



TOTALLY DISABLED WHILE WORKING FULL TIME

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As workers' compensation practitioners, we've all encountered employers who offer injured workers "light duty" work at pre-injury wages. Some of us have been involved in structuring policies for employers offering light or modified duty to employees. When the injured worker is then included in a general lay-off or is fired, has the employee presumptively demonstrated an earning capacity equal to his or her average weekly wage?

We may also have encountered the situation in which a claim for benefits was filed, the worker had been working full time prior to making the claim and there was no medical evidence of a change in the underlying condition. The insurer's very strong argument is that the employee demonstrated an earning capacity, and perhaps a capacity equal to his or her average weekly wage. Employee's counsel may struggle with arguments centered on accommodations and employability, but usually the best case scenario for the employee is a partial disability benefit award.

Can an employee be totally disabled from work while working full time? That may appear to be a stupid question, unless you are familiar with the bizarre and twisted world of ERISA disability benefit cases. In a recent "pre-Glenn"¹ case from the first circuit court of appeals, *Diane Denmark v. Liberty Life Assurance Company*, 481 F.3d 16 (1st Cir. 2007), an inspector and supervisor in manufacturing suffered from fibromyalgia for many years before she stopped work and applied for disability benefits from her employer's plan.²

The insurer denied the claim because "there was no significant change in [her] condition" on the date she stopped working. On review to the federal district

court, the administrator's³ decision to deny benefits was affirmed because the insurer had not "abused its discretion."⁴ The case was appealed to the circuit court and Judge Howard, in a dissenting opinion, wrote that such argument "does not survive even minimal scrutiny." *Id.* 69-70. Drawing from a line of federal circuit court cases, he found no "logical incompatibility between working full time and being disabled from working full time. A desperate person might force himself to work despite an illness that everyone agreed was totally disabling. Yet even a desperate person might not be able to maintain the necessary level of effort indefinitely," *Id.* citing, *Hawkins v. First U. Corp. Long Term Dis. Plan*, 326 F.3d 914, 918 (7th Cir. 2003).

In *Hawkins*, Judge Posner, no stranger to the imbalance of ERISA, further reasoned as follows: "Hawkins may have forced himself to continue in his job for years despite severe pain and fatigue and finally have found it too much and given it up even though his condition had not worsened. A disabled person should not be punished for heroic efforts to work by being held to have forfeited his entitlement to disability benefits should he stop working." *Id.* at 918.

As it turns out, Judge Posner's wisdom is a part of a line of federal cases with roots in Social Security Disability Insurance (SSDI) case law. In *Stark v. Weinberger*, 497 F.2d 1092 (7th Cir. 1974), for example, a claimant afflicted with scleroderma was found to be totally disabled during a period of time she was working full time: "The uncontroverted evidence demonstrates that plaintiff worked only because she desperately needed the money; was transferred from one department to another because of her condition; needed the assistance of her co-workers to perform; had a high absence rate; worked in great pain; received the criticism of her foreman, and was finally

¹ In *Metropolitan Life Insurance Company v. Glenn*, 128 S.Ct. 2343 (2008), the Supreme Court attempted to clarify the standard of review for employee benefit decisions made by administrators with conflicts of interest.

² In the ERISA law the term "plan" is derived from "employee welfare benefit plan" 29 USC §1002(1). In insured employee benefits for disability and life insurance, rights and liabilities under the "plan" as well as claims procedures are generally determined by the insurance policy.

³ The "administrator" of an insured employee benefit, such as income for disability, payment for health or life insurance, is the insurer. The fiduciary responsibility of an administrator under ERISA to make benefit determinations "solely in the interest of the beneficiaries" is delegated by contract to the insurer which determines eligibility for benefits and pays claims. This conflict of interest was addressed in *Glenn, supra*.

