

Column: *Walkup Talks Disability*

Applying for Disability Benefits for MCS: Issues to Consider, Part 2

- *Michael Walkup, Attorney at Law*



Michael Walkup is an experienced disability practitioner with over 25 years of experience in the disability law field. In 2001 he became disabled due to MCS, CFS, and FM. He is now providing a service to advise clients with potential disability claims who have MCS, CFS, and/or FM. As these programs and law are usually Federal, he is able to practice in all 50 states, so your location does not matter.

Michael is a long time Sustaining Member of the National Organization for Social Security Claimants' Representatives (NOSSCR), the only national body for disability representatives. He is also certified as a Federal Trial Lawyer and is admitted to the U.S. Court of Appeals for Veteran's Claims.

Michael would welcome the opportunity to try to help you with your legal claims. His web site may be found at www.MCSLegalHelp.com, or he may be contacted at MJWalkup@Amertech.net, or at 866-880-HURT (4878).

In the last article I briefly reviewed some of the various disability programs that are potentially available to someone who has become unable to work due to MCS and related conditions. I recommended that disability insurance claims need to be undertaken with some reticence for various reasons and that a claim for Social Security Disability and/or Supplemental Security Income might be a better idea, at least initially.

In this article I will explain further the pitfalls in pursuing disability insurance claims for MCS/EI.

First of all, it is important to understand the difference between two types of disability insurance plans, as the rules and procedures are quite different for each.

Employer Sponsored Plans

For most people, the only type of disability insurance they will have when they become unable to work is one provided by their last employer. These plans, which are known as *employer sponsored plans*, are governed by a special federal law known as the Employee Retirement Income Security Act, or ERISA.

As has become common in recent years, (the "Clear Skies Initiative", "

No Child Left Behind", "Patriot Act", etc.), the name for this law sounds like the opposite of what it really does, which is to take away legal rights from people who have either health or disability, or retirement insurance through their employers. With the incoming Administration, efforts may be made to amend various aspects of ERISA but, for now at least, we have to deal with the law as it stands, (and has stood since it was signed into law by Richard Nixon in 1974 immediately before he went on the air to announce that he was resigning in disgrace as President of the United States).

Under ERISA, once you have exhausted your appeals within the insurance policy with the claims department of the insurer, (who obviously don't want to pay you if they think they can get away with it), your only other recourse is to file for a review in court. Although you can file in state court in your jurisdiction, it can be "removed" to the federal court on motion of the insurance company (which *always* happens).

Once in federal court, the review of the decision of the insurance company is basically presumed to be correct unless you, the insured, can prove that the insurance company's decision was 'arbitrary and capricious'. As you might gather from the way that sounds, this essentially

means that you have to prove that the insurance company denial of benefits was basically “out in left field”, and cannot be supported by any rational view of the evidence.

You also have the additional burden in federal court to use only medical and scientific evidence which has been generally accepted by the medical and scientific community. In MCS, this is definitely not the case as there is a huge dispute about the validity of the MCS diagnosis or the mere existence of the condition. You also cannot introduce any new evidence in the federal court than that which you gave to the insurance company on your application and appeals.

Individual (Private) Plans

In some cases you may have a private disability policy. To get one of these you would have had to go out and buy one and pay 100% of the premiums yourself. Usually the only people who have these are self employed professionals like doctors, lawyers and dentists, or small business owners. Some people may have a variation of this in terms of a policy that pays their mortgage or car payment in case of loss of income due to a disability.

The good thing about the private policies is that ERISA has no application to them. They are treated as regular contracts and you can sue on them in state court as soon as you are denied benefits. Once in state court you can request a jury trial and the jury decides the case as an original review. This means that if they feel you are disabled, you win. Depending on the state, you may or may not have to contend with the “generally medically accepted” rule of evidence.

On the down side, the case can be removed back to federal court under “diversity” jurisdiction, if the insurance company is incorporated in a state different from yours, or has designated a place of suit in the contract. In that event you may find yourself having to deal with it in say, Delaware or California, and getting a lawyer in that state in addition to the one you originally consulted in your state.

Also, a jury trial is very time consuming, and lawyers usually are not going to do it on a contingency basis, especially if it involves a controversial diagnosis such as MCS. You are probably looking at a six figure legal fee, plus thousands in expert witness costs, and the case will take several years.

The Large Print Giveth: The Fine Print Taketh Away

Many insurance policies, whether employer sponsored or not, may also have various exclusions and limitations that can affect your situation in particular. For example, many policies have a limitation on “mental impairments” where they will only pay benefits for two years if the claim involves any sort of mental problem. It is easy to put MCS in a category where it is considered to be a mental problem, the most common being to consider it as a “somatoform disorder.” This is not quite the same as saying you are malingering or that it is “all in your head.” What it means is that you have an actual physical reaction, but the physical reaction is being caused by a mental state of some kind. In either event, it can lead to a limitation of benefits, and so is a prime defense in MCS, FMS and CFS cases.

In a new twist, some policies have added a similar limitation if the condition causing the disability is “self reported”. This means that there is no ‘accepted’ medical test that can objectively prove the impairment so the only evidence is what the patient says about their symptoms, which is typically the case in MCS, FMS, and CFS cases. I suspect that this wrinkle was introduced precisely to allow the insurance companies to get out from under these types of claims and avoid endless litigation. Ironically, this may allow for more companies to approve these cases with a settlement where they agree to at least pay the two years of benefits but not after that.

Also, be sure you are aware that there are both Long Term and Short Term disability plans. You have to apply for the Short and then the Long after six months if you are still out of work.

For more information: www.MCSLegalHelp.com