Only the Head Strong Survive: The Tragic Course of Head Injury Claims Under the Bert Bell/Pete Rozelle NFL Retirement Plan

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By
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I. Introduction

The National Football League (NFL) is the top American professional sports league in the world. Its players are among the highest paid in modern day society. However, because of the physical contact nature of the sport, the players are often the most injury-prone in comparison to other contact sports (excluding boxing, UFC boxing, martial arts and the like). According to ESPN, there are several members from all 32 teams who appear on the injured list each year. Injuries are sometimes so great that players are often forced to retire due to injuries suffered while on the field during employment in the NFL. This sport is one of few careers where it is commonplace for an employee-player to retire at a very early age and qualify for disability benefits because of bodily injuries and mental illnesses incurred from playing or during football practice.

Whether retiring early on or later in life, head injuries seem to be the cause or basis for most NFL retirements, a subject of deep concern to the NFL and health officials, a topic worth studying by neurologists, and has been the object of congressional hearings and recent lawsuits against the NFL. Among the list of injuries are concussions, brain damage, depression, memory-related diseases, severe headaches, and neurological problems, some of the most debilitating and career-ending injuries to football players. Since the Bert-Bell/Pete Rozelle NFL Retirement Plan (Plan or the Plan) is governed by the Employee Retirement Income Security Act (ERISA), players who are injured due to football-related accidents have a recourse provided to them by the plan, but in many cases claims are denied wholly or in part. Moreover, the road to making claims for disability benefits is commonly anything but simple and, in many cases, unfair. Unfortunately, the NFL Retirement Plan is one of many examples of how ERISA fails to protect the very people it was designed to safeguard: employees and their beneficiaries.
The administrative process one must take to make a head injury claim under most disability plans involves many steps, and the Bert Bell/Pete Rozelle NFL Player Retirement Plan is no different. During the administrative process, claims are denied, some wrongfully, or some claims are approved but not for the full amount for which a player may qualify. If the player disagrees with the claim denial he may appeal the denial internally. ERISA mandates that the plan “afford a reasonable opportunity . . . for a full and fair review by the appropriate named fiduciary of the decision denying the claim. If the denial is upheld on appeal, the player then has the option to commence a lawsuit against the Plan for wrongful denial of benefits under ERISA, which is the federal law designed to protect employees and their beneficiaries to ensure they receive promised retirement plan benefits.

There is hardly a satisfactory resolution afforded by the courts since it has a duty of deference and can only award equitable remedies. Section 502(a)(1)(B) allows a participant or beneficiary to file a civil action to “recover benefits due…under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” But does this absolutely redress the harm incurred by the employee-player? I think absolutely not. The denial of promised benefits will often lead to “non-economic injuries (i.e., pain and suffering) and extra-contractual economic injuries (i.e., lost wages due to a worsened medical condition). But section 502(a)(1)(B) merely allows ‘the successful plaintiff [to obtain] an order directing the plan to provide the benefits in dispute, plus attorneys’ fees or, if the employee has paid for the covered benefits out of his own pocket, he can obtain reimbursement.’ In other words, ‘consequential damages are not allowed’.” Equitable remedies “allow ERISA plan sponsors to impose self-serving terms that severely restrict the ability of a reviewing court to correct a wrongful benefit denial.” It seems that ERISA would better serve employees and
their beneficiaries by imposing consequential damages that would both encourage plan sponsors to award claimants the benefits it promised to pay and to provide adequate assistance to victims of wrongfully denied claims.

Of the most noted cases for claims brought against the Plan, such as Jani v. Bert Bell/Pete Rozelle Ret Plan\textsuperscript{16}, Boyd v. Bert Bell/Pete Rozelle Ret Plan\textsuperscript{17}, and Stewart v. Bert Bell/Pete Rozelle Ret Plan\textsuperscript{18}, most are claims for wrongful denials of disability benefits. The actual cases give an in depth review of how tedious the process can be to receive promised disability benefits or to even retain benefits once the claims have been approved.\textsuperscript{19} However, the number of denials in comparison to those actually receiving benefits coupled with the court's deferential treatment to the Plan yield an outcome that is the opposite of enforcing the Plan's obligation to honor its promise made to its employees-players.

This article first discusses the legislative history of the enactment of ERISA followed by a brief history on the enactment of the current NFL Retirement Plan, namely the disability benefits. Next discussed are the various disability benefits provided by the NFL Retirement Plan and the process players must undertake to receive the benefits. This article then examines recent disability claims caused by head injuries that are denied and ultimately taken to court for resolution. Discussed next is the process of making claims to the Board, how and why claims are denied, and ultimately how claims make it to federal court. This article will then analyze the application process used to determine whether a player is eligible to receive benefits. Finally, this article concludes with a summary of the reason ERISA was enacted, which was to ensure the protection of employees and their beneficiary’s, and how this is yet another sad demonstration of how ERISA “thwarts the legitimate claims of the very people it was designed to protect”.\textsuperscript{20}

II. Historical Background
A. ERISA Origins

In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA)\(^2\) to govern pension plans in order to protect benefits promised to employees by their employers (private companies). It is a “comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.”\(^2\) Employee benefits are used by employers to attract, retain, and reward good employees. These promised benefits are voluntary in nature and, prior to the passing of ERISA, were without any regulation. This meant that employees had no rights to enforce distribution of the promised benefits, and their only recourse was to commence a lawsuit in state court for breach of contract or tort in the event an employer failed to keep its promise.\(^2\) Many companies, prior to the passing of ERISA, abused their retirement plans by, for example, failing to deliver the benefits they promised, improperly using plan assets, and inadequately funding the plan.\(^2\) Companies were essentially free to terminate the plan, file for bankruptcy, or impose excessive service requirements, without ever having to pay the benefits they offered to employees since there was often no actual “proof” that a contract existed and offering benefits to employees was completely voluntary.

