



PENSION ACTION CENTER, GERONTOLOGY INSTITUTE
MCCORMACK GRADUATE SCHOOL OF POLICY AND GLOBAL STUDIES
UNIVERSITY OF MASSACHUSETTS BOSTON

100 Morrissey Boulevard
Boston, MA 02125-3393
P: 617.287.7307
F: 617.287.7080
PENSION.UMB.EDU

April 14, 2016

BY CERTIFIED MAIL; RETURN RECEIPT REQUESTED

David Conrad
Plan Administrator
The Weetabix Company
300 Nickerson Road
Marlborough, MA 01752

Re: Stephen [REDACTED]
[REDACTED]
[REDACTED], MA [REDACTED]

Soc. Sec. No: XXX-XX-[REDACTED]
D.O.B.: [REDACTED]

Dear Mr. Conrad:

Please be advised that Stephen [REDACTED] has requested the assistance of the New England Pension Assistance Project with respect to the issue of payment of disability pension benefits pursuant to The Defined Benefit Plan for Hourly Employees of The Weetabix Company, Inc. ("the plan"). Included as Exhibit A, you will find a release form signed by Mr. [REDACTED] authorizing this office to act on his behalf in this matter.

This letter constitutes a claim for benefits due him pursuant to the plan and ERISA.

Statement of Facts

Stephen [REDACTED] was employed as an hourly employee of The Weetabix Company in Clinton, Massachusetts, commencing on April 29, 2002. His last day of employment was May 27, 2014. See copy of Retirement Benefit Calculation from the plan, confirming Mr. [REDACTED]'s dates of employment, enclosed as Exhibit B.

Mr. [REDACTED] received his final paycheck on June 5, 2014. It included pay for 72 hours of regular pay through May 31, 2014, and 72 hours of vacation pay. The 72 hours for which Mr. [REDACTED] received vacation pay would therefore have extended through approximately mid-June of 2014. See copy of paycheck advice, enclosed as Exhibit C.

On January 31, 2015, the Social Security Administration ("SSA") issued a determination finding Mr. [REDACTED] totally disabled and entitled to Social Security Disability Insurance benefits. In its decision, the SSA found that Mr. [REDACTED] "became disabled under our rules on June 1, 2014". A copy of the SSA decision is enclosed as Exhibit D. A copy of the Disability Determination and Transmittal Form is enclosed as Exhibit E. The Social Security Administration pays disability benefits only for total disability. Its website clearly states that, "No benefits are payable for partial disability or short term disability". See excerpt from the SSA website enclosed as Exhibit F, www.ssa.gov/planners/disability/dqualify4.html.

Argument

Section 5.4(a) of the plan defines four requirements for a disability benefit payable pursuant to the plan. These requirements are: (1) that the participant was actively employed and accruing years of service for vesting purposes at the time the disability commenced; (2) that he was at least age 45 at that time; (3) that he had accrued at least 5 years of vesting service; and (4) that he is receiving Social Security Disability payments.

In Mr. ██████'s case, there is no issue regarding the second and third elements outlined in Section 5.4(a). As documented by Exhibit B, Mr. ██████ was 58 years of age and had accrued 11.75 years of service for vesting purposes when his employment ended.

Mr. ██████ also satisfied the first element enumerated under Section 5.4 as well. He was clearly accruing years of service for vesting purposes on the June 1, 2014, disability commencement date according to the terms of the plan. Section 1.24(b) specifically defines "Hours of Service" for purposes of vesting and credited service to include hours for which an employee is compensated "for reasons other than performance of duties (such as vacation...)." As Mr. ██████'s final paycheck, issued on June 5th, 2014, included approximately two weeks of vacation pay, it is clear that Mr. ██████'s Hours of Service for vesting purposes included credits beyond the June 1st disability date determined by the Social Security Administration. See Exhibit C.

Mr. ██████ satisfies the fourth element of the plan's requirements in that he was determined to be totally and permanently disabled by the Social Security Administration as of June 1, 2014. The plan ties its determination of total and permanent disability to the Social Security standard. It does not reserve unto itself any discretion in this matter. It refers only to the Social Security determination for the initial eligibility determination. It is noteworthy that the plan does reserve discretion in the matter of determining the matter of continued eligibility and does allow for the submission of medical evidence for continued receipt of benefits in Section 5.4(a). However, there is no such discretion reserved in the matter of the initial determination of eligibility; this determination is tied **only** to the Social Security Administration's determination, with no requirement for any additional or corroborating medical evidence.

ERISA requires that a plan document be interpreted according to its "plain meaning". Any interpretation which conflicts with the plain meaning of a plan's terms is "arbitrary and capricious". In the instant case, the plan's terms are clear and unambiguous; a participant meets the fourth prong of the elements enumerated under Section 5.4 if he is deemed disabled by the Social Security Administration. In Mr. ██████'s case, he was clearly determined to meet the SSA's standard for complete and total disability as of June 1, 2014. See Exhibits D and E. The plan may not substitute any other standard nor reject the clear evidence that Mr. ██████ met the plan's definition of disability.

