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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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ODDS AND ENDS: PUTTING BAD POLICY TERMS AND LAW TO GOOD USE - BY R. SCOTT WILSON

ERISA case law and long term disability policies have more than their fair share of traps for the unwary and rules that are unfavorable to claimants and plaintiffs. Occasionally, though, even bad rules can be put to good use.

1. When a Subjective Symptom Limitation Isn't a Bad Thing

A policy with a subjective or self-reported symptom limitation can be a significant hurdle for a claimant. A typical formulation is a provision limiting payment of benefits for "disabilities, due to a sickness or injury, which are primarily based on self-reported symptoms" to a specified number of months, most often 24. "Self-reported symptoms" are then defined as "manifestations of your condition which you tell your doctor such as pain or fatigue that are not verifiable using tests, procedures or clinical examinations standardly accepted in the practice of medicine." Though there are arguments limiting the applicability of such limitations—see Volume 3, Issue 8—such policy provisions can make a claim based on any condition more difficult, and are a substantial barrier to medical conditions like fibromyalgia and chronic fatigue syndrome.

On occasion, though, the subjective symptom limitation can be at least a short term benefit. We have seen several cases recently where the policy included a subjective symptom limitation to 24 months, but benefits were denied from the outset on grounds that the insurer (or the insurer's hired medical consultant) asserted that restrictions and limitations assessed by a treating source are not supported by objective evidence. In any case, it can be argued that it is arbitrary and capricious to impose an objective evidence requirement not contained in the plan. *E.g.*, *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433 (3rd Cir. 1997) (reviewing insurance company cannot add standard of "objective medical evidence" to plan if such a standard not included therein). But it is particularly arbitrary to impose an objective evidence requirement when the structure of the policy allows benefits for subjective symptom based disabilities to be paid for 24 months.

If an insurer were allowed to require such objective proof in such a context, the clause limiting payments for subjective conditions would be rendered superfluous, because it would be impossible to ever receive benefits in the face of such a requirement. *See Smith v. Continental Cas. Co.*, 369 F.3d 412, 420 (4th Cir. 2004) (suggesting that it was improper to deny a claim from the outset for a lack of "objective medical findings" when the policy provided for 24 months of payments for "Self-Reported Symptoms.") *See also Pelchat v. UNUM Life Ins. Co. of Am.*, 2003 U.S. Dist. LEXIS 8095, n.7 (N.D. Ohio 2003) (there can be no 'objective medical evidence' requirement to qualify as disabled during period an insured can be disabled because of self-reported symptoms).

The 24 month subjective symptom limitation may make fibromyalgia and chronic fatigue cases more difficult after the first 24 months. But the same policy provision should prevent a claimant's complaints, or his physician's assessment of restrictions and limitations, from being rejected by the insurer as insufficiently objectively supported for the first two years of disability. In the right circumstances, the 24 month subjective symptom limitation can actually make proof of disability easier for the first two years, giving you, the claimant, and his doctors two years of breathing space to better define the medical condition.

2. When Remand as a Remedy Isn't a Bad Thing

Whether the correct judicial remedy for an arbitrary denial of benefits is payment of benefits or remand to the insurer is often a hotly contested issue. Where there has been proce-

dural error in deciding the claim, "where the problem is with the integrity of the plan's decision-making process," remand is the correct remedy. *Elliott v. Metro. Life Ins. Co.*, 473 F.3d 613, 622 (6th Cir.2006). But benefits are properly reinstated where plan administrator had opportunity to review all evidence and did so in a manner that was arbitrary and capricious. *Williams v. Int'l Paper Co*., 227 F.3d 706 (6th Cir.2000). Understandably, courts are loathe to award benefits if the record does not establish that the claimant is entitled to those benefits; remedy should not create a windfall. *See Elliott v. Metro. Life Ins. Co.*, 473 F.3d 613, 622 (6th Cir.2006). However, the court may properly look at the record as a whole, determine that the plaintiff is clearly entitled to benefits, and award those benefits. *See Cooper v. Life Ins. Co. of North America*, 486 F.3d 157, 172-73 (6th Cir. 2007).

Plaintiffs can understandably view remand as being a half-measure at best, and possibly as just a roadmap for how the insurer should deny the claim better next time. On the other hand, there are some errors that simply can't be fixed on remand. If the court finds the insurer acted arbitrarily in relying upon non-examining physicians to reject the treating physician's assessment and deny the claim—*e.g. Kalish v. Liberty Mutual/Liberty Life Assurance Co*., 419 F.3d 501 (6th Cir.2005)—it will be exceedingly difficult for the insurer to rehabilitate its denial on remand. Short of time travel, it is simply impossible for the insurer to obtain a physical examination to address the time period of its earlier denial.

Additionally, in certain contexts, the court may both order retroactive payment of some benefits and remand the claim for further consideration. *See*, *e.g.*, *Thomas v. Hartford Fire Ins. Co.*, 2010 WL 472107 (M.D.Fla. 2010) (finding plaintiff was entitled to benefits for the own occupation period, while remanding the case to allow plaintiff to present, and insurer to consider, evidence of disability after the own occupation/any occupation definition switch). In cases where the record already contains good evidence on the question of any occupation disability, this can be a frustrating result. On other occasions, though, the closed ERISA record contains only good evidence for the own occupation (or subjective symptom, or mental/nervous) period. Obtaining a period of back pay plus a remand to consider disability beyond that period can give you and the claimant the opportunity to better develop the case.

Remand can rightly be criticized as giving the insurer a "second bite at the apple." *See Cooper v. Life Ins. Co. of North America*, 486 F.3d 157 (6th Cir. 2007) ("Plan administrators should not be given two bites at the proverbial apple"). But sometimes it's the claimant that needs the second chance to develop the file. And noting the possibility the court may find the plaintiff was entitled to benefits for the own occupation period, while remanding the case to allow plaintiff to present, and insurer to consider, evidence of disability after the own occupation/any occupation definition switch, may be a useful response when defense counsel suggests that he only sees this as an own occupation case.

UPCOMING SPEAKING ENGAGEMENTS

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.

"*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***

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