The passing of this Act was necessary to protect the rights of employees (and their beneficiaries) through its regulation of employee benefits, including retirement pension plans, profit sharing plans, health care, disability, and death benefits. ERISA assures this protection by imposing a list of requirements employers must follow pertaining to standards of conduct, responsibilities, and obligations under the plan. Since retirement plans are voluntary, ERISA, acting as a tax statute as well, provides tax incentives for both the employer and employee.\(^2\) So long as a retirement plan is “qualified” under the Internal Revenue Code,\(^2\) an employee is not taxed on her or his benefit until distribution and any contributions made by the employer for the
benefit of the employee is tax deductible when the contribution is made.  

ERISA divides employee benefits into two main types: retirement benefits and health and welfare benefits. Retirement plans are essentially benefits that are accrued during employment but the payout is deferred until actual retirement (so long as the employee is vested). Retirement plans are further categorized as either defined benefit plans or defined contribution plans. Defined benefit plans are paid to employees by employers based on a trust funded solely by the employer whereas defined contribution plans are funded by the employee and the employer (such as a 401(k) plan with a company match). Health and welfare or welfare plans provide medical benefits to employees or benefits due to an event that occurred outside the control of the employee (such as disability, death, unemployment, sickness and the like).  

Although ERISA governs three broad types of plans, there are also various other miscellaneous plans governed by ERISA, but the type of plan most worth noting here is the multiemployer plan. Multiemployer plans have more than one unrelated employer employing a group of employees belonging to the same collectively bargained unit pursuant to a collective bargaining agreement. These plans must meet other requirements imposed by the Department of Labor (DOL). Multiemployer plans, as one might imagine, usually have issues that are different from single-employer plans. Most issues involve inadequate funding or misusing plan funds which can often lead to employers denying disability claims even though an employee qualifies for disability benefits.

B. The NFL Retirement Plan

The Bert Bell NFL Player Retirement Plan was established in 1962. It was established to “provide retirement, disability and related benefits to eligible former professional football players.” The Pete Rozelle NFL Player Retirement Plan was established in 1989. In 1994, the
Pete Rozelle NFL Player Retirement Plan was merged into the Bert Bell NFL Player Retirement Plan, which was renamed the Bert Bell/Pete Rozelle NFL Player Retirement Plan, pursuant to a Collective Bargaining Agreement (CBA) between the National Football League Players Association (or NFLPA, the exclusive collective bargaining representative for NFL players), and the National Football League Management Council (or NFLMC, the exclusive collective bargaining representative for NFL clubs). The newly merged plan later established the NFL Player Supplemental Disability Plan to provide disability benefits in addition to those provided under the newly merged plan. The current plan is a pension plan under ERISA whereas the Supplemental Plan is an employee welfare benefit plan.

III. Disability Benefits under the Bert Bell/Pete Rozelle NFL Retirement Plan

The NFL provides disability benefits for its retired players under the supplemental disability plan. This is accomplished by automatic enrollment in the Bert Bell/Pete Rozelle NFL Retirement Plan and the NFL Player Supplemental Disability Plan. The Plan provides two types of disability benefits: Total and Permanent (T&P) Disability and Line-of-Duty (LOD) Disability. A player, once injured, can apply for one or both benefits, but each benefit has its own separate and distinct rigorous qualifications a disabled player must meet and prove before he can collect on any of the promised benefits.

A. T&P Disability Benefits

Under Article 5 of the Plan, a covered player who becomes “totally and permanently” disabled is eligible to receive “a monthly total and permanent disability (“T & P”) benefit”. Article 5 further provides that the benefit will commence after six months from the date the disability occurred. The Plan offers four types of T & P benefits: active football, active non-football, football degenerative, and inactive.
The plan’s active football total and permanent disability benefit, a player will receive a monthly benefit of $4,000 so long as the disability arises while a player is active and was caused by an injury while engaging in football activities. The injury must occur shortly after the disability first arises.41

(b) Active Non-football. The monthly [T & P] benefit will be no less than $4,000 if the disability(ies) does not result from [NFL] football activities, but does arise while the Player is an Active Player and does cause the Player to be totally and permanently disabled ‘shortly after’ the disability(ies) first arises.

(c) Football Degenerative. The monthly [T & P] benefit will be no less than $4,000 if the disability(ies) arises out of [NFL] football activities, and results in total and permanent disability before fifteen years after the end of the Player’s last Credited Season.

(d) Inactive. This category applies if (1) the total and permanent disability arises from other than [NFL] football activities while the Player is a Vested Inactive Player, or (2) the disability(ies) arises out of [NFL] football activities and results in total and permanent disability 15 or more years after the end of the Player’s last Credited Season.42 The total monthly benefit “will be no less than $1,750”.43

The basis for many cases for denial of disability benefits most often litigated on the premise that the Committee (and the Board) wrongfully denied a claim for benefits by only awarding a player Inactive Benefits.44 Some plaintiffs as well as outside treating physicians, have argued that the Committee and Board are overreaching, determined to award smaller benefits. This idea was brought up in Stewart.45

Another basis for denial of Active benefits is the players' failures to meet the “shortly after” standard of section 5.1(a). The “shortly after” requirement is satisfied when a disability
occurs less than 6 months after retirement from the NFL. The Board has discretion to determine whether the requirement is actually met in order to administer disability benefits. While the determination is taking place, players are often left “substantially unable to engage in any occupation or employment for remuneration or profit”.

B. LOD Benefits

Article 6 of the Plan provides the definition of a Line-of-Duty (LOD) benefit as well as the requirements for a player applying for said benefits. According to section 6.1, a player who incurs a “substantial disablement...arising out of League football activities... will receive a monthly line-of-duty disability benefit ... continuing for the duration of such substantial disablement but not for longer than 90 months.” Section 6.4 is the definitions section of the article, and provides in pertinent part:

“(a) For applications received on or after May 1, 2002, a “substantial disablement” is a permanent disability that ...

