DISABILITY INSURANCE AS PROMISED?

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As I embark on forming my own law firm to handle disability cases, an interesting question crossed my mind: Is it worthwhile to purchase group disability insurance for my staff? Knowing what it takes to combat the anti-coverage approach of disability carriers, this is a very difficult question to answer.

Let's take a brief journey into the morass of the "state of the disability promise" to understand the dilemma. This exercise may help formulate questions for clients with disability cases and perhaps shed some light on lawyers' own coverage.

During the 1980s, disability insurers aggressively marketed competitively priced long-term disability products for employees and professionals. The policies promised protection from the devastation a disability wreaks on financial security. Competing for premium dollars, insurance companies offered specialized policies such as "own-occupation" which provides benefits if one cannot perform the important duties of one's regular occupation even if capable of working in another field.

There are two types of disability claims: one based on an individually purchased policy and the other, a long-term disability (LTD) claim through a group benefit.

Starting in the late '80s, it became clear that insurance companies had not financially provided for the onslaught of new claims arising from the generously underwritten policies of earlier years. Some sold their disability business to other companies; others revamped, restructured and refocused their approach from claims payment to claims management. Today, policies are written strictly on an income-replacement basis, without the earlier protections afforded by the pure "own occupation" coverage. Based on the financial fallout, companies that survived the process directed their attention to financially strengthening their fortress and, in so doing, set termination ratios and goals. Some even forecasted in internal documents the nearly six-figure "savings" to be realized by denials.

Part of the motivational force driving the terminations and denial of claims was placed in the lap of the claim representatives. Bridled with the responsibility to make claims decisions, they often receive bonuses and are rewarded for their contributions to the company's bottom line. It is within this climate that new claims are scrutinized.

Based on these developments, it is imperative that holders of disability policies understand the assault that will be staged if a claim is made and plan for it. The following ideas should be at the top of any list when one is considering buying a policy, assisting an insured file a claim or litigating on behalf of a client.

• When the initial claim is filed, provide the most thorough information on the claimant's medical condition and details of the occupational duties that favor the claim. Provide support in the form of a co-worker or supervisor's statement. Consider the "dual occupation" issue early and prepare proofs for this common challenge. The insurance carrier will attempt to recast the claimant's job into a multitude of occupations, some of which can still be performed. For example, a surgeon who performs hospital procedures and administers his office may be unable to operate, but still can examine and treat patients and do the bookkeeping. Thus, the insurer may claim the surgeon is only partially disabled and not entitled to benefits.

• Be prepared for the company's investigation into whether an exclusion from coverage applies, such as pre-existing medical conditions or misrepresentations regarding medical or income issues on the application.

• Once the claim is validated, the insurance company will closely monitor all treatment. Be sure to inform the treating doctor to expect a multitude of contacts from the company. The doctor, not the staff, should complete all functional-capacities forms and understand the repercussions of those responses. The treating doctor must document the restrictions and limitations (R&Ls) of the medical condition, and include the effects pain and medication have on the ability to function. See *Smith v. Continential Casualty Company*, 2003 U.S. Dist. Lexis 13749 (pain and side affects from medication can be disabling unto themselves). The doctor should expect an in-house medical consultant to contact him for a "doc-to-doc" call.

• The insurance company will investigate the claimant's occupational duties. Be sure to detail the substantial and material duties, and what physical and mental level of functioning is necessary to perform them with reasonable continuity. *Kaufman v. Provident Life & Casualty Ins. Co.*, 828 F. Supp. 275. Beware, the company may find the claimant only residually disabled, which opens a whole new area of inquiry into the income derived from the duties that can still be performed. Also, residual-disability benefits are usually limited to age 65, while an individual disability policy may provide lifetime benefits for total disability.

• If the claim is denied, consider retaining a vocational expert to match how the R&Ls set by the treating physician prevent the individual from performing job duties. This expert's view usually carries more weight than merely a doctor's conclusion. If the definition of total disability in the policy is whether the individual can perform the duties of any "gainful occupation," an assessment must take into account the individual's pre-disability abilities, the R&Ls and how that correlates to the functional demands of gainful employment.

