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To Thine Own Plan Be True: Burdens of Proof and Standards of Review Under Attack in ERISA-Benefits Litigation

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The bedrocks of litigating benefits disputes under the Employee Retirement Income Security Act of 1974 ("ERISA") are under attack on multiple fronts. Under ERISA, it is well established that claimants have the burden of proving entitlement to ERISA plan benefits. When an ERISA plan grants a plan fiduciary discretionary authority to make benefit eligibility determinations or construe the terms of a plan, courts apply the abuse of discretion standard of review and will affirm the fiduciary's interpretation as long as it is reasonable.

A recent decision by the U.S. Court of Appeals for the Tenth Circuit all but disregards these central precepts.

The LINA Case

In *Van Steen v. Life Ins. Co. of N. Am.*, 878 F.3d 994 (10th Cir. 2018), the court considered whether the Life Insurance Company of North America ("LINA") had abused its discretion when it determined the plaintiff was no longer eligible for long-term disability benefits under his employer's ERISA-governed plan. LINA both funded benefits payable under the plan and made benefit determinations thereunder. The plan granted LINA discretionary authority to make benefit eligibility determinations and to construe the terms of the plan.

In October 2011, the plaintiff was physically assaulted while walking his dog. As a result, he suffered a mild traumatic brain injury ("mTBI") that impacted his cognitive abilities and prevented him from returning to work until September 10, 2012. At that time, the plaintiff's physician cleared him to work part-time, every other day. Approximately six weeks later, the plaintiff's physician cleared him to work part-time on a daily basis.

The plaintiff claimed that even under a part-time schedule he experienced cognitive difficulties and headaches and that he needed frequent rest. He often worked from home where it was easier to take naps throughout the day. Because he could no longer stay organized or keep track of deadlines after his injury, the plaintiff's work performance suffered.

The plaintiff filed a claim for residual long-term disability benefits, which LINA approved on March 30, 2012. Under the plan, the plaintiff was required to provide sufficient evidence that he was "unable to perform each and every material duty of his ... regular occupation on a full-time basis."

Approximately one year later, LINA again reviewed the plaintiff's file and contacted his physician's office for more information about his functional abilities. The physician's nurse told LINA that the plaintiff's restrictions were basically permanent as he was "not likely to improve."

Nevertheless, LINA notified the plaintiff one week later that it had determined that he was no longer eligible for residual long-term disability benefits under the plan, explaining that "the medical documentation on file does not continue to support the current restrictions and limitations to preclude you from resuming a full-time work schedule."

The plaintiff appealed this determination and provided a list of his basic job duties. He claimed that there was no evidence to support LINA's determination.

LINA upheld its determination on appeal, asserting that there was insufficient clinical evidence of how the plaintiff's functional capacity continuously prevented him from performing his occupation from and after March 16, 2013. The plaintiff appealed a second time and LINA again upheld its adverse determination. The plaintiff then filed suit in Colorado state court. Because ERISA governs, LINA removed the case to the U.S. District Court for the District of Colorado.

The Court's Decision

The district court held that LINA's benefit determination was arbitrary and capricious. LINA appealed to the U.S. Court of Appeals for the Tenth Circuit.

In its decision affirming the district court, the Tenth Circuit first noted that because LINA had discretionary authority to construe the terms of the plan and to make benefit eligibility determinations, it would review LINA's determination under the arbitrary and capricious standard. Under that deferential standard of review, the court stated it would uphold LINA's determination as long as it had been made "on a reasoned basis" and was "supported by substantial evidence" in the administrative record.

In a stunning sleight of hand, however, the Tenth Circuit imposed an extra-contractual burden on LINA by flipping the plan's language onto its head. The plan required the plaintiff to provide sufficient evidence he was "unable to perform each and every material duty of his or her regular occupation on a full-time basis." In other words, if he could perform one material duty of his job, he was not residually disabled under the plan. But the court stated it would uphold LINA's benefit determination only if there was "substantial evidence in the record supporting the determination that [the plaintiff] is able to perform each and every material duty of [his own occupation] for eight hours a day."

The problem is: this is not what the plan requires. The plan requires a claimant to provide evidence he or she is "unable to perform each and every material duty" of his job. The converse is not true. It is not LINA's burden to prove a claimant can perform each and every material duty of his or her job. Under the plan, LINA is justified in denying a claim for benefits when a claimant has failed to meet his or her burden. LINA would be justified in denying a claim when a claimant can perform just one material duty.

