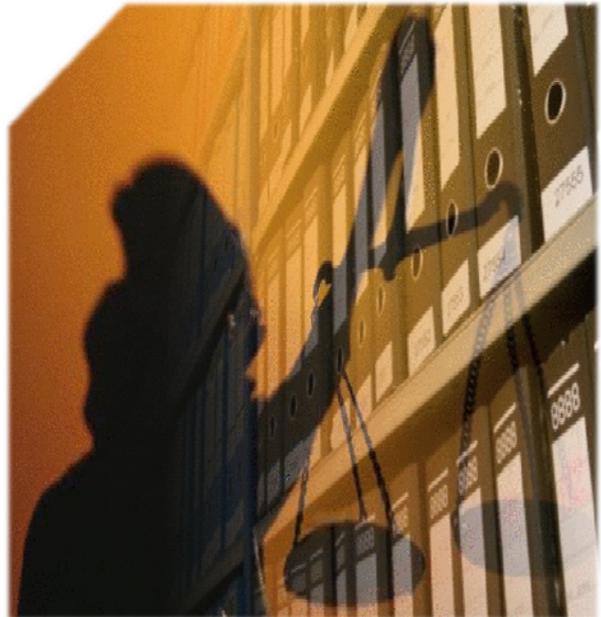


Under ERISA , Procedural Deficiencies Not Considered When the Standard of Review is De Novo

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

Recently, the court in *Ermovick vs. Mitchell, Silberberg & Knump LLP Long Term Disability Plan*, 2010 WL 3956819 (Decided October 8, 2010), addressed the question of whether evidence of procedural deficiencies should be considered in the context of a *de novo* review. The facts are relatively straight forward. James Ermovick worked as a word processor at the law firm of Mitchell, Silberberg & Knump. His claim for disability benefits was based on depression, anxiety and pain radiating in his back and neck due to myeloradiculopathy. Ermovick claimed to be totally disabled from any occupation while Prudential, the claims administrator, believed his disability to be temporary and therefore denied his benefits claim.

Eventually, the case found its way the U.S. District Court for the Central District of California. There, the court held that the proper standard of review was *de novo* and sought to address the case on the merits. Ermovick sought to offer evidence of certain procedural deficiencies. Specifically, Ermovick alleged that Prudential failed to conduct any meaningful review of the evidence and arbitrarily denied his claim without a proper review. He further argued that Prudential denied his claim based on a lack of information while at the same time failing to tell him what information was missing. Normally, this type of evidence is highly relevant because it can, if true, show that the claim administrator violated its duty to make a proper and informed claims decision. More importantly, it undermines the arguments and credibility of the claims administrator.



The problem the court faced was that the evidence, although relevant to the issue of Prudential’s credibility, was ultimately *irrelevant* on the narrow issue of whether Ermovick was disabled. Not to be deterred,

Ermovick cited to the 10th Circuit case of *Niles v. American Airlines, Inc.*, 269 Fed. Appx. 827, 833 (10th Cir.2008), which held that “[a] showing that the administrator failed to follow ERISA procedures therefore provides a basis for reversal separate from that provided by *de novo* review of the merits of the claim.” There, the court in *Niles* concluded that such procedural deficiencies effectively created an independent basis for reversal of a claims administrator’s decision. However, not every circuit believed this to be the case. For example, the Sixth Circuit took a more hard-line view. In *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 613 (6th Cir.1998), the court found that analysis of procedural deficiencies were not necessary under a *de novo* review provided that the denial of benefits was correct. If the decision made by the claims administrator was ultimately the right one, then the convoluted manner in which it reached that conclusion was irrelevant.

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

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

Assuming the Ninth Circuit doesn’t reverse this decision on appeal, it seems clear that when the standard of review is *de novo*, the court will not consider procedural deficiencies in ERISA cases.



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