ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

ERISA & DISABILITY BENEFITS NEWSLETTER

VOLUME 5, ISSUE 2, MARCH 2013

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 and R. Scott Wilson are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization.

MEDICAL CHANGE: THE RELEVANCE OF IMPROVEMENT OR WORSENING TO A DISABILITY DETERMINATION - BY: R. SCOTT WILSON

With few exceptions, our clients' medical conditions are rarely static. And quite frequently, the medical condition existed prior to the date the client ceased working. Is it proper for an insurer to terminate benefits when there is no evidence the underlying medical condition has improved? Is it proper to deny benefits when the claimant had worked with the medical condition for years, and there is no indication of worsening at the time disability is alleged.

I. It is arbitrary and capricious to terminate benefits where there is no evidence of medical improvement.

Eleventh Circuit has held in *Levinson v. Reliance Standard Life Ins. Co.*, 245 F.3d 1321 (11th Cir. 2001), that after an individual establishes disability, the Plan Administrator must show evidence of improvement before terminating benefits. "Because Levinson satisfied his obligations under the terms of the plan, Reliance had to produce evidence showing that Levinson was no longer disabled in order to terminate his benefits." *Id.*

Similarly, the Eighth Circuit explained in *McOsker v. Paul Revere Life Ins. Co.*, 279 F.3d 586 (8th Cir. 2002) that "in determining whether an insurer has properly terminated benefits that it initially undertook to pay out, it is important to focus on the events that occurred between the conclusion that benefits were owing and the decision to terminate them." *McOsker*, 279 F.3d at 590. The *McOsker* court stated:

> We are not suggesting that paying benefits operates forever as an estoppel so that an insurer can never change its mind; but unless information available to an insurer alters in some significant way, the previous payment of benefits is a circumstance that must weigh against the propriety of an insurer's decision to discontinue those payments.

Id. at 589. *See also Walke v. Group Long Term Disability Insurance*, 256 F.3d 835, 840 (8th Cir. 2001) (overturning plan administrators termination of benefits where nothing in record demonstrates medical improvement or change in circumstances to warrant termination of benefits insurer initially granted.). And just this month, the Sixth Circuit cited *Walke* and stated "it is unreasonable to find that a claimant ceases to be disabled absent a change in the underlying medical condition." *Neaton v. Hartford Life and Accident Ins. Co.*, 2013 U.S. App. LEXIS 5814 (6th Cir. March 21, 2013).

Given this, it can be useful advocacy to compare not just the treating physician's assessment of restrictions and limitations, but also the underlying objective medical evidence between the time the insurer approved the claim, and the time the insurer terminated benefits. It can be fairly compelling to point out that, in an orthopedic case for

example, that not only have physician imposed restrictions remained stable over time, but that MRI and EMG findings were exactly the same at the time benefits were approved, and the time benefits were cut off.

And this argument remains strong even under the deferential arbitrary and capricious standard of review. Even under that standard, a termination of benefits must have "a reasoned explanation," and result from "a deliberate, principled reasoning process." *Davis v. Kentucky Fin. Cos. Ret. Plan*, 887 F.2d 689, 693 (6th Cir. 1989); *Killian v. Healthsource Provident Administrators*, 152 F.3d 514, 520 (6th Cir. 1998). It is difficult to see how a deliberate principled reasoning process could consider essentially unchanged medical evidence yet result in a diametrically opposite conclusion.

II. It is relevant, but not fatal, if an individual's medical condition had persisted, even for years, prior to ceasing work.

If absence of improvement renders a termination of benefits unreasonable, is the reverse true? Does it damage a case, can an insurer deny a claim, when the medical condition had persisted for years, and there was no indication it got worse around the time a claimant stops work? In fairness, it is a relevant factor. It's analogous to our argument about termination without improvement, and carries a certain degree of logical appeal. This is especially true if the cessation of work was occasioned by personal, family, or labor market issues not easily tied to the medical condition.

At the same time, however, there are arguments in our favor. The insurer's logically intuitive position runs counter to a long string of cases that hold that a disability determination should not be made in a manner that punishes claimants for attempting to return to work. *See, e.g. Wilcox v. Sullivan*, 917 F.2d 272, 277 (6th Cir. 1990), ("Wilcox should not be penalized because he had the courage and determination to continue working despite his disabling condition"). As the Seventh Circuit reasoned, "a desperate person might force himself to work despite an illness that everyone agreed was totally disabling. . . A disabled person should not be punished for heroic efforts to work by being held to have forfeited his entitlement to disability benefits should he stop working." *Hawkins v. First Union Corp. Long-Term Disability Plan,* 326 F.3d 914, 918 (7th Cir. 2003). *See also Seitz v. Metropolitan Life Ins. Co.*, 433 F.3d 647, 651 (8th Cir. 2006) (insurer should not interpret policy so as to "unfairly punish individuals who test their limitations and attempt to keep working before seeking benefits").

Finally, in *Rochow v. Life Insurance Co. of North America*, 482 F.3d 860 (6th Cir. 2007), the plaintiff sought to be found disabled in 2001, while the insurer argued that he was working and receiving pay through January 2002. The *Rochow* court stated "the fact that Rochow remained on the payroll until January 2, 2002 is not determinative as to whether or not he was disabled during that time." 482 F.3d at 865. The *Rochow* court found that the insurer had acted arbitrarily and capriciously in denying benefits simply because the claimant continued to receive salary, without regard to the severity of his medical condition or his increasingly poor job performance as a result of that condition. *Id.* at 864-66.

Absence of medical worsening around the disability onset date can certainly make a case more difficult. But it is not fatal. Strong medical evidence combined with statements about the difficulties the individual was having on the job can be enough to overcome it.

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the National Business Institute Seminar in Chattanooga, TN scheduled for June 5, 2013 on "Handling a Social Security Disability Case".

Eric Buchanan will be speaking at the American Association for Justice Conference in San Francisco, CA scheduled for July 20 -24, 2013 on "Workers' Compensation Settlements: How they Impact LTD and SSD and Necessary Language".

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.

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