(1) Results in a 50% or greater loss of speech or sight; or
(2) Results in a 55% or greater loss of hearing; or
(3) Is the primary or contributory cause of the surgical removal or major functional impairment of a vital bodily organ or part of the central nervous system; or
(4) For orthopedic impairments, using the American Medical Association Guides to the Evaluation of Permanent Impairments (Fifth Edition, Chicago, IL) (“AMA Guides”), is (a) a 38% or greater loss of use of the entire lower extremity; (b) a 23% or greater loss of use of the entire upper extremity; (c) an impairment to the cervical or thoracic spine that results in a 25% or greater whole body impairment;
(d) an impairment to the lumbar spine that results in a 20% or greater whole body impairment; or (e) any combination of lower extremity, upper extremity, and spine impairments that results in a 25% whole body impairment.

In accordance with the AMA Guides, up to three percentage points may be added for excess pain in each category above ((a) through (e)).

(b) A disability will be deemed “permanent” if it has persisted or is expected to persist for at least 12 months from the date of its occurrence and if the Player is not an Active Player.

(c) “Arising out of League football activities” means a disablement arising out of any League pre-season, regular-season, or post-season game, or any combination thereof, or out of League football activities supervised by [the NFL] including all required or directed activities...[and] does not include...any disablement resulting from other employment, or athletic activities for recreational purposes, nor does it include a disablement that would not qualify for benefits but for injury(ies)or illness that arise out of other than League football activities.”

The Board has full and absolute discretion to define and interpret the terms of the Plan, decide claims for benefits under the Plan, and generally manage and administer the Plan. In other words, the Board's decision is final once rendered. The players' only recourse in the event of an unfavorable Board decision is to file an ERISA claim in federal court. The article will now describe the process of applying for benefits and explain how cases get to federal court.

IV. Highlights of Recent Head Injury Cases

It is arguably well established that the courts hardly overturn the Plan's Retirement Board's (Board) decision for denial of disability benefits under the Federal court's highly deferential abuse of discretion standard of review. Plans give the Board full and absolute
discretion in making award claims, which usually leaves little or no room for appeal. In fact, the first time the Federal court of appeals actually reversed the Board's decision was *Jani v. Bert Bell*. *Jani* helps to illustrate the severity of brain damage that can result from head injuries in the NFL, and the inefficient process that players must go through in order to obtain disability benefits. Courts are also reluctant to overturn Board decisions unless the circumstances are extreme (as we will see in the Jani case). The Board's decisions are subject to the highly deferential abuse of discretion standard of review mostly because the Board is almost always faced with conflicting medical evidence.

*Jani* highlights the struggles Mike Webster endured to obtain disability benefits because of severe brain damage he suffered from numerous concussions during his seventeen year career with the NFL. In this case, the Estate of the Mike Webster, former Pro Football Hall of Famer, sued the Bert Bell/Pete Rozelle NFL Player Retirement Plan and the NFL Player Supplemental Disability Plan for wrongful denial of benefits under ERISA. His position with the Steelers, a center position, was considered by the court one of the most exposed and unprotected positions on the field.

After retiring from football, Webster tried earning income through various means, including investments he made, a TV announcer position, and other odd jobs. He earned virtually nothing from 1996-2002 and in 1998, he was diagnosed with brain damage “resulting from multiple head injuries he sustained during his football career”. Mr. Webster applied for total and permanent disability benefits under Article 5.1 of the Plan. To provide support for his claim of being totally and permanently disabled, he submitted the reports of two outside doctors: psychologist, Dr. Krieg and board-certified psychiatry professor, Dr. Himmelhoch both of whom agreed that he was totally and permanently disable. The Board determined that Mr. Webster
was eligible for total and permanent degenerative benefits, which only qualified him for the lowest benefits payable from the Plan.\textsuperscript{65}

Mr. Webster appealed the Board's decision and ultimately died while the claim was on appeal.\textsuperscript{66} The plan informed Mr. Webster's estate that the determination for degenerative benefits was correct, and the estate appealed the decision to the Board\textsuperscript{67}, which was denied. The Estate filed an ERISA complaint in the United States District Court of the District of Maryland and the court found in favor of the plaintiffs, awarding the estate active disability benefits, the highest amount of benefits payable from the disability Plan. The tragic nature of the facts of this case no doubt influenced the court’s decision that the Board can and often times does abuse its discretion when denying benefit claims for disability.\textsuperscript{68} This is reminiscent of Roman Gladiator duels where gladiators fought until death for the pure entertainment of spectators and the Roman Empire. One can almost hear Russell Crowe's voice shouting after winning several gladiator matches in the movie \textit{Gladiator}, “Are you not entertained?!”.\textsuperscript{69}

Another noteworthy case is Boyd v. Bert Bell/Pete Rozelle NFL Retirement Plan.\textsuperscript{70} This case produced a different outcome where the court upheld the Board's determination of disability benefits payable to Brent Boyd.\textsuperscript{71} In this case, Mr. Boyd sought judicial review of the Plan's refusal to reclassify disability benefits.\textsuperscript{72} Under Section 5.5(b) of the NFL Retirement Plan, reclassification is permitted if a player presents “clear and convincing” evidence “that, because of changed circumstances, the Player satisfies the conditions of eligibility” for a different category of benefits.\textsuperscript{73}

Boyd applied for permanent disability benefits arising out of a head injury that he incurred while participating in football-related activities.\textsuperscript{74} The Board determined that Boyd was eligible for Inactive T&P Benefits according to the Plan but was not awarded degenerative
benefits, which would have awarded him a higher monthly benefit. Mr. Boyd later requested reclassification of his benefits from Inactive to Football Degenerative. Under Article 5.5 of the Plan, reclassification is permitted if a player presents “clear and convincing” evidence “that, because of changed circumstances, the Player satisfies the conditions of eligibility” for a different category of benefits. Boyd sought reclassification because he felt he was improperly denied Football Degenerative benefits and also because a number of new events had occurred since 2003. This, his attorney argued, established that Boyd's disability was caused by a head injury incurred while he was playing NFL football.

