



LONG TERM DISABILITY (LTD) BENEFITS:

What All Advocates and Claimants Must Know

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Overview

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 - a. General Policy Terms
 - b. Definition of "Disability"
 - c. ERISA?
- II. Application Process
- III. Claim Approved
- IV. Claim Denied/Proposed Termination: Filing a Lawsuit
- V. How to Value a Claim
- VI. Negotiating a Buy Out

I. LTD Policies

- Private insurance that pays a portion of your pre-disability income in the event you become unable to work due to a disability.
- Essential Policy Terms:
 - *Definition of Disability*
 - *How to Determine Benefit Amount*
 - *Elimination Period*
 - *Termination Date*
 - *Offsets*
 - *Limitations for mental illness, substance abuse, or other*
 - *Pre-existing condition*

Sample definition of disability.

"Disabled or Disability means that, due to Sickness or as a direct result of accidental injury:

- You are receiving Appropriate Care and Treatment and complying with the requirements of such treatment; and
- You are, during the Elimination Period and the next 24 months of Sickness or accidental injury:
 - *unable to earn more than 80% of Your Predisability Earnings at Your Own Occupation from any employer in Your Local Economy; and*
 - *unable to perform each of the material duties of Your Own Occupation; and*
- You are, after such period:
 - *unable to earn more than 60% of Your Predisability Earnings at any gainful occupation for any employer in Your Local Economy; and*
 - *unable to perform the duties of any gainful occupation for which You reasonably qualified taking into account Your training, education and experience."*

How "disability" is defined in the policy must be closely and meticulously analyzed.

Terms to look out for:

- Own occupation
- Any occupation
- Income loss
- Accident or Injury
- Local economy
- On-going care and treatment requirements

Own occupation v. Any occupation

Own occupation considerations:

- What are the essential duties
- Level of activity required
- Specialization
- Are regular and set hours required
- Interactions with public or coworkers

Any occupation considerations:

- Claimant's background and education
- What is gainful employment in claimant's local economy
- Claimant's limitations
- Vocational experts used or needed

How to Determine Benefit Amount.

- Look to specific clause in policy to determine benefit amount.
- The benefit will be a certain percentage of the claimant's last wage.
- Usually, there is a maximum benefit amount.
- If claimant was last working only part-time, does that impact his potential benefit amount?
- Did claimant pay extra for a larger percentage?
- What offsets current or potential offsets apply?
- Is there a cost of living adjustment?

Requirements, Limitations, and Restrictions.

- Must claimant file for Social Security and/or other benefits?
- What is the look back period and other requirements for pre-existing conditions?
- Are there limitations for mental and/or nervous disorders?
- What if claimant is disabled due to alcohol or other substance abuse?
- Does the policy's definition of disability impose any ongoing requirements?
- Act of war, participation in a riot, self-injury, or other exclusions?

The Employee Retirement Income Security Act of 1974 (ERISA)

What is ERISA: The Employee Retirement Income Security Act of 1974 sets minimum standards for most private employer sponsored pension, healthcare, and other benefits.

How to know if it applies to your LTD policy: If the LTD policy is a *private* employer provided employee benefit, then ERISA likely applies.

If ERISA applies: Few available remedies, record on review is generally limited to the administrative record on appeal, and federal court has jurisdiction.

Non-ERISA LTD Policies.

- If the plan is not offered by a private employer, then ERISA likely does not govern.
- Non-private employer plans excluded from ERISA include:
 - Local, county, city, state or federal governmental entities' employer provided plans,
 - Religious organizations' employer provided plans, and
 - Plans purchased individually on the open market.
- Allowed to conduct discovery just as in any other civil case.
- Can file lawsuit in state court if appropriate.
- Bad-faith and punitive damages as well as attorney's fees are potentially recoverable.

II. Application Process

- Consult with an attorney or other expert as early as possible in the process.
- To work or not to work, that is the question.
 - Have requests for reasonable accommodations been made?
 - What is the claimant's prognosis?
 - Has claimant taken any medical leave?
- Traps for the unwary in the application process:
 - Request and thoroughly review the policy language at the earliest possible moment and *prior* to completing the application.
 - Vacillating and/or being unrealistic about occupational prospects.
 - Repeated after me: "The carrier's claims adjuster is not your advocate or friend."
 - Develop as much supportive medical evidence as soon as possible.

III. Claim Approved

- What are the ongoing responsibilities of the claimant once "on claim"?
- How frequently will the carrier want to recertify the claimant?
- Does a definition convert at some point in the future?
- Can the claimant earn income and remain on claim?
- Should the claimant be mindful of their activities in public?
- Will the carrier monitor the claimant's social media accounts?

IV. Denial and Terminations

Preliminary Considerations:

- Review denial or proposed termination notices carefully as there is usually a short window of time to file for an appeal (Generally 180 days).
- The denial or proposed termination notice should clearly state the basis for the denial or proposed termination.
- What Independent Medical Examiners (IME) or Vocational experts did the carrier rely on?
- What evidence do you need to marshal to overturn the carrier's decision?
- Work expeditiously to gather the necessary evidence as the record is generally closed after the final administrative decision is made.
- Must exhaust all administrative remedies prior to filing a lawsuit.

Lawsuit considerations

- Determine the statute of limitations for filing of lawsuit.
- Decide venue.
- Does a *de novo* or abuse of discretion standard apply?
- What, if any, discovery can or should be conducted?
- Are there benefits to mediating the dispute quickly?
- What are the risks of proceeding to trial?
- What would the ultimate outcome at trial be if claimant "wins"?

Standard of Review

Abuse of Discretion:

- If the policy *unambiguously* confers discretion of interpretation to the plan administrator, then a reviewing court will only overturn the decision if an abuse of discretion is found.

De Novo:

- If the policy does not *unambiguously* confer such discretion, then a reviewing court will look at the administrative record *de novo*.

California Insurance Code Section 10110.6***:

- Plan language that confers discretion on a Plan Administrator is “void and unenforceable”. Affects policies issued *or* renewed after January 1, 2012.
- ***See Williby v. Aetna Life Insurance Co. (9th Cir. 2017) 867 F.3d 1129, which held ERISA preempts sec. 10110.6 as to self-funded employer provided plans.

Discovery

- If ERISA
 - Very limited discovery allowed.
 - Bias evidence allowed.
- If Non-ERISA
 - Discovery allowed as in any case.
 - This comes with potential benefits and risks.

V. How to Value A Claim

- Determine the benefit amount.
- Factor in offsets.
- Determine total potential benefits owed claimant under policy.
- Determine any past due benefits (if initial claim denied).
- Calculate any COLA and interest due.
- Present value discount.

Example of calculating value of claim

- Monthly Benefit Rate: \$5,000
- Number of Past Months of Benefits Owed: 24
- Interest Rate on Past Benefits: 4%
- Number of Months of Benefits Owed in the Future: 180
- Discount Rate on Future Benefits: 3.0%
- Cost of Living Adjustment Rate: 2.0%
- **Present Value of All Future Benefits=\$826,903.81**
- **Total Value of All Benefits = \$951,903.81**

VI. How to Buy Out Your Policy

- Calculate the total value of the claim.
- Other factors to consider:
 - Mortality rate
 - Likelihood of recovery or improvement in health
 - Insurance carrier known to negotiate buy outs
- Write a demand letter.
- Negotiate buy out.



QUESTIONS?

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