

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.

VOLUME 4, ISSUE 2, FEBRUARY 2012



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.

THE SOCIAL SECURITY ADMINISTRATION ISSUES A NEW RULE THAT PRECLUDES FILING A NEW APPLICATION WHILE AN OLD APPLICATION IS PENDING - BY JULIE E. MOYA

Often, our ERISA disability newsletter covers ERISA long-term disability (LTD) issues. But, our firm also handles a lot of social security disability cases, and many of our clients have both types of claims. Often the two claims overlap. For example, many LTD policies reduce the benefits payable, offsetting for social security benefits received.

This month's newsletter explains the Social Security Administration's (SSA's) new policy, greatly limiting the ability of disabled claimants to file a new application if a previous application is still pending on appeal. Social Security Ruling (SSR 11-1p) instructs local SSA Field Offices to refuse to accept a new application when a claimant has already filed an application that is denied by an ALJ, and where the claimant chooses to appeal that denial.

Prior to this rule, claimants with a strong case could file a new application, and potentially win a new claim, although usually with an onset date after the date of the ALJ's decision, while the prior decision is on appeal. Under the new rule, a claimant must wait until the appeal is decided before filing a new application. Thus, in cases where the claimant has a strong case on the new application, the claimant must still wait before starting the long social security application and appeal process, greatly delaying that claim.

Rule 11-1p: What is it?

One of the clearest summaries of the Rule is found in EM-11052:

Effective July 28, 2011, field offices will not

take a new disability application if a prior disability claim for the same title and same benefit is pending at any level of review (initial, reconsideration, hearing, or Appeals Council (AC)). See Social Security Ruling (SSR) 11-1p.

There is a limited exception. When a claim is pending at the AC, the claimant may file a new application if:

- The claimant has additional evidence of a new critical or disabling condition with an onset after the date of the hearing decision, AND
- The claimant wants to file a new disability application based on this evidence, AND
- The AC agrees the claimant should file a new application before the AC completes its action on the request for review.
- This policy change does not apply if the pending claim is:
 - for a different title or a different benefit type,
 - a Continuing Disability Review (CDR) or age 18 redetermination, or
 - in federal court or was remanded from federal court to the hearing office or AC.

¹The Social Security Administration often issues "rulings" setting out agency policy. While not subject to the notice and comment rules of a regulations, rulings are followed by agency personnel. SSA also issues memo's further explaining their rules. The new rule is set out in SSR 11-1p, but is clarified by SSA EM-11052. EM-11052 was published September 26, 2011.

ERISA & DISABILITY BENEFITS NEWSLETTER

Rule 11-1p: How Does it Affect Social Security Claimants?

In the past, when a claimant lost at his hearing, he could appeal, and file a new application at the same time. That way, if he lost his appeal, the second application would be much further along. Now, the claimant has to make a tough decision. He must choose to either: 1) protect his back pay and keep his appeal rights, or 2) lose his back pay and start his second application.

Rule 11-1p also creates a problem for lawyers representing clients with social security claims. Lawyers are stuck between the 60 day window to file the appeal and waiting on their client to make a decision on whether to appeal. If the client does not decide in time, attorneys no longer have a safe option other than to drop their client. Before, the attorney could simply appeal and then the client would have all the time she needs to do the new application without worrying about the appeal deadline. This is no longer the case.

Further, because back benefits can only be paid up to twelve months prior to an application, if a claimant chooses to appeal, and the appeal takes two or three years to be decided, as is often the case, and the claimant loses the appeal, there is a time period that can never be covered by an application. This appears to be a denial of due process rights, in that this rule, issued without notice and comment, often will result in a claimant not being able to file a second application soon enough to protect all of the claimant's back pay. Claimants have a property interest in their claim for benefits that is protected by the Fourth Amendment. *Day v. Shalala*, 23 F.3d 1052, 1064-1066 (6th Cir. 1994). In *Hamby v. Neel*, 368 F.3d 549, 559 (6th Cir. 2004), the court emphasized:

Furthermore, this court has previously held that a social security claimant has a property interest in benefits for which he or she hopes to qualify. *Flatford v. Chater*, 93 F.3d 1296, 1304-1305 (6th Cir. 1996) (based on the holding in *Richardson v. Perales*, 402 U.S. 389, 398, 28 L. Ed. 2d 842, 91 S. Ct. 1420 [1971], in which the court accepted the proposition that petitioner's claim to benefits gave him a protectable property interest).