The court was unpersuaded. It agreed with the Board's determination that “Mr. Boyd's request for reclassification involves the same circumstances as the initial classification of his [Total & Permanent disability benefits]. In both proceedings, Mr. Boyd has attempted to establish that his cognitive impairments are the consequence of a head trauma he experienced while playing NFL football. Indeed, Mr. Boyd even submitted reports from the same medical source...in both proceedings to establish the same proposition: that Mr. Boyd has decreased brain function consistent with head trauma”. The Board contends that it acted in compliance with the Plan in determining that Mr. Boyd provided no changed circumstances. The court opined that the Board did not abuse its discretion with its interpretation of the Plan terms and found in favor of the Board.

A more recent case highlighting the saga of disability claims is Stewart v. Bert Bell. In this case, Andrew Stewart, a former NFL player, brought an ERISA claim against the Plan and the NFL Players' Supplemental Disability Plan. Stewart played for the Browns where he injured his Achilles tendon. He later joined the Bengals where he injured his left anterior cruciate ligament (“ACL”) and tore his lateral meniscus. He was later signed by the 49ers and
injured his right hand during a preseason game in Barcelona. He missed the 1993 season game due to surgery performed on his right hand once he returned to the States. He then joined the Canadian Football League ("CFL") in 1994. After a few subsequent surgeries, Stewart retired in Canada and had been unemployed since 2003. Five years later, Mr. Stewart applied for [Total & Permanent disability benefits] alleging that he had been unable to work due to “constant pain due to injuries”.

The Plan's Retirement Committee awarded Mr. Stewart Inactive total and permanent disability benefits because it determined that his condition was due to injuries that did not arise out of [NFL] football activities. Mr. Stewart appealed to the Board.

This case differs from the two previous cases in that the Board received 3 contrasting opinions from doctors; one being Stewart's outside treating physician and the latter two being the NFL's physicians, one of which is a medical advisory physician (or MAP), who's decision is binding on the Board. The Board's physicians did not examine Mr. Stewart; rather, they only reviewed the report provided by Stewart's examining physician (Stewart's physician maintains that he became disabled due to injuries arising out of his NFL football activities. The other two physicians disagreed). In fact, the Board went back and forth a few times with all physicians seeking clarification of their reports and then asked them to review each other’s reports.

Stewart brought two claims against the Plan: a denial of benefits claim and breach of fiduciary duty. Both parties filed cross motions for summary judgment and the court denied the Plan's motion on Stewart's claim for denial of benefits, stating that “a reasonable fact finder could conclude that the Board’s decision that he did not qualify for Football Degenerative benefits was not the product of a 'deliberate, principled reasoning process'.” The court also denied Stewart's motion because the evidence he presented was not “so overwhelming that he is entitled to judgment as a matter of law”.

IV. How Players Make Head Injury Claims

As mentioned, the road to making claims for disabilities is not easy. The NFL has, however, raised awareness on head injuries and has made changes to the CBA that now provide guidelines each player must follow when suffering a head injury. Game officials have received concussion-awareness training and have been directed to remain alert to possible concussions during games.\(^9\) “If an official believes a player may have suffered a concussion, he should take appropriate steps to alert the team and get medical attention for the player.”\(^9\)

The NFL has made tremendous strides in raising concussion awareness in its players since Jani. In fact, in August 2007, the NFL took the initiative to address the management of concussions.\(^9\) A “Concussion Summit” was held by Commissioner Goodell, the goal of which “was to review the current medical and scientific studies on concussions that had been conducted by the MTBI committee and experts outside of the NFL”.\(^9\) After the summit, a new set of recommendations was handed down to players stressing the point “medical decisions must override competitive decisions”\(^9\) via a memorandum. Pursuant to the memorandum, “[t]he NFL listed what symptoms players should look for to detect concussions not only in themselves, but in fellow teammates who may have troubling recognizing a head trauma of their own”.\(^1\)

The memorandum went on to provide that in order for a player to return to a game after suffering a head injury, the “player should be completely asymptomatic and exhibit normal [mandatory] neurological test results”.\(^1\) Additionally, if “a player loses consciousness, he [is] not to return to the same game or practice session. [But] [f]inal decisions are still left up to the individual teams.”\(^1\) This memorandum, although a step in the right direction, still gives NFL team physicians and athletic trainers the right to exercise their medical judgment and expertise in treating concussions...”\(^1\) In light of the above, it is plausible to assume that the NFL is aware...
that head injuries are an important issue to players suffering from concussions and other head trauma. It should be expected that retired players would make post-retirement disability claims. ERISA plans are completely voluntary and since the NFL Retirement Plan makes provisions (and provides funding\textsuperscript{104}) for its player-employees, the Plan should provide benefits to deserving, legitimately disabled retirees in the most painless way possible.

Under the Plan, once a player suffers an injury which is proven to be debilitating, the player must submit an application to the Disability Initial Claims Committee ("DICC").\textsuperscript{105} The DICC consists of two members, one appointed by the National Football League Players Association (NFLPA) and one appointed by the National Football League Management Council (NFLMC).\textsuperscript{106} It is usually good practice for a player to submit reports from a plan-neutral physician in support of the disability claim. The DICC is responsible for deciding all initial claims for disability benefits under the Plan.\textsuperscript{107} The DICC “then decides whether benefits will be awarded based on the player’s application and medical evaluation”.\textsuperscript{108}

If a player receives a favorable determination, benefits are paid as soon as administratively feasible.\textsuperscript{109} If the player is unhappy with his benefits, as may be the case if he is applying for active benefits and is awarded inactive disability benefits instead, he may appeal to the Retirement Board (the Board).\textsuperscript{110} Claims that are outright wholly rejected may also be appealed to the Board. The Board, as a fiduciary of the Plan, has “full power, authority and discretion to interpret the Plan”.\textsuperscript{111} The Board conducts its own investigation and does not give deference to the DICC’s decision.\textsuperscript{112} On appeal, a player is now \textit{required} to attend at least one additional medical examination by a plan-neutral physician.\textsuperscript{113}

“The Board has six voting members; three who are appointed by the [NFLPA], and three appointed by the [NFLMC]. The Plan gives the Board 'full and absolute discretion, authority and
power to interpret, control, implement, and manage the Plan”.

