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INSURED BEWARE:
Potential Conflicts Between Your Disability Carrier and Their Recommended Social Security Attorney

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Many working Alabamians find themselves struggling to pay bills as a result of disabling personal injuries, preventing them from returning to their occupation. That loss of income is exactly what the Social Security disability process and ERISA-governed individual disability benefit claims are designed to address. Many people's first reaction to a disabling personal injury is to seek legal help in getting redress from the other party to the accident. When it comes to their potential insurance claims, though, they often either follow through the perfunctory steps their insurer tells them to do or assume their medical insurance is their only claim, forgetting they even have other potential benefits.

This crucial safety net is designed to replace income lost when a person is no longer able to work, but it is often controlled by the whims of disability insurance companies whose interests are best served in keeping these claims out of the hands of local attorneys. The result of allowing your client to fall into the hands of a national disability law firm recommended by a long-term disability insurance company can result in your client finding themselves at the end of the process with no safety net at all.

Thus, anytime a client arrives in your office with a claim involving personal injury, you may well be faced with, and indeed should look for, secondary claims even if they may be outside your typical practice area. Two of the most common secondary claims are Social Security Disability Insurance ("SSDI") claims and ERISA-governed disability benefit claims. As we will explain in this article, it is important that you, your client's first line of defense when it comes to providing for their and their dependents' futures after a disabling incident, take an active role in placing those claims in the hands of local attorneys and not leave your client subject to a disability insurance company's demands.

I. Social Security and ERISA Both Developed with Similar Goals

Social Security has its roots in English laws, called "Poor Laws," adopted to provide help to the poor. According to the Social Security Administration, the English Poor Law of 1601 was the first official codification of the idea that the state has a responsibility to care for the welfare of its citizens via a system of taxation. Colonists arriving at what is now the United States brought these ideals about the state's responsibility for the welfare of citizens with them and modeled care for the poor after the English system, but their financing and control were solely locally based. Eventually, as America became more complex, the local system was insufficient, and any relief provided was intentionally unpleasant to discourage dependency on the system. Although Social Security did not arrive until 1935, the need for this support was highlighted after the Civil War because a much higher proportion of the population was disabled or were survivors of deceased workers than at any prior time in American history. This need led to a pension program with many similarities to current-day Social Security.

In 1900, there were only five companies in the United States that offered their employees pensions. By

1932, only about 15% of workers had company-sponsored retirement savings or pensions. In response, 30 states created some form of age-based pension by 1935, however, only about 3% of the citizens received benefits under the plans and the average was approximately 65 cents a day. The federal Social Security program, signed into law by President Roosevelt on August 14, 1935, relied on the principle of social insurance. At the time the United States began its federal program, 34 other nations were already operating systems based on a similar form of social insurance. The initial program, though, lacked disability coverage. That did not come into being, with some limitations, until the Social Security Amendments of 1954. Payments to disabled workers without age restrictions were even later, September of 1960.

The Employee Retirement Income Security Act of 1974[45] ("ERISA"), on the other hand, was created by Congress to "protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . [and provide] appropriate remedies, sanctions, and ready access to the Federal courts."[46] Unlike Social Security, ERISA does not provide payments or financial benefits to American workers directly. Instead, its focus is making sure benefits that are promised by employers are protected. Like Social Security, ERISA began with a focus on pensions and there was very little protection, if any, for participants in employer retirement plans prior to ERISA.

The lack of protection for American workers' pensions came to a head in 1963 when Studebaker shut down its plant in South Bend, Indiana and terminated its pension plan. Because of the pension termination, more than 4,000 auto workers who had just lost their jobs also lost all or part of their pension plan benefits. The unexpected pension termination, despite the company's promises of a set pension amount at retirement, highlighted that any company could close or terminate its pension plan, leaving thousands of workers without the retirement income on which they were counting.

A decade later, in 1974, Congress responded by passing ERISA. Although it was originally drafted in response to a pension crisis and focused, therefore, on pension protections, ERISA includes protections for health and other forms of benefits that are employer-provided. It also contains disclosure requirements designed to keep participants informed of their rights and coverages under any plans provided by their employers.

