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BY U.S. MAIL & EMAIL TO: e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room M-5655
U.S. Dept. of Labor
200 Constitution Avenue NW
Washington D.C. 20210

**Re: Claims Procedure Regulations for Plans Providing Disability
Benefits**
RIN No.: 1210-AB39
Regulation: 29 C.F.R. §2560.503-1

Dear Assistant Secretary Borzi:

Thank you for the opportunity to comment on the proposed regulations for amending the claims procedure regulations applicable to disability benefit plans. We are writing on behalf of United Cerebral Palsy ("UCP") to offer comments, as set forth below.

BACKGROUND

Our organization educates, advocates, and provides support services to a broad spectrum of people living with disabilities. We work closely with our community affiliate network to advance the independence, productivity, and full citizenship of people with disabilities. As such, we are deeply interested in the content of these regulations. The protection of workers who become disabled is an important concern and we appreciate the Department of Labor's ("DOL") decision to further develop and improve upon the current procedural protections in place under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA").

DISCUSSION

STATUTES OF LIMITATIONS

The Supreme Court's decision in *Heimeshoff* is a landmine for ERISA disability benefit claimants. *Heimeshoff* permits an ERISA plan to prescribe not only the length of the limitations period (as opposed to applying the closest analogous state law contractual limitations period), but also when that period commences. The result is that a plan's terms can actually start the statute of limitations running long before the claimant ever has the right to file suit. Such a result can have drastic consequences on claimants' ability to pursue their disability benefit claims in spite of the otherwise substantive viability of the claims.

While the Supreme Court acknowledged that typically Congress does not intend for statutes of limitations to commence until their associated causes of actions accrue, it nevertheless allowed this result because the parties have agreed by contract to do so. The Court relied on this supposed contractual privity despite the fact that ERISA plan participants are rarely, if ever, given any say in negotiating the terms of their employer's ERISA plan, much less given the chance to agree by contract to any specific provisions. By implementing the three recommendations submitted below, however, the DOL is in the position to mitigate the oppressive results imposed by *Heimeshoff* and provide a fuller and fairer system of disability claim processing as intended by Congress in enacting ERISA.

First, in *Heimeshoff*, the plan required participants to file suit for benefit claims within three years after "proof of loss" is due, which occurred in December, 2005. The claimant went through the Plan's administrative process, as is required, and a final denial was issued in November, 2007. As a result, almost two years of the claimant's three-year statute of limitations had run before she ever had the right to file suit in the first place. A result that allows the time period within which one has the right to obtain legal redress of a wrong to be running against them before they have even been legally wronged is totally incompatible with our legal system. This is the case in any legal setting, but it is particularly so in the ERISA context, where the claimant is required -- by penalty of dismissal with prejudice -- to fully exhaust the plan's administrative procedures controlled by the adversarial party.

We believe the DOL is in an excellent position to clarify that the approach now permitted by *Heimeshoff* violates the full and fair review required by 29 U.S.C. §1133 and to adopt a rule tolling all applicable statute of limitations periods until the claimant's receipt of the final benefit determination. Such an alteration will make it clear that no limitations period can start before the internal claim and appeals process is complete and provide more meaningful access for disabled workers. Having clarity here would not only be equitable for the claimant, but it would also substantially cut down on litigation devoted to the threshold issue of the limitations period and may well lead to a standardization of internal limitations periods that would be salutary for both claimants and plan administrators.

Second, because contractual limitations periods are plan terms, the claimant should receive notice about the limitations period from the plan just as is the case with other plan terms.

As the DOL aptly points out in the preamble to these proposed regulations, “[i]nasmuch as plans are responsible for implementing contractual limitations provisions, plans may be in a better position than claimants to understand and to explain what those provisions mean.” Instead, plans, who are supposed to be functioning as fiduciaries, are able to enforce time limitations that can be utterly incomprehensible to practitioners, much less lay disability claimants, who are nevertheless purposed with figuring it out on their own.