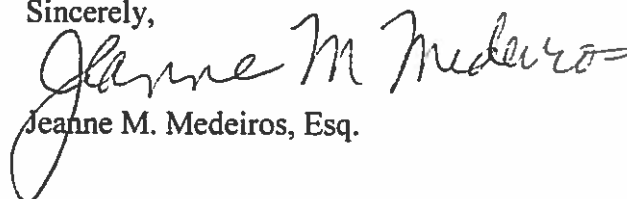
Conclusion

For the reasons discussed above, we hereby request that the plan pay Mr. [REDACTED] the disability benefit he is clearly entitled to pursuant to the terms of the plan document.

Please direct your response to us at: New England Pension Assistance Project, Gerontology Institute, UMass Boston, 100 Morrissey Blvd., Boston, MA 02125 or at Jeanne.medeiros@umb.edu.

Thank you for your attention to this matter.

Sincerely,


Jeanne M. Medeiros, Esq.

Enclosures:

Exhibit A - Release Form

Exhibit B – Retirement Benefit calculation from plan

Exhibit C- Copy of Mr. [REDACTED]'s paycheck advice, dated June 5, 2014

Exhibit D- Social Security Administration award letter, dated January 31, 2015

Exhibit E – SSA Disability Determination and Transmittal form

Exhibit F – Excerpt from Social Security Administration website

cc: Stephen [REDACTED]

Terrence J. Briggs, Esq., Bowditch & Dewey

**THE DEFINED BENEFIT PLAN FOR HOURLY EMPLOYEES OF
THE WEETABIX COMPANY, INC.
Retirement Benefit Calculation**

Participant's Name:	Stephen [REDACTED]
Social Security Number:	XXX-XX-[REDACTED]
Date of Birth:	[REDACTED]
Date of Hire:	04/29/2002
Date of Participation:	08/01/2002
Date of Termination:	05/27/2014
Date Calculation Performed:	05/05/2015
Normal Retirement Date:	12/01/2020
Annuity Commencement Date:	12/01/2020
Years of Service at Normal Retirement Date:	18.3333
Years of Service at Date of Termination	11.7500

<u>Benefit Formula</u>	<u>Accrual</u>	<u>Year of Service</u>	<u>Benefit</u>
\$35 for each Year of Service from 8/1/02 to 8/1/04	\$35	2.0000	\$70.00
\$40 for each Year of Service from 8/1/04 to 8/1/07	\$40	3.0000	\$120.00
\$45 for each Year of Service from 8/1/07 to 8/1/09	\$45	2.0000	\$90.00
\$50 for each Year of Service from 8/1/09 to 8/1/10	\$50	1.0000	\$50.00
\$55 for each Year of Service from 8/1/10 to 5/1/14 (DOT)	\$55	3.7500	\$206.25
\$55 for each Year of Service from 5/1/14 (DOT) to 12/01/20 (NRD)	\$55	6.5833	\$362.08
Total		18.3333	\$898.33
 Vested Monthly Normal Retirement Benefit:			 \$898.33
Service Ratio:			0.6409
Vested Monthly Benefit Payable at Retirement			\$575.75

The retirement benefit to which you are entitled is stated in the Plan's documents. This retirement benefit illustration has been prepared based on the current understanding of the Plan's provisions as in effect on the date of preparation of the calculation, and on personnel and employment data available on that date. To the extent your benefit differs from this illustration, the terms of the Plan control. If the understanding of the Plan's provisions or this data should prove to be incorrect, or if the calculation is for any reason erroneous, your Plan benefit will be adjusted retroactively to an amount which reflects the correct Plan provisions and data.

Social Security Administration
Retirement, Survivors and Disability Insurance
Notice of Award

Northeastern Program Service Center
1 Jamaica Center Plaza
Jamaica, New York 11432-3898
Date: January 31, 2015
Claim Number: [REDACTED]

20 2 MB 0.435 T2 MAAD296 PL1 S296 M3 PC1 150127

20

STEPHEN [REDACTED]



11

You are entitled to monthly disability benefits beginning November 2014.

The Date You Became Disabled

We found that you became disabled under our rules on June 1, 2014.

To qualify for disability benefits, you must be disabled for five full calendar months in a row. The first month you are entitled to benefits is November 2014.

What We Will Pay And When

- You will receive \$3,989.00 around February 6, 2015.
- This is the money you are due for November 2014 through January 2015.
- Your next payment of \$1,337.00, which is for February 2015, will be received on or about the third Wednesday of March 2015.
- After that you will receive \$1,337.00 on or about the third Wednesday of each month.
- These and any future payments will go to the financial institution you selected. Please let us know if you change your mailing address, so we can send you letters directly.
- The day of the month you receive your payments depends on your date of birth.

