January 19, 2016

By Email (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:

I write to comment on the Employee Benefits Security Administration's ("EBSA") proposed amendments to claims procedure regulation for plans providing disability benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"). For over seventeen years, my law practice has focused on representation of disability claimants, both under ERISA-governed long term disability plans and under the Social Security Act.

One of the key differences—and source of significant traps for the unwary—between ERISA and Social Security disability cases is the potential for wildly different procedural rules from plan to plan, and case to case, in the ERISA environment. With that in mind, I applaud the EBSA's stated purpose to "improve the current procedural protections for workers who become disabled and make claims for disability benefits from an employee benefit plan." Clear procedural regulations can mitigate against case-to-case uncertainty to the benefit of all parties. With this in mind, I would address two issues of timing: contractual periods of limitation; and the effective date of proposed regulations.

I. Comment on Notice for Applicable Statute of Limitations

The DOL has invited comment in the statute of limitations issues that have developed since the Supreme Court's decision in *Heimeshoff v. Hartford Life & Accid. Ins Co.*, 134 U.S. 604 (2013). *Heimeshoff* held that "[a]bsent a controlling statute to the contrary, a participant and a plan may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as the period is reasonable." Setting aside that most disability claimants will not have experience navigating a limitations period, the holding from *Heimeshoff* is counterintuitive; no claimant ever considers that a deadline to file suit to recover benefits would be running while his or her appeal is pending.

The *Heimeshoff* decision predictably has created much confusion. This confusion is exacerbated by the fact that most group policies feature a contractual period of limitation running from when "proof of loss" is due at the beginning of a claim. Thus, *Heimeshoff* left open the

possibility that an internal limitations period could run before the appeals process is complete (even where exhaustion is mandatory). And even where the limitation period does not run completely, the passage of time during either a period where benefits were paid, or where the claimant is exhausting administrative remedies, can dramatically foreshorten the time to file suit. Claimants with final denials may face dramatically different deadlines to file suit depending on how long the insurer paid benefits before terminating them or how long the administrative appeals process took. And, perversely, the more complicated the claim, the longer the administrative appeals process took, the shorter the time that may be left to file suit after a final decision is made.

I recommend two amendments to the regulations to address the confusions created by *Heimeshoff*. At a bare minimum, the amended language should require the claims administrator to notify the claimant of the date of the expiration of any plan based limitations period. As the DOL aptly points out in the preamble to these proposed regulations, plan administrators are in a better position to know the date of the expiration of the limitations period and should not be hiding the ball from claimants if the plan administrator is functioning as a true fiduciary.

Secondly, the DOL can assist by creating standards for what is a reasonable plan-based limitations provision in the same way that the DOL used its regulatory power to create timing deadlines for the claims process in prior versions of the regulations. I recommend that the DOL clarify that no limitations period can start before the internal claim and appeals process is complete. It also makes clear that there will be at least a one-year period after the completion of the plan's appeals process in which a claimant can file suit.

The justification for these rules is that it would cut down on litigation devoted to the threshold issue of the running of the limitations period. In addition, it may well lead to a standardization of internal limitations periods that would be salutary for both claimants and plan administrators.

Accordingly, I propose amending the proposed regulation by adding a section as follows and renumbering accordingly (added language is indicated by bolding and underlining):

29 C.F.R. 2560.503-1 (j)(6) [proposed regulation]

In the case of an adverse benefit decision with respect to disability benefits— (i) A discussion of the decision, including, to the extent that the plan did not follow or agree with the views presented by the claimant to the plan of health care professionals treating a claimant or the decisions presented by the claimant to the plan of other payers of benefits who granted a claimant's similar claims (including disability benefit determinations by the Social Security Administration), the basis for disagreeing with their views or decisions; and (ii) Either the specific internal rules, guidelines, protocols, standards or other similar criteria of the plan relied upon in making the adverse determination or, alternatively, a statement that such rules, guidelines, protocols, standards or other similar criteria of the plan do not exist.

(7) In the case of an adverse benefit determination on review with respect to a claim for disability benefits, a statement of the date by which a claimant must bring suit under

502(a) of the Act. However, where the plan includes its own contractual limitations period, the contractual limitations period will not be reasonable unless:

a. it begins to run no earlier than the date of the claimant's receipt of the final benefit determination on review including any voluntary appeals that are taken;

b. it expires no earlier than 1 year after the date of the claimant's receipt of the final benefit determination on review including any voluntary appeals that are taken;

c. the administrator provides notice to the claimant of the date that the contractual limitations period will run; and

d. the contractual limitations period will not abridge any existing state limitations period that provides for a period longer than one year.

(8) In the case of an adverse benefit determination on review with respect to a claim for disability benefits, the notification shall be provided in a culturally and linguistically appropriate manner (as described in paragraph (p) of this section).

II. Effective Date of Proposed Regulation

Disability claims are unique amongst ERISA welfare benefits in that they have the potential to extend over long periods of time: years, or even decades depending on the medical condition, age of the claimant, and plan at issue. When the DOL last promulgated claims regulations in 2000, those regulations stated that they applied to "claims filed on or after January 1, 2002." 29 C.F.R. § 2560.503-1(i)(3)(i) (2002). Consequently, numerous courts ruled that with respect to claims originally filed prior to 2002, but subsequently denied or terminated after 2002, were subject to the old, rather than the new, regulations. A benefit termination in 2006 would be subject to different regulations—including very different deadlines for decision-making and appeals—if it the claim originated in 1999 versus 2002.

This effective establishment of parallel regulatory regimes for current decisions by administrators or appeals by claimants, depending on when, years ago, the claim was originally made, benefits no one while adding a layer of inconsistency and traps for the unwary. To avoid the application of the previous regulations to disability claims that are already in process before the effective date, I suggest the following text be added:

The regulations shall apply to all claims pending with the plan fiduciary on or after the date that the regulations go into effect.

Thank you for the opportunity to comment upon these important proposed regulations.

Sincerely,

R. Scott Wilson