



December 11, 2017

BY ELECTRONIC MAIL

Office of Regulations and Interpretations,
Employee Benefits Security Administration
Department of Labor

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

Dear Deputy Assistant Secretary Hauser:

I am writing to request that the Department not modify or further delay the final disability claims regulations (Final Regulation on Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016)) that are now scheduled to go into effect on April 1, 2018.

I have been in private practice representing individuals seeking their disability benefits for over fifteen years. The majority of my practice involves representing clients who have disability insurance policies through their employment that are governed by ERISA. I have represented hundreds of clients who have had their ability to understand an adverse decision by an insurance company directly impacted by the Department's regulations setting forth their rights to obtain information relevant to the rationale for the decision made on their claim.

There are two issues I wish to address in my comments. First, the industry's allegation that there will be an increase in cost associated with the claims regulations and second, that providing the right to review and respond to new evidence or rationale from the claims administrator during the appeal is costly.

No Increase in Cost

The insurance industry claims that the rules will increase costs and therefore premiums will increase and negatively affect individuals access to disability benefits. A review of existing data proves this to be inaccurate.

All data points to the conclusion that access and participation in employer-based disability insurance has *increased*, not decreased, between 1999 and 2014. This is demonstrated in the

Department's own Bureau of Labor Statistics, <https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm> It is crucial to note that this participation level increased at a time in which despite the 2000 disability claims regulations and subsequent court decisions that addressed issues addressed in the current regulations, for example deemed exhaustion, the need to discuss and explain adverse benefits decisions, and the participants right to respond to new evidence. It seems that any new data from the insurance industry that is contrary to the existing data is suspect.

All the rules are critical to providing claimants with a full and fair review of their claim for benefits. It is also important to keep in mind that the BLS data shows that the cost of disability insurance is extremely modest, so any alleged cost increase is unlikely to have any effect whatsoever, and the benefits of the rules far outweigh any alleged increase in cost.

Providing a right to review and respond will not increase cost

The benefit of proving the right to review and respond by a claimant to new evidence or rationale from a claims administrator during an internal appeal far outweighs any alleged cost. It is not possible for a claimant to have a fair claim review by an insurance company if that claimant is unaware of and not given the rationale for the denial of benefits and an opportunity to respond to it in a substantive way. The industry claims this rule is costly. I argue that there is no cost associated with the rule, and in fact the opposite is more likely true- it is more costly to not have the rule at all.

This rule gives claimants the right to respond to an administrator's rationale for denying his or her claim and allows the response to be part of the record if there is any litigation that ensues. This is vitally important and critical to any future resolution of the matter as most ERISA cases are decided on a closed record. By way of example, I am litigating a case now in the United States District Court, District of Massachusetts, where this very issue is presented. My client was not given the right to respond to the insurance company's last rationale for denying her appeal. We attempted to communicate with the insurance company and asked it to review her response and it refused. Litigation ensued and now a motion will be presented to the court asking it to resolve the matter of what belongs in the record. In addition, the court, if it believes the insurance company should have allowed my client the opportunity to respond, may choose as a remedy to remand the matter back to the insurance company to undertake the review that this very rule contemplates. This is an example of how it is less costly for the insurance company to have allowed my client a response while the appeal was still pending rather than spend judicial resources to decide the matter after the fact.

The insurance industry's comments that a second appeal serves the same purpose is not accurate as a second appeal gives the claims administrator the same sandbagging opportunity as the first appeal and therefore does not solve the problem of not allowing a claimant to respond substantively to the rationale being offered to deny his or her claim. In fact, if the claimant has a substantive right to respond, it would obviate the need for any second appeal, and costly litigation as explained above.

In the end, there is no higher cost associated with this rule. It only removes the industry's ability to withhold information that would help claimants respond substantively to the rationale

Department of Labor
December 11, 2017
Page 2 of 2

they are being presented with as the basis to deny his or her appeal. The only loss to the insurance industry is the loss of the ability to give a new reason for denying a claim and not allowing any response to that new rationale.

Thank you for taking the time to consider my comments. If you have any questions or would like to discuss these issues further, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Katherine Sullivan". The signature is fluid and cursive, with a long horizontal stroke at the end.

M. Katherine Sullivan