Enclosure(s):
Pub 05-10153

Exhibit D

C

See Next Page



DISABILITY DETERMINATION AND TRANSMITTAL

1. DESTINATION DDS <input checked="" type="checkbox"/> ODO <input type="checkbox"/> DRS <input type="checkbox"/> DOB <input type="checkbox"/> INTPSC <input type="checkbox"/>		2. DDS CODE V37		3. FILING DATE 11/07/2014		4. SSN [REDACTED]		BIC (if COB or DWB CLAIM)	
5. NAME AND ADDRESS OF CLAIMANT (include ZIP Code) [REDACTED]						6. WE'S NAME (if COB or DWB CLAIM)			
7. TYPE CLAIM (Title II) DIB <input checked="" type="checkbox"/> FZ <input type="checkbox"/> DWB <input type="checkbox"/> CDB-R <input type="checkbox"/> CDB-D <input type="checkbox"/> RD-R <input type="checkbox"/> RD-D <input type="checkbox"/> RD <input type="checkbox"/> P-R <input type="checkbox"/> P-D MQFE <input type="checkbox"/>						8. TYPE CLAIM (Title XVI) DI <input type="checkbox"/> DS <input type="checkbox"/> DC <input type="checkbox"/> BI <input type="checkbox"/> BS <input type="checkbox"/> BC <input type="checkbox"/>			
9. DATE OF BIRTH 11/13/1955		10. PRIOR ACTION PD <input type="checkbox"/> PT <input type="checkbox"/>		11. REMARKS Cmt Phone: 978-343-3684 DDS Received 11/07/2014 AOD: 06/01/2014					
12. DISTRICT BRANCH OFFICE ADDRESS (include ZIP Code) FITCHBURG SSA/DO 881 MAIN STREET - ROOM 100 FITCHBURG, MA 01420				DO-BO CODE 040					
13. DO-BO REPRESENTATIVE				14. DATE		11A. <input type="checkbox"/> Presumptive Disability		11B. <input type="checkbox"/> Impairment	
DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED									
15. CLAIMANT DISABLED		16A. PRIMARY DIAGNOSIS		BODY SYS. 01		CODE NO 7160		16B. SECONDARY DIAGNOSIS	
A. <input checked="" type="checkbox"/> Disability Began		06/01/2014		OTHER AND UNSPECIFIED ARTHROPATHIES		ANXIETY RELATED DISORDERS		CODE NO. 3000	
B. <input type="checkbox"/> Disability Ceased									
17. DDI TYPE MRP		MO/YR 12/2021		REASON 7					
18. CASE OF BLINDNESS AS DEFINED IN SEC. 1614(a)(2)(216)(i)				19. CLAIMANT NOT DISABLED					
A. <input type="checkbox"/> Not Disab. for Cash Bene Purp				B. <input type="checkbox"/> Disab. for Cash Benefit Purp Beg				C. <input type="checkbox"/> Through Date of Current Determination B. <input type="checkbox"/> Through _____ C. <input type="checkbox"/> Before Age 22 (COB only)	
20. VOCATIONAL BACKGROUND				OCC YRS 16		EDYRS. 12 12th gra		21. VR ACTION SCIN SCOUT Prev Ref	
22. REG-BASIS CODE C1		23. MED LIST NO		24. MOB CODE		25. REVISED DET <input type="checkbox"/>		A. <input type="checkbox"/> B. <input checked="" type="checkbox"/> C. <input type="checkbox"/>	
26. LIST NO. <input checked="" type="checkbox"/> A		B		C		D		E	
27. RATIONALE		See Attached SSA-4268-U4/C4		Check if Vocational Rule Met. Cite Rule <input type="checkbox"/>					
28. A. <input checked="" type="checkbox"/> Period of Disability B. <input type="checkbox"/> Disability Period C. <input checked="" type="checkbox"/> Etab Beg _____ AND D. <input type="checkbox"/> Continues E. <input type="checkbox"/> Term _____									
29. LTR/PAR NO.		30. DISABILITY EXAMINER-DDS 11 Q141 Carrie Doherty		31. DATE 01/23/2015		32. PHYSICIAN OR MEDICAL SPEC. SIGNATURE ERIK PURINS, M.D. 33		33. DATE	
		32A. PHYSICIAN OR MEDICAL SPEC. NAME (Stamp, Print or Type) See ECAT dated 01/22/2015						32B. SPEC. CODE 33	
34. REMARKS report of								MULTIPLE IMPAIRMENTS CONSIDERED	
								34A. COMBINED MULTIPLE HOUSEHOLD SEVERE	
								34B. COMBINED MULTIPLE HOUSEHOLD SEVERE	
35. BASIS CODE		36. REV DET CODES		37. SSA REPRESENTATIVE		SSA CODE		38. DATE	

Disability Planner: What We Mean By Disability

The definition of disability under Social Security is different than other programs. Social Security pays only for total disability. **No benefits are payable for partial disability or for short-term disability.**

"Disability" under Social Security is based on your inability to work. We consider you disabled under Social Security rules if:

- You cannot do work that you did before;
- We decide that you cannot adjust to other work because of your medical condition(s);
and
- Your disability has lasted or is expected to last for at least one year or to result in death.

This is a strict definition of disability. Social Security program rules assume that working families have access to other resources to provide support during periods of short-term disabilities, including workers' compensation, insurance, savings and investments.

