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# COMMITTEE NEWS

## Health and Disability & Life Insurance Law

### Tracing the Evidentiary Path of Social Security "Other Income" Offsets in Disability Cases, Through Statutes, Case Law, and Regulations

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The interplay between disability benefits provided through the Social Security Administration and long-term disability benefits provided by a qualified plan under ERISA[1] has been the subject of considerable judicial rule-making. Recently, it has become the interest of federal regulators in establishing claims standards for private disability insurance programs.[2] There are two principal areas of overlap between these benefit programs, one financial and the other evidentiary.

The financial integration of Social Security benefits with long-term disability protection has become a standard form of plan design under ERISA. It has also led

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to consideration of the proper evidentiary use of favorable Social Security decisions in evaluating eligibility for long-term disability benefits under ERISA. This article examines the origin of the use of Social Security Disability Insurance ("SSDI") as an "other income" offset for group welfare plans offering long-term disability benefits.[3] It also discusses the evidentiary requirements of considering favorable Social Security decisions in determining long-term disability eligibility.

## I. Background

The Supreme Court has characterized ERISA as a "comprehensive and reticulated statute."[4] The Court has observed that "Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."[5] The text of ERISA, itself, contains only general provisions referencing long-term disability or income replacement benefits, albeit in the context of identifying qualifying welfare plans.[6] ERISA provides no eligibility standards for long-term disability. By contrast, the Social Security Act sets forth specific proof requirements for an individual to qualify for disability benefits.[7]

With so little of the ERISA text addressing long-term disability, the question arises of how the Social Security other income offset came to exist in the first place? The concept of a SSDI offset seems to originate with the U.S. Supreme Court case *Alessi v. Raybestos-Manhattan Inc.*[8] *Alessi* addressed the question of whether, under ERISA, a pension plan could lawfully reduce a pension payment for railway workers by amounts received for workers' compensation subsequent to retirement.[9] The basis for the offset was an Internal Revenue Service ("IRS") regulation that permitted offsetting of benefits, held as proof that the practice did not violate the non-forfeitability of the defined benefit pension benefits.[10] Under the Supreme Court's reading of the regulation, workers compensation benefits could properly be used as offsets to pension plan payments, as a matter of plan design, or "integration."[11] The Court found that ERISA did not proscribe such offsetting where the other income benefits "share a purpose."[12] The Court found it dispositive that "when it enacted ERISA, Congress knew of the IRS rulings permitting integration and left them in effect."[13]

In *Isner v. Minnesota Life Ins. Co.*, when a federal court in Michigan was confronted with similar questions involving financial integration in the context of welfare benefits, the same conclusion was reached.[14] In reaching its holding, the *Isner* court interpreted *Alessi* as equally applicable to welfare benefits, such as long-term disability insurance. The court explained, "the LTD benefits at issue in this case are not 'protected' by ERISA's non-forfeiture provision. Accordingly, it is within each plan administrator's authority to determine whether Plaintiff's benefits under that

plan are offset by Plaintiffs' Social Security benefits."[15] The court continued, "ERISA authorizes the integration of Social Security benefits with those available under an employer's disability plan, and imposes no 'reasonableness' requirement on such integration."[16]

There are obvious overlaps between the two programs. For example, most private disability plans contain "elimination" or waiting periods[17] as a condition of eligibility, as does Social Security.[18] The financial inter-relation of the two programs became a standard feature of plan design.

## II. *Ladd v. ITT*

Despite the use of the financial offset and, frequently, the presence of a plan-based requirement to apply for SSDI and advance a claim through various stages of appeal, some plans refused to credit a disability determination by the SSA as evidence of continuing disability. In reaction, courts began adopting a more critical look at how plans were evaluating Social Security's treatment of disability. This trend was reflected in *Ladd v. ITT Corp.*, where the court considered the overlap between the financial and evidentiary implications of a favorable Social Security determination.[19]

