

**ADVOCATING A CFS/FMS CASE - ADMINISTRATIVE APPEALS AND LITIGATION
ISSUES, CASE SUMMARIES AND STRATEGIES**

Subjective Disorders: Practical Tips for Utilizing the Medical Facts

11th National Advanced Forum on Litigating Disability Insurance Claims

June 11-12, 2008, Boston MA

Jason Newfield, Esq.

Frankel & Newfield, P.C.

585 Stewart Avenue

Garden City, New York 11530

(516) 222-1600

www.frankelnewfield.com

Disability claims that involve conditions which are either difficult to diagnose and/or difficult to demonstrate objective evidence of the impairment create some of the bigger challenges for counsel representing claimants.

These conditions include Chronic Fatigue Syndrome (“CFS”) and Fibromyalgia, as well as claims for cognitive impairment that either result from these conditions or typical cases of mental health impairment. This paper will seek to provide an overview of some of the recent cases that address “trends” seen regarding such cases, as well as to offer some strategic guidance in handling such cases, both at the administrative appeal level (on ERISA claims) and in litigation.

Where a claim is predicated upon either CFS or fibromyalgia, a host of challenges exist in successfully navigating the claim process. Many times, insurers require “objective evidence” to support a claim, despite the fact that these conditions do not lend themselves to such objective evidence.¹

¹ CFS is defined by a lack of tests to diagnose the condition. See <http://www.cdc.gov/cfs/cfsbasicfacts.htm#diagnosiscfs>

Despite the lack of objective evidence to diagnose these conditions, many insurers have been successful in denying or terminating claims on that basis. When these determinations have been challenged, often times courts have upheld the claim determinations, finding that it was either (1) proper to require objective evidence of the diagnosis; or (2) proper to require objective evidence of the impairment, despite agreement on the diagnosis. While these two issues may be considered quite different, in fact, by permitting insurers to require objective evidence of an impairment, courts have essentially permitted a nearly impossible hurdle for claimants suffering these conditions to clear.

From the CFS claimant's perspective, the better and more reasonable approach is that seen by several courts, holding that "it would defeat the legitimate expectations of participants in the LTD plan to require those with CFS to make a showing of clinical evidence of such etiology as a condition of eligibility for LTD benefits." Mitchell v. Eastman Kodak, 113 F.3d 433, 443 (3d Cir. 1997).²

From the fibromyalgia claimant's perspective, the better and more reasonable approach is that seen by several courts, holding that

"fibromyalgia and its diagnosis are controversial areas in both law and medicine. Moreover, we do not mean to say that a plan administrator will never have a basis to question a diagnosis of fibromyalgia because of its subjective aspects. However, given the nature of fibromyalgia we conclude, as the court did in Brown, that a plan administrator's insistence that objective evidence concerning fibromyalgia be provided

Fibromyalgia is a disorder of unknown etiology. See <http://www.cdc.gov/arthritis/arthritis/fibromyalgia.htm>

² Social Security ruling 99-2P covers claims for Chronic Fatigue Syndrome and helps to explain why many claimants are successful in navigating the Social Security process, while facing challenges in the LTD ERISA context.

may be an impossible burden upon the patient. It appears to us that the better practice is to have a hands on independent examination of the patient, rather than a detached review of medical records.”

Ott v. Linton Indus., 2005 U.S. Dist. LEXIS 14997, * 55 (M.D. Pa. 2005). Another case recognizing the challenges for fibromyalgia claimants is Holler v. Hartford Life & Acc. Co., 2005 U.S. Dist. LEXIS 25099 (S.D. Oh. 2005)(finding that severity of symptoms varies with good days and bad days, presenting challenge for claim consideration) cf Hoffpauir v. Aetna Life Ins. Co., 2007 U.S. Dist. LEXIS 85947 (W.D. La. 2007)(where Aetna argued that “fibromyalgia is not an illness, but is “simply a grouping of individuals with similar symptoms for research purposes...and is generally not intended to be used by clinical purposes.” Id., at *12-13³.

Against that backdrop, numerous courts have taken contrasting views as to what burden to place upon claimants suffering these conditions, and what conduct by an insurer is acceptable or improper when considering such claims. A recent case that was decided in the First Circuit, Denmark v. Liberty Life, 481 F.3d 16 (1st Cir. 2007), provides a striking example of the challenging spectrum that courts can impose upon claimants. In Denmark, the claim termination was upheld by the District Court, and on appeal to the First Circuit, the insurer’s claim determination was upheld. The Court ruled that permitting a requirement of objective evidence of inability to work was acceptable, despite the nature of the condition (CFS). The claimant in Denmark was awarded Social Security Disability benefits, because her severe pain, limitations and restrictions prevented her from performing her past relevant work and lacked capacity for employment. Id., at 18-19.

