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## General Comment

Re: Employee Benefits Security Administration (EBSA)  
Proposed Rule: Claims Procedure for Plans Providing Disability Benefits  
29 CFR Part 2560  
RIN 1210- AB39  
29 C.F.R sect. 2560-503-1

Dear Assistant Secretary Borzi:

Based on my observations and experiences representing individuals as beneficiaries or participants in ERISA welfare benefit plans since Pilot Life's arrival in 1987, may I ask you to take these few comments into consideration in regard to the above.

Perhaps no more apt introduction could be found than on Page 72020 of the Federal Register, where under "Benefits" it is stated:

"In addition, it could prove costly to a participant to hire a lawyer to provide an interpretation that should be readily available to the plan at little or no cost. Accordingly, the Department solicits comments whether the final regulation should require plans to provide claimants with a clear and prominent statement of any applicable contractual limitations period and its expiration date for the claim at issue in the final notice of adverse benefit determination on appeal and with an updated notice if tolling or some other event causes that date to change."

Hiring a lawyer is in my view a critical part of the process for any participant or beneficiary. The federal courts have required participants and beneficiaries to participate in a process pursuant under a court doctrine called the "exhaustion of administrative remedies." The irony is that there is no administrative agency charged with hearing the participants' appeals. In my opinion the courts have created a legal fiction designed to force the unwitting ERISA benefit claimant to participate in a process where what is not being explained and what is not being done to provide the participant a full and fair claims handling and review process is left to be uncovered, if possible, after the fact by experienced attorneys acting on behalf of those participants after-the-fact and at the denied claimants' own expense.

The only effective way to provide a plan participant access to the administrative process is for their to be some provision for an award of attorney fee for work done on behalf of the participant pursuant. Having endorsed implicitly as a "benefit" that the participant could avoid the expense of having effective legal representation the Department has in effect inserted itself into the fray on behalf of the plans and in a position adverse to that of the claimants.

The language employed by the Department in the proposal, e.g. at page 7026 in reference to subsection (b)(7), "adjudicated in a manner," ironically it seems elevates the erstwhile "nonadversarial" process by implication to a quasi-judicial agency decision. The decisions of the Administrative Law Judges in the Social Security appeals process are what immediately and inescapably come to mind.

Far from encouraging the federal courts to take corrective measures to remedy unfair claims processing, this language appears to provide a disincentive to the federal courts to become involved. "Ready access" to the federal courts is what ERISA was intended to provide, not ever more convoluted claims processing steps, with each one more challenging and daunting for the participant to attempt.

I have found that what often has happened to claimants is that the plans have not provided a glimmer of hope for them to comprehend what is not being provided to them in the claims process. Not only is specifically required information not being provided in the

notifications in writing already required by the claims procedure regulation, in many instances it is not at all clear what the plans or their insurers have been addressing in supposedly applying the provisions of the plans. A glaring example is the common approach of measuring nothing more than "functionality" in the sense of the ability to move a body part when supposedly attempting to determine whether a participant can perform any or all of the substantial duties of his or her regular occupation. The underlying assumption is apparently that anyone whose body functions can perform whatever duties, be the material or substantial or not, which he or she had been required to perform in his or her regular occupation. In this situation pain is not questioned as to whether it is reasonably consistent with the observations of the participant's physicians on examination or by the results of laboratory or other objective tests. Pain is simply disregarded. However, the plan provisions do not purport to disregard pain. Money was paid to the plan or its insurer on the premise that the insurer would if called upon provide for a disability as set forth in the plan's provisions, not by changing the question after the fact.

In short, some provision for attorney fees for the participants must be included in the revised regulation. Failure to do so leaves the participants without claims procedures that are meaningful.