



QUALIFYING FOR DISABILITY BENEFITS



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Among the challenges presented by spasmodic dysphonia (SD), qualifying for disability benefits can be both difficult and frustrating. The process is complex, confusing, and extremely difficult to navigate without the assistance of an experienced attorney. Yet despite these challenges, both the Social Security Administration and private disability insurers recognize the impact of SD on the ability to work; and depending on the severity of the illness and the quality and quantity of the evidence presented, an award of benefits can be achieved. What follows is some advice that may help you win your claim, although every claim is unique and presents its own challenges. The purpose of this article is to offer general suggestions. Specific legal advice may only be obtained from the attorney you have retained to represent you.

SOURCES OF DISABILITY BENEFIT PAYMENTS

In addition to Social Security disability, state disability programs offered by several states, and other public disability pension programs, the private disability insurance market offers two types of disability insurance: long term disability (LTD), which is offered as a group plan through an employer or association; and disability income, which is purchased individually and provides a fixed monthly indemnity in the event of sickness or accident causing an inability to work. The type of insurance you have or the public benefit program from which you are seeking benefits affects the steps you must follow after a claim has been denied.

Private Disability Insurance

If your claim is brought under a policy of individual disability insurance, and if benefits are denied, you may file a lawsuit based on breach of contract and you can choose to have your case heard by a jury. In some states, in addition to the benefits due, you may also be able to bring a claim for damages, including a claim for punitive damages if you can establish the claim was denied in “bad faith.”

Group disability, or LTD insurance, on the other hand, is usually subject to ERISA (Employee Retirement Income Security Act), a federal law that governs employee benefits. Unless you are a government employee (federal, state, county, or municipal), or your employer is a religious organization, the likelihood is that the ERISA law

will apply. Under ERISA, there is generally no right to a jury trial, nor is there a right to recover damages of any kind.

However, ERISA does offer one significant advantage that can be utilized to achieve success in litigation: Under ERISA, if a claim is denied in whole or in part, the statute entitles the claimant to a full and fair review proceeding with the insurer or plan sponsor. That review process is the key to victory.

Social Security Disability

The Social Security disability program is the largest disability insurance program in the world. Funded by payroll deductions (part of the “FICA” deduction funds the disability insurance trust fund), the Social Security disability program has a detailed claims process which ultimately leads to a hearing before an administrative law judge where testimony is heard and witnesses may be cross-examined. Other public disability programs have procedures unique to those programs – such procedures should be carefully examined because the failure to comply with the specific rules governing such programs could be fatal to an otherwise meritorious claim.

Whichever benefit you are seeking, though, the following information may be helpful in better understanding the disability claim process – and is intended to offer suggestions that may enhance the chances of success if litigation becomes necessary.

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THE EVIDENCE

There are two kinds of evidence in disability claims: medical and vocational. Since a diagnosis itself is almost never enough to establish disability, a heavy emphasis is placed on vocational evidence. This type of evidence considers the claimant's age, education, work experience, and other relevant factors such as the ability to read and write English or perform mathematical calculations depending on the nature of the job. Such evidence is crucial in answering the question of whether a given individual is "disabled." To answer that question, the public agency or insurer looks to three factors: a statutory or contract definition of disability (Social Security is the most stringent and requires a complete inability to perform any job), a medical condition that imposes work-related restrictions, and an analysis as to how those restrictions interfere with the ability to perform either a particular job, a range of jobs, or any job. Most disability benefits claims, such as those involving cardiac conditions, spinal impairments or neurological disorders, are diagnosed or rated based on positive laboratory tests or radiologic evidence. SD cases, however, present special challenges since such evidence is much harder to obtain and because SD imposes non-exertional impairments. An exertional impairment is much easier to assess because it examines whether someone has the strength to perform a job – lift a required amount of weight, stand for a particular

length of time, etc. In contrast, someone with a non-exertional impairment may be capable of physically performing all of the strength requirements of a job but still be unable to do that job if the occupation requires the ability to generate audible speech through the course of a work day.

Many people with SD who have dealt with Social Security disability are familiar with Social Security Listing 2.09 which provides that Social Security disability payments will be made if an individual suffers:

Loss of speech due to any cause, with inability to produce by any means speech that can be heard, understood, or sustained.

Social Security further points out that "the ability to produce speech by any means includes the use of mechanical or electronic devices that improve voice or articulation." Meeting or equaling a listing usually results in an award of benefits, but even if the listing section is not met, if there is another neurological cause for the disorder, such as Parkinson's disease, the claim may still qualify. Although the Social Security Listing is not directly applicable to ERISA or other private insurance claims, it does provide a guideline that insurers and courts are likely to follow.

Recognizing that there is currently no definitive "gold standard" diagnostic test for SD, the more detailed the clinical examination findings (from both the physician

and the speech language pathologists who work with the physicians) and other positive test findings such as laryngeal electromyography (EMG), the more likely the diagnosis will be accepted. In addition, proof also includes the claimant's own regularly kept diary of symptoms, plus observations made by friends, family members or co-workers that might reflect on pre- and post-disability functioning. It is also appropriate to submit other documentation such as video recordings that depict disability and personalize your claim to the insurance company claim analyst.

The most important proof, though, is a well-supported opinion from the treating doctor, preferably a physician with credentials that establish significant familiarity and expertise with SD. Although Social Security gives deference to the treating doctor's opinion, that is not necessarily the case, though, with insurers, so the greater the demonstrated expertise of the treating doctor, the more likely that doctor's opinion will be credited.

It is not uncommon that insurers will rely heavily on physicians who merely review medical records rather than examine the claimant even though every insurance policy gives the insurer the right to have the claimant examined. Thus, the more detailed the records as to both clinical findings and test results, the less likely a non-examining doctor will be able to challenge such findings.

