

DISABILITY INSURANCE and ME/CFS - Stacking the Odds for Success

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Disability insurance provides partial income replacement if you are disabled/unemployable because of any type of illness including ME/CFS. You may have disability insurance through a group insurance plan offered through your employer, union or association. You also may have purchased an individual disability insurance plan and paid the premiums yourself.

CONTRACT LAW

It is important to understand disability insurance is under the broad heading of law called “contract law”. Contract law is governed by the terms of the contract entered between the two parties. Disability insurance is thus a simple contract and therefore it is extremely important you review the terms of the policy for guidance as to what the insurance company can and cannot do. Many disability insurance policies are written in “plain language” and so you may be able to read the policy yourself to ascertain most of the terms. If it is not in plain language or if you are having any difficulty in understanding the important legal terms, consult a lawyer. This article is not a substitute for legal advice in your contractual situation, but this article will give you some helpful tips to stack the odds in obtaining disability insurance when you have ME/CFS.

SHORT-TERM DISABILITY (STD) vs. LONG-TERM DISABILITY (LTD)

Short-term disability pays a percentage of your normal earnings – for example 70% - up to only a certain amount of time such as 15 weeks or 26 weeks or even up to 52 weeks, then it automatically runs out as the name “short-term disability” implies. Once short-term disability expires, long-term disability benefits may be applicable and typically pays 60-70% of your normal income but with often a maximum dollar amount. Long-term disability benefits are usually paid for up to two years if you are unable to perform your regular occupation. After two years many long-term disability contracts will only pay disability benefits if you are disabled from performing any occupation. This highlights the importance of reviewing your disability insurance contract to determine your rights. Many disability policies for professionals will maintain the “your regular occupation” stipulation past two years even to age 70, which makes maintaining disability payments long term much easier.

COURT OF LAW CONSIDERATIONS

It is important to remember that in a court of law the issue is NOT what causes ME/CFS or do you have ME/CFS, rather the issue is what effect does the condition (whatever you call it) have on this person and does it disable this person from their occupation, or any occupation. Indeed, even if a diagnostic test for ME/CFS became available tomorrow, it would not change disability insurance litigation very much as the issue is not simply identifying an illness, rather it is determining the functional and thus employability of a person. This should give you encouragement to apply for disability insurance if you have ME/CFS, even with the current medical uncertainty surrounding the disease, as this is not as important in a court of law as it is in medical research.

This cannot be emphasized enough as the test is not one of “disability”, rather the test in a disability insurance dispute is employability. Employability requires regularity as regularity is the essence of employability. As well, if you must give up all your social, recreational, and family activities and sleep all off work hours to maintain your job, then you are likely unemployable as a court will not force you to give up everything in your life except work.

FILING A CLAIM – STACKING THE ODDS IN YOUR FAVOUR

A. Medical Records. From the moment you realize you are sick with the terrible disease of ME/CFS, it is important for you to understand that all of your medical records and doctors reports will be read by your lawyer and the insurance company to reconstruct a history of your illness. Thus, when speaking to your doctor it is important that you specify clearly to the doctor what you are able and what you are not able to do. Outline the specific tasks which exacerbate your symptoms versus which tasks you can do. This will help your doctor keep better chart records and write a better medical report for the insurance company. Note, however, despite your doctor completing a medical report the insurance company has the right to have you examined by a doctor chosen by the insurance company. Do not worry too much what this doctor says about you as these medical opinions are often quite easily discredited on cross-examination.

B. Attend all medical appointments. As your case is ongoing it is important that you attend all medical appointments you book. The medical records/charts will be produced as indicated above and if there are “no show” appointments without

an explanation this will be used against you by the insurance company to argue that you did not obtain proper medical treatment.

C. Adhere to recommended treatment plans. Related to above it is important that you vigilantly adhere to recommended treatments plans (assuming they are not harmful to you such as an uninformed physician recommending exercise). From a legal point of view, you must only follow one treatment plan recommended by one professional, not all the treatment plans recommended by all of the doctors you have seen. This is important in a disease such as ME/CFS where there are many different opinions about what would be helpful treatment. From a legal point of view, you need only follow one. Note following the “advice” of medical forums will not suffice in a court room.