Both Social Security and ERISA are federal statutes, but they operate differently. For example, Social Security is a federally-funded means of providing financial security but ERISA protects insurance benefits and other financial security promised by private actors (employers). Further, Social Security has its own application and approval requirements. Despite these differences, in the disability context, which is the focus of this article, there is much overlap between the two. Most importantly, both require a demonstration of disability, so coordination between those handling the two different disability claims is important.

II. Why Hire a Local SSDI Attorney?

For most individuals who are unable to work due to their medical condition(s), the decision to hire an attorney is subsequent to the Social Security Administration's decision to deny their initial claim for benefits. The competent representation of a local SSDI attorney is now more important than ever as Social Security benefits are more difficult to receive than in decades. While state-by-state data is unavailable, national data shows a troubling trend. In 2008, the national administrative law judge (ALJ) approval rate was 63%. By 2017, this rate had fallen to 45%. This rate is consistent with approvals rates in the late 1970s. While Alabama's ALJ approval rate is somewhat higher than the national rate, the "golden era" of SSDI attorneys in the state wherein the vast majority of cases were highly likely to be approved are gone. For these reasons, a competent local SSDI attorney is a necessity for a claimant denied their benefits.

A competent local SSDI attorney can provide meaningful assistance in many ways. A local attorney will be familiar with the ALJ's office, known as Office of Hearing Operations (OHO), and most importantly the ALJs themselves. As with any court, each judge has their own way of doing things. Understanding an ALJ's way of handling a hearing is vitally important to a case given ALJs usually conduct a thorough direct examination of the claimant. A well-established relationship between an ALJ and a local attorney goes a long way in OHO's non-adversarial, informal proceedings. Next, a local SSDI attorney will be very familiar with the regularly appearing vocational and medical experts. An experienced local attorney will generally know which way and, at times specifically what, these experts will testify to before the hearing begins. Also, an experienced local attorney will know what medical providers will be cooperative with submitting medical opinions, have local physician resources for examinations if necessary, and be familiar with how local medical providers handle referrals.

A local SSDI attorney will be focused on the best interests of the client you refer to them, which means he/she will seek all available resources to increase the chances of success. These resources can include consulting with the client's ERISA attorney for any available helpful documents. Coordination between the two attorneys – there are not many SSDI attorneys that handle ERISA cases and not many ERISA attorneys also handle SSDI cases, so there will most likely be two separate attorneys handling the SSDI and ERISA cases – can not only make the litigation of your client's claims cheaper, it allows the two claims to support each other, as explained more fully below.

III. From an ERISA Perspective, Having an Attorney for Both Social Security and ERISA is Critical

Most estimates conclude that around 49.4% of civilian workers receive disability insurance that is paid for by their employer and another 5% of workers pay for optional disability insurance that is offered through their work. Given many estimates indicate roughly 50% of American households have no disability insurance whatsoever, this means ERISA will most likely apply to a majority of disability-related claims that do not involve Social Security. The SSDI claim process and the ERISA disability claim process are often closely connected, parallel proceedings. It is important that these complement each other for a number of reasons, but this article will focus on two: 1) creating the ERISA record and 2) protecting your benefits.

Essentially, the "ERISA record" refers to all materials submitted, considered, or generated in the course of a claims decision process. For the most part, ERISA limits any future court review to these materials, so it cannot be overstated how important it is to make sure all evidence that helps your client is included in that record. Because both SSDI and disability insurance benefits require proving disability, it is important for your client's SSDI attorney and ERISA attorney to keep each other abreast of developments and share medical records that can often be costly and time-consuming to track down and obtain. A successful claim for either benefit should typically provide strong evidence that the other should be awarded as well. Although most ERISA insurers actively force claimants to file for Social Security benefits, they also typically attempt to wall themselves off from that process in an attempt to keep SSDI evidence outside of the ERISA record. This highlights the importance of communication between the two attorneys handling your client's secondary SSDI and ERISA claims.

Cooperation between the attorneys handling your client's secondary claims should also result in protecting their monetary benefits. There is little reason not to pursue both Social Security and disability insurance benefits, if they are available, and most insurance carriers will ***require*** claimants to file for Social Security and follow through with the entire appeals process. It is mind-boggling, but essentially all ERISA disability policy carriers collect premiums from insureds for years but then require the taxpayers to foot the bill by deducting the amount of Social Security payments from the monthly disability insurance benefit payments the carrier makes to insureds. This is referred to as an "offset." Many of these policies also allow the carrier to estimate what your client's SSDI benefits may be and deduct that estimated offset from the monthly payments regardless of the SSDI award status. The policies typically require the carrier to adjust any previously withheld offsets to reflect your client's actual award, should one be approved, and either pay up or deduct the remaining difference. But not all policies allow estimated offsets and not all carriers, even if allowed by policy, withhold an estimated offset. Many wait to see the result of the SSDI application and appeal process before seeking an offset from the arrearage award.