In *Ladd*, a 38-year-old customer-service representative's claim was denied, despite initial neck and back injuries and a continually deteriorating medical condition.[20] The claimant had been awarded Social Security disability benefits, partially due to assistance received from her plan in pursuing those benefits. After the plaintiff prevailed in her Social Security claim, the plan terminated her long-term disability claim. She sued, arguing, in part, that the plan was "estopped" from denying her benefits owing to her favorable Social Security decision.[21]

The *Ladd* court was persuaded that the administrator's determination was arbitrary because it did not appropriately consider the disability findings of the SSA, while simultaneously receiving those same benefits and thereby reducing its financial liability to the claimant through an offset. The court observed that:

> To lighten the cost to the employee welfare plan of Ladd's disability, the defendants encouraged and supported [the plaintiff's] effort to demonstrate total disability to the Social Security Administration, going so far as to provide her with legal representation.[22]
>
> *Ladd* also addressed the evidentiary significance of the Social Security award:
>
> The grant of social security disability benefits to Ladd has an additional significance. It brings the case within the penumbra of the doctrine of

> judicial estoppel—that if a party wins a suit on one ground, it can't turn around and in further litigation with the same opponent repudiate the ground in order to win a further victory.[23]

The court also found that the sequence of events "casts additional doubt on the adequacy of their evaluation of Ladd's claim, even if it does not provide an independent basis for rejecting that evaluation."[24]

Once courts held that the Social Security award should be considered by ERISA plans in evaluating disability claims, questions began to arise regarding exactly how much weight the award should be accorded.

## III. *Black & Decker v. Nord*

Within five years of the *Ladd* decision, the proper evidentiary weight of a Social Security decision was determined by the Supreme Court. During the interim period, a debate among the circuits arose as to whether consideration of the Social Security decision also required consideration of the award using the same standards and presumptions as are applicable to the claimants in those proceedings.

Courts had begun ruling that the "treating physician rule," a presumption used in Social Security disability proceedings, should be applied in the ERISA long-term disability context.[25] The evidentiary role may have reached its height when reviewing courts began to require long-term disability plans to apply the "treating physician rule" of the Social Security Administration to the resolution of disability claims under private group disability health plans. Courts found that given the plan's requirement that a claimant apply for Social Security benefits, certain presumptions, like the treating physician rule, were applicable to long-term disability insurance claims.

For example, the Eighth Circuit, in *Donaho v. FMC Corp.*, addressed the use of the "treating physician rule" as settled law:

> We have held, in Social Security cases, that a reviewing physician's opinion is generally accorded less deference than that of a treating physician, and we apply this rule in disability cases under ERISA as well.[26]

In *Regula v. Delta Fam.-Care Disability Survivorship Plan*, the Ninth Circuit held that, for policy reasons, the treating physician rule should be applied to ERISA claims:

> Therefore, for reasons having to do with common sense as well as consistency in our review of disability determinations where benefits

> are protected by federal law, we see no reason why the treating physician rule should not be used under ERISA in order to test the reasonableness of the administrator's positions.[27]

This trend came to an abrupt halt with *Black & Decker v. Nord*, where the Supreme Court vacated both *Donaho* and *Regula* and abrogated the use of the treating physician rule as applied to ERISA long-term disability cases.[28] Unanimously, the Supreme Court held that the rule was inapplicable to long-term disability plans and administrators could not be bound by a Social Security Administration determination.[29] In relation to ERISA, the Court found that

> [n]othing in the Act itself, however, suggests that plan administrators must accord special deference to the opinions of treating physicians. Nor does the Act impose a heightened burden of explanation on administrators when they reject a treating physician's opinion.[30]

The Court had previously observed that the use of a presumption in favor of the claimant's treating physician, presumptions employed in Social Security determinations, "grow out of the need to administer a large benefits system efficiently" yet can potentially, if not "inevitably simplify [the process], eliminating consideration of many differences potentially relevant to an individual's ability to perform a particular job."[31]