• Be ready to challenge labor market surveys, transferable skills analysis (TSA) and studies based on the Department of Labor's Dictionary of Occupational Titles and its updates to support denial of benefits. Labor market surveys are studies performed on behalf of insurance companies to identify similar jobs the disabled person is arguably

capable of performing. But this often overlooks the true restrictions and limitations, both physical and mental, due to the condition and its affects on functionality. The TSA is a process in which jobs are identified consistent with the worker's capabilities and functional restrictions. *Quinn v. Blue Cross & Blue Shield Ass'n*, 161 F. 3d 472.

Videotape

It's likely claimants will be surveilled by a gaggle of videographers, clamoring for a view of them doing something arguably inconsistent with the disability. Most courts are savvy to the limited uses of surveillance in a disability setting. *Carugati v. Hartford The LTD Plan for Salaried Employees*, 2002 WL 441479 (video surveillance of claimant walking her dog and carrying a step ladder was insignificant to her claim of disability based on chronic fatigue syndrome and fibromyalgia. "Total disability is not equated with a plan participant's ability to walk, care for oneself or perform routine daily functions but a participant's inability to engage in employment.") See also *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F. 3d 1154 ("relying on videotapes showing the plaintiff engaging in activities that are significantly less taxing than working … when all of the other objective evidence of treating physicians and therapists confirms that the plaintiff is totally disabled … is an abuse of discretion.")

A hot topic is whether occupational stress is disabling. Fortunately, one of the best cases in this area is in our own backyard: *Lasser v. Reliance Standard Life Ins. Co.*, 146 F. Supp. 2d 619. An orthopedic surgeon suffering from serious cardiac problems reduced his schedule significantly and omitted performing surgery because stress was likely to induce further cardiac complications. The 3rd U.S. Circuit of Appeals confirmed the district court's finding that Reliance's failure to consider occupational stress evidenced arbitrary and capricious decision-making. Reliance also argued Dr. Lasser was not totally disabled because he could still examine patients in his office, although he could not perform surgery. The court reasoned an "occupational" disability policy defines disability as the inability to perform the material duties of one's "regular occupation." The court reasoned that "a duty is material when it is sufficiently significant in either a qualitative or quantitative sense that an inability to perform it means that one is no longer practicing the regular occupation." See also, *Henar v. First Unum Life Ins. Co*., 2002 U.S. Dist. Lexis 17585 (applying the common care and prudence rule.)

Group Policies

If the disabled claimant is covered by a group policy, ERISA applies. Obtain the entire administrative record during the appeal. In litigation, establish that a conflict of interest poisoned the otherwise fair evaluation of the evidence through the use of company documents. The court may consider evidence outside the record to evaluate the level of an administrator's conflict of interest and to determine the appropriate standard of review. *Dorsey v. Provident Life & Accident Co.*, 167 F. Supp. 2d 846.

Courts permit discovery as to the conflict of interest and whether the beneficiary can point to evidence of specific facts calling the impartiality of the administrator into question. Convince the judge the company decision should be given no deference and is full of procedural irregularities. Following *Pinto v. Reliance Standard Life Ins. Co.*, 214, F. 3d 377, and its progeny, evidence of a conflict ignites a heightened arbitrary and capricious standard. This analysis pertains not only to plans administered by insurance companies, but to self-insured plans because there, too, specific evidence of bias or bad faith requires a heightened standard. *Bill Gray Enters. Employee Health & Welfare Plan. v. Gourley*, 248 F. 3d 206.

Discovery in individual disability cases must be focused, of course, on what the company personnel gathered and did with the information available to them in the context of the client's claim. Beyond that, proof that decisions were clouded by financial motivation and performance goals is vital to proving bad faith and a pattern and practice of improperly motivated behavior.

To protect your own and your clients' potential sole source of income should disability strike, you should understand the roadblocks to disability insurance so you can obtain the benefits of the policy. It is against this backdrop that I will decide whether to invest in disability coverage, understanding there are no assurances that even *bona fide* claims will be paid without a litigation battle.

Bonny G. Rafel will open her own law firm in Livingston Jan. 1, 2003 after 20 years as a member of Hack Piro in Florham Park, where she is a claimant's advocate on disability matters. She also is a frequent lecturer.