Given the amount of time after a claim is filed that it takes for the Social Security Administration to award benefits to many claimants, it is often the case that a significant amount of past due Social Security benefits will be paid in a lump sum for the previous months of disability. Oftentimes, the ERISA insurer has paid disability benefits during that time, so the insurer will then try to collect the past offsets it would have kept from the benefit payments for months covered by the SSDI lump sum payment. This is referred to as an "arrearage." Although the terms of most policies allow insurers to reduce *present* benefit payments based upon the amount an insured is *currently* receiving in Social Security benefits, it is unclear insurers are entitled to seek reimbursement from SSDI arrearage awards because Social Security benefits are not assignable and because the Supreme Court has limited ERISA insurers to a narrow set of equitable remedies. *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016). Your client's ERISA and SSDI attorneys should coordinate, not only throughout the process of both claims, but once approved for an SSDI arrearage, the ERISA attorney can help navigate the offset issue with the private disability insurance carrier.

IV. Be Wary of LTD-Insurer-Recommended SSDI Advocates

Most ERISA insurers have discovered how much it helps their bottom line to ensure that their claimants apply for and receive disability benefits from the Social Security Administration. This means the insurer, thanks to the offset, gets to have someone else (the taxpayers) pay all or the lion's share of the disability benefits they contracted to provide under the policy, along with other bonuses to the insurer. For instance, Social Security benefits lessen reserve requirements. Reserves are the amount of money insurance companies are required by state law to keep on hand based upon the likely lifetime amount that will have to be paid for each of the outstanding claims an insurer has pending. Insurers typically minimize their reserves to barely meet requirements because that money cannot be used or invested elsewhere, and it also prevents them from taking on additional insureds or liability (taking on more business). More insureds mean more potential outstanding claims, which leads to a higher reserve requirement.

SSDI also reduces insurers' ongoing liability to disabled insureds who are unlikely to ever recover. One of the many downsides of ERISA is that insureds can ***only*** sue for the amount the insurer has not paid to date. In other words, claimants cannot seek emotional, punitive, or future damages. This means that a Social Security award greatly diminishes the already small damages ERISA insureds can sue for because it reduces the amount of monthly benefits, and this emboldens many insurers to deny claimant's ongoing payments shortly after the claimant receives a Social Security award, regardless of whether that denial is warranted. Denial of future payments is particularly likely if the insurer seeks and is given the full amount of its alleged offset out of the claimant's SSDI arrearage payment. At that point, the insurer has recovered a large portion of the disability benefits it has already paid out over time. The low monetary liability of future payments further encourages insurers to roll the dice and see which claimants will give up on the stress of litigation and dealing with the incessant hurdles insurers place in the way of becoming eligible for benefits again.

Many insurers maximize these returns by pushing their insureds to "independent" SSDI companies that will represent the insured during the SSDI process. The Social Security Administration permits "advocates" to assist in the filing of claims for SSDI benefits. This term broadly includes both attorneys and non-lawyers. Advocates are permitted the same maximum fee, 25% of the backpay award, currently capped at $6,000.00, but not all advocates are admitted to the practice of law. Non-attorney advocates advertise that they help by answering questions and gathering medical records. As non-attorneys, though, they are not subject to the same ethical rules and, likely, your communications with them are not subject to attorney-client privilege. So, a claimant pays the same maximum amount to a non-attorney to assist and loses many of the protections and expertise a bar-admitted attorney offers. All that aside, there is an inherent potential conflict of interest between the insured seeking disability benefits and the insurance company-suggested vendor. Never forget that the insurer only wants a claimant approved for SSDI so it can recover an offset and reduce future payments, assuming the insurer even continues making future payments.

