From: Bob June [mailto:bobjune@junelaw.com]
Sent: Monday, January 18, 2016 9:59 PM
To: EBSA, E-ORI - EBSA
Subject: RIN 1210-AB39

January 18, 2016

Via Email: e-ORI@dol.gov

Ms. Phyllis C. Borzi
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1210-AB39
Claims Procedure for Plans Providing Disability Benefits

Dear Assistant Secretary Borzi:

Thank you preparing the proposed rulemaking on entitled Claims Procedure for Plans Providing Disability Benefits, RIN 1210-AB39. I greatly appreciate the obvious effort that went into this proposed rulemaking.

I am an attorney representing claimants in ERISA disability cases, and I have been doing so for most of my 21 years of practicing law. Unnecessary procedural obstacles frequently prevent claimants from obtaining the benefits to which they are otherwise entitled, and I believe the proposed rules will provide great help in this regard. I offer these specific comments regarding a few of the proposed changes.

Right to Review and Respond to New Information Before Final Decision

This proposal is very important. In all too many cases, I have seen insurers and claims administrators completely change their rationale when issuing an appeal denial. In some cases, the administrator admits that the initial decision was completely flawed, but the administrator then claims that there is an entirely new basis for denying the claim. But declaring that all appeals have been exhausted, the administrator refuses to accept any response to the new rationale, compelling the claimant to file suit. Some courts reviewing these claims then determine that

there was a procedural flaw defeating the claimant's right to a full and fair review, but the remedy is simply to remand the claim to the administrator to process a response to the appeal decision. The result is an unnecessarily prolonged process that frustrates claimants and consumes court resources. Requiring administrators to afford claimants a reasonable opportunity to respond to new information before finalizing the claim decision will do a great deal to solve this problem. Coupled with the proposed requirements for detailed articulation of the rationale for a benefit denial, I believe this provision will eliminate many procedural defects in ERISA disability claims and truly ensure that claimants receive a full and fair review in the administrative process.

Requiring a Statement of the Applicable Limitation Period

I believe it is very important to address notification of the applicable statutory or contractual limitation period in the proposed regulations. The Sixth Circuit has taken a step in the right direction with the decision in *Moyer v. Metropolitan Life Insurance Co.*, 762 F.3d 503, 505 (6th Cir. 2014). More needs to be done. I have represented a claimant in one case where the insurer paid benefits for the initial two-year "own occupation" period, but then denied subsequent benefits under an "any occupation" standard. However, the insurer argued that, under its convoluted contractual limitation period, the claim had accrued and the limitation period began long before the denial, while the benefits were still being paid during the "own occupation" period. This is simply unfair. The limitation period should not begin to run until a final administrative denial of the claim appeal is issued, at the point when the claimant first becomes entitled to file a lawsuit. Accordingly, I believe it is very important for the final regulation to require plans to provide claimants with a clear and prominent statement of any applicable contractual limitations period and its expiration date for the claim at issue in the final notice of adverse benefit determination on appeal, and to prohibit the contractual limitations period from beginning to run before that final notice of adverse benefit determination on appeal is issued.

Deemed Exhaustion of Claims and Appeals Processes

The proposed changes in the regulation relating to claims that are "deemed exhausted" is also very important. Particularly where administrators flagrantly violate established claim procedures, it is essential to afford claimants a *de novo* evidentiary hearing of the claim in district court. Right now, it is possible for an administrator to violate the claims regulations and plan procedures in such a manner as to defeat the purpose of the appeal procedure entirely, and if the

claimant proves the violation is substantial, the administrator may then expect to get a remand where it will once again enjoy deferential review. This should not be permitted. A substantial deviation from the claims procedure should mandate a *de novo* evidentiary hearing in the district court in order to preserve the claimant's right to a full and fair review. The provision permitting the administrator to show that a violation was *de minimis* is reasonable, provided that this burden is not inadvertently shifted to the claimant. A claimant should not be required to prove a negative – that the procedural violation was not *de minimis* – in order to obtain a *de novo* evidentiary hearing under these circumstances. This is a matter of fundamental fairness.

I greatly appreciate this opportunity to comment on the proposed regulations, and I strongly support adoption of the proposed regulatory changes. Thank you.

Respectfully submitted,

s/Robert B. June
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Dated: January 18, 2016