

November 10, 2017

Public Comments (RIN 1210-AB39): "Claims Procedure for Plans Providing Disability Benefits"

Claims Procedure for Plans Providing Disability Benefits Examination
Office of Regulations and Interpretations,
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Frances P. Steen and DOL Disability Benefits Examiners:

There is no doubt the December 19, 2016 Final Rule titled, "Claims Procedure for Plans Providing Disability Benefits", clearly reflects and is 100% buttressed by the intent of the 1974 ERISA and 2010 ACA conferees representing all 535 Members of Congress and the Office of the President. The Conference Reports for these Acts, clearly reinforce every statement and determination made by the Employee Benefits Security Administration (EBSA) in the Final Rule. The Final Rule, as it is currently written, has been supported and perfected by EBSA and should not be changed, at all.

With respect to reopening the Final Rule for further comment, the Department of Labor states that Members of Congress presented the Secretary of Labor with their concern regarding the Final Rule. Although any member of the public and any Member of Congress is welcome to voice such concern, under no circumstance should 28 Members of Congress who sent a letter to the Secretary of Labor, be able to overturn the intent of the 535 Members of Congress, including the conferees who represented all 535 Members of Congress, as documented in the 1974 ERISA and 2010 ACA Conference Reports. Certainly, the Executive Orders of a President should not be able to trump, override, usurp and/or reverse the law and the intent of the conferees. The DOL must follow the law and the intent of the law, over any Executive Order that may contradict the law.

With respect to the timing of the rule, the most disturbing decision made by DOL, was the arbitrary choice to delay the implementation of the Final Rule for over a year, and now delaying the rule 90 more days. Based on the findings by the EBSA published in the December 19, 2016 Final Rule, the Agency identified severe industry abuses in the disability claims arena. For the same reasons used to justify the promulgation of the new Claims Procedures, the Agency should have promulgated the new rule as an "Interim Final Rule", effective January 1, 2017. Once it was known to the EBSA, having clearly identified significant conflicts of interest issues, and many other abuses arising from those conflicts of interest, the Agency should have immediately sought to implement

the rule, so that both the law and the intent of the ERISA and ACA conferees, could be properly effectuated.

With respect to DOL seeking comment regarding the complete withdrawal of the Final Rule, that would be unconscionable and would almost certainly result in a deleterious impact on future disability claimants. Based on the Public Comments gathered, summarized and presented by the EBSA, the Agency may have unintentionally created a “Playbook” to further tilt the claims review procedures in favor of the claims adjudicators. Unintentionally, EBSA has provided guidance for how a fiduciary may incentivize those involved in the claims review process to best deny claims. Basically, the EBSA published a methodology that may be used as an instrument to more easily deny disability claims. To withdraw the rule, at this stage, would be unjustifiable and disturbing.

Based on the ferocious resistance from the plan administrators, demanding the Final Rule be opened up again for Public Comment, this reveals just how much of a premium the plan administrators place on their secrecy. The plan administrators argue that complying with the new Claims Procedures will be more expensive. However, there should be no additional cost for a plan administrator to be transparent and truthful regarding a decision to deny a claim. In fact, being truthful with regard to a claims denial, may actually reduce the number of lawsuits. One of the main reasons lawsuits are filed today, is because people are not given access to the truth. If the truth were provided, there may be even more reason not to file a lawsuit. Certainly, there are two reasons for secrecy. First, the plan administrators are hopeful once a claim is denied, the claimant will just go away. Next, the plan administrators do not want to reveal the strength of their rationale used to deny a claim. The plan administrators believe that if the rationale to deny a claim is very weak, more lawsuits may be filed against them. Certainly, it would not be the intent of the law or the conferees, to encourage DOL to create rules for the purpose of denying legitimate disability claims.

