Litigated Issues in the Occupational Analysis of a Claimant's Job
and
Effective Use of Functional Capacity Evaluations and Vocational Experts

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Introduction.

Increasing litigation over claims for short and long-term disability benefits in the past decade has spawned interesting arguments concerning the construction of disability income insurance policies. This paper addresses some of the issues which commonly arise in disability insurance litigation in the context of performing an occupational analysis of the claimant's job.

The first step, of course, is to analyze and dissect the policy and look at the definitions that apply: How does the policy define *occupation? – "own" or "regular" occupation.* How does the policy define *disability from the occupation*? - inability to perform*: the substantial and material duties* or *the important duties* or *all the important duties* or *each and every material duty* or *one or more of the important duties* or *at least one material duty* or *any duties on a full time or part time basis.* Does the policy

establish any framework for determining an insured's *occupational duties*? *the duties of the specialty/subspecialty* or *the duties of the occupation in the manner in which you performed them or the duties as they are customarily performed in the industry* or *the duties as they are normally performed within the occupation without regard to how they were performed in your particular job* or *the duties as they were performed for your employer but without regard to the number of hours worked per week if more than 40* or *the duties on a full time or part-time basis.*

The next step is to analyze the contractual language in relationship to the facts of the particular case and determine the various arguments than might be made regarding how the policy should be interpreted with consideration of the policy language, the facts, case law. The implications of the failure to perform such an analysis and make the appropriate arguments, is evident in the outcome of some of the cases reviewed. *See, e.g. Dahlin v. Metropolitan Life Ins. Co.*, 255 F. Supp. 2d 987, 997-98 and f.n. 4 (N.D. Iowa 2003) (holding that plan administrator's interpretation of "regular occupation" which required the employee to be unable to perform the essential duties of her occupation as well as the essential duties of that occupation for any other employer was not unreasonable in light of the fact that the Plaintiff failed to argue that the plan language should be interpreted otherwise).

Once all the permeations are understood counsel can make an informed decision on how to effectively utilize vocational experts or functional capacity evaluators. One of the most important factors in the successful utilization of a FCE or Vocational evaluator is the proper preparation of these professionals so that they understand the policy terms

and the implications of slight variations. This will allow these professionals to make the most appropriate evaluations based on the needs of the case.

Our paper discusses some of the key occupational issues and case law that both plaintiff and defense attorneys confront in the context of litigating the claimant's occupation and disability from the occupation.

I. Job v. Occupation.

During the initial period of disability, the term "totally disabled" is often defined to mean "you are unable to perform the material duties of your regular occupation," or "you are unable to perform the important duties of your own occupation." An enduring threshold issue has been what constitutes an insured's "regular occupation" or "own occupation?" More specifically, should these terms be defined by the particular job the insured is performing for his employer, or the occupation as it exists in the general workplace?

Most courts have held that "regular occupation" means the occupation as it exists in the general workplace without consideration to special or unusual circumstances that exist in the *particular job*. However, if the occupation within a particular industry or specialty varies from the occupation as generally performed, then most courts have recognized these differences and looked at the particular occupation.

Some decisions have taken the approach of generally construing regular occupation and looking to the DOT for guidance: *Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264, 271-73 (4th Cir. 2002) (when reviewing whether plan participant met policy definition of disability requiring an inability to "perform each and every

material duty of his/her regular occupation" reliance on Department of Labor's Dictionary of Occupation Titles for Editor and Vice President to define plaintiff's occupation as Vice President in Publishing was appropriate. On de novo review, the court found that there were no significant discrepancies between the job description from the employer and the DOT. Although Gallagher argued that the material duties in the DOT description did not match his actual job, he failed to "point to any specific duty in the DOT description that was in some way different than his actual job duties"); *Schmidlkofer v. Directory Distributing Associates, Inc.*, No. 03-5755, 2004 WL 1921184 at *2 (6th Cir. Aug. 25, 2004) (insurer's interpretation of "regular occupation" as one that "is performed in a typical work setting for any employer in the general economy" was rational); *Sullivan v. Trilog, Inc. Ins. Plan*, No. C 99-1005, 2002 WL 31496421 at *3-4 (N.D. Iowa Oct. 9, 2002) (ruling that the "term 'occupation' when given its ordinary meaning, has nothing to do with the particular employer and everything to do with a set of required skills" thus the treating physician's statement that the insured could perform her occupational duties for another employer justified a denial of benefits); *Ehrensaft v. Dimension Works Inc. Long Term Disability Plan*, No. 01-15062, 2002 WL 770611 at *2 (9th Cir. Apr. 29, 2002) (holding insurer "did not abuse its discretion in interpreting 'own occupation' to mean the insured's occupation as defined generally by the Department of Labor rather than the insured's specific job"); *White v. Health-South Long-Term Disability Plan*, 320 F. Supp. 2d 811, 819 (W.D. Ark. 2004) (holding that the insurer's use of a DOT description in its determination to deny benefits was not an abuse of discretion).

While courts generally have not defined "own occupation" or "regular occupation" based on the irregular circumstances of a particular employment situation; the courts do generally define "own occupation" or "regular occupation" by considering the particulars of a job, if the job as performed is also performed in a like manner by others within the industry or within a particular subspecialty or setting in which the job is performed. In other words, the courts will not make the occupation so generic that the job itself is disregarded. For example, the claimant who performed the job of a national accounts/sales manager in which the position required frequent air travel in order to maintain and service national accounts – a duty which is customary in the occupation and industry at this level of job performance will not be evaluated as performing a generic "salesperson" occupation or another sales manger occupation which does not include air travel.

Many courts will inquire into the particular demands of the occupation and have taken a more narrow approach, inquiring into the particulars of the insured's job. For example, in *Lasser v. Reliance Standard Life Ins. Co.*, 344 F.3d 381, 386 (3rd Cir. 2003), the Third Circuit addressed a provision in a disability policy which stated that the policy protected the insured from the inability to "perform the material duties of his or her regular occupation." The court stated that "[b]oth the purpose of disability insurance and the modifier 'his/her' before 'regular occupation' make clear that the 'regular occupation' is the usual work that the insured is actually performing immediately before the onset of the disability. *Id.* "Applying the text as written," the court found that the plaintiff's "regular occupation was as an orthopedic surgeon responsible for emergency surgery and

on-call duties in a relatively small practice group and within a reasonable travel distance from his home . . ." *Id.*; s*ee also Ebert v. Reliance Standard Life Ins. Co.*, 171 F. Supp. 2d 726, 735 (S.D. Ohio 2001)(rejected an insurer's contention that it did not have to consider the specific demands of the job and found that whether an insured could perform a "generic" occupation is not enough noting that "there is no reason to assume that a national standard set forth in the DOT defines the duties of plaintiff's regular occupation"); *Berkshire Life Ins. Co. v. Adelberg*, 698 So.2d 828, 830 (Fla. 1997) (construing phrase, "your occupation," narrowly in favor of coverage giving the phrase "the meaning that an average buyer of an insurance policy would give to the term." – insured who could return to work as a salesman, but who could no longer work as a yacht salesman entitled to continued receipt of benefits); *Freling, M.D. v. Reliance Standard Life Ins. Co.*, 315 F. Supp. 2d 1277, 1291 (2004) (ob/gyn found disabled based on an inability to perform the two material duties of his occupation as he performed it; rejecting automatic application of the DOT - holding that the insurance company's interpretation that the term "regular occupation" incorporates a "national standard" was unreasonable

Lasser and its progenitors thus suggest that the insurer should consider not only the particular job formerly held by the insured, but also to the nature of the institution where the insured was employed. *See also Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 252 (2d Cir. 1999) (holding that the insured was disabled because she could not perform in a position that was of the same general character as her former job at a small health care agency, even though she might be able to perform as a "Director of Nursing" at a large, general purpose hospital).

