ERISA Any Occupation Investigations by Linda E. Nee

Employer sponsored group Plans nearly always contain a definition of disability which includes the following:

"After 24 months claimants must be unable to perform the material and substantial duties of ANY occupation for which he has training education and experience." (There are 12, 24, 36 and 60 month any occupation plans.) Twelve month any occupation investigations begin the moment a new claim is submitted, so the process is often hurried with outdated medical restrictions and limitations.

To begin, any occupation provisions are adverse to employees and future claimants because they do not insure one's job, but only "occupations." There is a difference between what employees actually do on the job, and how the general occupation is defined in the national economy.

A good example is the job of a Walgreen's Manager who is expected to help unload and carry inventory, lift goods up on the shelf, push and pull hand trucks, and use other cleaning machines and materials to help service the store. However, the "occupation" of a Retail Store Manager in the national economy is defined as "sedentary" and does not mention lifting, carrying, extended walking or standing requirements.

If, due to a back injury the store manager is no longer able to lift and carry, the disability insurer will state he is able to do his job since the "occupation" is considered sedentary in the national economy.

Although some courts have decided against insurers on this matter, by far the majority has supported "occupations as defined in the national economy" particularly if specific provisions are written in the policy. This isn't good for claimants and is considered to be one of the adverse provisions contained in ERISA group policies.

Therefore, in order to qualify for disability benefits after 24 months of paid benefits, claimants must prove to the insurance company they not able to engage in any work activity in any occupation in the national economy. This definition moves closer to the definition of disability for Social Security Disability Income and is a higher burden of proof.

From the insurance company's perspective conducting an "any occupation investigation" is the last great attempt to deny ERISA claims legitimately, and a great deal of internal resources are dedicated to the "Transferable Skills Analysis" usually conducted anywhere between 9-18 months of paid benefits.

In today's insurance environment insurers are hiring third-party reviewers to conduct change in definition investigations such as Genex, Allsup, and Advocator Group. These companies also offer assistance with SSDI and in many cases have a "conflict of interest" with you and your claim.

As a whole, claims handlers and insurers in general are not good at conducting "any occupation investigations". Today, insurers are more likely to out-source this task to an agency that prepares routine charts, graphs, and documents identifying "alternative" occupations with outdated information from the Dictionary of Occupational Titles (DOT). The last update of the DOT was in 1976!

The problem is that "indexing" and "gainful" are frequently omitted from the process when in fact both can have significant effect on the outcome of any Transferable Skills Analysis (TSA).

"Indexing" is a process whereby claimants' pre-disability earnings are converted to equivalent inflation dollars by applying an "index" obtained from the Bureau of Labor Statistics often referred to as the Consumer Price Index.

Everyone knows in 1950 a Hershey Bar costs $.50, but today is sold for $1.50. The difference between the values of the dollar in 1950 is that it is today worth three times less and it takes three times as much to buy today what could have been purchased in 1950 for three times less.

Consider though, that for the last 10 years the United States has had a recessionary economy and there has not been a high rate of inflation. Indexing does not equate to significant dollars today the way it did in the past.

(Indexing is also mentioned in-group policies under the calculation of "residual earnings" and should not be confused with this discussion. "Indexing" is mentioned most often in the Glossary under the definition of "gainful occupation" in most ERISA Plans. i.e. "Claimant must be able to earn at least 60% of indexed pre-disability earnings.")

Pre-disability earnings two years ago are "indexed" and are converted to equal amounts of purchasing power today. Consider a claimant, who two years ago made $45,000 a year, but due to inflation would need today to earn $45,500 to have the same purchasing power today.

Indexing claimants' pre-disability earnings is important when determining whether "gainful" alternative occupations can be identified. Tragically, insurers just "forget about indexing and gainful" and fail to document either in the claim file before terminating claims.

In my experience claims handlers have no idea of the significance of "indexing" and mathematically wouldn't know how to perform the calculation anyway. Vocational reps aren't great mathematicians either and generally make mistakes unless they use a program that calculate "gainful" but omits "indexing." Either way, claimants are often harmed by these omissions.

Another mistake claims handlers frequently make with respect to conducting any occupation investigations is not updating current medical restrictions and limitations before referring files for vocational review.

Unfortunately, the TSA process is subject to the GIGO principle, of "garbage-in, garbage-out." If old medical restrictions and limitations are used to determine ability to work, the outcome of the TSA is equally not credible. Claims handlers can be lazy, or too much pressure is placed on them to "hurry up" the process so claims can be denied more quickly. Again, either way, claimants are harmed by unfair decisions.

The any occupation process should be a claimant or consultant "managed" process. Claimants often allow the insurance company to "do their thing" and the outcome is unlikely to be favorable without intervention.

Claimants need to know what the "any occupation" process is and that after benefits have been paid for 24 months, they may be terminated as the result of an "any occupation investigation" which includes a TSA or transferable skills analysis. Claimants also need to know claims handlers and vocational reps often bungle the process.

Most group certificate holders (ERISA group claimants) do not know or understand this process and by omission allow insurers to "do their thing". This does not work favorably for claimants in most instances.

Consistent with what I've posted on many occasions in the past, claimants need to re-examine the 1) definitions of disability in their policies and 2) glossary definition of what constitutes "gainful" to determine what point actions need to be taken to manage the on coming "any occupation" analysis. Make particular note of the word "indexed" in the definition of "gainful."

There are many adverse provisions contained in employer group ERISA Plans and the possibility of losing benefits after 24 months is one of them. It is important to be aware and knowledgeable about the "any occupation investigation" and be prepared to manage the process.

Finally, companies such as Unum Group place claims on Reservation of Rights (ROR) when any occupation investigations are taking place assuming the outcome will result in a denial for claimants. The company is able to have a contribution to profit for future denials whether justified or not.

If your claim is nearing an any occupation investigation and you need help, please feel free to contact me.