

The Nuts and Bolts of How to

Apply for Disability Benefits if you have ME/CFS or Long Covid:

Webinar Part 1

Barbara Comerford, JD, and

Gudrun Lange, PhD

1. DECISIONS THAT NEED TO BE MADE BEFORE YOU GO ON DISABILITY

- a. **Question:** If my health condition is affecting my ability to work, what is the best way to try to obtain disability benefits? Taking vacation versus FMLA versus requesting an accommodation, versus filing for Short Term Disability or simply resigning?

Important Points:

- ✓ Differences in decision making depending on the disability benefit sought:
 - ERISA (Employee Retirement Income Security Act) Long Term Disability (LTD) insurance (Group plan from either an employer benefit plan or a group professional organization)
 - Private LTD policy (which you purchase from a broker)
 - SSDI/SSI claims (government disability claims)

Key Take aways:

- **Know your Employee Benefit Plan or private LTD Policy terms, if you have one,**
- **Get a copy of the policy/plan before you decide how to proceed,**
- **Remember that SSDI/SSI claims have similarities and differences which you need to know.**

- b. **Question:** WHEN do I need to file for STD/LTD benefits? Do I still need to work or can I file when I am not actively employed anymore?

Important Points:

- ✓ Under most ERISA Disability Plans, you MUST be ***actively at work*** when you file for ERISA STD/LTD benefits. (Most of these plans require you to report your sickness absence to your supervisor and after 7 days, report your intent to file for STD benefits)
- ✓ If you file for SSD/SSI you ***must NOT be working or engaged in substantial gainful activity at the time you apply for benefits.***
- ✓ If you have an ERISA Group disability plan offered by your employer,
 - you must comply with the time deadlines or risk forever losing your right to these benefits.
- ✓ Private disability policies that you purchase directly from a broker usually provides more flexibility (as long as you continue to pay the premium)

- but you must still report proof of loss (the claim) in a timely manner under the policy.
- ✓ With SSDI/SSI claims, you will possibly lose significant retroactive benefits if you sit on those rights hoping you improve. (very common in ME/CFS and Long Covid cases)
 - KNOW THE TIME CONSTRAINTS WITH EACH
- ✓ Inform yourself about the continuation of health insurance under the Employee Benefit Disability plan once you have been approved for disability benefits.
- ✓ Medicare has a 24-month waiting period from your disability onset date once you qualify for SSDI benefits

Key Take aways:

- **In order to file for ERISA LTD benefits, you need to be actively employed (covered under the Employer Benefit Plan).**
- **If you are terminated or laid off before you can file for these benefits you are not actively employed and your entitlement to benefits is gone.**
- **For SSDI and SSI benefits, you must no longer be engaged in substantial gainful activity (SGA) (work) when you apply. Exceptions: sheltered work, non-SGA work**

- c. **Question:** Are all ERISA long-term disability plans the same or are there different types of Long-Term Disability Plans under ERISA?

Important Points:

- ✓ With ERISA cases, Get a copy of your disability plan from your employer or professional association BEFORE you file.
 - Remember often you can access your employer's online portal for employee benefits or less common these days, you can review a written employee benefits manual from Human Resources
- ✓ Online portal access almost always ends when the ERISA Short term disability or long-term disability claim is filed by the disabled employee.
 - so, get what you can while you can.
 - Many ERISA LTD Plans contain common provisions, but often there are material differences between these plans, sometimes within the same company, so know your plan
- ✓ Be aware of the SSDI off-set in almost all ERISA LTD policies/plans.

Key Take aways:

- **Remember, know your Plan/Policy terms before you file.**
 - **To repeat, there are differences between an Employer based or Other Group sponsored (ERISA) disability plans versus a private disability policy you purchase from an insurance broker. If you have both, you need to know the terms of each.**
 - **Your Disability Policy/Plan is your roadmap.**
 - **Know what your ERISA LTD Plan provisions are.**
 - **The same is true for LTD policies you purchase from a broker.**
 - **Pay attention to the deadlines within the document and always review the definitions in the glossary of the LTD policy whether it is an ERISA Plan or a disability income policy you have purchased or both;**
 - **Ignoring definitions and deadlines under a policy or plan is hazardous to your claim. Courts are guided by that language.**
- d. **Question:** Since I am not able to work on a consistent basis and have been absent a lot, my employer offered a severance agreement to me for my signature. It looks generous to me, and I could really use those funds now; should I sign it?