## IV. Post-*Black & Decker*

If the pendulum swung too far in the favor of an ERISA claimant, it inevitably made its way back to the side of plan administrators post-*Black & Decker*.[32] In *Metro. Life Ins. Co. v. Glenn*, the Supreme Court struck a harmony between the treating physician rule and *Black & Decker*'s departure from the same, effectively holding that a Social Security Administration finding of disability must be more than a simple footnote in a Plan Administrator's benefit denial.[33]

In *Glenn*, a claimant was directed by the administrator to "a law firm that would assist her in applying for federal Social Security disability benefits…" for which she was eventually approved for and of which "[t]hree-quarters went to MetLife, and the rest (plus some additional money) went to the lawyers."[34] Following approval of Glenn's SSD benefits, MetLife halted benefit payments, finding her "capable of performing full time sedentary work."[35]

The district court denied Glenn's claim while the Sixth Circuit reversed, of which the Supreme Court affirmed, noting of the reversal that:

> [i]n particular, the court found questionable the fact that MetLife had encouraged Glenn to argue to the Social Security Administration that she could do no work, received the bulk of the benefits of her success in doing so (the remainder going to the lawyers it recommended), and then ignored the agency's finding in concluding that Glenn could in fact do sedentary work. This course of events was not only an important factor in its own right (because it suggested procedural unreasonableness), but also would have justified the court in giving more weight to the conflict (because MetLife's seemingly inconsistent positions were both financially advantageous).[36]

While many courts have applied the *Glenn* holding, a consistent theme has emerged where, if a plan "requires claimants to apply for Social Security disability benefits from the SSA and, if denied, to exhaust all possible appeals… complete disregard for a contrary conclusion without so much as an explanation raises questions about whether an adverse benefits determination was the product of a principled and deliberative reasoning process."[37]

The trend in case law to elucidate more than a simple acknowledgment of a Social Security disability determination from a plan administrator in a benefits denial[38] has been adopted by the Department of Labor ("DOL") and was fully incorporated into its Final Rule updating the ERISA Claims Procedure.[39] Under the DOL's Final Rule, the updated Claims Procedure, codified at 29 C.F.R. § 2560.503-1, would require a plan administrator to accompany any decision in disagreement with a Social Security Administration's finding of disability with a "detailed justification…."[40] Not only would the administrator now be required to justify any disagreement (fully crossing over the "mentioned" threshold), but the plan would also be required to notify a claimant of an alleged deficiency in the record and provide an opportunity to supplement the record, particularly if the administrator is not in possession of an applicable Social Security Administration ruling.[41]

## V. Conclusion

Almost from the beginning, the Supreme Court allowed welfare benefit plans to use other income offsets, like Social Security Disability Insurance Benefits, as a form of financial integration and plan design. Since then, courts have expanded the evidentiary value of the Social Security findings as evidence of disability in the ERISA long-term disability context. Courts, and now federal regulators, seem to have settled on a thoughtful and deliberate consideration of the evidence while stopping well short of allowing the legal standards and presumptions to be applied

to private plans, seemingly an off-set in favor of claimants, in return for the offset of Social Security Disability Insurance benefits.

## Endnotes

1 The Employee Retirement Income Security Act of 1974 ("ERISA,") 29 U.S.C. § 1001 *et seq.*

2 *See* Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016).

3 A 2012 Group Long-Term Disability Benefit Offset Study conducted by the Society of Actuaries Health Section found that over 80% of long-term disability claimants were receiving Social Security Disability Insurance Benefits after 48 months of continuous disability. Group Long Term Disability Benefit Offset Study, Health Section- Society of Actuaries, 4 (July 2013) ("Group Long-Term Disability Benefit Offset Study.")

4 *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 361 (1980).

5 *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981).

6 *See* ERISA §3, 29 U.S.C. § 1002(1) (describing a welfare plan as "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.").

7 Under the Social Security Act, an individual claiming disability insurance benefits must demonstrate that they have "an inability to engage in any substantial gainful activity" because of a "medical determinable mental or physical impairment that is expected to last for a period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The individual must also demonstrate that his or her "physical or mental impairment [ ] are of such severity" that he or she is unable to perform their previous work, or other gainful activity, considering "age, education, and work experience…." *See* 42 U.S.C. § 423(d)(2)(A).