Let's look at the other requirements:

- How Much Work Do You Need?
- How We Decide If You Are Disabled.
- Special Situations

Publications

Disability

Benefits

Disability Starter

Kit

Other disability
publications

**Bowditch
& Dewey**
ATTORNEYS

MAY 03 2016

Terrence J. Briggs
Direct telephone: 508-926-3466
Direct facsimile: 508-929-3114
Email: tbriggs@bowditch.com

May 2, 2016

VIA email and post

Jeanne M. Medeiros, Esq.
New England Pension Assistance Project
Gerontology Institute
UMass Boston
100 Morrissey Blvd.
Boston MA 02125
Jeanne.medeiros@UMB.edu

**Re: Claim for Disability Benefits on Behalf of Stephen [REDACTED] from
The Defined Benefit Plan for Hourly Employees of The Weetabix
Company, Inc. (the "Plan" of the "Company").**

NOTICE OF ADVERSE BENEFIT DETERMINATION

Dear Attorney Medeiros:

I am the attorney engaged by the Plan Administrator of the Plan to assist in the analysis of Mr. [REDACTED] claim for disability benefits under the Plan.

The Plan Administration has determined that Mr. [REDACTED] does not meet the Plan's rules that would make him eligible for a disability pension.

First, I want to acknowledge receipt of your letter on behalf of Mr. [REDACTED] claim for benefits under the Plan (the "Claim"). Thank you for your very carefully considered analysis of the Plan's terms for a disability benefit as they apply to the facts of Mr. [REDACTED]'s situation.

As the Plan Administrator, the Company has the obligation of operating the Plan pursuant to its terms, to do otherwise would be a breach of the Company's duties as Plan Administrator.

(1) The specific reasons for the adverse determination with reference to the specific Plan provision upon which the determination is based.

Mr. [REDACTED]'s employment with the Company ended on May 27, 2014. His date of disability for Social Security disability benefits purposes was June 1, 2014. As described in the Notice of Award from the Social Security Administration ("SSA") and as SSA rules prescribe, his entitlement to receive benefits did not begin until November, five months after the disability date. As set out below, Section 5.4(a) of the Plan requires, among other things, that the Participant must be "receiving Social Security disability payments." Based on the plain language of the Plan document, Mr. [REDACTED] would have only been eligible for the disability benefit if he had either (a) remained in employment through the date in November 2014 when the disability payments began or (b) disclosed his disability to the Company and filed a disability benefits application with Social Security on or prior to that date. (Let me note that we interpret the Notice of Award to establish November 2014 as the date of receipt of disability payments even though the actual payments would not have been begun until February 2015.)

Plan section 5.4 (a) is set out below:

5.4 DISABILITY BENEFIT

- (a) A Participant who incurs a Total and Permanent Disability prior to retirement shall be entitled to receive a disability benefit upon meeting the following requirements:
- (1) he was actively employed and accruing Years of Service for vesting purposes; and
 - (2) he had attained age 45; and
 - (3) he had accrued at least 5 Years of Service for vesting purposes; and
 - (4) he is receiving Social Security disability payments under Title II of the Social Security Act.

As you point out in your letter, there is no dispute as to requirements (2) and (3) above. However, the language in Section 5.4(a) requires that a Participant simultaneously satisfy subsections (1), be actively employed and accruing Years of Service for vesting purposes, and (4), be receiving Social Security disability payments. Mr. [REDACTED] did not concurrently satisfy both of those two necessary elements.

Had Mr. [REDACTED] told the Company that he was disabled and unable to do his job, even though he had been successfully performing that job, the Company's practice would have been to ask him to submit to a physical to make the determination for Company purposes. If the physician had declared him disabled, he would have been placed on administrative leave. Had the physician not declared him disabled, he would have been instructed to return to work. At that point, if he had applied for Social Security disability, the Company would have deemed him to have satisfied the four requirements of Plan section 5.4(a) once he had received the Notice of Award. As we know, however, that was not the case. Mr. [REDACTED]'s employment terminated without his having informed the Company that he was disabled. He apparently filed his request for disability benefits with the Social Security Administration on November 7, 2014, several

months after his termination of employment. (See Box 3, Filing Date on Form [REDACTED] filed with the Claim.)

While we do not believe that it is relevant, given the requirement that he be receiving Social Security disability benefits while he was actively employed, we will respond to the Claim's assertion that his date of termination should be extended because when he terminated employment, he was paid for accrued but not used vacation time. You draw our attention to Plan Section 1.24(b), the definition of Hours of Service. Here is that Plan provision in full:

(b) Each hour for which an Employee is directly or indirectly compensated or entitled to compensation by the Employer (irrespective of whether the employment relationship has terminated) for reasons other than performance of duties (such as vacation, holidays, sickness, jury duty, disability, lay-off, military duty or leave of absence) during the applicable computation period;

Note the parenthetical expression beginning on the second line of that definition, "irrespective of whether the employment relationship has terminated." We interpret that expression to mean that any compensation paid for, among other reasons, vacation accrual, must be taken into account as an Hour of Service under the Plan even if, as is the case here, the employment relationship between the individual and the employer has terminated. We do not interpret those words to mean that the employee must or should be deemed to have remained in employment after the termination of the employment relationship.

