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Employers Beware: Recent Cases Heighten the Scrutiny Courts Give Benefit Determinations under ERISA

By Cynthia L. Sands, Esq.

Following the U.S. Supreme Court's decision last year in *MetLife v. Glenn*,[1] in which the Court determined that a "structural conflict of interest" exists when an employer "both funds the [employee benefit] plan" and "evaluates the claims", employers are cautioned to examine the claims administration procedures of their employee benefit plans governed by the Employee Retirement Income Security Act of 1974[2] ("ERISA"). It is important for administrators and fiduciaries to know what factors courts in the Ninth Circuit will consider in determining the amount of weight to afford a benefit denial decision when a structural conflict of interest is present.

Courts employ two different standards when reviewing benefits decisions made by administrators of ERISA plans. A denial of benefits under ERISA is reviewed under a 'de novo' standard unless the administrator or fiduciary has discretionary authority to determine eligibility for benefits or to construe the terms of the plan.[3] In contrast, "[w]hen a plan unambiguously gives the plan administrator discretion to determine eligibility or

construe the plan's terms, a deferential 'abuse of discretion' standard is applicable."[4] The majority of ERISA plans fall into this second category.

However, when the administrator of an ERISA plan both funds the benefits and makes the final benefit decision and gives the administrator discretion in making claims decisions, an inherent structural conflict of interest exists in the administration of the benefit plan.[5] Pursuant to *MetLife v. Glenn*, courts reviewing decisions under these types of plans must now consider the amount of weight to afford a structural conflict of interest, in addition to "procedural irregularities" in reviewing a claims decision.[6]

Courts in the Ninth Circuit (covering California, Oregon, Washington, Nevada, Arizona, Montana, Idaho, Hawaii and Alaska) must consider numerous case-specific factors to determine "the nature, extent, and effect on the decision-making process of any conflict of interest".[7] Courts may consider evidence outside of the "administrative record"[8] in making this determination. Many factors that courts have found to warrant a high amount of skepticism are common when administrators of ERISA plans determine eligibility for short and long term disability. These factors include:

- Whether the administrator "grapple[d] with the SSA's disability termination,"[9] where the plan requires a claimant to apply for Social Security disability benefits and deducts the amount of those benefits from the amount of the benefit under the plan;[10]
- Whether the plan required further degeneration of the disabling condition to continue to receive existing disability benefits,[11] or whether it terminated existing disability benefits without any sign of improvement and without an adequate explanation;[12]
- Whether the administrator or the physician reviewing the claim considered all of the medical evidence provided by the claimant, including the claimant's self evaluation of pain;[13]
- Whether the administrator selected a reviewing physician who has - or belongs to a group with - a financial incentive to submit favorable reports to the plan;[14] and
- Whether the administrator placed greater emphasis on evidence demonstrating a claimant's ability to work over evidence

demonstrating a claimant's inability to work.

In light of the numerous factors the Ninth Circuit considers in determining the amount of weight to afford a structural conflict of interest and procedural irregularities, it is important for employers to carefully examine all facets of the claims review process and consider all evidence of disability, including self-evaluations of pain, SSA benefit determinations, and financial incentives, before denying claims for disability benefits.

ENDNOTES:

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1. - U.S. -, 128 S. Ct. 234, 171 L.Ed.2d 299 (2008).

2. 29 U.S.C. §§ 1001-1461.

3. *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989)

4. *Burke v. Pitney Bowes, Inc. Long-Term Disability Plan,* 544 F.3d 1016, 1023-24 (9th Cir. 2008) (citing *Abatie v. Alta Health & Life Ins. Co.,* 458 F.3d 955, 963 (9th Cir. 2006) (en banc)).

5. *Montour v. Hartford Life & Accident Ins. Co.*, 2009 WL 3856933 *5 (9th Cir. 2009).

6. *MetLife v. Glenn*, - U.S. -, 128 S. Ct. 234, 171 L.Ed.2d 299 (2008).

7. Abatie, 458 F.3d at 970; *Parker v. Vulcan Material Company Long Term Disability Plan*, 2009 WL 4030535 (C.D. Cal.)

8. The "administrative record" consists of documentation received and considered by the claims administrator during the claims procedure, including arguments and statements made by the participant and documents and other evidence offered by the participant to establish his or her claim.

9. *Montour v. Hartford Life & Accident*, 2009 WL 3856933 (9th Cir. 2009).

10. The proper way to "grapple" with the SSA decision that is contrary to the benefit determination entails "comparing and contrasting not just the definitions employed but also the medical evidence upon which the decisionmakers relied." *Montour* at *12.

11. *Montour v. Hartford Life & Accident,* 2009 WL 3856933 (9th Cir. 2009).

12. *Taylor v. SmithKline Beecham Corp.*, 629 F. Supp. 2d 1032, 1041-1042 (C.D. Cal. 2009).

13. *Parker v. Vulcan Material Company Long Term Disability Plan*, 2009 WL 4030535 (C.D.Cal.).

14. *Caplan v. CNA Financial Corporation,* 544 F.Supp.2d 984, 989-990 (N.D.Cal.2008); *Parker v. Vulcan Material Company Long Term Disability Plan,* 2009 WL 1030535 (C.D.Cal.); *Taylor v. SmithKline Beecham Corp.*, 629 F. Supp. 2d 1032, 1041-1042 (C.D. Cal. 2009); *Sacks v. Standard Insurance Company,* 2009 WL 4307558 (C.D.Cal.).

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