D. Keep a medical diary. There are conflicting opinions in the legal world about keeping a medical diary to record your symptoms of pain and fatigue. The writer believes a medical diary - if it is consistently kept throughout the time that you are sick - can be helpful as it allows you to articulate exactly what went on over the years as time goes on. However, if you start keeping a medical diary and then stop part way through this can hurt your case as adverse inferences may be drawn from you stopping keeping a medical diary. Whether this is valid or not to draw an adverse inference is of course up to debate but the insurance company will attempt to argue that since you stopped keeping a medical diary you must have had a substantial improvement in your condition.

E. Honesty. Never embellish your situation to your medical doctor or to any healthcare treating professional. At the same time, it is important not to minimize your situation to healthcare professionals. It is important to attempt to be as objective as you can in articulating exactly how you feel so that the people who are seeing you or treating you can understand your true situation. Many health care professionals do not realize how devastating ME/CFS can be and so it is important to articulate specific things that you can and cannot do and for how long etc. But at the same time avoid embellishing or using adjectives that are hyperbole as that will not be helpful in a review of your claim.

F. Private Investigators. Related to the above aspect of honesty you should be aware that insurance companies will hire private investigators to attempt to videotape you engaging in activities that you have previously claimed you are unable to do. This is important in a case such as ME/CFS where the credibility of

the applicant is crucial. Thus, from a legal point of view a judge adjudicating on your credibility in a positive way will make the fundamental difference in your case. For example, does the judge believe you when you say you have fatigue and believe you when you say you can only engage in two hours of activities per day. On the other hand, if there is videotape evidence that is clearly contrary to your previous statements or testimony at a deposition about what you can and cannot do, then your case will be very difficult, not only for the insurance company to accept, but also for a judge to accept.

Therefore, we recommend that if you want to test your condition to see if you are getting better that you never preform such a test in public where other people can see it because it may end up being the one time when you are being videotaped which could then come back to be problematic. Bottom line, always be honest and straightforward.

G. Social Media.

Social media such as Facebook and Instagram have become fertile areas for disability insurance company lawyers to review for evidence of you being able to perform more than your stated capacity. This is outlined in the article [Facebook and Other Social Media Evidence and Personal Injury Litigation Cases](#). Social media suffers from the “highlight reel” problem in that we all like to post our best moments on Facebook or Instagram. However, this leads to an inaccurate picture of your true condition if you are simply only posting your best pictures.

It is best to stop engaging in Facebook and Instagram and any other social media if you have ME/CFS and are pursuing a disability insurance claim. Social media has the potential to create problems and could very well result in a denial of your claim if there are documents posted which show you engaging in activities that you have said you are unable to engage in.

H. No Gaps in Information

This is perhaps the most common mistake unrepresented people make in applying for disability insurance. Make a persuasive first impression by making sure there are not any missing pieces of information, whether medical or general, so that the disability insurance company can obtain an accurate picture of how sick you really are. At the time, it will seem like a lot of work to initiate the application thoroughly and completely but it is well worth it so that the insurance

company can grant you disability coverage without having to go to litigation and then later providing the missing information.

Common gaps in information are as follows:

- Incomplete listing of function limitations;
- Providing incomplete medical charts or missing medical charts from a doctor you have seen;
- Medical diagnosis if there are conflicting medical diagnoses;
- Explanatory information from co-workers or family member;
- Incomplete work history.

CONCLUSION

Stacking the odds in your favor in applying for disability insurance requires attention to detail and stamina to complete the application thoroughly. Unfortunately, people with ME/CFS do not have stamina so often applications are incomplete and thus unconvincing. It requires a great deal of work to assemble all the required documentation, and this is even more difficult, if not impossible, when you suffer from ME/CFS. It would not be [good management of your medical condition](#) to push through the application and further impair your health. Thus, it may be beneficial to enlist a family member or hire a disability agent or lawyer to assemble the required documents properly and completely for you to avoid an initial denial and to avoid having to go to court.

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