The terms of the Plan specify that when the voting members of the Board are deadlocked as to a medical decision, that decision should be submitted to a Medical Advisory Physician (MAP) who is then required to make a “final and binding determination regarding such medical issues”. If a player still disagrees or is unhappy with the Board's decision, he can now file an ERISA claim in federal court.

The Board is a named fiduciary under the Plan and therefore its decision is highly deferential, where the appropriate standard of review for ERISA claims is abuse of discretion. The Board undertakes the duty to protect the Plan by denying benefits to ineligible claimants and awarding benefits solely to claimants who qualify for them. “Abuse of discretion is a deferential standard of judicial review and reflects the courts’ hesitancy to interfere with decisions of a plan administrator when it is considered to be a fiduciary. Circuit courts will affirm the decision of a fiduciary if a reasonable person could have reached a similar decision, . . . not that a reasonable person would have reached that decision”.

ERISA requires that benefit plan procedures “afford a reasonable opportunity ... for a full and fair review” of dispositions adverse to the claimant and clear communication to the claimant of the “specific reasons” for benefit denials. In order for the review to qualify as a “full and fair review,” the administrator must “[p]rovide ... upon request ... all documents, records, and other information relevant to the claimant's claim for benefits”. ERISA also allows a person denied benefits under an employee benefit plan to challenge that denial in federal court. ERISA, however, does not set out standards district courts must use in reviewing an administrator's decision to deny benefits.

In most ERISA claims made to the federal court, both parties tend to move for cross
summary judgments on their claims. The “typical summary judgment analysis does not apply in ERISA cases”. Rather, the Eleventh Circuit established a six-step framework “for use in judicially reviewing virtually all ERISA-plan benefit denials”:

1. Apply the de novo standard to determine whether the claim administrator's benefits-denial decision is “wrong” (i.e., the court disagrees with the administrator's decision); if it is not, then end the inquiry and affirm the decision.

2. If the administrator's decision in fact is “de novo wrong,” then determine whether he was vested with discretion in reviewing claims; if not, end judicial inquiry and reverse the decision.”

3. If the administrator's decision is “de novo wrong” and he was vested with discretion in reviewing claims, then determine whether “reasonable” grounds supported it (hence, review his decision under the more deferential arbitrary and capricious standard).

4. If no reasonable grounds exist, then end the inquiry and reverse the administrator's decision; if reasonable grounds do exist, then determine if he operated under a conflict of interest.

5. If there is no conflict, then end the inquiry and affirm the decision.

6. If there is a conflict of interest, then apply heightened arbitrary and capricious review to the decision to affirm or deny it.

Either party can appeal any decision of the lower court and continue the appeals process up to the Supreme Court. If at any point the case is remanded to the Board for further determination and a favor decision is still not reached, the appellate process starts over. The majority of former NFL players who challenge the Board’s decisions in federal court lose either at the trial or appellate level.

VI. How the DICC and the Board Determine When to Grant a Claim for Benefits

The claims procedure is completely outlined in section 11.6(a) of the Plan, which states,
inter alia, that the player must file a written application; the Board or DICC will notify the player if any further information is required; if a claim is wholly or partially denied, then the Board will provide notice of the adverse benefit determination within 45 days of making the decision.\textsuperscript{129} The notice must state the specific reasons of the determination, reference to the specific plan provisions on which the determination is based, a description of any additional material or information needed, any rule, guideline, protocol, or other criterion relied upon to make the determination.\textsuperscript{130}

The Plan in Article 5, sets out a set of rules for determining T&P disability benefits payable to a retired player.\textsuperscript{131} The rules read more like guidelines as there is no “checklist” of requirements that must be met to determine eligibility. The decision to approve a claim is at the discretion of the DICC (and ultimately the Board) simply based on its interpretation of physician reports submitted by a player.

Section 5.2 of the Plan states that a player will be deemed “totally and permanently disabled if the...Board or [DICC] finds that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit”.\textsuperscript{132} A player “may first be required to submit to an examination by a competent physician[s] selected by the...Board or [DICC] and may be required to submit to such further examination as, in the opinion of the...Board or [DICC], are necessary to make an adequate determination respecting his physical or mental condition.\textsuperscript{133} What is unclear for T&P benefits is how the DICC and the Board can make such a determination. Courts, on a player's appeal of the Board's decision, agree that the DICC and Board may rely on a physician's recommendation to make initial determinations.\textsuperscript{134}

The court in \textit{Stewart}, for example, opined that a decision is reasonable if it results from a
“deliberate, principled reasoning process” and is “supported by substantial evidence”. Substantial evidence is that “which a reasoning mind would accept as sufficient to support a particular conclusion,” and “consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.” Should a player decide to appeal the decision of the DICC to the Board, the Board itself may require further examination by neutral physicians and/or a Medical Director. The Plan does not permit the Medical Director, to “decide or recommend whether a particular Player qualifies for a disability benefit.” Rather, he should only “provide advice on medical issues relating to disability benefit claims”. This applies to both treating and non-treating physicians alike.

“The duties and responsibilities of the Medical Director will be determined by the [Board], and will include medical advice with respect to the Plan’s neutral physicians and medical examination procedures. The Medical Director will provide advice on medical issues relating to particular disability benefit claims as requested by a member of the [Board] or a member of the [DICC]. The Medical Director will not examine Player.... The Medical Director will not be a Plan fiduciary”.