Problematically, these vendor companies invariably serve the insurance company and not the insured. These vendors do not have to use attorneys to represent persons for Social Security benefits, and they will not cooperate with insured's ERISA attorneys like a true advocate for the client would. Indeed, the vendors will typically require that insureds sign an agreement promising to pay the insurer all offsets out of the arrearage from the benefits Social Security ultimately pays, regardless of whether the insurer actually has a legal right to those offsets, putting ongoing payments on the claim at risk. Normally, the vendor will get the check from Social Security and pay the insurance company before or at the same time the insured gets paid what is left over (if anything remains after the insurer takes its offset and the advocate takes its fee).

There are extremely close connections between insurers and their preferred Social Security vendors, and any distinctions between the two as being separate are rarely made clear to insureds. For instance, at least one of these vendors freely advertises that it receives over 80% of its Social Security claimants from disability insurers. There are normally systems for constant communication between the two companies throughout the process, but these communications are limited to topics that benefit the insurer.

As an example of why this is problematic, bear in mind the above discussion regarding the creation of an ERISA record. When using one of these insurer-recommended SSDI advocates, neither the Social Security vendors nor the insurers ever inform the insureds that the vendors will not automatically give the insurer any of the medical records that are obtained to pursue Social Security benefits. Nor will the vendor provide the favorable SSDI decision itself to the insurer. Unfortunately, the insureds normally never receive these documents from the SSDI vendors and rarely even know they exist in the first place. Thus, the insured will not know they need to request the records and SSDI decision from the vendors only to then send them to the insurer, all while ERISA's deadlines are ticking. The insurer will then argue that the *insured's failure* to provide it with these documents means they cannot be allowed as evidence in court.

All of this means that the following scenario is often the norm. First, the ERISA insurer will use the SSDI vendor companies to argue on its behalf to the U.S. Government that the insured is too disabled to perform ***any*** work in the national economy for a ***minimum*** of 12 months. If that argument is successful, your client will be approved for SSDI benefits and the Social Security vendor will then send most or all of that taxpayer arrearage money to the insurance company. Next, the insurer will deny benefits, stating the insured is no longer disabled under the policy, but really because it has now recouped most of what it already paid under the policy and because of how little it now has to lose from litigation due to the monthly benefit obligations being reduced by a SSDI offset. As written in the policy, ERISA disability insurers typically apply a far lower standard of disability than the one used in determining SSDI eligibility (i.e. the inability to perform the specific occupation the insured was engaged in rather than any occupation in the national economy), but this same scenario somehow seems to repeat itself like clockwork. Despite having actual knowledge of the Social Security disability decision and engaging the Social Security vendor, the insurer will ignore the detailed SSDI opinion explaining its decision that your client is no longer able to perform any work and all of the medical evidence the vendor obtained during the process, because, unbeknownst to the insured, those documents were not provided to the insurer and are not part of the ERISA record. If litigation is pursued, the insurer will then blame its willful blindness on the insured in an attempt to curtail the litigation record and boost the reasonableness of its decision.[47]

Needless to say, these are not concerns if an injured person seeks the assistance of a local licensed attorney who specializes in assisting Social Security claimants, instead of the insurer-recommended vendor, and who can then coordinate with a local ERISA attorney. Not only is creating and protecting the ERISA record critical, but managing the offset appropriately is something experienced ERISA attorneys will manage to the insured's benefit rather than the insurer's.

In sum, the proper handling of an SSDI claim requires coordination between the SSDI attorney and an experienced ERISA attorney. Once you have identified that your client has a disabling injury, you are faced with choosing whether to refer those secondary claims out to local attorneys or leaving your client to choose on their own, in which case they are likely to be swayed by their insurer's recommendation. We hope this article will make you more aware of the implications for your client's other claims, their ongoing financial stability, and your potential referral with every client you encounter that has a disabling injury. When faced with selecting to whom you should refer your client's secondary claims, bear in mind the importance of the coordination and the position your clients may face if left to choose an SSDI and ERISA representative on their own.

1. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (Supp. III 1997).
2. 29 U.S.C. § 1001.
3. Under ERISA, insurers are purportedly serving as disinterested fiduciaries acting solely in insured's best interests and conducting a non-adversarial review. As a result, the arbitrary and capricious standard is typically applied and an insurer only needs to point to a reasonable basis for its denial. This means the Court can find the wrong decision was made, but the insurer still wins if it can come up with any reasonable basis supporting that wrong decision.

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