Important Points:

- ✓ **Do not sign a severance agreement until a disability lawyer reviews it.** Many employment lawyers are unfamiliar with ERISA LTD policy terms and conditions. As a result, if you sign a severance agreement without protecting your ERISA LTD rights, you may well have lost the right to sue for those benefits.
- ✓ Most severance documents include ERISA waivers.
 - Please note: ERISA LTD benefits are **NOT vested benefits** so severance agreements commonly state that Vested ERISA pension benefits are not impacted if you sign the agreement. However, ERISA LTD benefits are **NOT** vested pension benefits, they are welfare benefits which are not protected under most of these agreements. **EMPLOYEE BEWARE OF EMPLOYERS BEARING SEVERANCE AGREEMENTS**
 - If you fail to “carve out” non vested ERISA welfare benefits (LTD, health insurance, life insurance etc.) under a severance agreement you may lose your right to litigate a dispute with the ERISA LTD insurer, or other insurers who control other welfare benefits under the plan.
 - And under some ERISA employee benefit plans, payment of LTD benefits is tied to continuation of employee health insurance at an employee subsidized premium rate so carve outs in severance agreements are crucial to preserve those important welfare benefits.

Key Take aways:

- Do not throw the baby out with the bath water to get a quick lump sum payment under a severance agreement that is often considerably less than ERISA LTD benefits which continue to full retirement age and ERISA health insurance benefits at an employee rate (compared to exorbitant COBRA premiums)
- Do not sign a severance document until a disability lawyer reviews it to determine whether there is a need for ERISA welfare benefit carve out language: Do not be penny wise and pound foolish.
- Again, in most cases the severance you are offered by an employer is worth much less than disability benefit payments under an ERISA LTD Plan and in the hands of a capable ERISA disability lawyer, you may well be able to get severance, and preserve your disability benefits.
- While most plans require you to file for SSD, hiring an experienced SSD lawyer who is NOT affiliated with the LTD insurer ensures your interests are protected from a biased handling of your SSD claim.

- e. **Question:** Do I really need an attorney to assist in applying for SSDI/SSI and/or short term and/or long-term disability versus trying it on my own? What are the Pros and Cons?

Important Points:

- ✓ Best to pick a law firm experienced in both STD/LTD and SSDI claims to ensure uniformity in information submitted.
- ✓ Applying for SSDI on your own is not an issue; but if the case is denied, hire an experienced SSDI law firm who can work with your ERISA LTD lawyer.
- ✓ SSA's own statistics show that individuals who hire experienced SSD attorneys have a much higher rate of success in getting claims approved than those who do not.
- ✓ Hiring a lawyer when applying for ERISA STD/LTD benefits as early as possible is best as these cases are controlled by complex regulations and the ideal lawyer is experienced in both SSDI and ERISA STD/LTD claims.

Key Take aways:

- Be wise in weighing the pros and cons of retaining an attorney because you will live with this decision for many years. DO NOT BE PENNYWISE AND POUND FOOLISH!

- f. **Question:** Do I need to be concerned about whether an attorney is licensed in the state I live in?

Talking Points:

- ✓ SSDI: federal jurisdiction-lawyer licensed in a state other than your own can assist you.
- ✓ ERISA: also regulated by federal law-lawyer licensed in a state other than your own can take the case, **but**
 - if litigation is required the lawyer will have to seek admission to the federal court in that jurisdiction on a temporary basis after filing a motion with the court.
 - Or if the insurance company is headquartered in the state where the attorney is admitted, the attorney can simply file suit without a motion.
- ✓ Disability income claims are ruled by state law so a lawyer needs to be licensed in your state.

Key Take aways:

- **If it is an ERISA case the lawyer can file a motion with the court for admission on a temporary basis (known as a pro hac vice application).**
- **Another alternative is for an out of state lawyer to seek co-counsel in that state who is admitted to the federal court in that state.**
- **In ERISA cases, the cases are most often decided before the case is litigated. And the claimant is required to exhaust all administrative remedies before suit can be filed.**
 - **That is because the federal court in ERISA LTD cases most often only decides whether the LTD carrier abused its discretion in denying the claim, and/or that the case was not based on substantial evidence of record.**
 - **That is because, in most of these cases, the insurer is given “discretion” to decide the disability claim. In those cases, the Court is merely a “reviewing Court” not the ultimate decision maker on the issue of whether you are disabled. The Court in such cases is governed by an “abuse of discretion/arbitrary and capricious” standard of review which means the Court must determine whether there was any reason for the determination made by the insurer. If there was a valid reason to deny the claim in the opinion of the Court, it will defer to the decision of the insurer. Remember, the insurer *always* provides a reason, so the knowledge and expertise of an ERISA LTD lawyer in how to show those reasons were improper in your case will make all the difference in the outcome of the case. And unless the underlying administrative appeal addresses why those reasons are improper under the law, a Court cannot consider it in a litigation context.**
 - **In some ERISA LTD cases, a federal court can conduct a de novo review (meaning it can decide the issue of disability) but de novo review only occurs when there is no discretion given the insurer under an ERISA disability plan, or when the insurer’s conduct in reviewing the LTD claim**

