From: Marcus Castillo [mailto:marcus1499@gmail.com]
Sent: Tuesday, January 19, 2016 4:04 PM
To: EBSA, E-ORI - EBSA
Subject: RIN 1210-AB39 Comments re proposed ERISA claims regulation amendments

Dear Sirs/Madam,

I am writing to comment in support of the proposed amendments to the ERISA claim procedures affecting disability plans published at 80 F.R.No. 222 at 72014, which would amend 29 C.F.R. Part 2560.

I am an attorney board-certified by the Florida Bar in Labor and Employment Law specializing in employee benefits litigation. A significant portion of my practice includes disability insurance cases. As such, my clients' cases are governed by the existing claim regulation. Unfortunately, my experience echoes the Department's comments stated as a rationale for adoption: "insurers … are often motivated to aggressively dispute disability claims." I see this most clearly demonstrated in the "gotcha" tactic of retaining new consulting experts after submission of the claimant's appeal and thwarting any effort to disclose any information about such expert, let alone allow rebuttal of any new opinions. As noted in the commentary, this conduct has been condoned by the courts because the existing regulation does not provide a "review and response" right. See for e.g., Glazer v. Reliance Standard Life Insurance Co., 524 F.3d 1241 (11th Cir. 2008).

The manifest unfairness of the status quo is several-fold. Remember that the claimant bears the burden of proof on judicial review. The claimant bears that burden under the present system without having had the slightest opportunity to cross-examine adverse witnesses and without even having had the benefit of disclosure of adverse witnesses during the pre-suit appeals process. And yet that process is the closest justice to a "trial" the claimant ever gets. Adoption of review and response rights is merely a step in the right direction. True justice would afford claimants an opportunity to cross-examine the carrier's retained experts. This might well be the only opportunity to test their credibility since many federal courts severely restrict discovery during judicial review.

I strongly support backing the new regulation's mandate with "teeth" by stripping disability insurance carriers of the deference that often steers a court's decision in their favor. The status quo is often a "fox guarding the henhouse" situation: the so-called "neutral" claims adjudicator is simultaneously a representative of the carrier potentially responsible for paying the claim. Add to that the existing lack of effective "review and response" rights and it is a marvel that the existing system is even constitutional.

In sum, I urge you to adopt the proposed amendments as a first step towards rectifying the gross abuse of trust placed in carriers handling these claims.

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