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FRANKEL & NEWFIELD, P.C. is a boutique law firm focusing on assisting individuals with new or challenging disability claims, and individuals whose disability claims have been wrongfully denied or terminated. Our experience in recognizing issues before they become problems has helped guide many claimants through this difficult process at a time in their lives when they most need the benefits of these protections. Please feel free to consult with the firm on any disability related issues.

Welcome to “**LTD Management**,” Frankel & Newfield, P.C.’s newsletter for the Firm’s clients and professionals who routinely consult with the Firm, updating them on our practice, as well as important new developments in the law of disability insurance.

Firm Updates

The firm has re-launched its next generation web site, www.longtermdisabilityclaim.com. The new site offers greater navigation and links to other helpful sources of information concerning disability news and medical information.

Jason Newfield recently lectured to the American Conference Institute, in Boston Massachusetts on June 12, 2008. His topic was **Advocating a Chronic Fatigue Syndrome/Fibromyalgia case - Administrative Appeals and Litigation Issues, Case Summaries and Strategies**. This lecture was provided to attorneys and insurance industry employees.

Frankel & Newfield recently published another article in the CFIDS Chronicle, addressing the issue of Functional Capacity Evaluations, seeking to educate the public about the challenges faced with these exams and strategies to employ when an insurance company requests such an evaluation.

Frankel & Newfield once again were exhibitors at the Greater Long Island Dental Meeting this past April 2008.

The firm continues to regularly speak to medical groups concerning issues concerning disability insurance and recent events of note that involve the field of disability insurance.

Practical Concerns-Functional Capacity Evaluations

A trend that we are seeing more of is to have an insurer request a claimant to undergo Functional Capacity Evaluations (FCE’s). For a number of reasons, we have been troubled by these requests.

First, often times these evaluations are performed not by doctors, but, rather, by therapists, who are not in as good a position to ensure the safety of our clients. Further, we have been concerned that these tests lack validity - such that claimants who undergo these tests cannot support the existence of the impairment no matter how they perform. By example, if a claimant performs to the best of their ability, and completes all tasks, but is later that day (and typically for days thereafter) suffering the results of such exertion, their functional ability will be considered predicated solely upon the test performance, without consideration of the effects.

A claimant will thus be deemed to have full time work capacity on the basis of being to perform the

tests. On the other hand, if a claimant limits the testing due to real concerns about pain and injury, they will likely be accused of “self-limiting” behavior or called a malingerer. The insurer will thus utilize these results to state that a claimant did not properly perform to his or her ability and they will extrapolate the limited testing performed to state that they have full time capacity.

From a legal perspective, the problems inherent with FCE’s were recently addressed. In Stup v. UNUM Life Ins. Co. of Amer., 390 F.3d 301 (4th Cir 2004), the court was concerned about the validity of FCE testing and the insurer’s reliance upon the FCE results in its claim determination. The court felt that testing of only two and one-half hours could not truly indicate a claimant’s ability to work for an eight hour workday, five days a week.

In our practice, we counsel clients to object to this type of testing on several grounds. First, only a handful of policies specifically require this type of testing - and where they do not, we do not permit the test. In those policies where FCE language exists, we address the safety and validity concerns prior to permitting any testing, and deal with issues of witnesses, videotaping and post-testing health concerns in the context of our interaction with the insurers.

Success Stories

We recently secured a re-instatement of benefits for our client, whose claim had been terminated improperly. Our client, a financial advisor for Merrill Lynch, had her claim terminated because it was alleged that her impairment was due to a condition with a limited pay period, while we argued that her physical problems, due to fibromyalgia, were what caused her impairment. While in litigation, we secured a voluntary admission by Met Life that the claim should have been paid, and was able to secure all back benefits, legal fees and interest for our client. She continues to receive her monthly benefits from Met Life.

The firm also successfully secured the re-instatement of our client’s claim, while in

litigation, after securing a published decision on pursuit of widespread discovery against CIGNA. Due to our aggressive pursuit of justice in litigation, our client was awarded all of her past due benefits, interest and legal fees, as well as the re-instatement of her other employee benefits, including life insurance, 401(k) and others.