Sometimes arguments are made regarding the specific policy language and whether one must be unable to perform *all the material duties* or *each and every material duty* or *one or more of the important duties.* To some extent these issues are related to the total v. partial disability issues addressed later in this paper. Yet, this issue comes into play even when the policy contains no provision for residual or partial benefits and only provides benefits for total disability.

Despite policy language that defined disability as being unable to perform all of the material duties, the Fifth Circuit in *Lain v. UNUM Life ins. Co. of Am.,* 279 F.3d 337, 347 (5th Cir. 2002) affirmed the district court award of long term disability benefits where the insurer had argued that the claimant, an attorney suffering from a chronic condition that resulted in frequent, severe chest pains, was not disabled under the terms of its policy, because she could perform research on her condition on the internet. The court held that a fair reading of the policy, and the insurer=s previous interpretations of the provision, required only that a person be unable to perform a single material duty of her regular occupation before being disabled. The court rejected as evidence of a lack of objectivity the insurer=s view that the claimant=s ability to research her condition on the internet indicated that the claimant could perform her duties as an Attorney.

See Logue v. Reliance Standard Life Ins. Co., No. 01-264-B, 2002 U.S. Dist. LEXIS 10163 (D.N.H. June 4, 2002) (Although the treating physician stated claimant could perform light duty work during an eight-hour day, he had also consistently endorsed claimant's contention that she could not stand or walk for

more than two hours during an 8 hour workday. Since it was undisputed that claimant's position as a hospital discharge planner required her to stand and walk for much of the work day, claimant established that she was unable to perform *all* of the material duties of her job).

Disability policies sometimes define "regular occupation" or "own occupation" as the "occupation as it is performed in the national economy, rather than as performed for a specific employer or a specific location." *See e.g., Shipp v. Provident Life & Accident Ins. Co.*, 214 F. Supp. 2d 1241, 1243 (M.D. Ala. 2002). Under this formulation, there are various ways to determine what positions fall within an insured's "regular" or "own" occupation. "One method would be to have a vocational evaluation performed to compare the character, duties and training requirements of [an insured's] job with various other jobs . . ." *Dionida v. Reliance Standard Life Ins. Co.,* 50 F. Supp. 2d. 934, 939 (N.D. Ca. 1999). "Another method would be to determine which of the D.O.T. occupational titles covers the claimant's previous job." *Id.* Even when occupation is defined broadly in the policy, insurers still need to take care not to mischaracterize an insured's occupation. The Court in *Shipp* was critical of an insurer's misuse of a generic DOT job title to characterize the occupation. *See also Cunningham v. Paul Revere*, 235 F. Supp. 2d 746 (W.D.Mich. 2002).

Any Occupation Definitions of Disability:

Often times, disability policies, employ an "any occupation" definition of disability, similar to the one utilized by the Social Security Act (SSA). Under this definition, an insured is not "eligible for benefits if he could perform any substantial

gainful work that exists in the national economy." *See Gouras v. Burroughs Wellcome Co.*, 905 F.2d 1529, 1990 WL 74414 at *1 (4th Cir. May 7, 1990).

While the determination of the SSA is not dispositive, it is a factor that most courts state must be considered and many courts have looked to when determining the policy meaning of disability. In applying such a provision, a court may accord deference to a disability determination made by the SSA. *See Elliot v. Sarah Lee Corp.*, 110 F. Supp. 2d 458, 468 (W.D. Va. 2000). A contrary result was reached in a case where the policy provided that the insured "is unable to perform all of the material duties of any occupation for which he or she may reasonably become qualified based on education, training or experience." This standard, the Court ruled is not "analogous" to that of the SSA. Hence, "there is no obligation to afford the SSA decision significant weight." *Cossio v. Life Ins. Co. of North America,* 240 F. Supp. 2d 388, 394-95 (D. Md. 2002). Under this latter definition, an insured is "'disabled' when he is unable to perform 'any occupation,' so the policy does not require that the occupation constitute a significant number of jobs in the national economy." *Id.* at 394-95.

On this issue, the 7th Circuit Court of Appeals, with Judge Posner writing, held that "unable to engage in any and every duty pertaining to any occupation or employment for wage or profit for which you are qualified, or become reasonably qualified by training, education or experience" means essentially the same thing as the inability to engage in Asubstantial gainful activity@ under the Social Security program. *Ladd v. ITT Corporation*, 148 F.3d 753 (7th Cir. 1998). The Court acknowledged that the wording differs from that of the statute governing social security disability benefits which defines

disability at 42 U.S.C. ' 423(d)(1)(A), but found that the definitions were essentially analogous and that the arguments put forth regarding full time verse part time work had no merit. The Court discussion was as follows:

> AMetLife was unable to articulate any difference in actual meaning until the oral argument of the appeal, when its lawyer said that the reference to "any and every duty" means that an ITT employee is not disabled unless he or she can't even do part-time work, whereas (he thought) under the Social Security Act a worker who cannot work full time is deemed totally disabled. That is not what the Act says. As long as the worker can engage in "substantial gainful activity," he is not disabled even if the only work that he is capable of doing is only part time. E.g., *Brewer v. Chater*, 103 F.3d 1384, 1391-92 (7th Cir.1997); 20 C.F.R. ' 404.1572(a). Of course, the work must not be so meager as not to be substantial and gainful. See 20 C.F.R. ' ' 404.1573(e), 404.1574(a), (b). But the same, it turns out, is true under ITT's disability plan. For MetLife's lawyer quickly retreated from his effort to distinguish the plan from the social security disability law when asked whether a worker who could work ten minutes a day was thereby disentitled to total-disability benefits under the plan; he said no. Anyway his attempt comes much too late in the litigation to be considered. We shall proceed on the assumption that "total disability" under the plan means, at least insofar as Ladd's claim is concerned, the same thing as under the social security disability program. *Helms v. Monsanto Co.*, 728 F.2d 1416, 1420-21 (11th Cir.1984); see also *Torix v. Ball Corp.*, 862 F.2d 1428, 1431 (10th Cir.1988); *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 695 n. 11 (7th Cir.1992).@

When the “any occupation” definition of disability is defined too narrowly that it is unrealistic, the courts have looked to the social security definition of disability for guidance and the general intent of the policy and other similar disability policies to reasonably construe the policy language in a more practical light. Such a circumstance was discussed in detail by the Court in *Helms v. Monsanto Company, Inc.*, 728 F.2d 1416 (11th Cir. 1984). See *also, Hammond v. Fidelity*, 965 F.2d 428, 430 (7th Cir.1992) ("general" disability provisions should not be construed so literally that an individual

must be utterly helpless to be considered disabled. Rather, the insured should be entitled to recover provided he or she is unable to perform all the substantial and material acts necessary to the prosecution of some gainful business or occupation).