Of the many employee benefit laws established by the Employment Retirement Income Act (ERISA) of 1974, perhaps no other employee benefit law reveals a more “special nature and purpose” than the laws written for employee disability benefits arising from ERISA. In addition to the original intent by Congress to bar the use of “speculation”, whether in the investment arena or in the disability claims arena, as revealed by its choosing to use the “Prudent Man Standard”, just as important as that standard, the conferees chose to make their feelings known, just how “special nature and purpose” employee benefits are considered by Congress. Additionally, the conferees stated how they “expect the courts [and federal agencies like DOL and EBSA] to interpret the prudent man rule” in connection to employee benefit plans (No. 93-1280, 302 official page number in 1974-3 Conference Report section).

Starting in 1974, in light of the “special nature and purpose” that Congress holds the wellbeing of the nation’s employees, as evident by the utilization of the “prudent man” governing standard, almost certainly this reveals Congress’s intent for claims adjudicators responsible for reviewing objective medical evidence for the purpose of approving or denying disability claims. However, even more importantly, is what the Conference Notes do **not** say with regard to the intent of the conferees. Most notably, nowhere in the 1974 Conference Notes do the conferees hint or imply,

that the objective medical evidence provided by a claimant must approach a level to be near immaculate, indisputable, or the like. This is the central issue when adjudicating disability claims.

Certainly, all medical evidence should be reviewed with reasonable care, skill, prudence and diligence, but the use of *speculation* is *prohibited* by law. No doubt, the conferees intended for claimants to provide objective medical evidence to those who manage disability insurance plans, when filing a claim. However, just as importantly, the conferees also intended for those who review the objective medical evidence in connection to a disability claim, to avoid the use of speculation. In part, the conferees, chose to discourage the use of speculation with regard to the administration of employee benefit plans, because of the “special nature and purpose” the Congress holds the wellbeing of the nation’s employees. This is why the conferees chose the “Prudent Man Standard”.

Next, to clearly understand the intent of Congress, upon reviewing the 1974 ERISA Conference Report and the 2010 ACA Conference Report, it is also important to note that the conferees did **not** state it was their intent to place all burden of proof entirely on the claimant. If it was the intent of the conferees to place all burden of proof entirely on the claimant, the conferees would have said so. Clearly, based on the law and intent of the conferees, all claims must be reviewed in this legal light.

Certainly, it is the speculative nature and lack of independence and impartiality, that elevates the anxiety of a claimant. Apparently, according to EBSA, there are plan administrators out there, who are providing bonuses based on the number of denials made by a claims adjudicator, which is abhorrent. No doubt, such concern and anxiety is completely justified, especially since the claimant most likely does not have the financial resources to sustain an extended period of time necessary to appeal a claim. Clearly, time works against the claimant. Those who read the December 19, 2016 Final Rule, “Claims Procedure for Plans Providing Disability Benefits”, will see a confirmation of these serious concerns, specifically reflected in the EBSA’s key findings, which is remarkable:

Federal Register (12/19/2016)

Claims Procedure for Plans Providing Disability Benefits (B)(1)

Independence and Impartiality—Avoiding Conflicts of Interest:

This final rule requires that decisions regarding hiring, compensation, termination, promotion, or similar matters with respect to any individual must not be made based upon the likelihood that the individual will support the denial of disability benefits. For example, a plan cannot provide bonuses based on the number of denials made by a claims adjudicator. Similarly, a plan cannot contract with a medical expert based on the expert's reputation for outcomes in contested cases, rather than based on the expert's professional qualifications. These added criteria for disability benefit claims address practices and behavior which cannot be reconciled with the “full and fair review” guarantee in section 503 of ERISA, and with the basic fiduciary standards that must be followed.

Based on the Final Rule as written above, the EBSA's implementing guidance properly moves the requirement of "Independence and Impartiality" to a point more consistent with the intent of the original conferees who wrote ERISA in 1974, specifically regarding (1) the "Prudent Man Standard" and (2) a requirement for the fiduciary to review the substantive and objective medical evidence without speculation. Furthermore, the December 19, 2016 Final Rule better reflects the intent of Congress, as reconciled with the "full and fair review" guarantee in section 503 of ERISA. Certainly, this Final Rule promulgated by EBSA, best represents the original intent of the 1974 ERISA Conference Report and sentiment of the conferees, as to how "special in nature and purpose" employee benefits are held, including disability benefits. No person or court of law would disagree.

