

Doctors and Their Long-Term Disability Insurance

Insurance experts agree that most people are better prepared financially in case of death than if they become disabled, although, during income producing years, there's actually a much higher chance of becoming disabled. You and your family's financial well-being are tied to the application of your professional skills. The right disability policy protects that investment. The wrong one puts you at risk. We discuss ways to protect yourself – a practicing physician – and your family in the event of disability.

For doctors who suffer a disabling illness or injury, having to give up their practice can be a terrible blow to both their psyche and their wallet. Physicians with disability insurance have assumed that their policies will provide the lion's share of their former income. But will they?

Unfortunately, many disability insurance plans provide less benefits than you would expect. Why? To answer that question, you must know the important features of a physician disability policy in today's insurance marketplace. First, a little background information before the answer.

Until the 1990s, disability insurers considered doctors an attractive, low-risk market because they rarely filed claims, and even when they were disabled, they usually continued to practice - or tried to. Thus, insurance carriers typically offered them generous coverage at modest premiums.

But as managed care spread during the '90s, and doctors' incomes declined, their disability claims rose. (Insurers believe that wasn't a coincidence.) Many insurers lost money while others simply stopped writing disability policies or merged with bigger companies. Today, Unum Provident is the financial leader of the individual disability insurance market with about a 40% share.

The companies that still offer disability policies are limiting their exposure by raising premiums, reducing benefits, tightening restrictions, and adding exclusions. That means doctors who shop for disability insurance today often have to look harder and pay more for less coverage. The tips in this article should help to maximize your disability protection.

Shopping for disability coverage. Buy disability insurance coverage that is backed by a strong disability insurance company with top financial strength ratings. The insurer's rating information is evaluated by services such as A.M. Best, Standard & Poor's, and Moody's.

Contact your insurance agent and hit the Internet to find out about the company's claims record before buying a disability policy. Find out what claims experience their policyholders have had, how often the company has denied or terminated benefits, and whether there's any current litigation against the company alleging unfair claims practices.

Ask colleagues, the state medical society, or a disability attorney what they know about the company's reputation for handling claims. Contact your state insurance department or the National Association of Insurance Commissioners to find out how many complaints have been filed against the company and the reasons for the complaints.

What to look for in a policy. Getting down to the financial brass tacks, you want to buy benefit levels that will replace as much of your lost earnings as possible. In determining the appropriate benefit level for you, consider not only your present income but also what income you expect (and will need) in the future.

Of all the other features to look for in a disability insurance policy, the first and foremost is an "Own Occupation" definition of disability. This means disability is defined as the inability to perform the material and substantial duties of your occupation, not just the inability to perform any job in medicine or outside medicine. Ideally, the insurance policy should further define your occupation as your specialty, not just define your occupation as a "physician." Simply put, you want insurance to cover the possibility you can't return to the position you held before disability.

The ultimate issue of disability – its definition, how that definition is to be applied, and how it is to be factually determined – is governed the policy definitions and terms. In Helms vs. Monsanto Co., 728 F.2d 1416 (11th Cir. 1984), an insurance company interpreted its policy term, "total disability," to mean end of "conscious life," and withheld benefits because the beneficiary, though disabled, was still alive and conscious. Fortunately, the court in that case threw out the insurance company's decision as arbitrary and capricious. Most of the time, however, the issue of disability is not that simple.

Some policies state that if you can work in any job at all, in medicine or not, you will not be considered "disabled," and your benefit payments will be discontinued. In other words, many carriers are cutting losses by no longer offering the "own occupation" definition that physicians have preferred.

Other features of the disability insurance policy to look for are:

* Guaranteed renewable coverage so the insurance company can't terminate your coverage or increase your premiums as long as your premiums are paid (i.e., the policy is "non-cancelable"). Sounds good . . . but to further limit future liability and exposure, many insurance companies will no longer offer non-cancelable and guaranteed renewable disability policies. By removing these inherent "guarantees," insurance companies can increase premiums based on the claim experience of the specific group or specialty. Buyer beware!

* A provision that allows you to increase your monthly benefits in the future without you having to provide additional evidence of medical insurability. This may be called an increase option. With it, you may increase the amount of your coverage without having to pass another medical exam.

* Partial residual coverage, i.e., some provisions to continue coverage if and when you return to work but still suffer a loss of income.

* A Built-in cost of living adjustment to keep pace with inflation.

* The length of time you can receive benefits: shop carefully to make sure your policy is appropriate for your age and lifestyle.

* Waiver of premiums: in the event you become disabled during the effective period of your policy, it's desirable to have a provision waiving the payment of premiums while you're disabled.