The court in *Helms* using the Social Security definition of disability interpreted the provisions of an ERISA governed LTD plan that required total and continuous disability preventing any occupation or employment for remuneration or profit and a presumption of permanency during the remainder of claimant's life. The Court stated that:

> AIn order to determine when a Monsanto employee will be considered to be totally and permanently disabled … we must define the phrase "any occupation or employment for remuneration or profit." It is difficult to do this because a person would almost never be deprived of the ability to earn a nominal sum unless he is rendered completely immobile and without any cognitive ability. In order to establish a reasonable interpretation of this phrase we turned for guidance to insurance policies with similar provisions and to cases construing the Social Security disability provisions. Analogous insurance cases consistently agree that the term "total disability" does not mean absolute helplessness on the part of the insured. The insured can recover benefits if he is unable to perform all the substantial and material acts necessary to the prosecution of some gainful business or occupation. Gainful has been defined by these courts as profitable, advantageous or lucrative. Therefore, the remuneration must be something reasonably substantial rather than a mere nominal profit. See, e.g., *Russell v*. Prudential Insurance Company of America, 437 F.2d 602, 605 (5th Cir.1971); General American Life Insurance Company v. Yarbrough, 360 F.2d 562, 565 (8th Cir.1966); *Smith v*. *Mutual Life Insurance Co. of New York*, 165 So. 498, 500 (La.App.1936); *Protective Life Ins. Co. v*. *Wallace*, 230 Ala. 338, 161 So. 256, 259 (1935). [FN6]
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> > FN6. Although these cases were all construing state law which is not applicable to plans covered by ERISA we are not using them as precedent but rather as examples of different courts' interpretation of these provisions. Social Security cases dealing with disability provisions have followed a parallel path. [FN7] It is clear that the standard for disability under the Social Security Act is a stringent one. [FN8] The applicant must be unable to engage in "any ... substantial gainful work which exists in the national economy, regardless of whether such work exists in the

immediate area, in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. <section> 423(d)(2)(A) (1980). As the Fifth Circuit has pointed out, the showing required of the claimant is "so stringent that it borders on being unrealistic." *Laffoon v. Califano,* 558 F.2d 253, 256 n. 6 (5th Cir.1977), quoting, *Williams v. Finch,* 440 F.2d 613, 615 (5thCir.1971).FN7. Section 423(d)(1)(A) provides that the term disability means: inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; 42 U.S.C. <section> 423(d)(1)(A) (1980).FN8. The requirements of the Social Security Act are considerably more stringent than other acts. The Black Lung Benefits Act; for example, requires that the Secretary's regulations "shall not provide more restrictive criteria than those applicable under Section 423(d) of Title 42 [the Social Security Act]." 30 U.S.C. <section> 902(f) (1969). The Longshoremen's and Harbor Workers' Compensation Act's disability provision, 33 U.S.C. <section> 908(c) (1957) has been construed by the courts to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment...." *Washington Terminal Co. v. Hoage,* 65 App.D.C. 33, 79 F.2d 158 (1935).Yet in spite of its strictness the Social Security Act's requirements for disability are framed in terms of gainful employment and not just nominal employment. See, e.g., *Campbell v. Secretary of Dept. of Health and Human Services,* 665 F.2d 48 (2d Cir.1981), rev'd on other grounds sub nom, *Heckler v. Campbell,* --- U.S. ----, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983); Brenem v. Harris, 621 F.2d 688 (5th Cir.1980); *Markham v. Califano,* 601 F.2d 533 (10th Cir.1979); King v. Finch, 428 F.2d 709 (5th Cir.1970). In *Hill v. Califano,* No. 78-1235, an unpublished decision by the Tenth Circuit filed May 30, 1979, quoted in *Markham v. Califano,* 601 F.2d at 534, the court held that substantial gainful activity means performance of substantial services with reasonable regularity, either in competitive or self-employment. (emphasis added). Thus, it is obvious that courts do not insist upon a state of being not consistent with conscious life as a condition precedent for recovery under very similar disability clauses.@

II. Change in Occupation.

A related issue is whether the insured's "regular occupation" is the one in which he was engaged when he becomes disabled, or the one in which he was engaged when the

policy was issued. The majority rule is that "regular occupation" refers to the occupation in which the insured is employed at the time of the onset of his or her disability, rather than the occupation stated in the insurance policy or application therefor. *See e.g., Gross v. UNUM Provident Life Ins. Co.,* 319 F.Supp. 2d 1129 (C.D. Cal 2004) (in construing an individual disability policy the court stated: "…what matters is the occupation in which Plaintiff was engaged at the time he became disabled, not the occupation in which he was board-certified or what occupation he might have practiced at the time he purchased the insurance policy.") Similarly, in the ERISA arena, a very recent district court case *Smith v. Reliance Standard Life Ins. Co.,* 350 F.Supp 2d. 993 (S.D. Fl. 2004) held that regular occupation as used in plan was participant's work as performed "immediately prior" to his disability for his employer and the material duties referred to performing gynecological surgery, delivering babies and performing ob/gyn examinations and it was wrong for administrator to rely on the DOT job description for OB/GYN to define material occupational duties. The court looked to *Freling v. Reliance Standard Life Ins. Co.* and *Lasser* discussed infra in Section I, Job Verse Occupation.

See also, *Winter v. Minnesota Mutual Life Ins. Co.,* 199 F.3d 399, 409 (7th Cir. 1999) (holding that a genuine issue of fact exists as to whether insured's "regular occupation" was pit trader or computer trader when insured became disabled); *New York Life Ins. Co. v. Saunders,* 314 Ky. 577, 581, 236 S.W.2d 692 (1951) (finding insured's occupations as automobile salesman and garage executive at time of disability onset controlling over occupation as grocer at time policy was issued); *Colaluca v. Monarch Life Ins. Co.,* 101 R.I. 636, 643-44, 226 A.2d 405 (R.I. 1967) (finding "regular

occupation" when not defined in the policy is "the work he was doing at the time of his injury"); *Emerson v. Fireman's Fund, American Life Ins. Co.*, 524 F. Supp. 1262, 1267 (N.D. Ga. 1981) (same); *Stender v. Provident Life and Accident Co*, 2001 WL 811159 (N.D. Ill. July 17, 2001) ("the focus is on the how the claimant earned his 'primary living' before his injury."). As noted by a Missouri court:

> the designation of an occupation in the application, even though incorporated in the policy, does not per se cause that occupation to be the designated occupation . . . That is true of the policy in question. However, by the use of the terms, "his occupation," "regular occupation" or the like, such policies are held to refer to some particular occupation and not just any occupation. Such terminology is generally held to mean the insured's occupation at the time the disability occurs.

Hopkins v. North America Co. for Life & Health, 594 S.W.2d 310, 315 (Mo. Ct. App. 1980).

III. Specialty v. General Field of Employment.

The question of whether the insured is capable of performing the substantial or material duties of his regular occupation, frequently turns on whether "regular occupation" refers to the insured's specific practice or specialty, or his/her general field of employment. Most frequently, this question arises under disability policies involving independent professionals such as doctors, who often enjoy freedom in defining the parameters of their occupation.

Recognizing the "increasing tendency in the field of medicine to specialize," most courts hold that if an occupation has become that of a recognized specialty, and the insured suffers from an impairment which precludes the insured from performing that specialty, the insured is disabled. *Dixon v. Pacific Mutual Life Ins. Co.*, 268 F.2d 812,

815 (2d Cir. 1959) *cert. denied sub nom* 361 US 948 (1960) (holding that although insured physician found subsequent employment as a hospital superintendent, he was totally disabled as a specialist in surgery because of dermatitis of the hands)*; see Raithaus v. UNUM Life Ins. Co. of Am.*, 335 F. Supp. 2d 1098, 1123-24 (D. Hawaii 2004) (noting that since no provision in the policy indicated that all physicians would be treated as having the same "regular occupation," if plaintiff's routine work at the time of his injury was that of a urologist, and he could no longer perform the material duties of his urology practice, he would be entitled to long-term disability benefits; the court found that the ability to perform surgery was a material and substantial duty of the urologist); *Matten v. SMA Life Assurance*, No. 01 C7755, 2002 WL 31433405 at *2 (N.D. Ill. Nov. 1, 2005) (noting that focus is on whether insured's injury precluded him from performing duties of a "trial attorney," rather than an "attorney."); *see also Hoffert v. Commercial Ins. Co. of Newark*, 739 F. Supp. 201, 206 (1990) (where policy provided that insured was disabled if the insured was unable to engage in comparable employment for which he was "fitted by reason of education, training and experience," court held that comparable employment was that of a surgeon, rather than a general physician).