has been so egregious or unresponsive that the Court can then decide the issue of disability.

- If it is a disability income policy where you purchased the coverage yourself, the state court or the federal court hearing the claim CAN decide the issue of disability.
- SSDI and SSI litigation- As in ERISA litigation, the claimant in an SSDI/SSI litigation context must exhaust their administrative remedies before suit can be filed. Courts review the claim to determine if it was based on substantial evidence of record, or if there was a violation of the law.

Webinar Part 2

Barbara Comerford, JD and

Gudrun Lange, PhD

YOU DECIDED TO GO ON DISABILITY

- a. **Question:** How do I find a lawyer with a high probability of success? Do they need to have past experience with preparing ME/CFS and/or Long Covid disability cases for SSDI as well as employer/private insurers? Why?

Important Points:

- ✓ Check for names/referrals via advocacy groups.
- ✓ Check out attorneys online with careful attention to ERISA LTD cases they have successfully litigated or articles they have published etc...
- ✓ Many reputable disability attorneys offer a free consultation...use that opportunity to find out about the attorney's familiarity and expertise to file for ERISA LTD disability benefits pertaining to your health condition. And also question them about their view of your disability and their knowledge on how to prepare the case.

Key Take aways:

- **Interview attorneys if you decide to use one.**
- **Ask about the attorney's experience with ERISA LTD and Disability insurance claims, especially those involving ME/CFS and or Long Covid claims.**

- b. **Question:** What type of information and materials do I need to collect to successfully support my case?

Important Points:

- ✓ Medical records that document your medical history current AND past.
- ✓ Start collecting the documents early as it takes a while to obtain copies of medical records (if the provider has MY CHART or other electronic record access, download those records for your own electronic file)
- ✓ Start writing a journal documenting "good and bad" days; it is important to document everyday functional issues. Provide your physician with journal entries and request they be made part of your chart so when insurers send the provider questions about your functional abilities, they can simply refer to those entries or provide them to the insurer.
- ✓ Get evaluated by reputable health care providers who are experts in the field of your disabling impairment who are preferably Board certified, or who have a

longstanding background with treating patients with your illness and are otherwise credentialed in their field of expertise.

Key Take aways:

- **Collect relevant medical records documenting your illness with an evaluation conducted by an expert in the field of your particular illness who can focus on your functional ability (cognitively, physically etc..) and post exertional malaise.**
- **Include neuroradiologic workup if indicated, EEG, EKG, cardiopulmonary exercise test, neuropsychological evaluation, professional/academic performance evaluations etc...**
- **Include statements from someone close to you who observes your functional issues and can support the limitations you describe to the insurer. Think in advance of those who observe you most. This can be a spouse, partner, or other family member, close friend, former work colleague etc..**

- c. **Question:** Do I need to check my medical records or can I just forward them as they are?

Important Points:

- ✓ Once you file your disability claim, the insurer will have access to your medical record.
- ✓ As a result, it is crucial that you review the records to ensure they are accurate. Providers are like everyone else: they make mistakes. To ensure they are accurate, you must review them.
- ✓ If an entry in your medical chart is incorrect, you may ask for it to be corrected/amended. If you identify an error, and bring it to the provider's attention, please ensure that the correction/amendment appears in the chart before sending it to the insurer.

Key Take aways:

- **Check for inaccuracies and inconsistencies in the medical record before you submit them to either SSA or the STD/LTD insurer.**
- **If errors are discovered, have them corrected by the provider promptly and ensure the corrections/amendments have been made before sending them to SSA or the LTD insurer.**

- d. **Question:** Do I need to reveal that I have premorbid (i.e.-before becoming disabled) medical and/or psychiatric condition?