The *Hamby* court went on to clarify:

Contrary to the dissent's analysis, a property interest is neither predicated upon whether an individual has "earned" the benefits in question, nor upon the existence an individual's contribution towards that benefit. Instead, the Supreme Court has made clear that the rights bestowed upon individuals with legitimate property interests are defined by the language of intent found in the federal or state statute creating such benefits, to then aid the particular plaintiff in question. *Atkins v. Parker*, 472 U.S. 115, 128, 105 S. Ct. 2520, 86 L. Ed. 2d 81

(1985) (reiterating the Court's determination that "food-stamp benefits, like the welfare benefits at issue in *Goldberg v. Kelly*, . . . , 'are a matter of statutory entitlement for the persons qualified to receive them.'") (internal citations omitted).

Hamby at 558. A current beneficiary has a property interest in the "continued receipt" of benefits as well. *Difford v. Secretary of H.H.S.*, 910 F.2d 1316, 1320 (6th Cir. 1990). SSR 11-1p may cause them to forgo this right on their initial application in order to file a subsequent application.

For example, for many claimants, eligibility hinges on their age. 20 CFR Part 404, Subpart P, Appendix 2, section 200.00(e). A claimant may be found "not disabled" at 49 based on the same grounds that he would be found "disabled" at 50. If a claimant turns 50 after his hearing, he has to wait until his first case gets to federal court before pursuing a second case (which may have been immediately successful due to the increased age otherwise). This is not remedied by the "exception," either, because the exception requires a "new" disability with an onset after the hearing. A change in age does not create a new disability, but new eligibility.

Rule 11-1p: Does it Affect ERISA Long-Term Disability Cases?

First, social security is almost always an offset to LTD benefits. Unfortunately, the exact amount of a claimant's social security benefit is often determined by a myriad of conflicting and confusing factors. In the settlement of LTD or ERISA cases, even if an attorney knows how to calculate the final benefits amount accurately, it is the social security Notice of Award ("NOA") that is the authoritative source for this figure. Waiting on a decision from social security delays the NOA and may delay the settlement of a claimant's LTD case. Even worse, the absence of the final NOA may cause the claimant to receive an inaccurate LTD settlement.

Also, LTD carriers often use an unfavorable social security decision as an extra justification for their own denial. Essentially, "If SSA doesn't think he is disabled, why should we?" The only way for a denied claimant to remedy this situation is to get approved, and to do so quickly. Now, that approval may take months or years longer. It may occur after they have lost their LTD benefits or received an improperly reduced settlement.

Further, some LTD policies allow the carrier to estimate the client's SSA benefit. An incorrect estimate can improperly reduce your client's benefits. This creates hardship while your client waits on SSA to decide their case.

Also, in an ERISA matter, the social security decision is often a key piece of evidence that can support a claim; however, in order to be considered it must be available to the insurance company and be part of the record. Once the insurance company closes its claim file and issues a final decision, the insurance company will argue that the ERISA record closes,

ERISA & DISABILITY BENEFITS NEWSLETTER

information such as a new, favorable social security decision is not admissible. *Wilkins v. Baptist Healthcare Systems, Inc.*, 150 F.3d 609 (6th Cir. 1998). This Ruling may cause this situation in many ERISA cases, thanks to the delayed decision on the second application.

In sum, while decreasing the workload for SSA employees, Ruling 11-1p creates hurdles for disabled claimants and their attorneys, at best delaying some eventual favorable decisions, and at worse causing claimants to have lengthy time periods not covered by any application, even if the claimant is otherwise legally disabled during that time period.

UPCOMING SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the Bayside Fibromyalgia Women's Support Group at the Bayside Baptist Church in Harrison, Tennessee on Tuesday, February 21, 2012 at 6:00 pm regarding filing a claim for social Security and/or long term disability benefits.

Eric Buchanan will be speaking at the Southern Trial Lawyers conference scheduled for February 15-18, 2012 in New Orleans. He will be speaking on discovery and protective orders in disability cases.

Eric Buchanan will be speaking at the American Association for Justice Annual Convention scheduled for July 28 - August 1, 2012 in Chicago. He will be speaking on social security disability offsets in ERISA 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.

Representing disabled policy holders and people seeking disability benefits nationwide. Eric's disability and benefits team can help your clients!

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

We appreciate the opportunity to work with you on any of these cases.



"We thank all our clients who nominated us for the 2012 Seal of Satisfaction Award in the attorney category for Chattanooga. We are very honored to receive this recognition for the hard work that our disability and benefits team has put into helping our clients move forward in their lives." – Eric L. Buchanan

www.servicessselect.com

Eric Buchanan & Associates, PLLC
414 McCallie Avenue • Chattanooga, Tennessee 37402
telephone (423) 634-2506 • fax (423) 634-2505 • toll free (877) 634-2506
www.buchanandisability.com