Some courts reach this result by invoking the doctrine of *contra proferentem*, under which "ambiguous" policy language is construed against the insurer. *See Rahman v. Paul Revere Life Ins. Co.*, 684 F. Supp. 192, 196 (N.D. Ill. 1988) (holding that a doctor's "regular" occupation was that of an emergency cardiologist, rather than a general cardiologist); *Bell v. Continental Assurance Co.*, 123 Ill. App. 2d 274, 278, 260 N.E.2d 114 (1970)(holding that the insured planer operator was totally disabled due to a

back injury notwithstanding that the insured was capable of performing duties as a machinist); *House v. American United Life Ins. Co.*, No. 02-1342, 2002 WL 31729483, 2004 U.S.Dist.LEXIS 6942, (E.D. La. 2004) (noting that a fair reading of the policy supported the view that to be disabled, the insured, must be unable to perform the "substantial and material duties" of his occupation as a trial attorney, rather than the general practice of law).

In contrast, the court in *Guardian Life Ins. Co. of Am. v. Copper*, 829 F. Supp. 1247, 1248 (D. Kan. 1993), refused to read into a policy issued to a registered nurse a proviso that the insured was entitled to benefits if she were unable to perform the major duties of her subspecialty, cardiac care nurse. To do so, the court noted, would render meaningless a policy provision that provided, "[i]f you have limited your professional practice to a recognized specialty in medicine, dentistry, law, or accounting, we will deem your specialty to be your occupation." *Id.* Since this provision was not applicable to the insured, the court continued, "the only reasonable reading of the policy is that [the insured] is entitled to benefits only if she is unable to perform the major duties of a registered nurse." *Id.*

At least one federal district court has rejected an insurer's argument that "regular occupation," as defined in the context of a group policy should be interpreted generally, while the phrase should be interpreted narrowly in the context of an individual policy. *Raithaus v. UNUM Life Ins. Co. of Am.*, 335 F. Supp. 2d 1098, 1125 (D. Hawaii 2004) (although recognizing that this distinction is reasonable, the court noted that the record evidence and case law indicate that such a distinction should not be made).

It is not uncommon for an insurer to transmit to its insured, upon the insured's request for clarification of how the policy defines "regular occupation," a letter which further defines the specialty for which the insured is covered. Typically, the insured will rely on the letter to show that the insurer has recognized that "regular occupation" refers to the specific specialty that the insured claims to be disabled from. The insurer, though, just as often argues that because the letter was sent after consummation of the contract, it constitutes inadmissible parol evidence. Most courts have held that the so-called "specialty letter" is not merely parol evidence, but a "bargained-for modification" of the insurance contract. *See, e.g., Rosenberg v. Guardian Life Ins. Co.,* 510 So.2d 610, 611 (Fla. Dist. App. 1987) (holding that insurer modified the existing policy when it assured its insured in a letter that he would be entitled to disability benefits even though he was "able to engage in a general or specialized medical practice which did not include the essential activities associated with a specialist in opthalmic surgery."); *Kraft v. Massachusetts Cas. Ins. Co.,* 320 F. Supp. 2d 1234, 1238 (N.D. Fl. 2004) (holding that specialty letter was a bargained-for modification of the insurance contract such that the parties agreed that the amount of disability was to be measured against a regular occupation as an invasive and interventional cardiologist, rather than as a general cardiologist; thus insured was found disabled even though he continued working in a more general field of medicine).

Subspecialties have been recognized as the insured's regular occupation. See, *Oglesby v, Penn Mutual Life Ins. Co.,* 877 F. Supp. 872, 882 (D. Del. 1995)(holding that if insured's usual work was subspecialty of interventional and vascular radiology as he

contended, and not specialty of general radiologist, as insurer contended, and insured no longer could perform the substantial and material duties of that usual work, he would be entitled to benefits; --policy provided that the insured would be totally disabled where "You are unable to do the substantial and material duties of your “regular occupation”--defined as "your usual work when total disability starts).

IV. Total v. Residual Disability Claims.

Another challenge in disability cases involves the amount of work an insured may be capable of performing and still be considered “totally disabled.” In other words, to be deemed totally disabled, must the insured be unable to perform each and every material duty, or may the insured be able to perform some minor or substantial duties of his occupation? The judicial consensus is that an occupational disability policy does not require absolute helplessness. Rather, total disability typically exists if the infirmity renders the insured unable to perform the substantial and material duties of his or her occupation in the usual and customary manner.

Beyond acceptance of these general precepts, case law on the subject does not admit to easy synthesis. Courts are split on whether the inability to perform one, some, or even many material duties constitutes total disability or residual disability. Insureds invariably argue that their inability to perform any less than every duty establishes total disability. Conversely insurers contend that, since the insured is capable of performing one or more substantial and material duties of his occupation, he is only residually disabled.

The majority of courts have construed policies containing both total and partial disability provisions as a whole, thereby promoting consistency in the application of the total and residual disability provisions. *See Falik v. The Penn Life Mut. Ins. Co.*, 204 F. Supp. 2d 1155, 1157 (E.D. Wis. 2002) (holding insured physician only eligible for residual disability benefits when insured admitted that she could perform "some but not all of the substantial and material duties" of a pediatric physician); *Dym v. Provident Life & Accident Ins. Co.*, 19 F. Supp. 2d 1147, 1150 (S.D. Cal. 1998) (holding "residual disability" provision makes it clear that plaintiff is not "totally disabled" when plaintiff continues to perform one of the substantial and material duties of his occupation). Otherwise, the partial disability provision would be nullified. *See, e.g., Giampa v. Trustmark Ins. Co.*, 73 F. Supp. 2d 22, 29 (D. Mass 1999) (noting that "reading a total disability clause too broadly risks nullifying the partial disability counterpart" but one duty may be so prevalent as to amount to total disability);

Guistra v. Unum, 815 A.2d 811 (Me. 2003) (holding that orthopedic surgeon who could no longer perform major surgery was not totally disabled only residually disabled, when he was able to evaluate patients in his office and perform minor surgeries); *Conway v. Paul Revere Life Ins. Co.*, No. 5:99CV150-T, 2002 WL 31770489 at *10 (W.D.N.C. Dec. 5, 2002), *aff'd*, 70 Fed. Appx. 17, No. 03-1040, 2003 WL 21730096 (4th Cir. July 25, 2003) (existence of residual disability provision prevented furniture mover who could not lift over 100 pounds from being "totally disabled" when he could still perform some of the important duties of his job); *but see Dowdle v. National Life Ins. Co.*, No. 01-2346ADMJSM, 2003 WL 22047858 at *5 (D. Minn. Aug. 28, 2003) (orthopedic surgeon

unable to perform surgery, although still able to perform office consultations, found totally disabled despite existence of a residual disability provision in the policy). And s*ee, House v. American United Life Insur. Co.*, 2004 U.S.Dist.LEXIS 6942 (E.D.La. 4/20/2004) (trial attorney with cardiac condition could elect total disability or partial disability but could not receive both).

