ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

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ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

For more Information about Eric Buchanan & Associates, PLLC, visit our website at www.buchanandisability.com.



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DISABILITY UNDER AN ANY OCCUPATION STANDARD BY: R. SCOTT WILSON

The most common long term disability insurance policy we see has a "shifting" definition of disability: for an initial period (typically two years), disability simply means inability to perform the insured's own occupation; after that initial period, disability requires that the insured be unable to perform *any* occupation. Depending on the insured's occupation prior to becoming disabled, this can be a dramatically higher standard. This article will highlight several potential avenues for advocacy as the insured reaches the "any occupation" definition of disability.

1. Any Occupation Necessarily Implies an Occupation Your Client is Qualified to Perform

It should go without saying that, in order to count as an occupation your client can perform, your client must have the necessary skills, education, and training in order to perform that position, as well as the physical and mental capacity despite his or her medical impairments. *See, e.g.*, *Peterson v. Continental Cas. Co.*, 116 F.Supp.2d 532 (S.D.N.Y. 2000) (administrator must demonstrate existence of job claimant is capable of and can perform).

If the insurance company suggests your client is capable of a specific job, be prepared to look that job up in both the Dictionary of Occupational Titles and on O*Net. That job may turn out to be generally higher skilled than anything your client has ever done before, or require particular technical knowledge, computer skills, or similar educational pre-requisites that your client simply does not possess.

Depending on particular insurance policy language, it may not even be relevant that your client could be re-trained. A common policy we see defines any occupation disability as "inability to perform any occupation for which you *are* qualified by education, training, or experience." "Are" is present tense; I have argued that the ability to be re-trained in the future is simply irrelevant under this policy language, and vocational expert evidence that your client could perform other occupations with certain training or education is insufficient to deny benefits under the any occupation standard.

2. Whether an Express or Implied Term of the Policy, Any Occupation Means an Occupation of Reasonably Commensurate Remuneration

Unlike in Social Security cases, the amount of money that can be earned in a given occupation is a relevant question. A phrase such as "prevented from engaging in every business or occupation" in an ERISA plan cannot be construed so narrowly that an individual must be utterly helpless to be considered disabled and that nominal employment, such as selling peanuts or pencils which would only yield a pittance, does not constitute a business or occupation. Instead, a claimant's entitlement to payments based on a claim of "total disability" must be based on the claimant's ability to pursue gainful employment in light of all the circumstances. *See, e.g. VanderKlok v. Provident Life and Accident Ins. Co.*, 956 F.2d 610 (6th Cir. 1992) *citing Torix v. Ball Corp.*, 862 F.2d 1428 (10th Cir. 1988).

Some policies will include language defining how much (typically in terms of a percentage of pre-disability pay) an occupation must pay in order to be relevant to the

any-occupation disability analysis. At the very least, it can be pointed out that in purchasing the insurance policy, the claimant has sought to insure against loss of income. If a policy is designed to insure (by paying as a benefit) 60% of the insured's pre-disability monthly earnings, reasonable alternate gainful employment under the circumstances is should be employment that would pay that much, i.e., 60% of the pre-disability wage.

Particularly with skilled blue collar workers, there may be no skills transferable to, for example, sedentary jobs, while unskilled sedentary jobs do not pay the requisite amount to render the claimant not disabled under the any occupation standard.

3. Scrutinize the Assumptions Contained in Insurance Company Vocational Analysis

In order for the insurance company vocational analysis to have any evidentiary force at all, the assumptions that underlie that analysis must be accurate. Check to see if the vocational expert used by the insurer made accurate assumptions about both your client's restrictions and limitations and your client's vocational background.

In social security cases, where a claimant's capacity to perform other jobs is sought to be proved by vocational expert testimony in response to a hypothetical question, "the testimony must be given in response to a hypothetical question that accurately describes the plaintiff in all significant, relevant respects; for a response to a hypothetical question to constitute substantial evidence, each element of the hypothetical must accurately describe the claimant." *Felisky v. Bowen*, 35 F.3d 1027, 1036 (6th Cir. 1994). This principle is not less true in ERISA-governed long-term disability cases. A termination of benefits founded on a vocational expert's identification of jobs is arbitrary and capricious where the insurer provides the VE with only some, not all, of the claimant's limitations. *See Spangler v. Lockheed Martin Energy Systems, Inc.*, 313 F.3d 356 (6th Cir. 2002) (finding that where VE was only provided partial information, claims administrator "'cherry-picked' [Spangler's] file in hopes of obtaining a favorable report from the vocational consultant as to Spangler's ability to work").

Likewise, for the vocational expert's conclusions regarding your client's transferable skills to have any meaning, the vocational expert must accurately understand your client's past work. In one memorable case, the insurer assumed our client had high level computer and mathematics skills from past work as an engineer. However, our client was not an engineer in the slide-rule and pocket-protector sense, he was a river barge engineer on the Mississippi River, a mechanical position, inspecting engines, starting engines, repairing machinery.

4. Useful Restrictions and Limitations for Defeating Sedentary Jobs

One of the most common denials we see at the any occupation definition shift is an assertion that the claimant is capable of sedentary exertion, and therefore capable of various desk and clerical positions. Beyond education and skills, there are a number of important physical restrictions and limitations that can be useful for defeating such jobs.