It has been argued that oftentimes the opinions of a Medical Director (usually referred by the Plan) conflict with a player's treating physician. When physicians provide to the Board conflicting medical opinions as to whether a player is disabled, the courts determined that no special deference should be given to the opinions of the treating physicians. “[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”. “However, when a plan administrator denies benefits in the face of conflicting
medical opinions, the conflicting evidence on which the administrator relies must be substantial”.

“The decision must be based on the whole record and [the plan administrator] cannot pick and choose evidence that supports its decision while ignoring other relevant evidence' before it”.

The Grant case provides a perfect example of how the Board reaches decisions inconsistent with the terms of the Plan in the face of conflicting medical opinions. In this case, Willie Grant appealed a denial of LOD benefits. LOD benefits are granted, as described above, if a player is substantially disabled which is described as a 38% or greater loss of use of the entire lower extremity; a 23% or greater loss of use of the entire upper extremity; an impairment of the spine resulting in 25% or greater whole body impairment; an impairment to the lumbar spine that results in a 20% or greater whole body impairment; or any combination of lower extremity, upper extremity, and spine impairments that results in a 25% whole body impairment. Also, the American Medical Association Guides to the Evaluation of Permanent Impairments (AMA Guides), provide that up to three percentage points may be added for excess pain in each category above.

Upon his application for LOD benefits, Grant was referred to an orthopedist for a medical evaluation by the Plan. The orthopedist’s findings failed to meet the Plan's standard for determining receipt of LOD benefits under Section 6.4(a)(4) and the DICC denied Grant's claim for benefits. Grant appealed to the Board and shortly thereafter underwent another evaluation by a different physician. This physician’s ratings of Grant's condition met the threshold qualification levels for LOD benefits. Since the physicians' opinions conflicted, the Plan arranged for another medical evaluation by a third orthopedist whose rating of Grant met the Plan's threshold for LOD benefits with respect Grant's whole person impairment (WPI).
The Board later asked its Medical Director to comment on the ratings of the Plan's physicians\footnote{151} who, in turn, suggested that the Board refer Grant to a MAP for evaluation.\footnote{152} Even though the MAP's rating met the Plan's threshold for the receipt of LOD benefits, the Board sent him (the MAP) a memorandum acknowledging receipt of his evaluation and asking him to review his findings for compliance with the AMA Guides.\footnote{153} The MAP revised his report, lowering his ratings from his original examination, which of course did not meet the standards for LOD benefits.\footnote{154} The Board notified Grant that it was denying his appeal and affirming the earlier denial of LOD benefits. “Based on [the MAP's] final and binding impairment rating, the Retirement Board concluded that Mr. Grant does not have a substantial disablement within the meaning of the Plan.”\footnote{155}

The court after reviewing the extensive administrative record, found that the Board's decision was wrong, holding that the “Board's decision to affirm the denial of LOD benefits to [Grant] was wrong, and arbitrary and capricious”.\footnote{156} The court went on to say a decision is “wrong” if, after a review of the decision of the administrator from a de novo perspective, “the court disagrees with the administrator's decision”.\footnote{157} The case was remanded to the Board to make a decision consistent with the terms of the Plan.\footnote{158}

The Board and/or DICC not only complicates the process of head injury claims with decisions that do not conform to the terms of the Plan, it also presents complications with the players’ retention of benefits once awarded to players. Kelvin Moore, for example, was awarded T&P/long-term disability benefits due to a broken neck\footnote{159} sustained during a game when he played for the Bengals. After he was awarded the benefits, the Board wrote to Mr. Moore on several occasions for years requesting that he undergoes re-examination by various physicians, to which Mr. Moore complied.\footnote{160} During each re-evaluation, the physicians agreed that Mr. Moore
was still disabled. However, the Board later determined that Mr. Moore was no longer disabled and discontinued his disability benefit coverage after receiving one determination from a different physician that he was medically able to perform “light work” and other work not requiring “repetitive motions of the neck” and therefore was not totally and permanently disabled. The district court affirmed the Board’s decision but the Appellate reversed and remanded the case stating that “the Board’s decision to terminate Moore benefits was not based upon a reasonable interpretation of the [P]lan’s terms.”

VII. Policy Reasons for Claim Denials

NFL owners and the NFLPA agree that pension funding is a priority. “But they are also concerned that the Retirement Plan could be depleted if too many players are successful in receiving benefits.” The NFL and NFL Players Association have taken steps to make it easier for some injured former players to collect disability by agreeing to automatically allow a retiree who has qualified for a Social Security disability benefit to receive NFL disability payment as well. In Boyd, one argument against his claim denial was that members appointed by the Management Council have a financial conflict of interest because the plan was found to be underfunded in 2010.

Players consistently complain of contributing to an underfunded plan from which they receive little or no benefits from claims made to the plan. According to the Jeff Nixon Report, after the Plan merged and through June 26, 2007, of the 1,052 players who applied for LOD or T&P disability benefits only 428 applications were approved. Another 576 were denied and 48 were pending. During a congressional hearing in 2007, counsel for the plan admitted that “[b]ecause of the repeated increases in benefits and thus liabilities, the Retirement Plan is somewhat under funded from an actuarial point of view.”
On the other hand, a 2008 Congressional Research Service (CRS) Report for Congress, noted that “[d]ata provided by the NFL and the NFLPA show that possibly $919.6 million was spent on benefits for retired players in 2006 and 2007. However, the ways in which the data are presented by the two organizations leave room for interpretation. The NFLPA states that ‘active players gave up approximately’… $181.6 million during the period April 2006 through March 2007 for benefits for former players.”171