Accordingly, insurers will argue that where the policy provides benefits for residual disability as well as total disability, those circumstances where an insured is unable to perform one or more of his or her important duties is relegated to partial disability. *McOsker v. Paul Revere Life Insurance Company,* 279 F.3d 586, 588 (8th Cir. 2002). As a consequence, in order to be eligible for total disability payments, the insured would be required to show that he or she was unable to perform any of those important duties. *Id.* However, as illustrated by the McOsker case the ability to perform "some work" does not mean that one is residually disabled instead of totally disabled. *Id*. The policy at issue in the McOsker case allowed for residual disability benefits when one was unable to perform one or more of the important duties of one=s occupation and total disability benefits required one to show that one could not perform any of the important duties of the individual=s occupation. *Id.* The insurer=s termination of benefits was found to be erroneous because although the claimant could perform some work, there was no evidence that he could perform any of the important duties of his previous managerial position, and so he remained disabled under the policy definition of total disability. *Id.*

Some courts have adopted a different approach, assessing total disability if an

insured's inability to perform certain duties precludes continuation in his or her regular occupation. Under this approach, a determination of total disability may depend on the quantity of duties an insured is unable to perform; however, "a total disability may also result from the type of duties that an insured is unable to perform." *Hamaker v. Paul Revere Life Insurance Co.*, No. 1P02-0632-C-H/S, 2004 WL 963701 at *4, 2004 U.S.Dist.LEXIS 7796, (S.D. Ind. Apr. 2, 2004). As noted by the court in *Hamaker*, "this approach essentially looks more closely at effects and recognizes that some skills or duties are "essential" to continued employment in a particular occupation in any capacity." *Id.* Moreover, "regardless of the number of important duties an insured can still perform in isolation, he or she is totally disabled if unable to practice his or her regular occupation *in toto* and residually disabled if merely restricted in that practice." *Id.*

In *Soll v. Provident Life & Accident Insur. Co.*, 2002 U.S.Dist.LEXIS 11989 (E.D.La 2002), the court characterized the important question as whether the duties performed by the insured after the claimed onset of disability are "*the substantial and material duties* of his pre-disability employment." Because the insured, a physician, no longer performed clinical duties, he was found entitled to total disability benefits. The court also held, citing *Shapiro v. Berkshire Life*, 212 F.3d 121 (2d Cir. 2000) that if the insured can earn a living in a similar way but using different means and methods, benefits are payable.

Some policies expressly provide that benefits are payable only to an insured who is "unable to perform *all*" of the material and substantial duties of his or her occupation.

The Fifth Circuit recently considered such language in a policy that also contained a partial disability provision. *See Ellis v. Liberty Life Assurance Company of Boston*, ___ F.3d. ___, 2004 WL 2635692 (5th Cir. Nov. 19, 2004). The court concluded that in the context of the policy as a whole, a fair reading of the phrase "unable to perform all" was that the insured was not totally disabled if she could perform "at least one" of the "material and substantial duties of her occupation." *Id.* at *5. The court noted that its conclusion was strengthened in light of the fact that the policy also contained a provision which provided that one is partially disabled if he is "able to perform one or more, but not all of the material and substantial duties." *Id.* A different interpretation of the policy, the court held, would result in unanticipated costs because the insurer would be required to provide both total and partial disability benefits to an insured if he could not perform "any one" of the material and substantial duties of his occupation. *Id.*

The stakes in the total –vs- partial disability debate dramatically increase when the policy at issue requires a period of total disability prior to the entitlement to any residual benefits. It is not uncommon to see policy language which states that during the elimination period and for some period following the elimination period the insured must be totally disabled as a condition precedent to receiving any residual benefits. In this case, an insured who is residually disabled from the onset of the claim, may be precluded from entitlement to any benefits. In these instances most courts have looked to the substance of the work or the nature of the duties that can no longer be performed to arrive at equitable result.

The recent court opinion in *Gross v. UNUM Provident Life Ins. Co.* 319 F.Supp.

2d 1129 (C.D. Cal 2004) addresses numerous occupational issues including total and residual issues, occupation at time of disability, job verse occupation, specialty, and declined to rule on the residual disability issues until the issue of total disability was resolved insured's performance of some duties post- disability did not prevent total disability.

The debate also heats up when the insured is earning more money in the performance of the new occupation then in his/her own or regular occupation. In this case, a finding that the insured is residually disabled and earning increased income from the performance of his occupation, but not totally disabled, would typically result in no payment under the policy since there is no loss in income. However, income is an improper consideration in determining whether the insured is totally disabled. "Because occupational disability policies are 'designed to indemnify against loss of capacity to work, not against loss of income,' the fact that a claimant derives a 'larger income from a new occupation will not bar recovery under his disability policy.' " *Giampa v. Trustmark Ins. Co.*, 73 F.Supp.2d 22, 27 (D.Mass.1999) (quoting *Niccoli v. Monarch Life Ins. Co.*, 70 Misc.2d 147, 332 N.Y.S.2d 803, 805 (N.Y.Sup.Ct.1972), *aff'd,* 45 A.D.2d 737, 356 N.Y.S.2d 677 (N.Y.App.Div.1974)). *See, also, Gross infra* at 1154.

Like all policy provisions, residual clauses vary and sometimes they specifically preclude the payment of total disability benefits when an individual is working in any occupation, not just the own occupation. In this case, the residual disability can come into play even when an insured is clearly totally disabled from his/her own occupation, but is working in another occupation. This type of policy is rare.

Thus, in most cases construing own occupation policies with residual clauses, whether a claimant continues to work in his pre-disability occupation in a very different or limited fashion or whether he is essentially performing a different occupation altogether, although using some of the skills he acquired will not preclude a finding of total disability. *See, e.g., Blasbalg*, 962 F.Supp. at 369 (finding that the plaintiff's using the knowledge he acquired as a computer programmer to earn a living post-disability "d[id] not equate to an ability to return to his specialized calling as a computer programmer"); *Niccoli v. Monarch Life Ins. Co.*, 70 Misc.2d 147, 152, 332 N.Y.S.2d 803 (N.Y.Sup.Ct.1972). In *Niccoli*, the court upheld the jury's finding that the plaintiff who, pre-disability, had been a practicing physician specializing in obstetrics and gynecology, was totally disabled notwithstanding his post-disability occupation as a sex education and family planning consultant for a hospital. ("This court will not give a strained interpretation to the contract, nor foreclose the physician from the promised benefits of his contract because he has used some of his acquired knowledge and medical training in his new occupation. Lacking unequivocal language to such effect, this court will not compel an insured professional man to march backward toward obscurantism and ignorance in order to receive the benefits of a policy which he purchased to protect himself if he became incapable of practicing his chosen calling.") 70 Misc.2d at 152.

V. Legal v. Factual Disability

Generally, disability policies provide coverage for factual disabilities - those due to sickness or injury - rather than legal disabilities. Insurance companies, therefore,

typically are "not liable for a loss of earned income that results from a license suspension or other consequences of the insured's unlawful behavior." *Massachusetts Mutual Life Ins. Co. v. Millstein*, 129 F.2d 688, 690 (2d Cir. 1997). *See also, Neiman v. Provident Life & Accident Ins.Co.*, 2002 U.S. Dist.LEXIS 16900 (S.D.Fla. 8/26/02).

Defense attorneys might say that oftentimes, an insured who has lost his or her license, and also suffers from a sickness or injury, will submit a claim for disability benefits. While Plaintiffs' attorneys might say that oftentimes an insured who has a severe disability will suffer consequences such as the suspension or loss of a license and will then recognize the severity of the sickness or injury and file a claim for disability benefits. Under such circumstances, the insurer will deny coverage on the ground that the legal disability, not the factual disability, precludes the insured from performing the duties of his or her regular occupation.