For more information about results we have secured, go to www.longtermdisabilityclaim.com and click to success stories.

Disability Insurance Coverage Definitions

In our ongoing effort to educate policyholders, we once again provide some insight into definitions contained in many disability insurance policies.

Physical Examination: The term, as ordinarily employed, permits an insurer to require a claimant to be examined by a doctor of its choosing.

We advise clients that any testing sought (such as an FCE) can be argued as not an examination, but rather an evaluation not contemplated by the contract of insurance. As noted earlier in this Newsletter, FCE’s are quite dangerous for claimants, and careful thought must be employed not to be trapped by an insurer in acquiescing to such testing.

Trends/Decisions on Disability Cases

There have been a number of interesting decisions from the Courts that decide these claims. There are also a few trends that we have noticed from the recent cases that have been decided by courts.

From the perspective of the claimant, it is clear that the courts are moving toward an appreciation of the improper and biased conduct of insurers, and are more receptive to arguments by claimants of biased conduct. Nonetheless, many decisions still favor insurers, particularly those where a claimant can be shown to have inconsistencies between statements made to the insurers and information gathered from the investigation performed by insurers.

Thus, working with the treating physician is of paramount significance. Failure to secure the support of your doctor will ensure the denial or termination of your claim.

One court recently found that the insurer acted in an arbitrary and capricious manner when it failed to have a medical doctor review the claimant's medical documentation, relying instead upon a nurse to review the materials. This was an important factor supporting the court's decision. One trend seen in many cases has been the insurer's usage of "peer reviews", a situation where the claimant is not seen, but, rather, a paper review of the file is conducted. This approach has been approved by many courts, but is also assailable

One issue that is troubling in these scenarios is where the peer doctor alleges to have discussions with the treating physician, but the alleged discussion differs greatly from all of the past statements of support from the doctor. It soon becomes clear that the "peer" doctor has recreated history. To effectively combat this tactic, we insist on a confirmation of discussion between the doctors, so that there is no "confusion", and so the treating doctor's words are not miscast.

Another court recently found that a claimant, with a history of serious cardiac problems, which required medical intervention over a long time period, was disabled, even without immediate and current heart symptoms. The court found that the claimant should not be forced to "take the risk that continuing to work could generate" and was found to meet the definition of disability. This case is of significance to claimants in similar situations, since we can utilize the rationale of the court to persuade courts and insurers in other matters. These are some of the more challenging types of cases, because the impairment is not so readily seen or observed - but, rather, the risk of deleterious health consequences is the claim support.

On the other hand, courts have been ruling against claimants whose alleged conditions have been refuted or called into question by other materials developed during the insurer's investigation.

As an example, where the insurer develops surveillance of the claimant engaging in certain activity, or where the claimant advised his treating physician as to certain activities which were inconsistent with the claimed restrictions or limitations, the insurers have succeeded in terminating the claims, and having the courts uphold these claim determinations. In these cases, the courts have been largely unpersuaded by the argument that surveillance only depicted a limited amount of functionality. This recalls the adage "a picture is worth a thousand words."

Thus, to effectively address such issues damaging a claim, we advise clients to be honest in their articulation of the functionality, and to be prepared to offer an appropriate explanation of any activity that might be considered inconsistent. We advise that everything can be explained in a vacuum, but a constellation of explanations can sink a claim.

One final trend to be aware of in the ever aggressive claim handling world is with claims of cognitive impairment. Insurers are now attempting to disprove such claims by the tandem use of neuropsychological evaluations and forensic psychiatrists, in an effort to accuse claimants of suffering from somatoform disorder or to be malingering. However, some of testing employed in this effort lack validity and some courts have appropriately thrown out such testing to support these conclusions on that basis.

Thus, whenever a claimant is requested to undertake such neuropsychological testing, careful consideration of the issues need be employed, to ensure that the testing being conducted is valid and is being appropriately considered.

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