

July 14, 2004, Wednesday

SECTION: Pg. 6

LENGTH: 2402 words

HEADLINE: Defining 'disability' means looking at duties

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BODY:

One of the difficulties in analyzing insurance claims involving disability has to do with deciding whether the individual claiming benefits is unable to perform the duties of his own occupation.

The case of *Freling v. Reliance Standard Life Insurance Co.*, 2004 U.S. Dist. LEXIS 7107 (S.D. Fla. 2004) is a very interesting example. An obstetrician/gynecologist, Dr. Freling, accidentally amputated his left index finger and lacerated and damaged the nerves in that finger and in the middle finger in an accident with a circular saw.

Unable to work, Freling made a claim for benefits under a disability insurance policy that pays a monthly indemnity when the insured is unable to perform the duties of his regular occupation. Freling claimed he was unable to perform surgery and other occupational tasks that he had performed prior to the onset of disability.

Reliance Standard's own occupational consultant concurred that even though the injury occurred in the non-dominant hand, Freling could not perform deliveries, Caesarean-section births or other obstetrical and gynecological surgical procedures. Nonetheless, because he was able to perform other duties, Reliance denied the claim.

Freling appealed and submitted evidence from other doctors explaining that his injuries limited him from performing his regular occupation since he would need "full motor and tactile sensation of both hands for the comparison of tissue differences." Nonetheless, Reliance upheld the determination on the grounds that he could practice as a "physician." The insurer also cited an article written by a physician that pointed out the performance of surgery was still possible despite finger amputations.

There was no dispute that the term "regular occupation" was not defined by the policy, nor did the policy contain provisions establishing a framework for determining an insured's material duties. Amazingly, Freling did not dispute the insurer's argument the policy required that "he must be completely unable to perform each and every material duty of his regular occupation to qualify for benefits." *26. Instead, the insured contended that his regular occupation had two material duties, neither of which he could perform: delivering babies and performing surgery.

The court found that Reliance Standard's use of the Dictionary of Occupational Titles, or DOT, was an improper means of determining the insured's regular occupation since the policy refers to "his/her" regular occupation. Under the policy, the meaning of the term "occupation" is not broadened until after the insured receives 24 months of benefits, then the insured has to show the inability to engage in any occupation to continue receiving benefits.

However, during the initial benefit period, Freling claimed the insurer had to consider his own job duties. Such a determination requires analysis of the particular job engaged in by the insured according to *Berkshire Life Insurance Co. v. Adelberg*, 698 So.2d 828 (Fla. 1997), which held that a yacht salesman was entitled to be evaluated for occupation disability as to his ability to sell yachts, not his ability to sell generally. Based on that authority, the court found Reliance Standard's arguments that a broader definition needed to be applied was an unreasonable interpretation.

The court also found that Reliance Standard had been criticized in other cases for applying the DOT mechanically, including *Ebert v. Reliance Standard*, 171 F.Supp.2d 726 (S.D. Ohio 2001), which held:

"The policy does not define the duties of an insured's regular occupation to mean the duties of a 'similar' DOT-specified occupation. Defendant is not in a position where it must determine plaintiff's regular job duties in the absence of an actual job description. The hospital provided a job description as well as a supplemental job description at the request of defendant that further described the duties required while at work at the hospital... There is no reason to assume that a national standard set forth in the DOT defines the duties of plaintiff's regular occupation." *Id.* at 735.

The court also cited *Lasser v. Reliance Standard Life Insurance Co.*, 344 F.3d 381 (3d Cir. 2003), which found that the insurer improperly interpreted the own occupation standard and that it should be interpreted to mean the occupation the insured is performing prior to the onset of disability. Thus, the court found:

"The definition of Dr. Freling's regular occupation requires, at a minimum, reference to plaintiff's specific medical practice, his specialty, duties or what he did on a daily basis in his occupation... His specific practice, specialty or daily duties are referenced only for determining the character and nature of plaintiff's regular occupation. The policy is certainly not construed to provide disability benefits where all that is presented is that the insured is unable to perform a specific job with a specific employer." At *37.

The court next held that Reliance Standard improperly specified "material duties" that were not part of Freling's occupation. The court noted that the DOT does not list "each and every material duty of a listed occupation." The court further found that the plaintiff's interpretation of "material" duties was reasonable and consistent with the District Court opinion in *Lasser*:

"The materiality of a given occupational duty depends upon the importance of that duty to the claimant's professional endeavors, measured as a combination of the amount of time the activity consumes and its qualitative importance to the professional mission. A duty is 'material' when it is sufficiently significant in either a qualitative or quantitative sense that an inability to perform it means that one is no longer practicing the 'regular occupation.'" 146 F.Supp.2d 619, 636 (D. N.J. 2001).

In addition to finding the plaintiff's interpretation of material duties reasonable, the court conversely found Reliance Standard's interpretation unreasonable since the insurer never made an effort to ascertain what duties Freling performed were material. Rather than looking at what the plaintiff did, the court found that Reliance Standard relied entirely on the DOT to define the insured's duties. The court also found the defendant's case citations distinguishable:

"Rather than explain how it determined that all the tasks listed under the selected DOT definitions comprise Dr. Freling's material duties, Reliance instead refers to cases from other jurisdictions in which physicians who were unable to perform surgeries were nonetheless denied disability benefits because of their ability to perform other duties. These cases are also distinguishable. See, e.g., *Dym v. Provident Life and Accident Insurance Co.*, 19 F.Supp.2d 1147 (S.D. Calif. 1998) (plaintiff was asked to list his 'important duties' and was found to be capable of performing minor surgeries, a task to which plaintiff devoted a substantial portion of his practice); *Klein v. National Life of Vermont*, 7 F.Supp. 223 (E.D. N.Y. 1998) (finding that plaintiff did not spend the majority of his time performing surgery at the time of his disability); *Yahiro v. Northwestern Mutual Life Insurance Co.*, 168 F.Supp.2d 511 (D. Md. 2001) (plaintiff claimed that surgery comprised only 25 percent of his practice, and thus surgery could not be the only material duty); *Ames v. Provident Life and Accident Insurance Co.*, 942 F.Supp. 551 (S.D. Fla. 1994) (plaintiff did not dispute insured's determination of his material duties)." At *46-*47.