After reviewing the Public Comments originally submitted regarding the new Claims Procedures, many of which were submitted by the nation's most experienced disability law practices that have been instrumental in shaping the nation's ERISA laws, through case law, that several firms were a party to, a common theme was crystal clear, and repeated over and over again, regarding the prior / preceding Claims Procedures. Example after example was provided, revealing just how faulty the Claims Procedures are today, and how they are unintentionally encouraging a total disregard for "independence and impartiality" during the claims review process, and are being misused, and are creating conflicts of interest among the many parties connected to the review process, including fiduciaries, adjudicators, doctors, vocational experts, etc. Again, all extremely disturbing tales.

No doubt, the firms submitting Public Comments are among the most talented anywhere, with the best of the best disability benefit law firms being located in Washington, D.C. Certainly, it is the D.C. area firms that are the most familiar with the intricacies of federal law, how it works, and that best understand the law is *always* about intent. In fact, these firms understand exactly why the congressional Conference Notes are so important. With respect to ERISA, the Conference Notes are critical to understanding the intent of the conferees. As the Department knows, the D.C. firms in lieu of going to court, often times will go straight to Congress to have the laws changed, or just as importantly, similar to the implementation of the new ERISA Disability Claims Procedures Final Rule, promulgated on December 19, 2016, these firms will work with a Department to have the key implementing guidance corrected. Certainly, many of the law firms who knew to submit Public Comments, were a party to key ERISA decisions over the past 43 years. Although these law firms may be located in Washington, D.C., they represent disability claimants outside of D.C., nationwide.

With respect to the DOL's October 12, 2017 decision to delay the implementation of the rule for an additional 90 days, that decision, no doubt, trampled upon a key component of ERISA and trampled upon the explicit intent of the 1974 conferees, as revealed in the 1974 ERISA Conference Report, specifically in relation to independence and impartiality, as discussed below in the Final Rule:

Federal Register (12/19/2016)

Claims Procedure for Plans Providing Disability Benefits (B)(1)

Independence and Impartiality:

Consistent with the ACA Claims and Appeals Final Rule governing group health plans, paragraph (b)(7) of this final rule explicitly provides that plans providing disability benefits “must ensure that all claims and appeals for disability benefits are adjudicated in a manner designed to ensure the independence and impartiality of the persons involved in making the decision.”

Obviously, the key purpose of the Final Rule was to, “ensure the independence and impartiality of the persons involved in making the [claims approval or denial] decision.” Clearly, this EBSA guidance is 100% aligned with the 1974 ERISA conferees stating how they “expect the courts [and federal agencies like the Department of Labor and the Employee Benefits Security Administration] to interpret the prudent man rule” in connection to the nation’s employee benefit plans. Certainly, a “prudent man” [fiduciary] must ensure the “independence and impartiality” of those involved in reviewing disability claims. Obviously, according to EBSA’s own findings, this has not been the case over the past 10 years, which is why the new Final Rule was promulgated and is needed.

Certainly, it is important to recognize, the EBSA must have believed industry-wide abuse was so prevalent, the Agency determined that a new “Claims Procedure” was warranted, even without any recent legislative changes to ERISA. In fact, the EBSA stated in the Federal Register, that “The Department’s determination to revise the claims procedures was additionally affected by the aggressive posture insurers and plans can take to disability claims coupled with the judicially recognized conflicts of interest insurers and plans often have in deciding benefit claims”.

Furthermore, based on input from the ERISA Advisory Council, coupled with what the Agency discovered through the public comments it received, EBSA learned the prior claims procedures, even though intended to protect participants, were not working as intended. This key EBSA finding, is revealed within the following claim made by the EBSA, found in the Final Rule:

The Council was made aware of recurring issues and administrative practices that participants and beneficiaries face when appealing a claim that may be inconsistent with the existing regulations” and administrative law. In fact, the Department believes that this action was necessary to ensure that disability claimants receive a full and fair review of their claims, as required by ERISA section 503, under the more stringent procedural protections that Congress established for group health care claimants under the ACA and the Department’s implementing regulation at 29 CFR 2590.715-2719 (“ACA Claims and Appeals Final Rule”). This final rule will promote fairness and accuracy in the claims review process and protect participants and beneficiaries in ERISA-covered disability plans by ensuring they receive benefits that otherwise might have been denied by plan administrators in the absence of the fuller protections provided by this final regulation. The final rule also will help alleviate the financial and emotional hardship suffered by many individuals when they are unable to work after becoming disabled and their claims are denied.