Courts generally hold that where the factual disability precedes the legal disability, benefits are payable. *See, e.g., Ohio National Life Ass. Corp. v. Crampton*, 822 F. Supp. 1230, 1233 (E.D. Va. 1993) (finding legal disability that arose after physical disability is not a bar to collecting benefits); *Solomon v. Royal Maccabees Life Ins. Co.*, 243 Mich. App. 375, 383-85, 622 N.W. 2d. 101 (2000) ("[i]f a claimant suffers from both a factual and a legal disability, . . . and the factual disability is medically bona fide and genuinely arose before the legal disability, the fact that the legal disability arose later will not necessarily terminate a claimant's right to disability benefits."); *see also New York Life Ins. Co. v. Daly*, No. 95-6702, 2001 WL 1231736 at *5 (E.D. Pa. Oct. 10, 2001) (holding that disputed issue of material fact existed as to whether attorney's depression

preceded his disbarment) and *Walker v. UnumProvident Corp.,* 2002 U.S.Dist.LEXIS 21647 (D.Minn.2002) genuine issue of material fact exists since there was evidence the plaintiff was restricted by his disability long before he lost his license to practice medicine.

The obverse is equally true. Generally, benefits are not payable if the legal disability preceded the factual disability. *See, e.g., Suarez v. Massachusetts Mut. Life Ins. Co.,* 132 F. Supp. 2d 1382, 1386 (M.D. Ga. 2000) (Insured physician's disability from depression was legal, not factual, and thus not covered by disability policy where depression followed insured's criminal conduct and consequent suspension of his medical license), *aff'd,* 232 F.3d 216 (11th Cir. 2000); *Provident Life & Accident Ins. Co. v. Belding*, No. 96-56018, 1998 WL 405852 at *1 (9th Cir. July 8, 1998)(finding insured's legal disability of losing his license to practice psychiatry predated his mental illness, thus precluding coverage under the policy); *Kocer v. New York Life Ins. Co.,* 340 F. Supp. 2d. 1351, 1358 (N.D. Ga. 2004) (holding that insured's legal disability of losing his medical license prior to onset of medical ailment precluded recovery notwithstanding that insured was still licensed to practice in Utah and Georgia). But, see,

In *Massachusetts Mutual Life Ins. Co. v. Woodall,* 304 F. Supp.2d 1364, 1377 (S.D. Ga. 2003), the federal district court considered a scenario that falls "between the 'before and after' cases. . ." In that case, the plaintiff, an attorney, alleged disability due to depression that resulted "principally and directly from his being subject to allegations of misconduct . . ." *Id.* at 1378. The plaintiff, however, was not disbarred until after the onset of his disability. *Id.* at 1376. The insurer relied on the public policy that a person

must not be allowed to prosper from his own wrongdoing in support of his position. With regard to the public policy argument, the court observed that

> [i]n this case the "public-policy" issue is not only first impression but troubling to say the least. Like the defendant who kills his parents and then pleads for mercy because he's an orphan . . ., there is something inherently disturbing about a man who commits a grievous wrong, unsurprisingly becomes "depressed" when confronted and punished over it, and then demands that his disability insurer pay him for a disabling "depression" as documented by his own psychiatrists.

Id. at 1372-73. Further, the court

> "*Erie* guesse[d]" that in a case like this, Georgia's Supreme Court would conclude that where legal-disability consequences imminently loom on the "depressed" disability benefits claimant's horizon, and those consequences are inextricably intertwined (causation-wise) with the depression-based disability (i.*e*. the "detection-confrontation-punishment" consequences that result from wrongful conduct are the predominant cause of the disabling depression), the factfinder may disregard on public policy grounds, the mere fact that the "factual" disability preceded the legal disability.

In *AllAmerica Financial Life Ins. Co. and Annuity Co. v. Llewellyn*, 139 F.3d 664 (9th Cir. 1997), the Ninth Circuit held that "constructive notice" of a legal disability was sufficient to bar a claim for disability benefits. In that case, the insured chiropractor had been subject to an investigation for work-related fraudulent activities for the several years leading up to his license revocation. Although the insured closed his office and discontinued his chiropractic practice the day after the Final Order revoking his license was entered because of an alleged disability due to depression, he claimed that he was not aware of the revocation until a week or two later. The court found that regardless of when the insured claimed to have learned of the official revocation, "he had sufficient constructive notice such that the revocation became effective the day the Final Order was issued." *Id*. at 666.

VI. Regular Occupation of Person who Becomes Unemployed.

It is not uncommon for an insured to file a disability claim after he or she has become unemployed. The question presented, then, is whether the term "occupation" in the disability policy can be interpreted as meaning "unemployed" or "retired." Or is the term "occupation" more appropriately interpreted as the person's customary and usual occupation prior to unemployment. Otherwise stated, can an "unemployed person" be considered the "regular occupation" of the insured at the time of the onset of the disability so that the insurer can properly deny benefits on the grounds that the insured is capable of performing the activities of daily living?

In *Norcia v. The Equitable Life Ass. Soc. of the U.S.*, 80 F. Supp. 2d 1047 (D. Az. 2000), the court was faced with, but did not resolve, this precise issue. The insured there filed a claim for disability benefits after he had ceased working. After several years of receiving disability benefits, the insured submitted to a functional capacities evaluation. The FCE report stated that the insured was able to perform all activities of daily living within his lifting restriction of 10 pounds. Based upon these results, the insurer determined that plaintiff was capable of performing the activities of daily living and terminated his benefits. Essential to its determination was that the insured considered plaintiff's occupation to be that of a "retired/unemployed person." *Id.* at 1053. The insured filed a claim for bad faith termination of disability benefits. The insurer relied on a single case from New Jersey which had broadly interpreted "occupation" to mean "the way an individual primarily occupies his time: the principle activity of one's life. While an occupation may be followed for the sake of money, it is not essential to do so." *Id.*

(quoting *Ohrel v. Continental Cas. Co.*, 138 N.J. Super. 170, 187, 350 A.2d 310, 317 (1975)). The district court certified to the Arizona Supreme Court the question of aforementioned question. Unfortunately, the case was apparently settled and the Arizona court did not rule on this issue.

The Ninth Circuit also addressed this issue in *Amadeo v. Principal Mut. Life. Ins. Co.*, 290 F.3d 1152 (9th Cir. 2002). The court considered the following policy language: "unable to perform the substantial and material duties of your regular occupation in which you were engaged just prior to the disability." *Id.* at 1162-63. The court rejected the insurer's argument that the plaintiff's regular occupation was that of an unemployed person as such an interpretation "was not within [plaintiff's] expectations under California Law." *Id.* at 1162. "An unemployed person is not performing the substantial and material duties" of a "regular occupation" or "working in another occupation" by performing the daily activities of living. *Id.* "Nor is a person's 'regular occupation,'" the court continued, "composed of whatever activities the person was performing the previous day." *Id.*

Similarly, in *Burriesci v. Paul Revere,* 679 N.Y.S. 2d 778, 255 A.D.2d 993, (1998), the court considered policy language which defined "occupation" as the occupation "in which You are regularly engaged at the time You become Disabled." *Id.* at 993. The plaintiff left her employment, and while she was looking for a new job, she injured her back. Thereafter, she filed a claim for disability benefits. Although the insurer paid benefits to the plaintiff for a short duration, it terminated her benefits for lack of proof of continuing disability on the ground that the plaintiff was unemployed at the

onset of her disability. The court noted that "[b]y failing to use language that provides that an insured must be actively working at the time that the disability arises, the policy does not unambiguously exclude coverage for unemployed insureds." *Id.* at 994. Accordingly, the court held that occupation in which the plaintiff was "regularly engaged" and to which she was attempting to return when she was injured was her "occupation," for purposes of the policy. *Id.; see also McPhee v. The Paul Revere Life Ins. Co.,* 883 So.2d 364, 368 (Fla. App. 2004) (holding that plaintiff was regularly engaged in an occupation at the time of his disability notwithstanding that he was not actively employed at the time of his disability).