This can readily be resolved, however, by placing that burden where it belongs, on the plan administrators who crafted these limitations and who are in a far better position to know the date of the expiration of their own limitations period. There is no reason to allow fiduciaries to continue to hide the ball. Thus, we recommend an amendment to the regulations governing the manner and content of notification of benefit determinations on review (29 C.F.R. §2560.503-1(j) [proposed regulation]), wherein the claims administrator is required to notify the claimant of the exact date of the expiration of any applicable plan-based limitations period.

Finally, the DOL should regulate to prevent plans from contracting around applicable state statutes of limitation, which typically range between one and three years, to unreasonably shorten the time period in which claimants have to pursue their legal remedies.

Together, these three requirements would be minimally invasive to plans and their administrators, but they would be extraordinary in their potential to make a meaningful impact on the fairness of a process that is, by all accounts, intended to be fair.

II. COMMENTS ON THE REGULATIONS AS PROPOSED.

The proposed amendments to the disability claim regulations are a welcome step forward in clarifying and protecting the rights of claimants, as well as in providing more accountability to plan administrators. We believe there are certain areas where we further modifications could be made to further improve the process.

1. Disclosure of Internal Rules.

The DOL’s proposed regulation regarding disclosure of the internal rules or criteria used to make a disability benefit decision, 29 C.F.R. §2560.503-1(g)(1)(vii)(B)[proposed regulation], is helpful because internal rules, guidelines, protocols, standards, claims manuals, and similar materials often create hidden plan terms that the claimant is unable to learn of or discover in order to address them in the appeal.

As is true in the healthcare context, plans sometimes argue that internal criteria are confidential or proprietary. But keeping the rules that are used to administer a plan a secret is inconsistent with the most basic premise of ERISA. Benefits must be administered “in accordance with the documents and instruments governing the plan.” 29 U.S.C. §1104.

In addition, much litigation would be avoided if the claimant could know what criteria he or she needed to meet in an appeal. The regulations should therefore emphasize that if the plan relies on an internal rule, it cannot maintain it is confidential. Given that the regulations require adverse benefit determinations to include the reasons for the denial and the applicable plan terms, this additional requirement should not be onerous and would promote the dialogue between claimant and plan that ERISA contemplates. As with the limitations provisions, there is no reason for a fiduciary not to be forthcoming with this information upon which it relied. Moreover, making the details of the plan and the rules by which they are playing more accessible to the average, unsophisticated claimant is undeniably a positive step in the advancement of the rights of the disabled.

2. Rescission.

The proposed language regarding treating rescissions of coverage as adverse benefit determinations should be expanded to encompass any situation where a limitation is invoked so that the claimant can immediately appeal. For instance, a plan may approve benefits but may invoke a temporal limitation that exists in the plan, such as for mental and nervous disorders or for “self-reported” illnesses or the disability definition change from “own occupation” to “any occupation.” Many insurers defer the right to appeal until the date that benefits end, which imposes significant economic hardship on claimants who may then be deprived of benefits for several months while appeals proceed. The claimant should have the option to immediately appeal that determination to avoid the economic hardship in the future.

3. Deemed Exhausted.

This regulation should be edited to clarify that the deemed exhausted provision applies to both claims and appeals, not just “claims.” Presumably, if there is a violation of the regulations, the claimant can seek review regardless of whether the claim is in the “claim” or the “appeal” stage. We suggest adding the following bold and underlined clarifying language to 29 C.F.R. §2560.503-1(l)(2)(i) [proposed regulation]: “In the case of a claim for disability benefits, if the plan fails to strictly adhere to all the requirements of this section with respect to a claim **or appeal**, the claimant is deemed to have exhausted the administrative remedies available under the plan ...”

4. Disagreement with Other Decisions.

The regulation requiring a discussion about the difference between the plan’s decision and awards made by treating doctors or other systems, such as Social Security, should be expanded to set forth a deferential review requirement. Indeed, the Supreme Court handed the Department of Labor an opportunity to issue a more substantive regulation requiring that deference be given to treating doctor opinions. In *Black & Decker v. Nord*, 538 U.S. 822 (2003), the Supreme Court rejected an argument that plan administrators should give discretion to opinions rendered by treating doctors, much as the Social Security Administration has issued a regulation requiring such deference. 20 C.F.R. § 404.1527(d). However, the Court stated:

If the Secretary of Labor found it meet [sic] to adopt a treating physician rule by regulation, courts would examine that determination with appropriate deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,

467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). The Secretary has not chosen that course, however, and an *amicus* brief reflecting the position of the Department of Labor opposes adoption of such a rule for disability determinations under plans covered by ERISA. See Brief for United States as *Amicus Curiae* 7-27.