It must be noted, that in light of the rampant abuses identified by EBSA, it is curious EBSA chose to implement the new rule as a Final Rule, rather than an "Interim Final Rule", choosing to delay the implementation of the rule until January 1, 2018. Certainly, in reviewing the EBSA's own rationale and logic for promulgating the new Claims Procedures, one could argue the new rule should have been promulgated as an "Interim Final Rule", not a Final Rule, which would have made the rule effective immediately upon publication. It is indisputable that the same "good cause" found by the EBSA to promulgate the rule change, could have also been used to justify the promulgation of an "Interim Final Rule", as well. The logic is so intertwined, there is no way it could be uncoupled.

With respect to further delay of the Final Rule to April 1, 2018, this decision, no doubt, tramples upon the intent of the 1974 ERISA and 2010 ACA conferees. Based on the law and the intent of the conferees, the proper solution would be to immediately promulgate an "Interim Final Rule". To be fair to all respective parties, the following "Interim Final Rule" should be promulgated without delay:

INTERIM FINAL RULE (Proposed):

The amendments made on December 19, 2016, shall become applicable to claims for disability benefits that are filed after April 1, 2018, or any disability claim denied from January 1, 2017 thru December 31, 2018.

This proposal represents the most reasonable and fair rule for all parties, supported by law and the intent of the conferees, for the transition between Claims Procedures. Having the date range through December 31, 2018 for denied claims only, which includes claims filed prior to April 1, 2018, eliminates any possible deleterious impact on those claimants impacted by any conflict of interest or harmful action performed to deny a claim. If the December 31, 2018 date were to be set to April 1, 2018 for those who filed a claim between January 1, 2017 and April 1, 2018, almost certainly, there would be adjudicators who would rush to deny as many claims as possible prior to April 1, 2018. The date range must be from January 1, 2017 thru December 31, 2018 for all denied claims.

NOTE: Not one single disability claim that was properly denied during this period, would be reversed, as a result of the Interim Final Rule being retroactive back to January 1, 2017 and forward thru December 31, 2018. Only claims *improperly* denied would be reversed.

Here is the key legal question: How can the intent of ERISA, as reflected by the 1974 ERISA and 2010 ACA conferees not be extended to those who should have been protected by ERISA all along, once the EBSA was made aware of rampant industry wide abuses? Unquestionably, to deprive someone who had their claim denied starting January 1, 2017, would trample upon the intent of the conferees and the law. How can the EBSA, in good conscience, not extend the "fuller protections provided by the final regulation" to all those who had their claim denied between January 1, 2017 and December 31, 2018. Certainly, there can be no rational reason based in law, to the contrary.

Based on the 1974 ERISA conferees who noted just how “special nature and purpose” employee disability benefits are to the Congress, certainly the Department of Labor must be extraordinarily sensitive in this regard, ensuring the rule of law and its full intent be observed. Certainly, the “Interim Final Rule (Proposed)”, herein, to DOL above, best reflects (1) the intent of the conferees implementing the ERISA law required by section 503, consistent with the 1974 Conference Report, (2) the intent of the Congress under the more stringent procedural protections that Congress established for group health care claimants under the ACA and (3) the EBSA’s December 19, 2016 Final Rule, all consistent with the intent of ERISA law, as reflected by the 1974 Conference Notes.

