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insights

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5 takeaways from the employee ERISA win in McMillan

In an ERISA decision issued August 13, 2018, the Tenth Circuit was critical of almost every step in AT&T's process for denying disability benefits to its employee.

The decision in *McMillan v. AT&T Umbrella Benefit Plan No. 1* provides several key takeaways that merit a reminder about the proper administration of ERISA disability claims.

At issue in McMillan were 26 weeks of short term disability benefits. To qualify for these benefits one had to be unable "to perform all of the essential functions of his job" as a Senior IT Client Consultant.

Reading the opinion and appreciating the case's prolonged administrative and court history, you could suspect the Plan spent more on attorneys' fees and administrative costs than the benefits that were at issue.

Background

McMillan had coronary disease, type-two diabetes, hypertension and sleep apnea. A cardiologist determined that he had small vessel coronary disease that could not be corrected by surgery or grafting. McMillan reported that he experienced shortness of breath even when walking on flat ground inside as well as daytime somnolence. In addition, a neuro psych exam performed as a part of the Social Security proceedings had concluded that McMillan would have marked difficulty concentrating and persisting through a normal work day due to memory problems.

The Plan consulted with five doctors from different areas of specialty, and all five concluded McMillan was not disabled. The Plan denied the claim and then the appeal. The district court found the Plan's denial was arbitrary and capricious, but rather than award benefits it remanded the matter to the administrator. The court concluded that the Plan had failed to adequately consider McMillan's ability to perform all of his essential job functions and had incorrectly classified the occupation as sedentary. McMillan's job required him to travel between 20 and 100% of his work week and the district court did not believe those duties were consistent with the sedentary classification.

McMillan submitted more medical records on remand and the Plan retained new medical consultants, but the outcome was the same. This time the district court again found the administrator's decision arbitrary and capricious, and entered judgement for McMillan. The Tenth Circuit affirmed.

Here are five takeaways from this case.

1. **Look at the language of your plan.** Several doctors stated in their opinions that there was not any objective evidence to support the claim. The Tenth Circuit noted that the Plan did not expressly require objective evidence and was critical of the physicians' insistence upon objective evidence.

   The takeaway: There is not any downside to a plan expressly requiring by its written terms that a participant submit objective evidence to support his claim.

2. **Be accurate.** Although on remand the Plan reclassified McMillan's job as "light" rather than "sedentary," some of the consulting physicians still stated in their letters that his occupation was sedentary.

   The takeaway: Make certain that your consulting physicians accurately describe the claimant's job/occupation.

3. **Get specific about a claimant's circumstances.** Although the consulting physicians on remand acknowledged the travel requirements of McMillan's job, none of them made any attempt to explain how

a claimant who had difficulty breathing when walking on flat ground could nonetheless engage in an occupation that might require him to travel by plane for as much as 100% of his work week. The Tenth Circuit acknowledged that the consulting physicians opined that McMillan could perform his job duties but noted that, "there is no discussion in any of the reviewers of what travel entails and how McMillan could meet those demands in light of his serious medical impairments, particularly shortness of breath."

The takeaway: Do not accept physician consultant letters that read like form letters and that do not engage in any serious discussion or analysis of what you know is going to be one of the claimant's main arguments.

4. **Watch your tone.** The Tenth Circuit found significant that one of the physician consultants rewrote his review on several occasions, not in response to new evidence, but in response to "[The administrator's] narrowly tailored leading questions." The administrator had asked the consultant whether a 100% travel requirement would change his opinion that McMillan could perform his job duties. It is difficult to see how this question is "leading."

   The takeaway: Where an administrator thinks he is being diligent by digging deeper by asking specific questions of a consultant, a cynical court could view it as badgering your consultant for the answer you want.

5. **Be descriptive.** One of the consulting physicians took exception to some of the test interpretations made by one of McMillan's neuropsychologists, who had conducted seven different tests. The Tenth Circuit was concerned that this consulting physician had not explained what the neuropsychologist should have done differently or how the results would have changed.

   The takeaway: It generally is not enough for the consulting physician to opine only that the treating physician is mistaken or incorrect. It is better when that consultant can provide some description of how or why the treating physician is mistaken and then to explain the significance of that mistake. The new regulations, not mentioned in the opinion, require as much.

None of these takeaways is surprising headline news. But the fact we have to read them in a federal appellate court opinion in 2018 is a good reminder of their importance.

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