Orleans, LA. He will be speaking on discovery in disability cases.

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

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