Important Points:

- ✓ **YES, you do.**
- ✓ **Do not hide any part of your medical or psychiatric history.**
- ✓ **This information needs to be incorporated into the medical and neuropsychological reports.**
- ✓ **Remember, if you were able to work with that psychiatric condition prior to becoming disabled, IT WAS NOT THE CAUSE OF YOUR DISABILITY. NO GOTCHA MOMENTS should be handed to the insurer. Sometimes, pre-morbid psychiatric conditions actually help individuals' job performance.**

Key Take aways:

- **Do not hide any part of your medical and/or psychiatric record.**
- **It will be discovered. and the insurer will try to use that non-disclosure against you.**
- **No "gotcha moments."**

- e. **Question:** How do I go about finding a physician or clinical neuropsychologist who specializes in ME/CFS and/or Long Covid? What are the most important items to concentrate on?

Important Points:

- ✓ Inquire about their experience with these conditions, knowledge about available literature, and approach to management.
- ✓ **VERY IMPORTANT:** are they willing to complete the LTD paperwork? If not, you must find another experienced physician or provider who will. Refusal to complete paperwork will undermine your disability claim.

Key Take aways:

- **A health care provider who will not complete disability paperwork and/or who does not accept ME/CFS and/or Long Covid as a serious health condition, is not a provider who should be taking this journey with you.**

- f. **Question:** What happens if my claim gets denied?

Important Points:

- ✓ You should obtain a lawyer experienced in filing ERISA LTD claims/appeals for ME/CFS and/or Long Covid.
- ✓ Knowledge of these conditions is as important as adhering to the specific timelines and deadlines in these cases.

- ✓ Follow the advice of your health care providers for follow up and do not procrastinate when testing etc... is recommended.
- ✓ Insurers will request the medical documentation from your physician/provider and will review those records to determine whether you were compliant. Non-compliance can be used to deny/terminate STD/LTD benefits.

Key Take aways:

- **When should you obtain legal advice: AS EARLY AS POSSIBLE.**

2. **YOU ARE ON DISABILITY**

- a. **Question:** I filed for LTD benefits under an ERISA group STD/LTD plan. Why did the insurer insist I file for Social Security Disability? And should I use the SS vendor they offer?

Important Points:

- ✓ Conflict of interest in SS vendors hired by the ERISA LTD insurer is a problem.
- ✓ LTD insurers want to offset their financial exposure, and in many cases they want to totally eliminate their liability so subtle or not so subtle signals to the SS vendor they retain to represent you often becomes a serious problem for the claimant.
- ✓ Some of these SS insurer vendors are not lawyers.
- ✓ Often these LTD SS vendors present ME/CFS cases as mental health claims to conform to the insurer position that ME/CFS is actually a mental disorder (eg: somatoform disorder) in an effort to reduce the length of time these claims are otherwise payable. Remember, most of these ERISA LTD Policies pay benefits for non-mental disorders to SS full retirement age (presently age 67).
- ✓ However, most ERISA LTD policies ***also contain*** mental health limitations where benefits are only payable for 24 months if the claimant is disabled by a mental impairment. So how the case is presented to SSA matters for BOTH LTD and SSD.
- ✓ You are NOT required to hire the LTD insurer SS vendor, and there is no financial benefit in using their vendor since YOUR SS attorney fee is not subject to offset under ANY ERISA LTD policy.

Key Take aways:

- **LTD insurers are usually protecting their interests, not yours, to claim an offset or to attempt to totally negate your disability.**

- b. **Question:** Am I home free once I have been approved for Social Security Disability or get my LTD insurer to pay my claim either initially or following an appeal?

Important and Key Points:

- ✓ Unless you have accepted a total release and settlement with the LTD insurer, they will keep reviewing your claim until the claim ends.
- ✓ Keep going to the doctor to protect the record for your claim.
- ✓ Follow up on doctors' recommendations to protect the record.
- ✓ LTD Reviews can occur within weeks, months, or annually following approval.
- ✓ Expect an SSA review within a window of a year or three years following approval and abide by your doctor's recommendations re treatment to protect your health AND the documentary medical evidence SSA requires. Under SSA regulations, there are 2 types of continuing disability reviews (CDR):
 - 1. Simple: usually no need to hire a lawyer. SSA will send a single page form.
 - 2. Complicated: SSA regulations require continuing review of disability claims. These forms can be quite lengthy and you should hire an attorney to complete them with you.