Later in Section 1.24 we learn why Hours of Service are counted:

An Hour of Service must be counted for the purposes of determining a Year of Service, One-Year Period of Severance, and Credited Service.

In addition, Hours of Service will be credited for employment with other Affiliated Employers. The provisions of Department of Labor regulations 2530.200b-2(b) and (c) are incorporated herein by reference.

Hours of Service are counted for purposes of the Plan, but not for determining the date of a termination of employment. "Year of Service" and "One-Year Period of Severance" are used for vesting purposes. "Credited Service" is used to compute the Participant's Accrued Benefit. Each is defined in the Plan: Year of Service at Section 1.50, One-Year Period of Severance at Section 1.33, and Credited Service at Section 1.10.

None of this serves to move the employee's date of termination of employment, they only address the service used to determine the employee's vesting percentage and accrued benefit. We have taken those 72 hours of vacation pay into account for purposes of Mr. [REDACTED] pension benefit accrual.

As we have gathered documents related to Mr. [REDACTED]'s service, we have located a record of the Commonwealth's Unemployment Assistance Department that shows the effective date of his claim for Unemployment benefits to be May 25, 2014. We do not know when he actually

applied for those benefits, although the record, which we attach, shows a first Transaction Date of June 12 and a Week Paid date of June 7, 2014. As you know, a worker must be available for work in order to collect unemployment benefits. We take this to show that Mr. [REDACTED] did not regard himself to be disabled as of the date of his termination of employment.

We also attach his final time card. It shows that his last day of work was May 22, 2014, a Thursday and a day when the Company last discussed with him his right to take a job on another line. He said that he was undecided whether to take the job or ask that he be laid off. He did not report to work on Friday, May 23. The plant was closed the next three days for Memorial Day weekend. He did not return to work on Tuesday, the 27th, but was given credit for that day as a sick/personal day.

2. A description and explanation of any additional material or information needed for the claimant to perfect the claim.

We invite you to submit any material that you can provide that shows that Mr. [REDACTED] notified or informed the Company that he was suffering a disability that made it impossible for him to do his job prior to his May 27, 2014 date of employment termination.

We believe that we are properly and reasonably interpreting the phrase "receiving Social Security disability payments." However, if you can show us any reliable authority interpreting that phrase to mean the date of the determination of disability, we will be happy to review it.

Finally, if you are able to show that the proper date for receipt of Social Security disability payments is the date of the determination of disability, please provide us with some authority for using unused vacation accruals to extend the date of termination of employment when those accruals were paid as compensation to the employee, please do so.

Each of these is a matter of interpretation, not a matter of facts required to perfect Mr. [REDACTED]'s claim, but any citations or support you can find we shall review with care.

3. The Plan's review procedures and applicable time limits.

We believe that you have a full copy of the Plan document, nevertheless, we attach the relevant pages from the Plan and the Summary Plan description, and we summarize them here.

You may ask that we review the claim and the adverse benefit determination so long as you make the request no later than 180 days after receiving this Notice.

If you request a review, you may submit written comments, documents, records, or other information relating to the claim. Please include the following information: (i) a list of the issues that you contest and that you wish us to review on appeal; (ii) your position on each issue; (iii) any additional facts you believe support your position on each issue; and (iv) any legal or other arguments you believe support your position on each issue.

Our review will take into account all the information you submit, without regard to whether it was submitted with the Claim or considered in our initial benefit determination. Because this is a disability determination, the review will give no deference to the initial adverse decision. The review will be conducted by the Plan Administrator

We will supply you with reasonable access to and free copies of all documents, records, and other information that is relevant to your claim. A document is considered relevant if it: (i) was relied on, submitted, considered or generated in the making the benefit determination; (ii) demonstrates compliance with the administrative processes and safeguards required in making the benefit determination; and (iii) constitutes a statement of policy or guidance with respect to the Plan concerning the benefit denied for the claimant's diagnosis, whether or not such advice or statement was relied on in making the benefit determination.

We will notify you of the determination on review not later than 45 days after the receipt of your request for review. Under special circumstances, we may extend the 45-day period under rules set out in the relevant pages from the Plan document.

If the decision on review is adverse, our Notice of Decision will be written in language calculated to be understood by Mr. [REDACTED] and will include the specific reasons for the adverse decision and the specific Plan provisions on which the decision was based. It will also notify you that you are entitled to receive, free of charge access to documents and other information relevant to the claim, it will describe any voluntary appeal procedures, notify you of your right to file a civil action under Section 502(a) of ERISA, inform you of any internal rule or guideline on which we relied in making the adverse determination, and include a statement notifying you that the local office of the U.S. Department of Labor and state insurance regulator can explain to you what other voluntary alternative dispute resolution mechanisms are available.

4. **Mr. [REDACTED] has the right to bring a civil action under Section 502(a) of ERISA following an adverse benefit determination on review.**
5. **No internal rule, guideline, protocol, or other similar criterion was relied on in making this adverse determination.**

The Plan Administrator relied upon the Plan document, the Notice of Award, and the Company's payroll records in making this adverse determination.