Not surprisingly, the Tenth Circuit found no evidence that the plaintiff could perform each and every material duty, because that is not the analysis that LINA conducted. Indeed, once LINA determined the plaintiff could perform one material duty, the analysis could be over. But LINA had not simply concluded that the plaintiff could perform one material duty. LINA had determined that he could perform his occupation on a full-time basis; thus, it concluded, he was not entitled to additional residual long-term disability benefits under the plan.

In his brief, the plaintiff argued that a plan fiduciary abuses its discretion if it fails to consider "one or more of a claimant's essential job functions," and he cited cases in support. But given the plan language at issue, this argument is inapposite. The plan requires that claimants prove their eligibility by showing they are unable to perform "each and every material job duty." So, in fact, if a claimant fails to show he or she cannot perform each and every material duty, he or she is not eligible for benefits under the plan. In other words, in this case, if there was substantial evidence that the plaintiff could perform just one of the material duties of his job full-time, the court should have upheld LINA's determination.

However, the plaintiff did not look at it this way. Throughout his brief, he argued that LINA "failed to address ... whether [p]laintiff can perform each and every material duty of his occupation." The district court agreed. According to the lower court, this was "the key issue in the case."

Further, the plaintiff argued that "LINA never evaluated whether [the plaintiff] was capable of only part-time work," as required by the plan's "Residually Disabled" provision. The district court found this significant, as well, holding the evidence in the administrative record supported the plaintiff's treating physician's opinion that the plaintiff could work part-time and that the physician consultants relied on by LINA had not opined whether the plaintiff "can work on his position on a part-time basis."

But, as stated previously, this is not what the plan requires. The plan places the burden on claimants to provide evidence of an inability "to perform each and every material duty of his or her regular occupation on a full-time basis." The plan does not require LINA to present evidence that claimants can work part-time! Indeed, claimants must show they cannot work full-time before benefits are payable. It is immaterial that the plaintiff's physician opined he could work part-time. Incidentally, merely because the plaintiff could work part-time does not mean he could not also work full-time. In fact, LINA concluded he could work full-time. Because LINA concluded the evidence in the record demonstrated that the plaintiff could work full-time, it goes without saying that LINA found the plaintiff had not met his burden of proof.

Further, the plaintiff sought to flip the language upside down a second time, when he took to task LINA's physician consultant for "never stat[ing] in his paper review that [the plaintiff] was capable of working full-time." But this, too, was not what the plan required, nor was it what a peer review physician typically considers. (Peer reviewers are not tasked with opining about job duties. They opine about functional capacity.) Based on the plan language, if the consultant had a reasonable basis for opining there was insufficient evidence in the record that the plaintiff could not perform each and every material

duty of his job or there was evidence plaintiff could perform a single material duty full-time, LINA could rely on the opinion and support an adverse benefit determination.

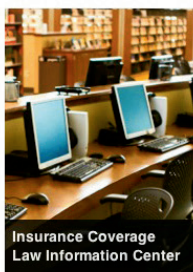
The Tenth Circuit jumped aboard the bandwagon. The court criticized LINA's peer reviewers for failing to opine that the plaintiff "was capable of performing each and every material duty of his regular occupation on a full-time basis." The court simply ignored LINA's argument that peer reviewers do not assess a claimant's job duties. Further, the court also criticized the opinions of LINA's vocational experts for failing to find that the plaintiff was capable of performing each and every one of his material duties on a full-time basis. Ultimately, the court said, LINA's experts, whether medical or vocational, failed to evaluate the plaintiff's ability to perform his material job duties on a full-time basis, notwithstanding that this is simply not what the plan required.

Accordingly, the court held that LINA had abused its discretion because the benefit determination was not "well-reasoned," i.e., it was not "based on medical evidence that [the plaintiff] is capable of performing each and every material duty of his occupation ... on a full-time basis." Indeed, the court concluded, LINA provided no such evidence.

In short, the court misinterpreted the plan and misapplied the standard of review. If it had applied the standard correctly it would have deferred to LINA's benefit determination, even if it would have reached a different decision on its own. But it did not. Instead, it trod onto a darker path. It substituted its judgment for LINA's and shifted the burden of proof onto LINA. This case is an unfortunate example of judicial overreach. Practitioners should be mindful that absent clear advocacy, courts, even federal circuit courts, will sometimes get confused and get it wrong.

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