The NFL also states that an estimated $388 million was contributed by players in 2006 to fund the Supplemental Disability Plan and other retirement plans under the new Plan.172 The NFL estimated that the costs of these benefits would be slightly lower in 2007.173 The number of players actually receiving benefits in 2007 is disproportionate to the amount of funds contributed. By October, 2007, only 8 players were receiving the highest amount available in the from the Active Football T&P category. ($224,040 annually, totaling nearly $1.8 million); another 12 players received Active Non-Football T&P benefits; 112 received benefits under the Football Regenerative category; and finally, 92 players received benefits from the Inactive category.174

An interview with Eugene Upshaw, former director of the NFLPA, shares his reasons for the low number of claim approvals. He fears that “if disability payments ‘go to any borderline cases out there,’ the floodgates will open, and there ‘might be thousands’ of claims from NFL retirees who will ‘say they hurt somewhere on their bodies…a lot of guys have little things.’ He says that the league couldn’t endure such a press of claims. ‘We couldn’t afford that,’ he says. ‘And the [active] players wouldn’t go for it…. We can’t pay for everything for all the [retirees] asking for it. We want to protect money for the retired players who really need and deserve it.’”175

VIII. Conclusion
ERISA was enacted by Congress in 1974 in the wake of Studebaker\textsuperscript{176} and other like cases “to promote the interests of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits.”\textsuperscript{177} ERISA does not require employers to provide benefits to employees. It provides the guidelines that essentially police employers who voluntarily promise benefits and later decide not to provide said benefits. ERISA requires that benefit plan procedures “afford a reasonable opportunity...for a full and fair review” of dispositions adverse to the claimant and clear communication to the claimant of the “specific reasons” for benefit denials.\textsuperscript{178}

The Bert Bell/Pete Rozelle Retirement Plan is governed by ERISA. The court has the duty to hear ERISA-based claims and provide resolutions that will ensure protection of benefits promised to employees and their beneficiaries. However, in many cases, ERISA's remedies fail the very employees it was designed to protect.

Enacted to safeguard the interests of employees and their beneficiaries, ERISA has evolved into a shield of immunity that protects...entities from potential liability for the consequences of their wrongful denial of...benefits.\textsuperscript{179} Unfortunately, a harmed plaintiff's final recourse is an ERISA action due to ERISA's preemption\textsuperscript{180} which, quite arguably, provides no remedy to harmed employees. Under any other form of law, there would be a remedy. Under ERISA (preemption), there is no remedy.

A retirement plan can be described as a mutual exchange of promises: a Plan administrator wants to attract, retain, and reward good employees and therefore will provide certain competitive benefits to accomplish the goal. Employees/players who perform their duties expect the plan to honor its promise in the event it becomes necessary to file a claim. Under the current NFL Retirement Plan, it seems that players making legitimate claims for benefits will
most likely be denied benefits or in the alternative receive the lowest amount of benefits provided under the plan despite overwhelming evidence that the player deserves and is in dire need of the deserved disability benefits. The lack of recourse afforded NFL players when their disability claims are not only wrongfully denied by the plan administrator but also upheld by the courts highlights the inadequate remedies provided under ERISA. ERISA should adopt similar remedies from other areas of law to truly protect employees and their beneficiaries. Otherwise, ERISA will continue to be a vehicle through which plan sponsors and administrators circumvent the very premise of the Employee Retirement Income Security Act of 1974, as amended.
ERISA § 3(1); 29 U.S.C. § 1002. Other benefits that fall under most welfare plans include vacations, apprenticeship and prepaid legal services.

I.R.C. § 401 (a) imposes a tax (the Code states that employers receive a deduction).

The steps to making claims will be discussed in detail in section V, infra.

ERISA § 502(c)(3).


See also ERISA § 502(a)(1)(B).


Brent V . Boyd v. Bert Bell/Pete Rozelle NFL Player Retirement Plan, 410 F.3d 1173, 1178 (9th Cir. 2005)


See section V, infra


**BARRY KOZAK, EMPLOYER BENEFIT PLANS**, 28 (Carolina Academic Press 2010)

See ERISA § 402(b) (employee not taxed until benefits actually received); see also I.R.C. § 404(a)(5) (the Code states that employers receive a deduction).

I.R.C. § 401(a) imposes a “laundry list” of requirements the must be met in order for plans to maintain their qualified status to receive the tax incentives.

Supra, note 21. Title 26 of the I.R.C. codifies retirement plans’ tax provisions.

ERISA § 3(1); 29 U.S.C. § 1002. Other benefits that fall under most welfare plans include vacation pay, education, child care, apprenticeship and prepaid legal services.

See ERISA § 3(37) for multiemployer plans. All other plans mentioned previously are most commonly single-employer plans.

The term multiemployer plan is defined by the Multiemployer Pension Plan Amendments Act of 1980 (MEPPA). These plans are usually defined benefit plans.


Id.

29 U.S.C. § 1002(2)

29 U.S.C. § 1002(1)

Jani, 209 F. App’x at 306.

Id.