VII. Active at Work

Sometimes the issue arises regarding whether the claimant is "active at work" to be covered for benefits. This issue becomes more complex when an employee is experiencing difficulty at work due to his/her impairments and is facing termination or has been terminated. *See, e.g., Mason v. Equitable,* 2002 WL 461375 (9th Cir. 2002) (administrator's finding that employee was no longer actively at work after date he received termination letter, and not covered when disability began in following month, was abuse of discretion; letter gave employee thirty days notice, and employer's request that employee not come to work during those thirty days amounted to leave of absence, within meaning of plan provision continuing coverage through month after leave of absence began).

The receipt of regular wages, vacation or sick pay has been interpreted to mean that an insured remained active at work. *See Dodd v. The Long Term Disability Plan,*

2003 WL 21396788 (E.D.La. 2003) (found that an insured receiving vacation pay while on a leave of absence remained “active at work.”); *Pearce v. Paul Revere Life Ins. Co.*, 29 Employee Benefits Cas. 1357 (D.Minn.,2002) (employee whose clinical depression disability was diagnosed while she was on paid leave of absence from job was still "employee," for purpose of determining her eligibility for residual disability benefits under employer's long-term disability policy; fact that employee's last day of actual work occurred prior to diagnosis was irrelevant). However, an employee will not be considered active at work following a lengthy, unpaid leave of absence. *See Perry v. New England Business Service, Inc.*, 347 F.3d 343 (Cir. 1st 2003) (employee who had been on leave of absence for six years due to work-related injury, was not "participant," and thus not eligible for benefits; plan unambiguously provided that employee's eligibility for benefits terminated on date that she ceased to be full-time employee).

At least one court has addressed a disability occurring after employee left work on a day on which she was terminated and found that employee was covered for entire day. *See, Lauder v. First Unum Life Ins. Co.*, 284 F.3d 375 (C.A.2. N.Y. 2002)(insured injured in fall that occurred after she had left work on day on which she was terminated was an employee at time of fall, and thus was covered under policy; both insured and her employer had considered day in question to be insured's last day of employment, and coverage under policy was properly construed as continuing through the whole of her last day of active employment, rather than ending when she walked out employer's door for the last time).

The courts have found that the active at work requirement met when an employee's hours are reduced just prior to disability. *See Campbell v. Unum Life Insur.Co.,* 2004 WL 497712 (E.D.La. 2004) (because the insured's limited hours were due to her disability, she met the active at work requirement of the policy).

Still employee must be a full time employee within the meaning of policy. *See Principal Mutual Life Ins., Co. v. Charter Barclay Hosp., Inc.,* 81 F.3d 53, 56 (7th Cir.1996) (denying benefits to employee under plan which required full-time employment of at least 30 hours a week because there was no evidence in the record that the claimant was a full-time employee); *see also, Ruttenberg v. United States Life Insur. Company,* 2004 WL 421989 (N.D.Ill. 2004) (court granted summary judgment to an insurer due to the insured's failure to meet the "full time employee" requirements of the policy).

Even after expiration of the policy coverage may still be in place. *See e.g., Life Ins. Co. of North America v. Centennial Life Ins. Co.,* 927 F.Supp. 1476 (D.Kan. 1996) (Recurrent disability provision of employer's group long-term disability insurance policy unambiguously afforded coverage after policy expiration to employees who were totally disabled when policy expired, returned to work after expiration, and suffered recurrence of total disability due to same or related causes after working less than six months, notwithstanding that employer secured replacement coverage after the expiration date).

The failure to advise an employee of the active at work requirement can be a breach of fiduciary duty. *Horn v. Cendant Operations, Inc.,* 2003 WL 21513210 (10th Cir. 2003) (failure to advise was fiduciary breach) Also, promissory estoppel is an

available basis for claiming benefits under ERISA, notwithstanding the rule that ERISA claims cannot be modified orally. *See Principal Mutual Life Ins., Co. v. Charter Barclay Hosp., Inc.*, 81 F.3d 53, 57 (7th Cir.1996)

VIII. Daubert Challenges to the Admissibility of Vocational Expert Testimony.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786 (1993), the Supreme Court directed district court judges to perform a gatekeeping function to insure that evidence presented by expert witnesses is relevant, reliable and helpful to the factfinder's evaluation of such evidence. For years in the wake of *Daubert*, a question remained as to whether district courts were to perform this gatekeeping function solely with respect to scientific testimony, as in the *Daubert* case, or if the gatekeeping function was to be utilized to assess non-scientific testimony. It was not until it decided *Kumho Tire v. Carmichael*, 526 U.S. 137, 151, 119 S. Ct. 1167 (1999), that the Supreme Court proclaimed that *Daubert's* gatekeeping function also covered non-scientific testimony. Since *Kumho Tire*, surviving a challenge to admission of opinion testimony for vocational experts has become increasingly difficult. Although, it is generally recognized that vocational rehabilitation expertise flows from a valid non-scientific method, the qualifications of the vocational expert and the reliability of his/her methodology is often challenged.

Under the Federal Rules of Evidence:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702. The basis of this "specialized knowledge" can be practical experience as well as academic training and credentials. *Waldorf v. Shuta*, 142 F.3d 601, 625 (3d Cir. 1998). Although academic credentials are not required, it is clear that, "at minimum, a proffered expert witness . . . must possess skill or knowledge greater than the average layperson." *Id.*

In *Waldorf*, a personal injury action, the Third Circuit considered whether the district court properly qualified a vocational expert despite the expert's lack of formal training in that particular field. The district court noted his experience as a social worker which involved, among other things, helping disabled persons in meeting their life needs, in accomplishing specific employment opportunities and supervising an 80 to 84 bed care unit which housed individuals who had severe mobility impairment. *Id.* at 626. According to the district court, "based on his experience and his familiarity with the literature in the field, . . . [he] was qualified properly as a vocational expert." *Id.* The district court further noted that "[w]hile his formal credentials may be a little thin, he certainly had sufficient substantive qualifications to be considered an expert under the liberal standard of Rule 702." *Id.* The Third Circuit affirmed, concluding that the district court's decision was a "reasoned decision." *Id.; See also Elcock v. KMart Corp.*, 233 F.3d 734, 744 (3d Cir. 2000) (holding that district court did not err in finding that vocational expert without formal training who kept abreast of relevant literature, attended conferences regarding vocational rehabilitation, and earned a degree in a field tangentially related to vocational rehabilitation was qualified to present expert testimony).