Need for a sit-stand option can eliminate some sedentary jobs. Furthermore, the more accurately that sit-stand option can be defined, the more useful that restriction is. The extent to which sedentary jobs will be affected by the need to alternate between sitting and standing will depend on just how frequently the claimant needs to alternate positions, and how long he can sit or stand at one time. As a consequence, vocational testimony is not substantial evidence of jobs the claimant can perform if the vocational expert was not told how often the claimant needs to shift positions, or the length of time his can sit. *See Castrejon v. Apfel***,** 131 F.Supp.2d 1053 (E.D.Wisc. 2001). For example, work as an attorney is generally sedentary, while allowing a certain amount of freedom to stand up, stretch, or move about the office as needed for comfort. On the other hand, it would seem impossible to perform the brief-writing, file reviews, and paperwork expected of an attorney if one's ability to sit was limited to 30 minutes at a time, for a total of just four hours a day.

Restrictions on manual dexterity are highly relevant to sedentary jobs. *See Faison v. Secretary of H.H.S.*, 679 F.2d 598, 599 (6th Cir. 1982) (sedentary jobs, while requiring less strength than other jobs, also require more manual dexterity); *Hurt v. Secretary of H.H.S.*, 816 F.2d 1141 (6th Cir. 1987) (claimant who lacks bilateral manual dexterity cannot perform a wide range of sedentary work).

Pain (or narcotic medications) may impact attention and concentration, regardless of the exertional level. Failure to take pain and medication side effects into account is arbitrary and capricious. *Smith v. Continental Casualty Co.*, 450 F.3d 253, 264-65 (6th Cir. 2006). *See also Adams v. Prudential Ins. Co. of America*, 280 F.Supp.2d 731 (N.D. Ohio 2003) (arbitrary and capricious to fail to consider impact of medication side effects on ability to perform particular job). The impact of medications on concentration or wakefulness is can be particularly important with respect to more highly skilled occupations. As noted in *Sabbatino v. Liberty Life Assurance Co.*, 286 F.Supp.2d 1222, 1231 (N.D. Cal. 2003) "engineer . . . may be a sedentary occupation, but one that requires careful thought and concentration. Simply being able to perform sedentary work does not necessarily enable one to work as an engineer."

Absenteeism is an important factor, especially when the claimant has a medical condition that is episodic or has a

tendency to vary over time. Attendance is an essential work duty, and chronic absenteeism will render an individual unable to perform the job. *See, e.g., Murphy v. ITT Educational Services, Inc.,* 176 F.3d 934 (7th Cir.1999); *Morgan v. Hilti, Inc.,* 108 F.3d 1319 (10th Cir.1997); *Tynall v. National Education Centers, Inc.,* 31 F.3d 209 (4th Cir.1994); *Hilburn v. Murata Electronics North America, Inc.,* 181 F.3d 1220 (11th Cir.1999). Both ERISA long term disability and Social Security disability cases recognize chronic absences as a legitimate basis for disability. *Katzenberg v. First Fortis Life Ins. Co.*, 500 F.Supp.2d 177, 195 -196 (E.D.N.Y. 2007) (summary judgment denied to insurer when CEO would be unable to effectively perform his job due to frequent medically necessary absences); *Nicolas v. MCI Health and Welfare Plan No. 501*, 2008 WL 4533728, 3 -5 (E.D. Tex. 2008) (In ERISA § 502(a) claim for benefits, Court reversed insurer's denial of benefits because it failed to consider objective medical evidence in the record, including evidence of chronic medical absences); *Douglas v. Bowen*, 836 F.2d 392, 396 (8th Cir. 1987) (individual disabled where medical record established claimant would have more than the 1 to 2 absences per month VE stated employers could tolerate).

5. Pitfalls: Factors that Are NOT *Useful for Defeating Sedentary Jobs in an Insurance Context*

It finally bears mentioning that there are two important factors that are useful in Social Security cases for establishing disability when a claimant is broadly capable of sedentary exertion, that are not useful, and even harmful, with respect to most LTD policies.

Age. Social Security's "Grid Regulations" formulaically take age into account as a vocational factor, such that an individual who is over 50, cannot perform his old job anymore, and now finds himself limited to sedentary exertion will be found disabled. However, insurance policies do not have these rules, and we frequently meet with clients who have been approved for social security benefits based upon a combination of their age and a limitation to sedentary work, but who are denied LTD benefits under the any occupation standard based upon the exact same findings. No matter how much insurers try and disregard a Social Security decision when the ALJ finds the claimant unable to perform full time work at any exertional level, the insurer will be perfectly happy to defer to Social Security's findings that a claimant is capable of sedentary work, and cut off benefits on that basis.

Psychological Restrictions. Social Security treats all impairments (with the exception of drug or alcohol addition) more or less equally. Insurers do not, and we frequently see policies that limit payment of benefits for disabilities caused by mental or nervous conditions to two years. Policies may vary about what the definition of a mental or nervous condition is (organic brain disorders are typically excepted; bi-polar disorders sometimes are excepted). But a mental and nervous restriction can greatly limit the ability to preclude jobs on the basis of psychological restrictions, rather than physical restrictions, impeding job performance.

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the NOSSCR Social Security Disability Spring Conference on ERISA LTD claims in New Orleans, LA on May 12-15, 2010.

Eric Buchanan will be speaking at the Kentucky Trial Lawyers Conference on subrogation and offsets in disability cases in Louisville, KY on June 11, 2010.

D. Seth Holliday will be speaking at the Kentucky Trial Lawyers Conference on subrogation and offsets in disability cases in Northern KY on June 25, 2010.

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates are available to speak to your organization regarding Social Security Disability, ERISA Long-term Disability, Group Long-term Disability, Private Disability Insurance, ERISA Benefits, Denied Health Insurance Claims and Life Insurance Claims. Contact Molina Haynes, Office Manager at (423) 634-2506 or via email at mhaynes@buchanandisability.com