

In ERISA Cases, The Standard Of Review Really Does Matter

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Litigation pursuant to the Employee Retirement Income Security Act (ERISA) is rather unique. Unlike most cases, ERISA disputes are based on a limited scope of permissible evidence. The range of that scope is ultimately dependent on which standard of review is employed by the courts. Typically, when the standard of review is abuse of discretion, the scope of admissible evidence is limited to what was before the claims administrator when the claims decision was made, i.e. the "administrative record." The reason for this limited subset of evidence is based on the sole question before the court, namely, "Did the claim administrator abuse its discretion?" Obviously, evidence discovered or submitted after the claims decision was made would be irrelevant to that question, hence the narrow scope. However, when the standard of review is *de novo*, the question before the court changes to whether or not a claimant is entitled to benefits. Consequently, the scope of review alters the realm of admissible evidence, which is often outcome determinative.

A recent opinion from the 9th U.S. Circuit Court of Appeals demonstrates how the scope of review can impact the scope of the evidence a court will consider in deciding whether a claimant is entitled to benefits. In *Muniz v. Amec Construction Management Inc.*, 2010 DJDAR 16519 (Oct. 27, 2010), the court addressed the question of the scope of evidence allowed in a *de novo* review and whether the burden of proof can be shifted to the claims administrator in an ERISA disability case. The claimant, Dierrro Muniz, was diagnosed with HIV and applied for benefits through his employer's long-term disability plan. Connecticut General Life Insurance Co. approved benefits and paid Muniz for the first 24 months. However, after 24 months, the definition of disability changed to require Muniz to prove he was unable to perform all of the essential duties of any occupation for which he was qualified by education, training, and experience. As a result, Connecticut General concluded that Muniz did not meet its burden of proof and it terminated his disability benefits.

At trial, the parties agreed that the standard of review was *de novo* because the plan did not grant sufficient discretion to Connecticut General as the claims administrator. Accordingly, the district court placed the initial burden upon Muniz to show that he was entitled to benefits under the terms of the plan. After conducting a *de novo* review, the district court found the administrative record was insufficient for it to determine whether Muniz was "totally disabled" under the terms of the plan at the time that his benefits were terminated. The court then asked the parties' counsel for their positions on appointing an independent expert to evaluate Muniz and present an opinion as to his functional capacity. Muniz's counsel agreed that such an evaluation was appropriate.

The parties reached an agreement, and Muniz was tested and evaluated by a physical therapist. After analyzing the record with the inclusion

of the functional capacity evaluation, the district court concluded that Muniz had the burden of proof and did not meet that burden; he thus, was not "totally disabled" under the terms of the plan. Muniz appealed.

The 9th Circuit affirmed the district court's ruling, explaining that because the case involved a *de novo* review, he retained the burden of proof and that the burden-shifting approach was limited to abuse of discretion cases where the administrator's potential conflict of interest was in question, citing to *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech. Inc.*, 125 F.3d 794, 798 (1997). The court also affirmed the trial court's use of the functional capacity evaluation because Muniz consented to it and because it was appropriate to determine disability status in a *de novo* review. See *Walker v. American Home Shield Long Term Disability Plan*, 180 F.3d 1065 (9th Cir. 1999); *Opeta v. Nw. Airlines Pension Plan for Contract Employees*, 484 F.3d 1211, 1217 (9th Cir. 2007).

Post-administrative review evidence of a claims administrator's procedural deficiencies was, however, not permitted in *Ermovick vs. Mitchell, Silberberg & Knupp LLP Long Term Disability Plan*, 2010 WL 3956819 (Oct. 8, 2010) because, as the court held, this type of evidence is only allowed when the standard of review is abuse of discretion. *Ermovick* addressed the question of whether evidence of procedural deficiencies should be considered in the context of a *de novo* review. James Ermovick worked as a word processor at the law firm of Mitchell, Silberberg & Knupp. His claim for disability benefits was based on depression, anxiety, and pain radiating in his back and neck. Ermovick claimed to be totally disabled under the "any occupation" definition of disability while Prudential, the claims administrator, believed his disability was temporary and denied his benefits claim. Ermovick sued Prudential.