After determining whether the witness is qualified to testify competently regarding the matters he or she intends to address, a court must next assess the reliability of the proffered expert testimony. In *Daubert*, the Supreme Court identified four non-exhaustive factors to assist courts in determining whether testimony meets the standard of reliable scientific knowledge: (1) whether the expert's theory can and has been tested; (2) whether it has been subjected to peer review; (3) the known or expected rate of error; and (4) whether the theory or methodology employed is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593. At its core, the 'scientific knowledge' inquiry seeks to determine whether there is 'some objective, independent validation of the expert's methodology.'" *Siharath*, 131 F. Supp. 2d 1347, 1351 (quoting *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998)). As indicated above, although "[v]ocational rehabilitation is a social science that does not exactly mirror the fundamental precepts of the so-called harder sciences," *Daubert* factors nonetheless apply to vocational expert testimony. *Elcock v. KMart Corp.*, 233 F.3d 734, 747 (3d Cir. 2000). As such, "[j]ust as a scientist would want to duplicate the outcome when evaluating a colleague's claim that he had developed a technique for cold fusion, a vocational rehabilitationist assessing [plaintiff's] disability determination would want to test the underlying hypotheses and review the standards controlling the technique's operation in an attempt to reproduce the results originally generated." *Id.*

It is clear that a vocational expert must follow the methodologies generally employed by other vocational experts, such as statistical analyses or other social science research, in arriving at their opinions. *See Equal Employment Opportunity Comm'n v.*

Rockwell Int'l Corp., 60 F. Supp. 2d 791, 797 (N.D. Ill. 1999) (excluding vocational expert who failed to follow or misapplied methodology and principles normally applied in his discipline); *Ammons v. Aramak Uniform Serv., Inc.*, No. 01 C 4073, 2002 WL 31748837 at *3 (N.D. Ill. Dec. 6, 2002) (vocational rehabilitation counselor's testimony excluded because her opinion was not based on any specific methodology applied to the facts, but was based on subjective beliefs and unsupported speculation); *see also Huey v. United Parcel Service, Inc.*, 165 F.3d 1084, 1087 (7th Cir. 1999) (opinion of vocational expert excluded because although the expert may have had specialized knowledge or skills, "he did not apply them to the analysis of [plaintiff's] claim.").

In *Elcock*, 233 F.3d at 748, the proffered vocational expert admitted "that he employed an untested, novel method for performing vocational rehabilitation assessments that was based on an arbitrary admixture of two widely used methods." Although the defendant did not dispute that the two widely used approaches were accepted methodologies, it challenged the vocational expert's combination of the two methods. In finding that the method was not generally accepted and reliable, the court noted that the method was nothing more than a "hodgepodge" of accepted approaches, with the result that the expert was offering a "subjective judgment about the extent of [plaintiff's] vocational disability in the guise of a reliable expert opinion." *Id.*

IX. Functional Capacity Evaluations (FCE).

"A functional capacity evaluation is the best means of assessing an individual's functional level." *Lake v. Hartford Life and Acc. Ins. Co.*, 320 F. Supp. 2d 1240. 1249 (M.D. Fla. 2004). Nevertheless, questions have arisen under ERISA as to the weight that

should be accorded to FCEs that are conducted by therapists retained by the insurer, as opposed to the opinions of the plaintiff's treating physician. . In a case litigated by one of the authors, Pamela Atkins, the court found that the insurer failed to properly interpret a functional capacity evaluation and held that the results could not sustain a denial contradicted by every other piece of evidence. *Byrom v. Delta Family Care Disability and Survivorship Plan, 343 F.Supp. 2d 1163* (N.D.Ga. 2004) (Decision of ERISA plan administrator to discontinue long-term disability benefits for beneficiary who suffered from rheumatoid arthritis was unreasonable under strict arbitrary and capricious standard of review; administrator chose to credit a PT's FCE and administrator-selected doctor's conclusory and inconsistent statements over the opinions of treating physicians, an independent rheumatologist's independent medical examination (IME), a Social Security disability award, administrator selected doctor's initial IME and FCE, majority of surveillance conducted on beneficiary, and the statements of beneficiary's neighbors).

See also, Edgerton v. CNA Insurance, 215 F. Supp. 2d 541, 550-51 (E.D. Pa. 2002) (finding that an FCE conducted on a single day by a physical therapist was outweighed by the opinions of the plaintiff's treating physician who had observed the plaintiff's condition for several years); *See Boardman v. Edwards Ctr., Inc. Long Term Disability Plan,* No. CV 02-1384-JE, 2004 WL 1098942 at *5 (D. Or. May 17, 2004) (finding that the opinion of an occupational therapy assistant, who saw the patient on one occasion for the purpose of evaluating his claim, is insufficient to overcome credible evidence from a physician who has examined and treated the patient on numerous occasions over a 12-year period); *see also Stup v. UNUM Life Ins. Co. of Am.,* 390 F.3d 301, 309 (4th Cir.

2004) (finding that the FCE lasted only two and a half hours, so the FCE results did not necessarily indicate the plaintiff's ability to perform sedentary work for an eight-hour work day).

The Supreme Court's decision in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003), made clear that the treating physician rule does not apply in ERISA cases. In *Nord*, the Supreme Court recognized that a while "a consultant engaged by a plan may have an 'incentive' to make a finding of 'not disabled,' so a treating physician, in a close case, may favor a finding of 'disabled.' *Id.* at 832.

> [C]ourts 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.

Id. at 834. However, it just as plain that a claims fiduciary may not arbitrarily refuse to credit a claimant's reliable evidence. *Id.*

The federal district court in *Ballinger v. Eaton Corp.*, 212 F. Supp. 2d 1086 (S.D. Iowa 2002) (vacated at the request of parties that settled), drew a distinction between therapists and doctors as relates to the treating physician rule. Although the case was decided prior to *Nord*, it is noteworthy because the Eighth Circuit, at that time, did not apply the treating physician rule to ERISA cases. *See Delta Family-Care Disability and Survivorship Plan v. Marshall*, 258 F.3d 834, 842 (8th Cir. 2001) (holding that "a treating physician's opinion does not automatically control.").

In *Ballinger*, the claims administrator denied disability benefits to the plaintiff, relying on an FCE that was performed by an occupational therapist. The FCE contradicted the plaintiff's treating physician's assessment that the plaintiff was totally

disabled. The defendant cited Eighth Circuit precedent regarding the treating physician rule in support of its rejection of the plaintiff's Disability Continuation Statement that was completed by his treating physician. The district court noted that plaintiff's reliance on the Eighth Circuit cases was misplaced due to the fact that those cases "dealt with the intricate balancing of one physician's opinion against another physician's opinion." *Ballinger,* 212 F. Supp. 2d at 1093. "In this case," the court continued, "we have the opinion of an occupational therapist who saw the patient for two hours versus a medical doctor who treated the patient for more than five years." *Id.* The court ultimately held that the FCE was insufficient to controvert all of plaintiff's evidence of disability and that the denial of benefits was an abuse of discretion. *Id.* at 1095.

The distinction drawn in the *Ballinger* case seemingly leaves open the possibility for one to argue that the Supreme Court's rejection of the treating physician rule applies to contradictory opinions of physicians such that a court may impose upon plan administrators a heavier burden of explanation when relying on an FCE that was performed by a therapist. However, since *Nord,* it seems that some district courts would reject that argument. *See White v. Health- South Long Term Disability Plan,* 320 F. Supp. 2d 811, 819 (W.D. Ark. 2004) (holding that where an FCE provides a well-reasoned explanation as to why the plaintiff can return to work, it is within the insurer's discretion to accord greater weight to the FCE than a treating physician's opinion); *Sejdic v. Group Long-Term Disability Plan for Employees of Homseside Lending, Inc.,* 348 F. Supp. 2d. 1313 (M.D. Fla. 2004) (two FCEs found plaintiff could perform full time sedentary work and the review performed was not selective); *but see, Mialgro v. IMB*

Disability Plan, 231 F.Supp. 2d. 1167 (M.D. FL. 2002)(only FCE found that plaintiff could not work an 8 hour day, no indication of review of objective evidence, and court expressed concern that administrator had selectively reviewed the evidence).

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