We hope that you understand we take no pleasure that we cannot find in favor of Mr. [REDACTED]'s claim. He was a valued employee at the Company for many years. However, we are

Jeanne Medeiros
May 2, 2016
Page 6

bound by the terms of the Plan as we understand them. You should be confident that any appeal for review that you file will be considered seriously and respectfully. If you wish to discuss this Denial, please contact me, as counsel to the Plan for the purposes of this letter. I can be reached by phone at my office through 508.926.3466, on my cell phone 413.668.8585, or by email at tbriggs@bowditch.com.

Very truly yours,



Terrence J. Briggs

TJB: enc.
cc: S. Hodgson
D. Conrad

issues for Westabix appeal

issue 1

- letter says I must simultaneously
- be actively employed & accruing Yrs of Service; and
 - be receiving Soc Sec Disability payments

↑ I believe this is a legal & factual impossibility - due to SSA's method of paying DIB

- letter from plan seems to be adding requirements not in plan language -
i.e. he had to notify plan, submit to physical, etc. - this is not in the plan unless I am mistaken

issue 2

what does it mean to ~~have~~ be accruing "years of service" → again, they are adding terms to plan which are not there -

re: "term of employment relationship" = no longer actively employed

- plan only refers to being active employee & accruing YOS } as if they are the same thing

issue
3

applying for & receiving
unemployment benefits 2

tough to argue this one 2

receiving UEB = being "available
for work"

↓
therefore, inconsistent w/ disability
status

but can we argue they're looking
at evidence outside of scope
of what plan allows them
to look at?

plan references only the
SOC SEC Disability
determin

→ see section 2 of letter for info
plan has ~~identified~~ identified



UNIVERSITY OF MASSACHUSETTS BOSTON

50 Years

PENSION ACTION CENTER, GERONTOLOGY INSTITUTE
MCCORMACK GRADUATE SCHOOL OF POLICY AND GLOBAL STUDIES

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August 15, 2016

BY CERTIFIED MAIL; RETURN RECEIPT REQUESTED

David Conrad
Plan Administrator
The Weetabix Company
300 Nickerson Road
Marlborough, MA 01752

Re: Stephen [REDACTED]
[REDACTED]
[REDACTED] MA [REDACTED]

Soc. Sec. No. XXX-XX [REDACTED]
D.O.B.: [REDACTED]

Dear Mr. Conrad:

On April 14, 2016, this office filed a claim for disability retirement benefits pursuant to the Defined Benefit Plan for Hourly Employees of the Weetabix Company, Inc. (hereinafter, "the plan") on behalf of the above-named Stephen [REDACTED]. See copy of that letter with its exhibits, attached as Appeal Exhibit A.

On May 3, 2016, this office received a letter from the Plan Administrator denying Stephen [REDACTED] claim for disability retirement benefits. A copy of that letter is attached hereto as Appeal Exhibit B.

This letter is an appeal of the plan's decision denying Mr. [REDACTED] disability benefits pursuant to the plan and ERISA. We enclose a Release form signed by Mr. [REDACTED] authorizing this office to act on his behalf in this matter as Appeal Exhibit C.

Statement of Facts

Stephen [REDACTED] was employed as an hourly employee of The Weetabix Company in Clinton, Massachusetts, commencing on April 29, 2002. His last day of employment was May 27, 2014. See copy of Retirement Benefit Calculation from the plan, confirming Mr. [REDACTED]'s last dates of employment, enclosed as part of Appeal Exhibit A.

Mr. [REDACTED] received his final paycheck on June 5, 2014. It included pay for 72 hours of regular pay through May 31, 2014, and 72 hours of vacation pay. See copy of paycheck advice,

also enclosed as part of Appeal Exhibit A.

On January 31, 2015, the Social Security Administration ("SSA") issued a determination finding Mr. [REDACTED] totally disabled and entitled to Social Security Disability Insurance benefits. In its decision, the SSA found that Mr. [REDACTED] "Became disabled under our rules on June 1, 2014." A copy of the SSA decision is enclosed as part of Appeal Exhibit A. A copy of the Disability Determination and Transmittal Form is also enclosed as part of Appeal Exhibit A.

The Social Security Administration pays disability benefits only for total disability, not for partial or short-term disability. See 42 U.S.C 423 (d)(1). Social Security Disability benefits are only payable after the expiration of a 5-month waiting period past the date of disability. See 42 U.S.C. 423 (c) (2).

Argument

In its denial letter of May 2, 2016, the plan asserts that Mr. [REDACTED] did not satisfy the requirements for eligibility for disability benefits as outlined in Section 5.4(a) of the plan document. Section 5.4(a) reads as follows:

5.4 Disability Benefit

- (a) A Participant who incurs a Total and Permanent Disability prior to retirement shall be entitled to receive a disability benefit upon meeting the following requirements:
- (1) he was actively employed and accruing Years of Service for vesting purposes; and
 - (2) he had attained age 45; and
 - (3) he had accrued at least 5 Years of Service for vesting purposes; and
 - (4) he is receiving Social Security disability payments under Title II of the Social Security Act.