The trial court held that the proper standard of review was *de novo* and sought to address the case on the merits. Ermovick sought to offer evidence of certain procedural deficiencies. Specifically, Ermovick alleged that Prudential failed to conduct any meaningful review of the evidence and arbitrarily denied his claim without a proper review. He further argued that Prudential denied his claim based on a lack of information, while at the same time failing to tell him what information was missing. Normally, this type of evidence is highly relevant because it can, if true, show that the claim administrator violated its duty to make a proper and informed claims decision. The problem the court faced was that the evidence, although relevant as to whether Prudential conducted a full and fair review, was ultimately irrelevant on the narrow issue of whether Ermovick was disabled. Not to be deterred, Ermovick cited the 10th U.S. Circuit Court of Appeals case of *Niles v. American Airlines Inc.*, 269 Fed. Appx. 827, 833 (10th Cir. 2008), which held that "[a] showing that the administrator failed to follow ERISA procedures therefore provides a basis for reversal separate from that provided by *de novo* review of the merits of the claim." There, the court concluded that such procedural deficiencies effectively created an independent basis for reversal of a claims administrator's decision. However, not every Circuit Court of Appeals has reached this result. For example, the 6th U.S. Circuit Court of Appeals took a more hard-line view in *Wilkins v. Baptist Healthcare System Inc.*, 150 F.3d 609, 613 (6th Cir.1998). There, the court found that analysis of procedural deficiencies was not necessary under a *de novo* review provided that the denial of benefits was correct. If the decision made by the claims administrator was ultimately the right one, then the convoluted manner in which it reached that conclusion was irrelevant.

Since existing case law in the 9th Circuit did not provide clear guidance, the court in *Ermovick* came to the conclusion that it should follow the 6th Circuit rational based on *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006). In *Abatie*, the 9th Circuit held that "even in instances of wholesale and flagrant violations of the procedural requirements of ERISA, the Court's remedy is to accord no deference to the Plan and review the record *de novo*." By according no deference, the court believed that the 9th Circuit left no room for an independent basis for reversal. The *Ermovick* court interpreted this holding to mean that giving "no deference" also equates to providing no weight to procedural deficiencies. There was, of course, one exception to this rule. Where the procedural deficiencies caused the record itself to be incomplete, then the court may supplement the administrative record with addition

evidence.

In *Ermovick*, since neither party asked to supplement the record, the court reasoned that the administrative record was complete. As a result, the court held that evidence of procedural deficiencies was not necessary when the standard of review was *de novo*. On that basis, the court proceeded to conduct its own independent review of the record, which revealed that, despite the errors in handling the case, Prudential's decision to terminate benefits was correct.

In *Muniz* and *Ermovick*, it is likely that the standard of review was outcome determinative.

Identifying the correct standard of review and properly evaluating how that standard of review is likely to impact an ERISA case are thus critical inquiries that may mean the difference between failure and success.



Letter to the Editor

The Wall That Separates

Kris Whitten's attempt to refute the principle that the First Amendment created a "wall of separation" between church and state is riddled with factual errors. ("The Founders Did Not Seek to Abolish Religion," Nov. 24) I'll just point out one glaring example.

Whitten falsely claims that James Madison espoused the view that "the Establishment Clause did not require neutrality on the part of government in respect of religion." On the contrary, Madison wrote that both the government and religion benefited by "the total separation of the church from the State" (*Letter to Robert Walsh*, March 2, 1819), which was "strongly guarded...in the Constitution of the United States" (De-

tached Memoranda, circa 1820).

Citing the "line of separation between the rights of religion and the civil authority," Madison urged that the "tendency to a usurpation on one side or the other or to a corrupting coalition or alliance between them will be best guarded against by entire abstinence of the government from interference in any way whatever." (*Letter Rev. Jasper Adams*, Spring 1832). Madison regarded "the practical distinction between Religion and Civil Government as essential to the purity of both, and as guaranteed by the Constitution of the United States." (*Letter to Baptist Churches in North Carolina*, June 3, 1811).

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