In addition to the above, the EBSA pointed to existing federal law, “adopting certain procedural protections and safeguards for disability benefit claims that are currently applicable to claims for group health benefits pursuant to the Affordable Care Act”, to serve as guidance for this new rule. Although the EBSA has referenced Executive Orders for the timing of the Final Rule, giving plan administrators a reasonable amount of time to implement the new changes, it is important to note that the original intent of the 1974 ERISA and the 2010 ACA conferees, as reflected in the Conference Reports, was trampled upon by this delay, based on the decision to EXCLUDE those who may have had a disability claim denied between January 1, 2017 and December 31, 2018. As DOL knows, often as a result of a change in law, the conferees will express their expectations regarding the timelines of such changes, by requesting an Agency implement changes “expeditiously and without delay” and many times, retroactively. The EBSA’s decision to update the Claims Procedures without such guidance, and to establish January 1, 2018, as the date of promulgation, was derived, in part, as a result of following statement reflected in the Final Rule:

The Department's experience since 2000 with the Section 503 Regulation and related changes in the governing law for group health benefits led the Department to conclude that it was appropriate to re-examine the rules governing disability benefit claims.” The Department's experience acknowledges the existence of, “Insurers and plans looking to contain disability benefit costs [that] may be motivated to aggressively dispute disability claims. Concerns exist regarding conflicts of interest impairing the objectivity and fairness of the process for deciding claims for group health benefits. Those concerns resulted in the Affordable Care Act recognizing the need to enhance the Section 503 Regulation with added procedural protections and consumer safeguards for claims for group health benefits.

Certainly, by implementing the proposed “Interim Final Rule” offered herein, to protect all claims denied between January 1, 2017 thru December 31, 2018, by extending the benefits of the new Claims Procedures, would not only ensure legal compliance with ERISA, it would ensure that full and fair consideration is extended to all disability claims, by allowing ready access to the relevant evidence and standards, while ensuring the impartiality of the persons involved in each claim that was denied, and would provide all denied claimant’s notice and a fair opportunity to respond to the evidence, rationales, and guidelines for each important decision made by the adjudicator, to make certain the basis for such decisions are fully and fairly communicated to those who have a claim denied, during this limited period of time. This would ensure all recently denied claims will be in full compliance with ERISA section 503. Clearly, the new Claims Procedures reflect the Department’s

best understanding for how to best comply with ERISA section 503, therefore, any Final Rule must apply to all recently denied claims between January 1, 2017 thru December 31, 2018. Since the new Claims Procedures best reflect the requirements of ERISA law, case law, and the intent of the conferees, all recently denied claims must be granted all the privileges of the new rule.

It is important to note, that the intent of the conferees writing both ERISA and ACA, would not have supported such an arbitrary decision made by DOL, to allow known industry wide abuses to continue, once the Department was made fully aware of such abuses. Furthermore, the conferees would not have supported any DOL implementing guidance that would knowingly harm those who have been denied their disability benefits for claims denied between January 1, 2017 and December 31, 2018, which is the relevant period of transition between the two Claims Procedures. DOL must promulgate the following “Interim Final Rule”, to ensure that justice under the law is extended to all:

INTERIM FINAL RULE:

The amendments made on December 19, 2016, shall become applicable to claims for disability benefits that are filed after April 1, 2018, or any disability claim denied from January 1, 2017 thru December 31, 2018.

Almost certainly, promulgating a Final Rule on December 19, 2016 and making that rule effective over a year later, resulted in a deleterious impact on those filing disability claims during 2017. These claimants were not only denied the “fuller protections of the final regulation”, the plan administrators were unintentionally motivated to deny as many claims as possible during 2017, knowing that denying claims starting in 2018, may be more difficult. The proper determination, after now having reopened the Final Rule for comment and delaying a perfected Final Rule for an additional 90 days, must be to make the rule retroactive back to January 1, 2017, for any claim denied, all the way thru December 31, 2018. Almost certainly, once the agency was made aware of the industry wide abuse, an “Interim Final Rule” should have been promulgated on January 1, 2017. Making the rule retroactive resolves any and all legal implications, connected to the prior decision.