In order to receive a disability benefit under the plan, a participant must meet these four requirements. The plan agrees that Mr. [REDACTED] satisfied the second and third requirements, but has denied the benefits based on its interpretation of the first and fourth requirements. The plan's denial effectively hinges on one major point: it asserts that Mr. [REDACTED] needed to simultaneously satisfy the first and fourth requirements enumerated in Section 5.4. It asserts that Mr. [REDACTED] had to meet the definition of being "actively employed and accruing years of service" while simultaneously be "receiving Social Security disability payments".

As will be argued below, the plan's interpretation of Section 5.4 is both incorrect as a matter of law under generally-accepted principles of plan interpretation, and sets up a factually impossible standard of eligibility.

The plan's interpretation of Section 5.4 is incorrect as a matter of law under generally-accepted principles of plan interpretation

Pursuant to ERISA, a plan provision must be interpreted using a "fair reading" of the

provision that is internally consistent with the plan's other provisions, Dennard v. Richards Group, Inc., 681 F.2d 306(5th Cir. 1982). It also cannot impose a standard or add terms which are not contained in the pension plan document itself, Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984). The plan's denial letter fails in both these regards.

The plan's interpretation, that a participant must simultaneously be actively employed and receiving Social Security disability benefits, creates a standard that is impossible to satisfy, and which renders the disability provision, on its face, a nullity. In order to qualify for Social Security Disability payments, one must be unable to work. It is impossible for a person to be unable to work, thus qualifying for Social Security Disability payments, and at the same time be actively employed and accruing years of service.

In order for the Social Security Administration to determine an applicant disabled, that applicant must have a severe medical condition that prevents the applicant from performing any of his previous work and from performing any other type of work. See Disability Benefits, (2015), <https://www.ssa.gov/pubs/en-05-10029.pdf>. Essentially, an applicant must be unable to work to qualify for Social Security Disability payments. Therefore, it is contrary to reason to interpret Section 5.4 of the plan in the manner which the plan asserts. It is not possible to be simultaneously actively employed and receiving Social Security disability payments. A plan may not be interpreted in a manner which frustrates the essential purpose of the provision, Morgan v. Mullins, 643 F. 2d 1320 (8th Cir. 1981). The plan's interpretation of Section 5.4 does precisely that.

It is unlawful for a plan to require that a participant's benefit eligibility be conditioned upon terms that are not in the plan document. A plan cannot add terms that are not in the plan. In Morgan v. Mullins, the Eighth Circuit held that "[w]here the Trustees [of the plan] impose a standard not required by the pension plan itself...such action 'would result in an unwarranted and arbitrary construction of the [p]lan.'" See Morgan v. Mullins, supra, at 1322. Similarly, in Blau v. Del Monte Corp., the Ninth Circuit held that the "imposition of a standard that is not contained in the terms of a plan amounts to an arbitrary and capricious decision." See Blau v. Del Monte Corp., supra at 1354.

In the instant case, the plan has done just that, inserting an elaborate procedural and substantive requirement wholly absent from the plan document itself. The denial letter of May 2, 2016, asserts the following:

"Had Mr. [REDACTED] told the Company that he was disabled and unable to do his job, even though he had been successfully performing that job, the Company's practice would have been to ask him to submit to a physical to make the determination for Company purposes. If the physician had declared him disabled, he would have been placed on administrative leave. Had the physician not declared him disabled, he would have been instructed to return to work. At that point, if he had applied for Social Security disability, the Company would have deemed him to have satisfied the four requirements of Plan section 5.4(a) once he had received the Notice of Award." See Appeal Exhibit B, page 2.

This practice described above – notice by the employee to the employer, submission to a

physical examination by the company, determination of disability, administrative leave - is glaringly absent from the terms of the pension plan document or Summary Plan Description, and appears to be fabricated out of whole cloth. "ERISA requires [summary plan descriptions] to be 'written in a manner calculated to be understood by the average plan participant, and...be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.' 29 U.S.C. Section 1022(a)." Balestracci v. NSTAR Elec. And Gas Corp., 449 F.3d 224, 232 (1st Cir. 2006). Mr. [REDACTED] was not reasonably apprised of his rights and obligations in either the Weetabix Company Inc's Summary Plan Description or the Plan Document. The First Circuit has previously held that summary plan descriptions "play a key role in communicating to beneficiaries the essential information about [a] plan." See Balestracci, 449 F.3d at 232. Since Mr. [REDACTED] was never notified of essential information about the Weetabix Company Inc.'s plan and procedure for determining whether a beneficiary is disabled, then he cannot be punished for not following the procedure. Mr. [REDACTED] could not be expected to know about and follow this procedure if he was never notified of it.

The plan's invention of a requirement that Mr. [REDACTED] notify the employer, submit to a physical examination, and be placed on administrative leave in order to be entitled to benefits is troubling for a number of reasons. First, as noted above, any such provision should clearly have been spelled out in the plan document and SPD in order for it to be effective. Second, the fact that the plan is now inventing a procedure whereby a participant could possibly meet the requirement of simultaneous employment and receipt of disability benefits, is evidence of the fact that the plan knows that its interpretation of Section 5.4 is not supported by the plain meaning of the plan's provision. It seeks to explain its misinterpretation of Section 5.4 by adding terms that are non-existent in the plan document.