8 *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981).

9 *Id.* at 507.

10 26 C.F.R. §§1.411(a)-(4)(a) provides that "nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits." The regulation interprets 26 U.S.C. § 411, "the section of the Internal Revenue Code which replicates for IRS purposes ERISA's nonforfeiture provision… [and] plainly encompasses awards under state workers' compensation laws." *Alessi* at 517-18.

11 *See Alessi*, 518-521, with the Court holding that "Congress thereby permitted integration along the lines already approved by the IRS, which had specifically allowed pension benefit offsets based on workers' compensation. Our judicial function is not to second-guess the policy decisions of the legislature, no matter how appealing we may find contrary rationales." *Id.* at 521.

12 *Id.* at 520.

13 *Id.* at 519.

14 *Isner v. Minnesota Life Ins. Co.*, 677 F. Supp. 2d 950 (E.D. Mich. 2009).

15 *Id.* at 956.

16 *Id.* at 957.

17 *Loughman v. Unum Provident Corp.*, 536 F. Supp. 2d 371, 376 (S.D.N.Y. 2008).

18 42 USC §423(c)(2).

19 *Ladd v. ITT Corp.*, 148 F.3d 753 (7th Cir. 1998).

20 *Id.* at 754-55.

21 *Id.* at 756.

22 *Id.*

23 *Id.* (citing *McNamara v. City of Chicago*, 138 F.3d 1219, 1225 (7th Cir. 1998) & *Waldorf v. Shuta*, 142 F.3d 601, 615–16 (3d Cir. 1998)).

24 *Id.* at 756.

25 20 C.F.R. § 404.1527. The Social Security Administration has since made significant changes to the "treating physician rule," applicable to claims filed after March 27, 2017. *See* 20 C.F.R. § 404.1520(c).

26 *Donaho v. F.M.C. Corp.*,74 F.3d 894, 901 (8th Cir. 1996)(citing *Thompson v. Bowen*, 850 F.2d 346, 349 (8th Cir. 1988)).

27 *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1139 (9th Cir. 2001).

28 *The* Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003).

29 *Id.* at 834 ("we hold, courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation.").

30 *Id.* at 831.

31 *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 804 (1999).

32 While the policy of judicial administration which ERISA embraces is intended to promote a "non-adversarial dispute resolution" process, the stark reality of precedent is that, often, either claimants or administrators emerge with new advantages over the other. *Gallegos v. Mt. Sinai Med. Ctr.*, 210 F.3d 803, 808 (7th Cir. 2000).

33 *Metropolitan Life Ins. Comp. v. Glenn*, 128 S. Ct. 2343 (2008).

34 *Id.* at 2346-47.

35 *Id.* at 2347.

36 *Id.* at 2351-52. In his dissent, Justice Scalia remarked that "the only possible basis for finding an abuse of discretion in this case would be unreasonableness of petitioner's determination of disability. The principal factor suggesting that is the finding of disability by the Social Security Administration. But ERISA fiduciaries need not always reconcile their determinations with the SSA's, nor is the SSA's conclusion entitled to any special weight. The SSA's determination may have been wrong, and it was contradicted by other medical opinion." *Id.* at 2360-61 (Scalia, J., dissenting).

37 *Montour v. Hartford Life and Accident Ins. Co.*, 588 F.3d 623, 635 (9th Cir. 2009).

38 *See Glenn v. MetLife*, 461 F.3d 660, 671 n3 (6th Cir. 2006)("we find that the word 'discussed' is somewhat misleading; 'mentioned' would be a more accurate choice.").

39 Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (December 19, 2016).

40 *Id.* at 92321.

41 *Id.* While the updates to the ERISA Claims Procedure were set to take effect January 1, 2018, the DOL has since proposed a 90-day delay of the applicability of the rule. Claims Procedure for Plans Providing Disability Benefits; Extension of Applicability Date, 82 Fed. Reg. 47409 (October 12, 2017).