Almost certainly, the 1974 ERISA and 2010 ACA conferees, representing all 535 Members of Congress, would have expected those people who may have had their claims improperly denied between January 1, 2017 thru December 31, 2018, to have an opportunity for their claims to be reopened and re-reviewed, using a more proper interpretation of the “intent” of the law, rather than having these claims denied forever, as a result of a faulty set of Claims Procedures, acknowledged publicly in the Final Rule, by the Department of Labor, the Employment Security Benefits Administration and the ERISA Advisory Council, as understood to be severely flawed. Not only did the EBSA publicly determine that the Claims Procedures were severely flawed, the courts have also acknowledged the same, as documented by the EBSA Final Rule.

In summary, there are four critical issues identified herein, that I am hopeful DOL will acknowledge:

First, the Department must not withdraw its Final Rule, with regard to the Claims Procedures. That would be absurd and trample upon ERISA law and ERISA case law, as well as the intent of the conferees as revealed in the 1974 ERISA and 2010 ACA Conference Reports. The DOL must follow the law and the intent of the law, over any Executive Order that may conflict with the law.

Second, since DOL has discovered rampant industry-wide abuse in the disability claims arena, to pretend such abuse has not been documented and published in the Final Rule, would be improper.

Third, nowhere in the 1974 ERISA Conference Notes do the conferees ever hint or imply, that the objective medical evidence provided by a claimant must approach a level to be considered near immaculate, indisputable or the like. DOL should acknowledge this fact in the Claims Procedures.

Fourth, rather than rewarding those plan administrators that may have trampled the legal rights of people who may have had their claims improperly denied between January 1, 2017 through December 31, 2018, these claimants must be given proper consideration to receive the “fuller protections provided by the final regulation” to have their claims properly re-reviewed. The DOL obviously had no problem finding the legal basis to reopen and delay this Final Rule, therefore, should have no problem accepting the legal basis offered herein, to reopen these denied claims.

In the past, having had the privilege of working with the Chairman and Ranking Member of the Senate Defense Appropriations Committee and the Defense Acquisition Regulatory Council, to pass important DoD procurement legislation, followed by the DFARS implementing guidance, I was given the rare opportunity to go through the end-to-end process, from enacting legislation through the promulgation of a Final Rule. Certainly, the most important lesson I learned, was that “intent” of the conferees was critical. Obviously, President Trump wants to cut regulations, but regulations cannot be cut when the purpose of the regulations are to effectuate the intent of the law and the conferees. Based on how DOL is interpreting the EO referenced in the Final Notice, to reduce regulations, all future legislation passed by Congress would need to include the implementing guidance detailed in the Conference Report (i.e. Disability Claims Procedures, DFARS rules, etc.), which would not be practical or logical. Given the choice between promulgating Final Rules that reflect the guidance of an EO vs. the law and the intent of the conferees, the law must prevail. As the DOL struggles through this reality, today’s Claims Review procedures continue to cause harm.

No doubt, the Department is now, “Up to its eyeballs in alligators”, with the promulgation of a Final Rule a year ago, and then delaying the implementation of the Final Rule an additional 90 days, all driven by an Executive Order that appears to directly conflict with ERISA law, the ACA law, and the intent of the conferees representing the 535 Members of Congress, as reflected in the 1974 ERISA and 2010 ACA Conference Reports. The most logical, rational and sensible solution, would be for DOL to make the proposed “Interim Final Rule”, as presented herein, effective January 1, 2018.

Certainly, the Plan Administrators have been prepared for a January 1, 2018 start date for this Final Rule. As part of the “Interim Final Rule”, the Department could extend the Public Comment period thru April 1, 2018, and then make a determination whether or not to make further changes

to the “Interim Final Rule”. Almost certainly, the courts would support this rationale and logic, as well as the rationale and logic to make the rule retroactive back to January 1, 2017, for those who may have had their disability claims improperly denied, even though the DOL knew of rampant industry abuse.

I very much look forward to reading the Department’s response to the arguments, logic and rationale contained, herein. The implications will be applicable to the entire rules making process, for every federal agency and/or department, as to whether or not an Act of law or an EO is superior.

There are many people out there depending on the DOL to make this right, including me. The Disability Claims Review process must be transparent and free of conflicts of interest, no doubt.

Sincerely,

Carl Perkins, LXXIV