⁴ In this strange and *sui generis* ERISA world, the insurer places a "discretionary clause" in the insurance contract and by way of the authority of *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948 (1989), decisions to deny claims can only be reviewed by a federal court on an arbitrary and capricious/ abuse of discretion standard of review. State consumer protection laws are pre-empted and the court reviews a closed "administrative record" (insurer's claim file). This bizarre hybrid system of trust and administrative law superimposed upon a private insurer's claims process has created a recipe for unfair and unscrupulous insurance claims practices. See, *Radford Trust v. Unum Life Insurance Co. of America*, 321 F.Supp.2d 226 (D. Mass. 2004).

fired because she could not satisfactorily perform her job without assistance." *Id.* at 1100.

See also, *Leidler v. Sullivan*, 885 F.2d 291 (5th Cir. 1989); *Wilder v. Apfel*, 153 F.3d 799, 801 (7th Cir. 1998). Other examples in the seemingly illogical circumstance of total disability and full time work are found in the following compendium of cases:

There are cases in which although the claimant is currently earning a decent wage, he really is permanently disabled from engaging in gainful activity. Maybe his boss feels desperately sorry for him and is retaining him on the payroll even though he is incapable of working. That act of charity ought not be punished by denying the employee benefits and thus placing pressure on the employer to retain an unproductive employee indefinitely. *Thomas v. Sullivan*, 928 F.2d 276 (8th Cir. 1991). Maybe as in *Chicager v. Califano*, 574 F.2d 161 (3d Cir. 1978), a seriously disabled worker is able to work only by dint of his extraordinary determination and the extraordinary assistance extended to him by kindly fellow workers. Or, since \$500 a month is nowadays hardly a living wage, we suppose that even a terribly disabled person might be able to scrape that much together by occasional work done at great personal cost, and yet by any realistic criterion he would be permanently disabled and should not be punished for his extraordinary exertions by being denied disability benefits. *Storyk v. Secretary of Health, Education & Welfare*, 462 F. Supp. 152, 158 (S.D.N.Y. 1978). These are all cases in which although the disabled person is gainfully employed, the gainful employment is not substantial when viewed in terms of the purpose of the statute, because were it not for effort by himself or others far beyond the call of duty he would not be employed at all. "The claimant may," in short, "rebut a presumption based on earnings with evidence of his inability to be self-employed or to perform the job well, without special assistance, or for only brief periods of time." *Keyes v. Sullivan*, 894 F.2d 1053, 1056 (9th Cir. 1990). *Corrao* was such a case; the

claimant made sporadic sales of drugs to support his habit. The Social Security Administration's regulations note, as a further basis for rebuttal, that "if you are working in a sheltered workshop, you may not be earning the amounts you are being paid." 20 C.F.R. § 416.974(a) (3).

Jones v. Shalala, 21 F.3d 191, 192-93 (7th Cir. 1994).

These rationales from federal Social Security rulings made an easy transition to federal appeals of employee disability benefit denials under the ERISA law. For example, the eleventh circuit writes: "We doubt that Levinson's status as a full-time employee constitutes evidence that he was able to perform the material duties of his occupation on a full-time basis. *Levinson v. Reliance Standard Life Ins. Co.*, 245 F.3d 1321, 1326 n.6 (11th Cir. 2001).

Encouraging individuals to "test their limitations" as in *Seitz v. MetLife*, 433 F.3d 647, 651 (8th Cir. 2006) or to "give it a go," *Marecek v. BellSouth Telecomms., Inc.*, 49 F.3d 702, 706 (11th Cir. 1995) are additional circumstances where it was found unreasonable to demand proof of a change in condition. "Some disabled people manage to work for months, if not years, only as a result of superhuman effort, which cannot be sustained. Sometimes work beyond one's limitations is essential to maintain one's standard of living, or is the result of an effort to disguise one's limitations from friends and coworkers. Reality eventually prevails, however, and limitations that have been present all along overtake even the most determined effort to keep working...[we can even imagine] a lawyer trying to carry on, to defy her limitations, in order to avoid abandoning the profession in which so much of her human capital and spirit is invested. *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 982-983 (7th Cir. 1999).

As shown in this line of federal cases, a credible Plaintiff with plenty of support can prevail in an argument that he or she was totally disabled from work while working full time. ☺☺

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