ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

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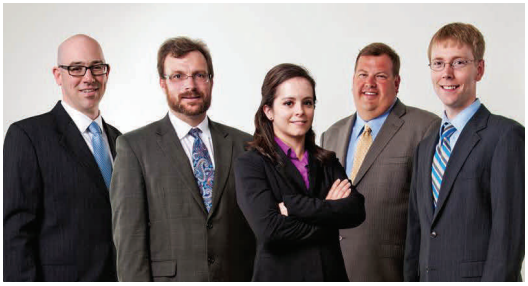
ABOUT OUR FIRM

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. Eric Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the National Board of Social Security Disability Advocacy. For more information, visit our website at www.buchanandisability.com.



Jeremy Bordelon, R. Scott Wilson, Rachael Pas, Eric Buchanan & Hudson Ellis.

WHEN 1/3 + 1/3 + 1/3 ≠ 1 THE UNINTENDED IMPACT OF INARTFULLY DRAFTED ASSESSMENT FORMS

BY R. SCOTT WILSON

Meeting with a potential client recently I read a denial letter stating that his benefits were being terminated on grounds that his own physician had released him to full-time sedentary work. He was shocked by this turn of events, as he assured me that he had spoken with his doctor, who continued to support disability. And lest I think that there was a miscommunication between doctor and patient, he had the documentation to prove it: a recent assessment form, describing the patient's abilities in specific numbers, falling far short of a full work day. He opined his patient could sit for 3 hours, stand or walk 1, and would require significant bed rest and extra breaks throughout the day. Obviously these restrictions are in no way compatible with full time work; how had the insurer denied benefits?

The answer to this question became apparent when I reviewed the claims file. The insurer, too, had requested that the treating doctor complete an assessment form. But instead of rating physical abilities in terms of specific numbers, the insurer's form asked the doctor to rate his patient's abilities in categories: never, occasionally, frequently, and constantly. "Never" was defined literally, as zero percent of the day. The remainder of the categories were defined as broad ranges: "occasionally' was defined as one to thirty-three percent of the day; "frequently" was defined as thirty-four to sixty-six percent of the day; and "constantly" was defined as sixty-seven to one hundred percent of the day. On this form, the doctor opined that the patient could "occasionally" sit, stand, and walk (while lifting up to 10 pounds), which the insurer promptly interpreted as an opinion that the patient could do full time sedentary work.

To my mind, this is a patently unfair form, or at least an unfair way to interpret the form. With "never" defined literally as zero percent of the day, "occasionally" is the lowest possible reasonable category for assessment of sitting, standing, and walking, unless we are talking about an individual who is paraplegic or in an iron lung. If "occasional" sitting, "occasional" standing, and "occasional" walking is interpreted to add up to full time work, there is no possible combination of boxes the doctor can reasonably check that produces a conclusion of disability. So how do we combat this form?

The first way is factually. The insurer's interpretation of its assessment form serves to remind us that a good assessment form asks for limitations that are quantifiable, numeric. This avoids the situation where you and a vocational expert are debating what a "moderate" limitation means, or where within a thirty-three percentage point

range the claimant's abilities actually falls. And getting those specific numbers make the legal arguments that follow much more compelling.

Legally, the generally recognized definition of sedentary work is work that "involves up to *two hours of standing or walking* and *six hours of sitting* in an eight hour work day"; an individual who can sit only occasionally is not capable of sedentary exertion. *Connors v. Conn. Gen. Life Ins. Co.*, 272 F.3d 127, 136 (2nd Cir. 2001) (emphasis in original). *See also Wykstra v. Life Ins. Co. of North America*, 849 F.Supp.2d 285, 294-95 (N.D.N.Y. 2012); *Topits v. Life Ins. Co. of North America*, 2013 U.S.Dist. Lexis 1478956 at *24-25 (D.Ore. 2013). Insurers have been repeatedly criticized for finding individuals capable of performing sedentary work when restricting to sitting on only an occasional basis. *Connors*, *supra*; *Wykstra*, *supra*; *Topits*, *supra*. *See also Alfano v. Cigna Life Ins. Co.*, 2009 U.S.Dist. LEXIS 7688 (S.D.N.Y. Jan. 30, 2009); *Solnin v. GE Group Life Ins. Co.*, 2007 U.S.Dist. LEXIS 20955 (E.D.N.Y. Mar. 23, 2007); *Krizek v. Cigna Group Ins.*, 2005 U.S.Dist. LEXIS 16593 (N.D.N.Y. Mar. 22, 2005). But again, this argument works best when we can also point to a numeric assessment form, that shows the doctor's more accurate opinion does not add up to a full time work day.

Turning back to our recent client, remember that when he described his patient's abilities in specific numbers, that assessment fell far short of a full work day. He opined the patient could sit for 3 hours, stand and walk 1, and would require significant bed rest and extra breaks throughout the day. That he opined on the insurer's form that the patient could "occasionally" sit, and "occasionally" stand and walk is an artifact of the extremely broad categories utilized on that form. In context not really an opinion that the patient is capable of full time sedentary work; given the broad definitions of "occasional" and "frequent," and given his previous numeric assessment, there was really no other set of boxes the doctor could check.

Even under the arbitrary and capricious standard, to survive judicial review, a termination of benefits must have "a reasoned explanation," resulting 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). Concluding an individual is capable of full-time sedentary work on the basis of a form that would elicit the exact same check-marks if the doctor thinks the individual can work a five hour day or an eight hour day is patently arbitrary. But again, this argument is much more compelling when we have the numeric assessment showing that the doctor really meant only a five hour day.

Beware of insurance company assessment forms. Companies can craft forms in which, at least by their own interpretation, leave no combination of boxes a doctor can check which make a claimant disabled. (And it's not just insurance companies; functional capacities evaluation providers often use similar forms). There are factual and legal ways to combat these forms, but they work best together

Email R. Scott Wilson with any questions or comments at swilson@buchanandisability.com.

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 UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the upcoming NOSSCR Social Security Disability Conference on ERISA Long-Term Disability Claims: What Social Security Representatives Need to Know. The conference is scheduled for May 6-9, 2015 in Arlington, VA.

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