POTENTIAL PITFALLS

Social Security disability claims based on SD alone are particularly difficult since there are many occupations that do not require the ability to speak; however, disability insurance claims are often based on an inability to perform a particular job or a job that would lead to earnings commensurate with pre-disability salary levels. Nonetheless, even if the disability claim is job-specific, a claimant can expect insurers may try to challenge the payment of disability claims on the following grounds:

Lack of objective evidence. Some disability insurers have denied claims due to a lack of objective evidence such as medical tests. But the majority of courts have rejected that tactic. Most courts deem clinical observations "objective" evidence, and even diaries maintained by claimants have been accepted by the courts as objective evidence. However, even if more specific laboratory findings are not necessarily required, many insurers expect to see the results of fiberoptic nasolaryngoscopy, including the video, or EMG findings before the diagnosis is fully accepted.

Self-reported illnesses. Some disability insurance policies try to limit the duration of disability payments in cases involving "self-reported" illnesses such as migraine headaches, and might try to classify SD as a self-reported illness as well. Again, with enough clinical findings and objective test results, insurers, who have the burden of proving the applicability of such a limitation, cannot meet that obligation.

Mental illness. Insurers may also attempt to characterize SD as a psychiatric illness such as a conversion reaction in order to limit claims, since group disability policies generally limit the duration of benefit payments for psychiatric illnesses to two years. Like the self-reported illness limitation, the insurer has the burden of proof in establishing the presence of a mental disorder rather than a physical condition; and with sufficient clinical evidence, that burden cannot be met.

YOU'VE WON – NOW WHAT?

Even after benefits have been awarded, that does not mean the insurance company will continue to send you payments without further challenge. Insurers frequently employ two tactics to try to establish that additional benefits are not due:

Surveillance. Insurers will, on occasion, utilize surreptitious video surveillance to see if the insured may be engaging in activities inconsistent with claimed restrictions. However, just because you are in a restaurant enjoying a meal with your family does not prove you can generate audible speech unless the investigator is also able to obtain an audio recording. Thus, so long as the medical evidence is consistent and the treating physician's opinion remains unequivocal, there should be little fear of losing benefits due to surveillance.

"Independent" Medical Examinations. Unfortunately, the so-called "independent" medical examination is often not independent at all and is biased in favor of the insurer. However, in claims involving SD, given the

limited number of practitioners with established credentials in evaluating and treating SD, it is likely that anyone selected to perform an examination would know of your doctor's reputation and would be likely to corroborate his or her findings.

Continuing disability reviews. Both the Social Security Administration and private disability insurers perform continuing disability reviews. However, that should not be a cause for worry. Once you qualify for Social Security benefits, the burden of proof is on the Social Security Administration to establish material medical improvement before benefits can be terminated. Although the same standards do not apply to private disability insurers, most courts recognize that without evidence of improvement, the insurer likely lacks a legitimate basis for terminating benefits.

FIND AN ATTORNEY

The comments made above are by no means exhaustive and cannot be applied to specific situations. Moreover, the law varies from state to state and different public disability programs utilize differing standards and procedures for adjudicating disability claims. It is therefore important to secure experienced, competent counsel to assist in these cases. Finding such an attorney is often no easy feat because very few attorneys have specific experience in handling disability benefits cases; and even fewer are willing to take cases governed by the ERISA law.

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However, with patience, recommendations from local support groups and on-line discussion groups, and even a detailed search of the Internet, attorneys can usually be located, many of whom are willing to accept cases on either a contingency fee basis (fees are payable only if benefits are obtained) or by placing most of the fee obligation on a contingency fee basis after payment of an initial retainer.

The time to secure legal representation and hire an attorney is not when litigation is imminent after the exhaustion of all claim appeals—the best time to find a lawyer is no later than immediately after an initial claim is denied; actually there is nothing inappropriate or premature about seeking a consultation with an attorney even before a claim is submitted. However, in cases governed by ERISA, the attorney's participation in a pre-suit appeal is critical to success because courts in ERISA cases often limit the evidence under review to the documentation contained in the claim file.

Further, because many ERISA cases are reviewed under a deferential standard of review which will reverse the denial of benefits only if the insurer's decision is found to be arbitrary and capricious; i.e., without a reasonable basis, an attorney's guidance is essential in

creating not just a winning case, which is often not enough, but an airtight case, which is crucial to an award of benefits.

If ERISA does not apply, an attorney's participation early in the process may help create a record that, if not successful in resolving the claim short of litigation, could lead to an award of punitive damages in those states that recognize bad faith claims. An experienced attorney is therefore invaluable in analyzing the insurer's decision and the evidence supporting the denial of benefits, and, based on knowledge of prevailing case law, he or she will suggest how to obtain the most persuasive evidence and present winning arguments to rebut the adverse finding.

BE OPTIMISTIC

Disability claims involving SD present challenges that are often not present in other types of disability claims; however, the burden is not insurmountable. A well-documented case will almost always succeed, while a claimant who has had limited doctor visits and inconsistencies in the medical evidence will have a far more difficult challenge. However, with good evidence and strong capable legal advocacy, the challenge of qualifying for disability benefits may be overcome.

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Spasmodic dysphonia is a neurological voice disorder that involves involuntary "spasms" of the muscles in the vocal cords causing interruptions of speech and affecting the voice quality. The mission of the National Spasmodic Dysphonia Association is to advance medical research into the causes of and treatments for spasmodic dysphonia, promote physician and public awareness of the disorder, and provide support to those affected by spasmodic dysphonia.