* Waiting period for benefits: most policies have a waiting period before you can start to collect benefits. A policy with a 90 day waiting period or longer can be cheaper and more cost-effective than one with only a 30 or 60 day period, provided you maintain sufficient savings to carry you through the waiting period.

* Benefit exclusions or limitations in the areas of rehabilitation benefits, cosmetic surgery, transplant procedures, nervous disorders, chronic fatigue syndrome, and HIV, any of which can become critical to your well-being and recovery, but may not be covered.

* Coordination with other coverage: check how the policy interacts with your health insurance – whether the policy will, for instance, pay your health insurance premiums for you in the event you become disabled.

The pros and cons of group coverage. Should you buy disability insurance on your own or through your group practice or professional association? If your employer offers group disability coverage, take it gladly. But you still may need your own coverage. Your after-tax dollars will be used to purchase any individual coverage. The best time to buy an individual income protection policy is when you're young and healthy. Individual disability insurance is owned by you and can be taken with you to a new job or employer. It seems like a cost-savings for your practice or employer to fund your disability income protection insurance using group policy rates, but there are potential pitfalls.

Group disability insurance policies (“LTD” or long term disability) are notorious for having a restrictive definition of disability. They can require you to be completely disabled before they will pay a benefit. Stated differently, they won't pay a benefit unless you are unable to do any type of work. A group LTD policy is typically an insurance plan designed to replace 60% of base salary to a monthly maximum spelled out in the insurance policy. Your individual needs may be greater.

Group plans can also have some shortfalls such as -

* Offsetting their disability benefits by income received from workers' compensation or social security disability claims

* Not keeping pace with inflation

* Not covering a partial disability (yet partial disability is more common than total disability)

* Premiums may be raised and coverage may be canceled

There's devil in the details. If you are considering buying disability insurance from your association, make sure you obtain and read the master association policy and not just the marketing or promotional material. The small print can make a huge difference if you ever need to invoke your disability coverage.

In the event of disability, you could take a big financial hit because of an often overlooked pitfall in employer-provided disability coverage: the benefits can be taxable if your employer pays the premium. The usual rule is that if you pay your premiums with after-tax dollars, your benefits are tax-free. If you deduct premiums or your employer pays the premiums, the benefits may be taxable to you at the time of the claim. Consult your tax lawyer and/or accountant.

On the other hand, there can be beneficial features of group LTD insurance. It's typically less expensive than individual coverage, it may not require a medical exam to qualify for benefits, and persons with sub-optimal health have a better chance of getting coverage.

The claims experience. The authors have assisted doctors pursuing claims and/or lawsuits for career-ending disabilities. We have represented doctors trying to get their denied disability claims accepted or their terminated disability benefits reinstated. We like to view our experience as a window to the future of any given disability insurance policy, one that allows us to assess at the time of purchase the level of protection that the policy will afford.

From this experience, we'll tell you this: Don't think for a second that the disability insurance company will give your claim for benefits the red-carpet treatment and pay full benefits with a smile, no matter how long you've paid premiums or received disability payments.

After navigating through the initial stages of a disability claim by filing a timely claim application, well-supported by treating and consulting providers and satisfying the insurance company's requests for submissions, many disabled medical practitioners think they can breathe easy and relax with a secure future of disability income. Have we got a surprise for you! One thing for certain is that disability insurers will defend vigorously against even the strongest claims.

If the insurer thinks it has arguable grounds to believe you are feigning disability, exaggerating injury, or embellishing the medical condition that keeps you from working, expect to have a major fight on your hands sooner or later. You should get legal counsel to square off against the insurance company's lawyers or else you will find yourself on a very uneven playing field. The disparity in the level of legal sophistication is too great for you to go it alone against the insurance company in the event you face a denial of disability benefits when you are genuinely disabled.

Insurers looking to disqualify you from receiving disability benefits have some common techniques up their sleeve for gathering evidence against you. Expect to receive a request for a so-called independent medical examination (IME). There will probably be a paragraph in your disability policy requiring cooperation with the insurance company's medical examinations, but the terms are often vague about the nature, extent, and level of intrusiveness of these exams (e.g., whether they allow invasive procedures; radiological studies; whether they allow you to record the exam, etc.).

Battles between insureds and insurers can flare up over these exams, given the inherent conflict between the physician who wants to collect disability payments and the insurance company that wants to save expenses. And don't expect your long-time attending doctors' opinions of disability to build a fortress around your disability payments. In the case of Black & Decker Disability Plan v. Nord, 538 U.S. 822, 123 S. Ct. 1965 (2003), the U.S. Supreme Court held that employee benefit plan administrators are not required to accord any special deference to the opinions of treating physicians.*

*Note that under a private policy you buy yourself, your rights under an employee benefit plan are often controlled by a complex federal law known as ERISA (the Employee Retirement Income Security Act of 1974). This law weighs heavily in favor of insurers. In a dispute over an employee disability policy, you should definitely have legal counsel available to assert your rights under ERISA.

