

THE DISABILITY INSURANCE REPORT



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FRANKEL & NEWFIELD, P.C. is a general litigation law firm focusing on assisting individuals with long term disability claims, and individuals whose long term disability claims have been wrongly 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 the protections they purchased.

Welcome to the inaugural issue of "*The Disability Insurance Report*," a quarterly 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.

Relevant Statistics on Disability

Few people realize the potential danger of becoming disabled. According to the U.S. Census Bureau, you have a one in five chance of becoming disabled. A 1997 study released by the Census Bureau reveals that more than 152 million people between the ages of 21 and 64 (the prime working age for most Americans) have some form of disability. According to the American Council of Life Insurers (ACLI), a person 35 is six times more likely to become disabled than die before he or she reaches age 65.

The risk of a 40-year-old becoming disabled 90 days or longer prior to age 65 is 64% and the average disability period for a 40-year-old disabled at least 90 days is 5-1/2 years.

Every year 12% of the adult U.S. population suffers a long-term disability. One out of every seven workers will suffer a five-year or longer period of disability before age 65, and if you're 35 now, your

chances of experiencing a three-month or longer disability before you reach age 65 are 50%. If you're 45, the figure is 44%.

According to UNUM, the leading cause of long-term disability (more than 90 days) for working-age Americans was cancer, based upon claims submitted during 2001. Rounding out the Top 5 list for long-term disability (LTD) causes are pregnancy complications, back problems, cardiovascular conditions, and depression.

Finally, according to the 1985 Society of Actuaries, the following table shows how many people have recovered, died or remained disabled for five years after the onset of a disability:

Age at Onset of Disability	Recovered	Died	Still Disabled
24	44.1%	9.7	46.2
35	34.0	12.3	53.7
45	21.5	19.9	58.6
55	11.8	28.5	59.7

What these statistics reveal is that many of our readers will, at some point in their working careers, be forced to file a claim for long term disability benefits (if they had the foresight to have purchased a policy of long term disability insurance).

Recent Decisions on LTD Cases

Several Court holds that insurers' failure to consider impact of medications was arbitrary and capricious

In a recent case, an employee sponsored ERISA long term disability insurer failed to consider the effects that narcotic medications had upon a claimant's ability to perform his occupation. Thus, the Court reinstated benefits to the claimant, and granted the claimant costs and attorneys' fees.

Citing precedent from other courts, the Court ruled that the insurers' reliance upon a medical examination that failed to discuss the effect of these medications rendered the insurers' decision to terminate long term disability benefits, which had been paid for 24 months, arbitrary and capricious.

Another Court recently imposed costs and attorneys fees against a long term disability insurer, finding that the failure of the insurer to properly consider the impact of medications upon the insureds ability to perform his job, was arbitrary and capricious. Upon application by the claimant, the Court imposed costs and attorneys fees against the insurer.

The Court held that an award of costs and fees would deter insurance companies from ignoring the effect of daily doses of potent medication on a person's ability to work. Thus, the imposition of fees was appropriate under the circumstances.

Court holds that insurer hired IME report lacks credibility

A Court recently held that a long term disability insurance plan determination was arbitrary and capricious because it relied upon a supplemental report of a physician whose opinion stating a lack of disability became more definite after his initial report failed to offer that conclusion, without any reasonable justification for the change in the physician's opinion other than a telephone call with the insurance company.

Thus, the Court reinstated the claimant's long term disability benefits, discounting the physician's

supplemental report and finding that the physician's opinion that the insured could possibly return to work under certain limited circumstances was contrary to the overwhelming evidence supporting the insured's disability.

Denial of Benefits Arbitrary where Risk of Future Occupational Stress Ignored

A Court recently determined that a long term disability insurer acted in an arbitrary manner where it failed to consider evidence that further occupational stress would result in further cardiac problems for a long term disability claimant.

The insurer relied upon the results of an exercise stress test to deny the claim. The claimant had submitted medical records from his treating cardiologist indicating that his blood pressure was elevated when working but under control after he stopped working. These records supported the claimant's disability. The insurer failed to consider such evidence, relying instead only on the information favorable to its denial determination. Thus, the determination was reversed.

Another Court recently determined that a long term disability insurance company improperly denied a claim for long term disability benefits where it acted in a self serving manner and failed to consider the effects of occupational stress on the ability to perform a job. The Court held that prior caselaw supported its conclusion that a future risk to a claimant's health can qualify as a present disability entitling the claimant to benefits, and that it is a basic tenet in insurance law that an insured is disabled when the activity in question would aggravate a serious condition affecting the insured's health.

In reviewing the handling of the claim, the Court noted that the insurer acted in a self serving manner by focusing only on portions of medical reports favorable to its position, while ignoring substantial evidence supporting disability. Thus, the Court reversed the plan's determination.

LTD Questions and Answers

Q. I am a podiatrist. My long term disability insurance carrier has requested that I submit to an interview, to clarify the duties of my occupation. What do I do?

A. First, determine why the insurance company needs "clarification". Have you provided a detailed listing of the major duties of your occupation? Have you articulated the variety of surgical procedures that you perform? If so, what are they truly looking for?

If you decide that granting the insurer an interview is appropriate, how much leeway do you wish to provide the interviewer? Do you allow the interview to be wide ranging, covering issues that might not be necessary for clarification of your duties?

At **Frankel & Newfield, P.C.**, we help claimants determine the limits of what is a reasonable request by the insurer for an interview and guide claimants through the long term disability claim process, so that the insurer does not determine your occupational duties, we do.

Q. I had my Attending Physician complete the requested statement supporting my disability. Now, the insurance company has determined that I do not meet the definition of disability, based upon my own doctor's responses. What do I do now?

A. It is all too common that claimant's treating physician does not appreciate the impact of their findings on a claimant's long term disability claim. Many busy physicians have support personnel complete portions of the form without a true understanding of what is being asked. The insurer utilizes the favorable portions of the response to determine the claim, to the detriment of the claimant, while often ignoring other information that supports the claim.

At **Frankel & Newfield, P.C.**, we collaborate with the Attending Physician to ensure that they understand the claimant's occupational requirements and restrictions and limitations of the claimant, and that the responses on the physician statement are fully consistent with the claimant's inability to perform the occupation.

Q. My long term disability insurer is requesting that I undergo an IME. What are my rights?

A. While most policies provide the insurer with the right to conduct IME's, there are limitations that can and should be imposed. First, be very wary of an Independent Medical Examination. Many of these IME's are anything but independent. In most cases, the report prepared by the physician (paid by the insurer or their agent), will indicate no limitations on returning to work, and the insurer utilizes this report to deny the claim.

Next, learn more information about the examiner prior to the examination. You are entitled to the CV of the examiner and should utilize your resources to learn about their qualifications.

At **Frankel & Newfield, P.C.**, our clients appear at IME's only after we are satisfied that the testing is appropriate and the client's health will not be placed in jeopardy. In addition, we often appear at these examinations with our clients to protect their rights

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