From: Mark DeBofsky
Sent: Wednesday, December 06, 2017 12:26 PM
To: EBSA, E-ORI - EBSA
Subject: RIN 1210-AB39

Dear Deputy Assistant Secretary Hauser:

Although I have submitted comments at every stage of the development of the regulations relating to disability benefits, since the matter is yet to be resolved, I am commenting yet again on the Final Regulation on Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016)) that are now scheduled to go into effect on April 1, 2018.

I believe I present a unique perspective on this issue since the bulk of my legal practice relates to the representation of individuals who have been denied short-term and long-term disability benefits; and I have practiced in this area for more than 30 years. I was involved with the development of the 2000 regulations and testified before the Department of Labor prior to the promulgation of those regulations; and I had also suggested a number of the proposals that have been incorporated in the regulations. Because I believe that both claimants and insurers seek the same goal; i.e., that meritorious claims get paid promptly as the result of a fair and objective process, the regulations promote that goal and go a long way toward preventing the abuses I have encountered. There is a reason why the bulk of ERISA litigation involves disability benefits. It is because claimants often feel that they were unfairly denied benefits despite overwhelming evidence supporting their claimed disability, often including favorable Social Security disability determinations.

I would like to spend the rest of this submission addressing what I believe to be the principal objections to the regulations. First, the claim that the regulations would significantly increase costs is unproven. I have yet to see any actuarial study that would support such a claim; and I sincerely doubt that any such study could be produced. But even if the costs may modestly increase, the specter that fewer employers would offer benefits is sheer nonsense. Employers provide benefits to their employers for reasons that go well beyond altruism. Employee benefits are a valuable tool employers use to both recruit and retain outstanding employees. Moreover, the cost of disability benefits is often passed on to the employee, which, in turn, would make the benefits non-taxable under the Internal Revenue Code. The IRS has repeatedly issued Revenue Rulings explaining that if disability insurance premiums are paid with after-tax dollars, the resulting benefits are non-taxable.

Second, given the nature of litigation of disability benefit claims, a more robust and fairer claim process may be the only means a claimant has to achieve due process. The federal courts treat ERISA claims as quasi-administrative ("review of a record." *See, Perlman v. Swiss Bank Corp.,* 195 F.3d 975 (7th Cir. 1999)). That means there is no trial (and obviously no jury trial), no discovery permitted, and no further evidence allowed. As a result, the reality of our law practice is that we often have to turn down potential clients who have already gone through the claim process even though their claims would be meritorious if only we could submit additional evidence or be permitted to submit testimony from a treating doctor. The most critical of the proposed regulations is the one that gives the claimant the last word in the claim process. Without a regulation permitting claimants the opportunity to comment on adverse evidence obtained by the benefit plan administrator/insurer during the claim process, claimants can be sandbagged since meaningful challenges to such adverse evidence are precluded.

Third, the importance of a Social Security determination cannot be overstated. As part of their settlements of regulatory charges resulting from market conduct investigations, both Unum and CIGNA agreed to give deference to favorable Social Security determinations. Every disability insurer and plan administrator should be subjected to the same standard. The definition of "disabled" under the Social Security Act (42 U.SC. Sec. 423) is far more stringent than the definitions in disability insurance policies; and a favorable outcome of a Social Security claim represents an objective process by a neutral administrative agency. While the rules may be somewhat different, Social Security no longer gives deference to a treating doctor's opinion just because that doctor is a treating doctor. Moreover, the Social Security Medical-Vocational Rules that take into consideration a claimant's age, education, and work experience have been recognized as "well-developed, relatively efficient and by no means overly generous to claimants—by which a plan may show adequate consideration of a claimant's vocational characteristics. " *Demirovic v. Bldg. Serv. 32 B-J Pension Fund*, 467 F.3d 208, 216 (2d Cir. 2006). Hence, requiring disability plans to meaningfully explain a differing outcome from the Social Security Determination would enhance the claim process and its fairness.

Fourth, the Regulations promote the use of impartial consultants. Especially in view of a litigation regime that effectively precludes discovery, the rule promotes the use of practitioners who bring more objectivity and fairness into the evaluation of claims instead of using doctors and other consultants who appear to earn the bulk, if not all of their income, reviewing disability claims and thus are influenced by the notion of regulatory capture into being biased to favor benefit denials.

Fifth, the requirement of disclosure of the time limit for filing suits is simply a tool to prevent confusion and unnecessary premature adjudication of claims. Likewise, the disclosure of internal guidelines utilized by plans insures consistent treatment of similarly situated claimants.

In summary, the regulations have already gone through an extended comment period and the comments presented were all taken into consideration before the final rules were issued in December 2016. There is no reason whatsoever to delay the implementation of the rules, especially since insurers and benefit plan administrators have already been given more than adequate time to institute procedures and measures to comply with the rules.

/s Mark D. DeBofsky

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