The court then turned to the question of whether Reliance's factual findings were correct. The court found that Reliance Standard improperly disregarded the evidence submitted in support of the claim, and that the insurer's reliance on an article about performing surgery with fewer than 10 fingers was not only outdated, but that it was also not supportive since it offered no evidence Freling could perform the type of surgery he previously performed.

Hence, the court found the insurer's rationale to be nothing other than "a self-serving and illogical reading of" the supporting evidence. Nor could the court find the insurer's determination reasonable since it "summarily disregarded Dr. Freling's evidence, in the form of an opinion from a practicing OB/GYN, that plaintiff's duties required the use of two hands." At *53.

Instead, the court deemed the benefit denial improper based on a "pecuniary interest in utilizing a broad construction of the policy terms that would allow an automatic application of the DOT. The more duties Reliance can identify as 'material,' the more likely it is that an insured will be able to perform at least one duty and thus be disqualified from the receipt of benefits under the policy." At *55.

The court also criticized the insurer for not obtaining an independent medical examination, finding that the absence of current and relevant support for a conclusion contrary to the evidence submitted by the plaintiff suggests self-interest. Accordingly, the denial of benefits was held to be arbitrary and capricious. The court also refused to remand the case since the "completeness of the administrative record" was not contested.

The judge in this case did an extremely thorough job of dissecting the vocational evidence in order to prevent Freling's coverage from becoming illusory. In addition to Ebert, the court could also have cited *Shipp v. Provident Life & Accident Insurance Co.*, 214 F.Supp.2d 1241 (M.D. Ala., Aug. 16, 2002), which was also critical of an insurer for over-reliance on the Dictionary of Occupational Titles.

Unfortunately for the plaintiff, he failed to challenge the insurer's interpretation of the unable to perform "each and every material duty" provision of the policy. A 6th U.S. Circuit Court of Appeals ruling this spring, *Carr v. Reliance Standard*, 2004 U.S.App. LEXIS 7180 (6th Cir., April 14), interpreted such a provision to mean that the insured cannot collect benefits if he is able to perform any single material job duty, an interpretation that renders the policy virtually illusory.

Although the 4th Circuit reached the same conclusion in *Gallagher v. Reliance Standard Life Insurance Co.*, 305 F.3d 264 (4th Cir. 2002), virtually no one can meet the definition of disability under that policy unless that individual is essentially comatose. Indeed, under such readings of the policy, even the actor Christopher Reeve would not be found disabled since he is able to speak when he is off his respirator, and speaking is a material duty of an actor. Carr and Gallagher are also inconsistent with the generally accepted state of the law that would interpret "any and all" to mean the inability to perform any significant job duty of one's occupation. *Saffle v. Sierra Pacific Power Company Bargaining Unit Long Term Disability Plan*, 85 F.3d 455 (9th Cir. 1996) also provides useful guidance. There, the court pointed out the inability to perform "each and every" material job duty means just the opposite of what the 4th and 6th circuits held:

"Reading 'each and every' literally could mean either that a claimant is not totally disabled if she can perform any single duty of her job, no matter how trivial -- or that a claimant is totally disabled if she cannot perform any single duty, no matter how trivial. There is little question that the phrase should not be given the former construction, as 'total disability' would only exist if the person were essentially unconscious. See, e.g., *Helms v. Monsanto Company Inc.*, 728 F.2d 1416 (11th Cir. 1984) (holding that arbitrator's literal interpretation of 'total disability' as absolute helplessness was unreasonable because it would render the entire plan meaningless and would contradict policies underlying ERISA; rather insured can recover if he is unable to perform all the substantial and material acts necessary to the prosecution of some gainful business or occupation); *Torix v. Ball Corp.*, 862 F.2d 1428 (10th Cir. 1988) (same)." 85 F.3d at 458-9.

Saffle also ruled that any other construction would collapse the definition of "own occupation" disability into a general definition of disability which was clearly not intended. Another case reaching the same conclusion is *Lain v. Unum Life Insurance Co.*, 279 F.3d 337 (5th Cir. 2002), which determined that when the insured is incapable of performing any material job duty under an "own occupation" definition of disability, benefits are properly paid. Also see, *House v. American United Life Insurance Co.*, 2002 U.S. Dist. LEXIS 23396 (E.D. La. Dec. 3, 2002); *Denault v. American United Life Insurance Co.*, 2003 U.S. Dist. LEXIS 24210 (S.D. Ind., Dec. 19, 2003); and *Fleishman v. General American Life Insurance Co.*, 2003 Pa. Super 445; 839 A.2d 1085 (Nov. 21, 2003).

Perhaps most telling, though, is that in another ruling involving the same insurer as in Carr and Gallagher, the court found that interpreting the "each and every" requirement to mean the ability to perform "any" job duty disqualifies an insured from payment is contrary to the manner in which the insurer has historically adjudicated claims. In *Conrad v. Reliance Standard Life Insurance Co.*, 2003 U.S. Dist. LEXIS 19669 (D. Mass., Oct. 31, 2003), defendant's counsel conceded that the interpretation made by the court in Gallagher was inconsistent with the insurer's own interpretation. Carr and Gallagher are therefore aberrations from the accepted state of the law.