

Column: *Walkup Talks Disability*

Applying for Disability Benefits for MCS: Litigation

- *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).

For those of you who missed it, in my previous articles in this series I discussed disability insurance plans and workers compensation benefits claims for people who have developed MCS/El. Before going into a detailed discussion of Social Security Disability, I wanted to touch on one more potential option for recovery, namely litigation.

Litigation, as used here, refers to lawsuits against individuals, corporate, or governmental entities that may be responsible for inflicting some insult which triggered or aggravated an MCS/El condition. These would be similar in concept to suing the person who rear ended your vehicle while you were stopped for the traffic signal. What you are trying to show is that you were injured because the other party was 'negligent'. Negligence means the doing of something that a reasonable person would not have done under the circumstances, or the failure to do something that a reasonable person would have done under the circumstances.

There is also another concept known in the products liability field of 'strict liability' where a maker of an 'unreasonably dangerous' product may be responsible regardless of actual negligence. Governmental bodies, such as municipalities, state governments, the federal government, etc., on the other hand, have 'qualified immunity' in which they are immune from liability unless they have acted

with 'gross negligence' or were 'willful and wanton'. This can also mean that they acted with a 'reckless disregard' of the consequences of their actions or inactions.

Contrary to popular belief, there is no such thing as someone being liable automatically if there is an injury 'on their property'. You still have to prove that they were negligent.

Finally, in order to become liable for an injury, the other party has to have owed a 'legal duty' to the person who was injured to avoid injuring them. If you produce or sell a product, sell or rent a house to someone, or take your car out on the roadways, you owe a duty to anyone who might reasonably be expected to become injured if you are negligent.

One question I get a lot is "Can I sue the doctor that the insurance company sent me to for an examination?" Basically, no. A doctor who examines you for the purpose of a claim or lawsuit, or to qualify you for insurance, does not owe you a "duty" in terms of medical malpractice or negligence and cannot be sued by you if he/she, for example, exposes you to something to which you are sensitive and makes you worse. The insurance company that sent you there might, if they know about your condition, be liable. But, not the doctor. If you were sent to the doctor by the government, such as for a Social Security Disability claim, the government is immune and cannot be sued.

You also can't file a lawsuit for anything that is covered under the workers compensation laws of your state. What this means is that if you were injured or exposed at work, you cannot sue your employer in court. You are limited to going through the workers compensation system in your state and are limited to the types of benefits that are payable there. The up side to this is that you don't have to prove negligence in a workers compensation claim. More is covered on this in my previous article.

You may, however, be able to sue a 'third party' even if your injury or exposure was work related. A third party would be someone other than your employer who may have been negligent and whose negligence may have caused or contributed to the problem. An example of this would be if your employer rents space in a building, but does not own the building, and you develop problems associated with "sick building syndrome". You can then sue the owner of the building. Even if your employer does own the building, you might be able to sue the builder or the architect, or both. This is what happened in the county courthouse building I described in the last article.

Such a suit would be in addition to any workers compensation claim you may have. There would also not be any offset of the settlement *per se*. But, the responsible party would have to reimburse the workers compensation carrier for a portion of the benefits paid, which can reduce your end of the recovery.

Mold Cases

Mold cases have been more successful but you may have difficulty tying the mold exposure to a more global sensitivity to general environmental exposures or proving that you became completely disabled from the mold exposure. I will be taking up the medical/legal issues further in a later article.

Product Cases

There have been a lot of cases involving various products, especially pharmaceuticals. Usually these

are done as class actions so that the huge expert witness expenses can be spread out over a large number of cases. Again, good luck in showing that you have developed a sensitivity to perfumes from a pill you took, and which prevents you from working for the rest of your life and forces you to live in a tent in the desert. But, some type of recovery may be possible on at least a limited basis.

Federal Court

You want to stay completely out of federal court if you have MCS/EI that you are trying to tie to something to which you were exposed.

The issues of what causes what, and whether you can develop a more generalized impairment from exposure to some particular thing, are hard enough, but the federal courts impose an evidentiary rule which they made up a few years ago that makes it virtually impossible to do anything on a chemical sensitivity case.

The rule to which I am referring came out of a case in which the plaintiff's name was *Daubert* and is therefore now called the *Daubert Rule*.

The purpose of this was to limit what was referred to as "junk science" from the federal courts. It requires that before any expert evidence is admissible, it has to be shown to be generally accepted in the medical or scientific community.

It is very easy for people defending these cases to find an expert who will say that MCS/EI is not generally accepted, and that anyone who attempts to treat it and says otherwise is a quack and charlatan. Once this happens, the case pretty much is over unless you can bring in other types of evidence from other sources or call the condition something else.

Again, it is important that you consult with an attorney in your state on any particular litigation case you think you may have as these are often matters of state law which may vary. There have been some success stories in recent years, so there may be some hope.