In our experience, sometimes the goal of the insurance company comes through loud and clear with these IME's: find and document that the physician is not disabled, is not disabled to the extent she claims, or only has some degree of impairment but can work in her former practice capacity. At other times, the insurer does not avail itself of an IME but rather simply pays for a physician to review the claimant's medical records and then write a report of the reviewer's impressions and conclusions.

In one recent court case we handled, the disability insurance company paid its former director of disability (who was the disability insurer's employee just months earlier) to review the medical records of a disabled financial consultant with a substantial spine condition. When the reviewer reached the preordained conclusion that the claimant was not disabled from his previous position, the insurer cut off the disability payments. The claimant was left with either of two difficult options: Accept the cutoff of benefits or take the insurance company to court. During the ensuing lawsuit, we fought hard against the reviewer's conclusions by showing his bias in favor of his former employer and his failure to consider key evidence, such as medication side-effects and the claimant's

inability to withstand air pressure changes with airline travel. We argued that the reviewer's medical review was hardly "independent," and won a substantial settlement for our client

Medical exams are not the only tactic the insurers use to head off disability claims.

Disabled physicians bringing claims for benefits can expect to be the star in surveillance videos looking for evidence of fraud or exaggeration. Insurers often use outside sleuths to follow the insured and monitor his activities for days or weeks at a time. The latest in mini-camera technology and creative editing can be used to film unwary claimants when they least expect it, resulting in one-sided and incriminating videos.

Their idea is to catch the insured on film performing activities that are inconsistent with the claimed disability, e.g., working out at a gym, walking for a distance, or even carrying grocery bags without any apparent discomfort. Thought you had a right to privacy? Sometimes insurance companies will secretly record a claimant's most innocent activities, like driving normally or dropping off a child at school, to argue that no disability exists. The insurer may deny or cut off benefits taking the position that if the physician is capable of engaging in the physical activities shown on the video, he can surely return to the practice of medicine. We have seen insurers go so far as to argue that seemingly normal driving or walking by a claimant (without obvious visible discomfort) is evidence the physician can return to her own occupation. This is an unacceptably crude and irrelevant standard of disability, often called by lawyers for the disabled a "sit and squirm" test.

Of course, as lawyers for disabled physicians, we try to bring the issue back to where it belongs. Total disability from medical practice doesn't mean total physical impairment and helplessness. Instead, it should mean only that the doctor has been rendered unable to perform the substantial and material duties of her own occupation in the usual way. The ability to drive or carry clothes from the dry cleaner has little correlation with the ability to withstand the physical and mental stress of performing neurosurgery, taking night calls as an OB, or seeing large numbers of patients in a busy office practice. An orthopedic surgeon who can no longer operate, and can only intermittently hold down an office practice without periods of absence, in most cases has absorbed a big financial hit regardless of whether he or she has some residual functional capacity.

There is no limit to the ingenious arguments of disability insurance companies we have seen attempting to disqualify insureds from receiving disability payments. They may advance the position that an insured doctor has stopped working by choice, not because of disability, but simply to avoid the long hours, constant pressure, declining income, or high office overhead of modern medicine. The insurer may say the impaired physician is really suffering a mid-life crisis or burnout. It may also argue that the physician wants to pocket a claim for disability benefits for a financial gain, or perhaps that the physician's disability insurance (sometimes under multiple policies) will net her more money than remaining in medical practice.

A common position the disability insurers take is that the insured, by virtue of being a physician and with years of training and education, can perform any number of other jobs within or outside of medicine. Using vocational assessment experts, they will argue that the physician has many transferable skills and thus can perform some other occupation. The insured doctor can argue back that he or she chose his or her own occupation, and the inability to perform many of the duties of that particular occupation is what renders him or her disabled. This is a frequent point of dispute between an insurance company and a disabled doctor claiming benefits.

Self-protection tips. Here are steps to protect yourself if you file a disability claim:

1. Get necessary claim forms as soon as possible after you become disabled. Find out the submission deadlines for new claims (i.e., read the policy requirements). Policies often require claimants to file within a very short time after becoming disabled in order to be eligible for benefits at all. The time period can be as short as a matter of weeks.

2. Get copies of all pertinent medical records. Any supporting records must include a doctor's description of your disability, test results, and treatment. Provide all relevant information about the disability and its effect on your professional performance to your treating physicians so they'll be fully informed when your carrier contacts them.

3. You must gather proof that you're disabled. First read the policy's definition of disability. Make sure your treating physician understands what the main duties of your occupation are, and ask if he or she will certify a claim to that effect.

