

Disability Carriers Need to Brace for the Onslaught of COVID-19 Claims

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As states across the country prepare to return to work, disability insurers should expect to see an increase of claims stemming from COVID-19. Many of these claims, however, will not be because the insured has COVID-19, but rather, due to the *fear* that the insured may get the virus if he or she returns to work. For many, an underlying medical condition such as diabetes or heart disease may increase concerns about their prognosis if they contract the virus once exposed to their work environment. These individuals will likely argue that they are disabled because they are at a higher risk of developing serious complications, including death, due to their underlying condition. With the rise of these types of claims, insurers will be faced with the following question – is an individual disabled from returning to work due to the *risk* that if they contract COVID-19 they will die?

WHAT TYPES OF CLAIMS SHOULD INSURERS EXPECT TO SEE?

Under a typical disability insurance policy, to qualify for “Total Disability” benefits an insured must prove that, because of sickness or injury, he or she is not able to perform the material and substantial duties of his or her occupation. Policies generally further require that, to qualify for disability benefits, the insured must be under the regular care and attendance of a doctor. Occupation is defined as the regular occupation (or occupations, if more than one) in which the insured was engaged at the time he or she became disabled.

Insurers should expect to see an increase in claims from insureds, claiming that they are totally disabled from performing the material and substantial duties of their occupation due to the possibility of contracting COVID-19 and the possible effect it will have on their physical health due to a pre-existing condition. Insurers should also expect to see an increase in Business Overhead Expenses (BOE) claims. BOE insurance pays qualified business expenses where an owner or partner becomes disabled and cannot work. The purpose of such insurance is to meet everyday expenses such as salary and utility bills.

HOW WILL COURTS LIKELY ANALYZE THESE CLAIMS?

As a general rule, it is the insured’s burden to prove entitlement to disability benefits. Language of disability insurance policies, as with any contract, must be given its plain and ordinary meaning. Further, policies must be read to give full force and effect to each provision. Courts have construed the “substantial” and “material” language as requiring an insured to be unable to perform *any* of the substantial and material duties of his or her occupation, particularly where the policy also contains a residual disability clause. See *Simon v. Unum Group*, 2009 U.S. Dist. LEXIS 27695 (S.D.N.Y. Mar. 30, 2009). Where a claim is made under a short-term or long-term disability policy governed by ERISA, a denial of benefits is reviewed *de novo* unless the benefit plan gives the administrator fiduciary discretionary authority. In such a case, the plan administrator’s decision to grant or deny disability benefits will generally be reversed only if it is arbitrary

and capricious, meaning that it should be supported by substantial evidence and cannot be erroneous as a matter of law.

Where an insured does not presently have a disabling condition, but fears that returning to work would exacerbate a previous condition, courts have found that the Total Disability standard was not met unless the insured can prove that he or she is unable to return to his or her regular occupation. See e.g. *Clarke v. Aetna Life Insurance Company*, 2009 U.S. Dist. LEXIS 11400 (S.D.N.Y. Dec. 1, 2009). Courts have also looked to whether a reasonably prudent person would be deterred from returning to work by the risks involved. See e.g. *Napoli v. First Unum Life Insurance Company*, 2005 U.S. Dist. LEXIS 7310, at *23 (S.D.N.Y. Apr. 21, 2005). Moreover, a slight risk of harm due to occupational stress is not sufficient to render a person disabled. *Id.*

COVID-19 presents a novel situation in that the insured may in fact never contract the virus. As such, cases in which an insured has a diagnosed mental or physical condition which will likely be exacerbated by a stressful work environment are distinguishable. In contrast, here, the claim will not be that an underlying medical condition will be exacerbated, but rather that an entirely new disease will be contracted. The fear of contracting an entirely new condition is not likely to qualify an insured for disability benefits under the plain language of a standard disability policy.

Further, insureds will also have the burden to show that they are under the regular care of a physician due to their allegedly disabling condition. Since the insured will not have actually contracted COVID-19, this will be a difficult burden to meet.

Another facet to the dilemma is that, if the insured is able to work in another occupation for which he or she is qualified or which uses some, but not all, of his or her pre-disability occupational duties, then he or she will not qualify for disability benefits. Importantly, most disability policies do not insure the “title” of an insured’s occupation – rather they look to the material and substantial duties the insured performed immediately before he or she claimed disability. Therefore, if an insured is able to perform some of his or her pre-disability occupational duties from home, then he or she would not qualify for disability benefits.

The plaintiffs’ bar will likely rely on “risk of relapse” cases to support their position that insureds are entitled to disability benefits. There is a line of cases which consider “risk of relapse” as a disabling condition, and the courts look to whether the evidence of probability of relapse is sufficiently high to justify a finding of disability. See e.g. *Colby v. Assurant Employee Benefits*, 603 F. Supp. 2d 223, 243 (D. Mass. 2009). Similarly, there is a line of cases finding disability where the insured’s heart conditions may potentially be exacerbated by workplace stress. See *Aitken v. Aetna Life Insurance Company*, 2018 U.S. Dist. LEXIS 164008 (S.D.N.Y. Sep. 25, 2018); *Lasser v. Reliance Standard Life Insurance Company*, 146 F. Supp. 2d 619, 628 (D.N.J. 2001); *Keiser v. First Unum Life Insurance Company*, 2005 U.S. Dist. LEXIS 10987, at *48 (S.D.N.Y. June 8, 2005). In those cases, courts have found that an individual is disabled if a return to his or her employment would aggravate a serious condition affecting the individual’s health. However, without an underlying condition the risk of relapse falls apart.

MENTAL NERVOUS CLAIMS

Insurers should also be prepared for increasing mental nervous claims. These will be considered on a case-by-case basis. Courts examining the risk of relapsing into depression or anxiety due to a stressful work environment conduct a fact-specific analysis. See *Clarke v. Aetna Life Insurance Company* 2009 U.S. Dist. LEXIS 111400 (S.D.N.Y. Dec. 1, 2009). These claims will be fact-specific and depend heavily on the insured's medical history and specific occupational duties.

CONCLUSION

Going forward, disability insurers will have to manage an influx of claims from insureds claiming to be disabled from returning to work as a result of COVID-19. The merit of each of these claims will undoubtedly vary, depending on the insured's underlying conditions, co-morbidities, history of medical treatment, and occupational duties. However, both insurers and insureds alike should be aware that the mere fear of contracting COVID-19, without more, is unlikely to meet the definition of Total Disability under a standard disability income policy.

If you have any questions about how a business can mitigate their premises liability during the COVID-19 pandemic, please contact Andrew I. Hamelsky (hamelskya@whiteandwilliams.com; 212.631.4406) or Jenifer A. Scarcella (scarcellaj@whiteandwilliams.com; 212.714.3064).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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