Mr. [REDACTED] was accruing Years of Service at the time he became totally and permanently disabled

Mr. [REDACTED] was accruing years of service for his vacation pay in accordance with the plan document. The plan document states that "a Year of Service shall mean a Computation Period of twelve (12) consecutive months during which a Participant performs one Hour of Service." Mr. [REDACTED]'s vacation pay falls within the second definition of "Hour of Service" included in the plan document: "[e]ach hour for which an Employee is directly or indirectly compensated or entitled to compensation by the Employer (irrespective of whether the employment relationship has terminated) for reasons other than performance of duties (such as vacation, holidays, sickness, jury duty, disability, lay-off, military duty or leave of absence) during the applicable computation period[.]" Finally, the plan states that an hour of service "must be counted for the purposes of determining a Year of Service[.]"

The plainest reading of the definitions in the plan document are that a participant earns hours of service for vacation pay, irrespective of whether the employment relationship has terminated. Mr. [REDACTED] was earning hours of service from his vacation pay and because those hours count towards a year of service, he was accruing years of service for vesting purposes through his vacation pay. Therefore, the first requirement to earn a disability benefit is satisfied.

The First Circuit has held on multiple occasions that a plan administrator's interpretation

of a plan cannot be unreasonable. See Colby v. Union Sec. Ins. Co. & Management Co. for Merrimack Anesthesia Associates Long Term Disability Plan, 705 F.3d 58 (1st Cir. 2013); Harris v. Harvard Pilgrim Health Care, Inc., 208 F.3d 274 (1st Cir. 2000). In Colby, the First Circuit recently held that “[t]he provisions of an ERISA plan must be read in a natural, commonsense way.” See Colby, 705 F.3d at 66.

In reading the plan document, the most natural interpretation is that hours of service from vacation pay, irrespective of whether the employment relationship has terminated, count towards a year of service for vesting purposes. In Harris, the First Circuit held “[a] primary purpose of ERISA is to ensure the integrity and primacy of the written plans so that the plain language of an ERISA plan should be given its literal and natural meaning.” See Harris, 208 F.3d at 279. “Since one of the primary functions of ERISA is to ensure the integrity of written, bargained-for benefits plans...generally speaking ERISA does not mandate that a covered plan include particular substantive provisions. Thus, the plain language meaning of an ERISA plan must be enforced in accordance with its literal and natural meaning.” See id. at 277-78. The natural meaning of the plan, that Mr. [REDACTED] was accruing years of service for vesting purposes through his vacation pay, must be enforced in accordance with ERISA.

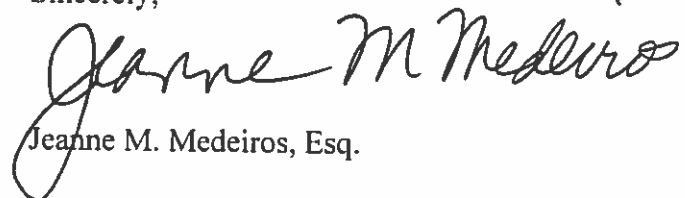
Alternatively, if the plan continues to assert that Mr. [REDACTED]’s employment ended on May 27, 2014, it should look to the substantial and overwhelming evidence that he was, in fact, disabled prior to that time. Mr. [REDACTED]’s disability is a chronic one, not the result of some single event which occurred on June 1, 2014. We enclose as Exhibit D the Consultative Examination Report concerning Mr. [REDACTED] which concludes that he was in a major automobile accident when he was 24 years old, and currently suffers from a “mild neurocognitive disorder due to traumatic brain injury without behavioral disturbance”, attention deficit hyperactivity disorder, and social anxiety disorder. The conditions noted are all chronic and of a long-standing nature, and did not arise suddenly on June 1, 2014.

Conclusion

For the reasons discussed above, we hereby request that you review this matter and render a decision that Mr. [REDACTED] is entitled to disability retirement benefits pursuant to the plan and ERISA. Accordingly, we request that the plan calculate and pay the disability retirement benefits owed to Mr. [REDACTED]

Please direct your written response to us at: Pension Action Center, Gerontology Institute, Univ. of Massachusetts Boston, 100 Morrissey Blvd. Boston, MA 02125. Please feel free to call us at 617-287-7335 if we can provide you with any further information. Thank you for your attention to this matter.

Sincerely,


Jeanne M. Medeiros, Esq.



Sophie Esquier
Legal Intern

Enclosures:

Appeal Exhibit A – Claim letter with exhibits, dated April 14, 2016

Appeal Exhibit B – Denial letter in the instant matter, dated May 2, 2016

Appeal Exhibit C- Release Form

Appeal Exhibit D – Consultative Examination report, dated January 17, 2015

cc:



Terrence J. Briggs, Esq., Bowditch & Dewey