4. Ask an experienced disability attorney for advice on what to include in your claim and to review the claim to make sure it's thoroughly documented. He or she will then be prepared to help when the company starts asking questions, or to assist you if the company wants to interview you. If your claim is denied, counsel will be in a better position to represent you in an appeal of the denial or in a subsequent lawsuit.

5. Supply with your claim a detailed account of your average workday prior to disability. Be very specific and detailed. Include the percentage of time you typically devoted to the specific activities you can no longer perform, and the amount or percentage of your practice income you'll lose if you cannot adequately perform them. Verify this information with your former colleagues in your practice.

6. Don't hesitate to request a different independent medical examiner if you suspect bias or if the doctor isn't credentialed in a specialty relevant to your condition. In any event, keep a careful record of the exam, including all tests that were ordered. Ask for a copy of the exam results to be sent to you, your doctor, and your attorney.

7. If the carrier denies your claim or fails to reach a decision in a reasonable period, ask—in writing and by certified mail—for a detailed explanation of all reasons. Check your policy to see if it contains a time limit for appeals or for initiating legal action.

Don't get tripped up procedurally by assuming your disability is obvious and speaks for itself.

8. If you engage an attorney, make sure he or she is well-versed in disability insurance litigation. It is always better to seek advice early rather than late. It's important to create a strong record early on.

ERISA or not. At the outset of a disability claim, one must first determine whether or not the benefit plan is covered by the Employee Retirement Income Security Act of 1974 (otherwise known as "ERISA"). Disability policies provided by a group practice as a fringe benefit usually fall under ERISA, while those owned independently do not. If your policy is governed by ERISA, any lawsuit concerning your disability payments will be heard in federal court by a judge, instead of a jury. Furthermore, ERISA will govern how the judge weighs the evidence in your case.

You might think that the opinions of your attending physician (who, after all, knows you best and spends more time on your condition than any insurance examiner) will rule.

What exactly is the role of the treating physician in the claims process and what deference must plan administrators give to their reports and opinion letters? As mentioned above, the U.S. Supreme Court has held that an ERISA plan administrator is not required to give extra weight to the opinions of treating physicians. In other words, the treating physician's findings and opinions are not sufficient alone to win a case for the claimant if there is a contrary opinion in an independent medical examination, supported by other substantial evidence on the same condition or illness.

What's the effect of the disabled physician's use of pain medications? In Adams v. Prudential Insurance Company of America, 280 F. Supp. 2d 731 (N.D. Ohio 2003), the claimant was required to take narcotic pain relievers on a daily basis and those narcotics substantially interfered with his daily activities. The court stated that the insurer erred by refusing to consider evidence of how the use of narcotic analgesics on a daily basis would affect a claimant's ability to perform a job. As a result, the court awarded disability benefits to the claimant.

A case study. A prominent Maryland physician made the assumption that his disability insurance company would surely cover him following a massive heart attack, coronary bypass surgery, and other severe complications. He had bought an "own occupation" disability policy years earlier and never made a claim on it until the heart attack struck.

After making disability payments for a period of time, his insurer disagreed and terminated the payments. The termination was based on a video surveillance tape taken by the insurer's investigator. The video showed the doctor working a few hours longer than part-time on occasion and having the ability to perform some everyday, non-strenuous functions outside of his professional activities.

However, much like a baseball player who could still hit but not run the bases, or play shortstop but not flag down infield grounders, the doctor could not perform all the material and substantial duties of his own occupation.

At first, the physician thought the idea of fighting his own insurance company over the cut-off of benefits so repulsive that he couldn't stomach a fight. He knew that battling his insurer, while keeping his practice going with reduced hours and reduced duties, would take an intense emotional toll and add to his feelings of frustration and uncertainty about the future.

He also knew that resuming full-time work (and the associated stress) could cause his already precarious physical condition to deteriorate. And the decreased endurance and concentration combined with increased fatigue meant the doctor could never again practice in his usual manner. After much soul-searching, and with no other viable option, the doctor sued his long-term disability insurer to get his disability payments back again.

In addition to gathering overwhelming evidence supporting the physician's disability claim, we accused the insurer of failing to conduct independent medical exams before cutting off the disability payments, ignoring the strong evaluations of disability by our client's treating and consulting physicians, and distorting the findings of the video surveillance, all to welch on their responsibility to pay a legitimate claim. On the way to a trial, the insurance company proposed a settlement conference and we obtained a favorable settlement on our client's behalf.

What happened to this disabled doctor wasn't unusual and wasn't the worst case we've handled by any stretch of the imagination. We successfully countered the insurance company's hardball tactics and strategy of delay. For the doctor, fighting a big insurance company wasn't easy, but he didn't wear down and is glad he didn't surrender.

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