

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

November 21, 2017

DOL Disability Benefits Examiners:

When reviewing the December 19, 2016 "Claims Procedures Final Rule", the DOL Disability Benefits Examiners must evaluate this rule looking through the lens of (1) the ERISA statute, (2) case law, and most importantly, (3) the words written by the 1974 ERISA conferees as documented in the 131 page Conference Report (link provided below). Although Executive Orders and Public Comments may be important, such Orders and Comments are only relevant when they reflect the law and the intent of the law, and do not trample upon the intent of the law as revealed by the Conference Report conferees. Without question, the intent of the law, as reflected by the conferees, is the most important factor when evaluating the ERISA Claims Procedures Final Rule.

Over and over again, in the 1974 Conference Report, the conferees refer to the "Prudent Man Rule", as their guiding principle that every decision by the fiduciary and/or his Assignee, must comply with. Also, the conferees stated many times, that every decision made by a fiduciary and/or his Assignee must be made "prudently and in the interest of the participants and the beneficiaries". When reviewing the "Claims Procedures Final Rule" through this lens, coupled with the many abuses identified by the Employment Security Benefits Administration (EBSA), it becomes clear this Final Rule reflects the requirements of federal law and reflects the intent of ERISA law, as revealed by the conferees. Certainly, any fiduciary and/or their Assignees, paying adjudicators bonuses based on the number of denials they make and/or hiring experts based on the expert's reputation and likelihood to support claim denials, was absolutely NOT the intent of the conferees. These industry-wide abuses, as well as the other shenanigans revealed by EBSA, on December 19, 2016, are abhorrent, unlawful and just not right.

Without doubt, the December 19, 2016 Final Rule is 100% consistent with ERISA and the intent of the conferees. In the Final Rule, the DOL Disability Benefits Examiners must now reaffirm the expressed demands of the conferees and ensure that all fiduciaries and/or their Assignees are (1) following the Prudent Man Rule and (2) following the conferee requirement that every ERISA decision must be made prudently and in the sole interest of the participants and the beneficiaries. The new Final Rule aligns with these requirements and should be promulgated as an Interim Final Rule, without further delay.

Since DOL and EBSA have both certified the pre-December 19, 2016 Claims Procedures to be legally defective and faulty, an Interim Final Rule should be promulgated retroactively back to January 1, 2017. Disability claimants denied their rights using Claims Procedures known to be legally defective and faulty by DOL, EBSA, by the fiduciaries and their Assignees who are not acting prudently, is an egregious violation of the law, and the intent of the law, as reflected by the conferees.

I would respectfully request each Examiner to download the 1974 Conference Report. The U.S. Government Publishing Office has made the complete "Internal Revenue Cumulative Bulletin 1974 [3]" available for download, which includes the Conference Report, in PDF format found at:

[www.gpo.gov/fdsys/granule/GOVPUB-T22-ee2c4caebb24235e8dfb1a5ff7ced434/GOVPUB-T22-ee2c4caebb24235e8dfb1a5ff7ced434-3/content-detail.html](http://www.gpo.gov/fdsys/granule/GOVPUB-T22-ee2c4caebb24235e8dfb1a5ff7ced434/GOVPUB-T22-ee2c4caebb24235e8dfb1a5ff7ced434-3/content-detail.html)

The Conference Report is found on pages 416 thru 547, as originally published in the bulletin. I respectfully request that the DOL Disability Benefits Examiners start with the "Establishment of Trust" clause on page 459 of the document, and read all the way through the clause titled, "Basic Fiduciary Rules", that start on page 463, under the section titled, "Prudent Man Standard". I respectfully request that the Examiners please recognize a key demand of the conferees, specifically stating that, "In implementing the procedures of the plan, fiduciaries must act prudently and in the interests of participants and the beneficiaries."

While reviewing the relevant details found on pages 459 thru 463, I am certain the Examiners will determine that the December 19, 2016 "Final Rule", clearly reflects the law and the intent of the law, as revealed by the 1974 Conferees. The only remaining issue is the delayed implementation of the Final Rule. Such delay would not reflect the intent of the conferees.

Last, it is important the Examiners reaffirm all demands made by the conferees, that were explicitly written and intended to guide the (1) Department of Labor, (2) the courts and (3) the fiduciary and/ or his Assignees, with respect to the ERISA "implementing procedures". The conferees demanded that all implementing procedures follow the "Prudent Man Standard", which also includes the DOL ERISA Claims Procedures as promulgated in the Final Rule.

Certainly, any Public Comment received by DOL that does not shed light on the law or the intent of the law, as reflected by the 1974 conferees in the ERISA Conference Report or case law, must be evaluated by the DOL Examiners with severe scrutiny. I respectfully request the intent of the ERISA conferees be acknowledged by the DOL Examiners and the Final Rule be promulgated as an Interim Final Rule retroactive back to January 1, 2017, the date EBSA should have implemented the new rule based on EBSA knowledge of rampant, industry-wide abuse. Unfortunately, DOL is treating the ERISA Claims Procedures, as if the Department were promulgating procurement rules and regulations. If the Department does not make the Claims Procedures retroactive back to January 1, 2017, then the Department will have intentionally created two classes of disability claimants, a "Protected Class" and a "Non-Protected Class".

Certainly, the conferees expected the courts and the Department to recognize how special nature employee benefits were to the Congress. The conferees would have never tolerated the Department creating two classes of disability claimants, and neither should the courts or the Department itself. Often, the approval of a disability claim is a matter of life and death for the

beneficiary. DOL must recognize this fact, recognize the intent of the conferees, and immediately promulgate an Interim Final Rule making it retroactive back to January 1, 2017.

The DOL must stop promulgating rules as if it were promulgating procurement rules, like delaying the effective date of the Final Rule by an additional 90 days. Once EBSA learned that the Claims Procedures were legally defective, it should have acted immediately, not waiting an entire year to make the Claims Procedures effective and then delaying those rules another 90 days. Although I commend the DOL for developing the new Final Rule, the decision to delay the implementation by over a year, and then an additional 90 days was unjustifiable. Furthermore, from time to time, DOL should observe the same guidance provided by the conferees regarding the periodic review required of the fiduciary and/or his Assignees, and apply those same requirements to DOL review of the ERISA Claims Procedures. Waiting over a decade to review such requirements would not be the intent of the conferees.

If there is one basic demand made by the conferees that should be communicated in the Interim Final Rule, it would be that, "In implementing the procedures of the plan, fiduciaries must act prudently and in the interests of participants and the beneficiaries." Based on the industry-wide abuses identified by EBSA, this key intent of the conferees should be reinforced by DOL with the fiduciaries.

Sincerely,

Concerned Disability Claimant / Beneficiary