See Bert Bell/Pete Rozelle NFL Retirement Plan (Amended & Restated as of Apr. 1, 2009) (“Plan”) Articles 5 & 6.
See the Plan, supra note 37 at § 5.1.
39 Id
40 See Stewart, supra note 18
41 See the Plan, supra note 37 at § 5.1(a)
42 Id. See also the Plan, supra note 37 at §§ 5.1(a)-(e)
43 See Plan, supra note 37 at §5.1(e)
44 See Stewart, supra note 18, for example “he Committee approved Stewart’s T & P benefits claim, but awarded him only “Inactive” T & P benefits because it “found that [Stewart’s] disabling condition(s) did not arise out of [NFL] football activities.”
45 Id. “Dr. Meek also stated that Dr. Bach’s April 24, 2010 report “correctly ... reported his potential conflict of interest [because] he is one of the Medical Advisory Physicians for the [Plan].” Id. Dr. Meek said that he “had no likely conflicts of interest and had not been associated with the NFL or the NFL Players Association”
47 Id. “Webster was mostly unemployed after 1995, earning essentially nothing until his death in 2002. The Board’s investigator summarized Webster’s post-retirement history by noting that he found no ‘evidence that any of [his business ventures] succeeded.’ He concluded, ‘It is unclear whether any of these ventures were successful and whether or not Mr. Webster’s health has affected his ability to operate these business ventures.’”
48 Id. 
49 See Plan, supra note 37 at §6.1
50 See Plan, supra note 37 at §6.4
51 Willie Grant v. Bert Bell/Pete Rozelle NFL Player Retirement Plan 2010 WL 3749197 (N.D.Ga.)
52 Derek Marks, One For Twenty-Five: The Federal Courts Reverse A Decision of the NFL’S Disability Board for the First
54 Heiner, Concussions, supra note 46
55 Marks, One for Twenty-Five supra note 52, citing Jani, supra note 35
56 Heiner, Concussions, supra note 46
57 Marks, One for Twenty-Five supra note 52, citing Jani, supra note 35
58 See Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan, 468 F.3d 1082, 1085 (8th Cir. 2006)
59 Heiner, Conclusions, supra note 46 at 257.
60 See Jani, supra note 16
61 Id, citing “Alzado Defends Role in ‘Violent Game,’ ” United Press International, Oct. 29, 1984
62 Id
63 Id, citing Administrative Record at MLW0040
64 Id
65 See Plan, supra note 37, Article 5
66 See Jani, supra note 16
67 See section II, supra
68 The court in Jani also noted that Mr. Webster could not maintain gainful employment for several years and was even living in his car.
69 Gladiator Movie, Dreamworks, 2000
70 Boyd, supra note 11
71 Id.
72 Id.
73 Id
74 Id.
75 Id. The Plan provides two types of disability benefits, further divided into different categories which will be discussed in detail in the next section. See Article 5 of the Plan.
76 Id, citing Plan section 5.5(b).
77 Id.
78 Id.
79 Id.
80 Id.
81 See Stewart, supra note 18
82 Id.
83 Id.
84 Id.
85 Id.
86 Id.
The Retirement Board of the NFL. This is protocol for players who disagree with the decision of the Committee based on Article 5 of the Plan.

See Plan, supra note 37

See Stewart, supra note 18

Id.

Id.

Id.

Id. citing Frankton, 2011 WL 1977617


See Plan, supra note 37

See Stewart, supra note 18

Id.

Id.

Id.

Id., citing Frankton, 2011 WL 1977617


Stewart, supra note 18

Id.

Id.

Id.

Id.


Id., citing See NFLPA White Paper, supra at 9


See Grant, supra note 51

Marks, One for Twenty-Five supra note 52, citing Jani, supra note 16

See Plan, supra note 37 at Articles 5 and 6

Marks, One for Twenty-Five supra note 52, citing Jani, supra note 16


Id., citing See NFLPA White Paper, supra at 9

Id citing NFLPA White Paper, supra at 9 (stating medical examination is required by federal law)

Stewart, supra note 18

See Grant, supra note 51

See Plan, supra note 37 at Article 8

Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan, 468 F.3d 1082, 1085 (8th Cir. 2006). See also Firestone, 489 U.S. at 115

See Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan, 410 F.3d 1173, 1178 (9th Cir. 2005) (“An ERISA fiduciary is ‘obligated to guard the assets of the [Plan] from improper claims, as well as to pay legitimate claims.’”)

Marks, One for Twenty-Five supra note 52 (internal quotations omitted, emphasis provided), citing Johnson, supra note 97

Id., citing 29 U.S.C. § 1133(2); 29 CFR § 2560.503-1(g)(1)(i)

Id., citing 29 C.F.R. 2560.503-1(h)(2)(i)(ii)

29 U.S.C. § 1132(a)(1)(B)


See, eg Grant, supra note 51, Stewart, supra note12, and Boyd, supra note 118 (all examples of both parties moving for summary judgment)


Williams v. BellSouth Telecommuns., Inc., 373 F.3d 1132 (11th Cir.2004)

Grant, supra note 51. See also The Supreme Court's decision in Metro. Life Ins. Co. v. Glenn, which cast doubt on the sixth step of this procedure. 554 U.S. 105, 128 S.Ct. 2343, 2350-51, 171 L.Ed.2d 299 (2008) (conflict of interest should be weighed as one factor in determining whether administrator abused discretion but no change in standard of review required by existence of conflict).

Marks, One for Twenty-Five supra note 52, see also, e.g., Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan, 468 F.3d 1082 (8th Cir. 2006); Boyd v. Bert Bell/Pete Rozelle NFL Player Retirement Plan, 410 F.3d 1173 (9th Cir. 2005); Williams v. Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan, 61 F. App’x 362 (9th Cir. 2003); Sweeney v. Bert Bell NFL Player Retirement Plan, 156 F.3d 1238 (9th Cir. 1998); Courson v. Bert Bell NFL Player Retirement Plan, 75 F. Supp. 2d 424 (W.D. Pa. 1999), aff’d 214 F.3d 136 (3d Cir. 2000).

See Plan, supra note 37 at § 11.6(a)

Id at 11.6(a)(1)-(6)

See Plan, supra note 37 at § 5.2

Id.

Id. Emphasis provided
Stewart, supra note 18, (Stewart argued was that the Board improperly relied on one of the physician's recommendations).


See Plan, supra note 37 at § 11.15(b).

Stewart, supra note 18.


See Plan, supra note 37 at § 11.15(b).

Id.

Stewart, supra note 18.

See Plan, supra note 37 at § 11.15(b).


See Plan, supra note 37 at § 6.4

See Grant, supra note 51

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.


Moore, supra note 139 citing Boyd, 410 F.3d at 1178.


Id.


Boyd, Supra note 118. The court ruled that there was no conflict of interest.

See Nixon, Supra note 165

Id.


Id.

Id.

Id


29 U.S.C. § 1132(b)(1)(B)