538 U.S. at 832. With respect to other systems such as Social Security, the regulations should require plans to give significant weight to evidence of an award of Social Security disability benefits as supporting a finding of disability, unless there is compelling evidence that the decision was founded on an error of law or an abuse of discretion, inconsistent with the applicable medical evidence, or substantively inconsistent with the definition of disability contained in the applicable insurance policy.

5. Meaning of “Testimony.”

In the preamble to the proposed regulations, the DOL has stated: “the proposal would also grant the claimant a right to respond to the new information by explicitly providing claimants the right to present evidence and written testimony as part of the claims and appeals process” (emphasis added). But the actual proposed regulation states that a claimant may “present evidence and testimony as part of the disability benefit claims and appeals process.” 29 C.F.R. §2560.503-1(h)(4)(i)[proposed regulation] (emphasis added). Hence, there is an inconsistency between the preamble and the proposed regulation in that the preamble specifies “written testimony” whereas the proposed regulation just says “testimony.” This could lead to costly disagreements over whether the regulation contemplates actual live testimony, i.e. a hearing. More importantly, under the current regulation, claimants can submit testimony in the form of an audio or video CD. This is useful in cases where the claimant cannot read or write so that a written statement is impossible. It is also particularly helpful in those cases where actually seeing and hearing the claimant might be important. As such, we are concerned that the reference to “written testimony” in the preamble might give plans the ammunition to disallow any audio or video submissions on the grounds that these forms of evidence do not represent “written evidence.” If this were the interpretation given to the language in the proposed regulation, it would actually put claimants in a worse position than they face at present.

6. Independence and Impartiality.

The proposed regulation regarding the impartiality of claims personnel is essential and we applaud the DOL’s effort to minimize the effect that biased individuals have on the claims and appeals process. However, the proposed regulation needs clarification in three areas. First, the proposed regulation should make clear that impartiality is ensured, even where the plan, itself, is not directly responsible for hiring or compensating the individuals involved in deciding a claim. This clarification is necessary because, as a practical matter, plans frequently delegate the selection of experts to third-party vendors who, in turn, employ the experts. Second, clarification is needed concerning which individuals are “involved.” Claims administrators often protest that physicians, or other consulting experts, are not “involved in making the decision” but merely supply information (such as an opinion on physical restrictions and limitations) that is considered by the claims adjudicator. Under this logic, plans may argue that consulting experts are not affected by the impartiality regulation. Finally, the proposed regulation should make clear that not only claims adjudicators and consulting physicians must be impartial.

Vocational experts and accountants are also frequently used in the claims process and should be included in the scope of the impartiality requirement.

In close, we think that the proposed regulations, together with our recommendations submitted herein, go a long way towards strengthening, improving, and updating the rules that are applicable to plans providing disability benefits under ERISA. We thank you for the opportunity to comment on the proposed regulations and to participate in this process.

If you have any questions, please do not hesitate to contact us.

Sincerely yours,

s/
Jennifer McCue
Director of Advocacy, United Cerebral Palsy

About United Cerebral Palsy

United Cerebral Palsy (UCP) educates, advocates and provides support services through an affiliate network to ensure a life without limits for people with a broad range of disabilities and their families. Together with nearly 100 affiliates, UCP has a mission to advance the independence, productivity and full citizenship of people with disabilities by supporting more than 176,000 children and adults every day—one person at a time, one family at a time. UCP works to enact real change—to revolutionize care, raise standards of living and create opportunities—impacting the lives of millions living with disabilities. For more than 60 years, UCP has worked to ensure the inclusion of individuals with disabilities in every facet of society. Together, with parents and caregivers, UCP will continue to push for the social, legal and technological changes that increase accessibility and independence, allowing people with disabilities to dream their own dreams, for the next 60 years, and beyond. For more information, visit www.ucp.org.