³ Aetna also argued that “the recommended treatment for persons falling within that grouping is that they continue to work...” Id.

The Denmark court, after acknowledging that it would be improper to require a claimant to provide objective evidence of the disabling diagnosis for a condition that does not lend itself to such proof, nonetheless felt comfortable requiring objective evidence of the inability to work. Id., at 38.

Another case demonstrating the challenges facing claimants is Hernandez v. SBC Comm., 2008 U.S. App. LEXIS 2888 (5th Cir. 2008), a case where the Court held that the claimant provided insufficient evidence of impaired working ability as result of CFS/FMS).

Yet another case where the court upheld the claim termination was Williams v. Aetna, 509 F.3d 317 (7th Cir. 2007), where, despite acknowledging concern about requiring objective proof of the CFS condition, nonetheless was satisfied that it was appropriate to require objective evidence of pain or fatigue's limitations on functionality. The Court thus held that "[b]ecause Williams's functional limitations due to his fatigue could be objectively measured, the Plan did not act arbitrarily and capriciously in denying Williams's initial application or appeal on the basis that the record lacked accurate documentation in this regard." Id., at 323.

These cases are representative of an approach that permits insurers to create hurdles that appear almost impossible to overcome, and are at odds with the approach taken by many other courts. Some of these cases include: Hawkins v. First Union Corp. Long Term Disability Plan, 326 F.3d 918 (7th Cir. 2003); Crespo v. UNUM Life Ins. Co. of Amer., 294 F.Supp. 980 (N.D. Ill. 2003); Ott v. Linton Indus., 2005 U.S. Dist. LEXIS 14997 (M.D. Pa. 2005); Cook v. Liberty Life Assur. Co. of Boston, 320 F.3d 11 (1st Cir. 2003); Mitchell v. Eastman Kodak, 113 F.3d 433 (3d Cir. 1997).

Inasmuch as the new judicial landscape appears to favor an approach that permits an insurer to require objective evidence of the functional difficulties which prevent the claimant suffering from CFS or fibromyalgia (or other conditions that are not readily diagnoses objectively) from working, it is important for claimants and their counsel to implement strategies to meet this rigorous standard.

Thus, this paper will address some of the issues that can be important in developing such support.

1. Neuropsychological testing

Many claimants who suffer with CFS and/or fibromyalgia have cognitive difficulties (and not simply depression). However, simply advising your treating doctor that you are cognitively impaired is unlikely to satisfy the proof of loss requirements in policies. Thus, one source of evidence of impairment can be developed through effective neuropsychological testing.

Many of the battery of tests that can be administered can help to identify how or where a claimant is suffering cognitively, and effective utilization of such testing can help a claimant demonstrate impairment if the results of testing is supportive. One challenge associated with such testing is that typically, a claimant's baseline or pre-morbid intelligence cannot be fully appreciated, potentially leaving a gap where one's functioning is "average" or comparable with age based controls. The issue would be to contrast pre-morbid functioning (particularly where one was at a high level) against current abilities, or deficits.

2. Proper Functional Capacity Testing (“FCE’s”)

FCE’s have long been utilized by insurers investigating disability insurance claims, in a purported effort to determine a claimant’s “functionality”. However, such testing is generally problematic, in that typically, the testing will lack reliability and is not a proper tool for assessment of realistic ability to sustain activity. Never is this more true than with a claimant suffering from CFS, where sustained activity is markedly compromised.

A true FCE is one that can properly test with reliable data, rather than subjective reporting which insurers contend is the “objective evidence”. Two day FCE testing with data developed on post-exertional malaise, through validated and well recognized in the science community protocols, is what is the ONLY meaningful effort to establish a data based nexus to the disabling/impairing condition - with regard to CFS patients.⁴

This is so because on a one day test that is limited to a number of hours, a claimant may well produce acceptable output, yet suffer deleterious consequences shortly thereafter. On two day testing, however, the literature and data reveals that CFS patients suffer severe post-exertional malaise which would provide strong evidence that such a claimant lacks meaningful capacity to engage in sustained activity.

While only a handful of groups are currently carrying this out - many other

⁴ VanNess M, Snell C, Stevens S. Diminished cardiopulmonary capacity during post-exertional malaise. *Journal of Chronic Fatigue Syndrome* 2007; 14(2): 77-85; and Ciccolella M, Stevens S, Snell C, VanNess M. Legal and scientific considerations of the exercise stress test. *Journal of Chronic Fatigue Syndrome* 2007; 14(2): 61-75

outfits are equipping insurers with interpretations of performance that are skewed by an inherent bias and which do not accurately assess or reflect the impact of repetitive activity has upon a CFS patient. One court recognized the difficulties in relying upon FCEs. Stup v. UNUM Life Ins. Co. of Amer., 390 F.3d 301 (4th Cir 2004). In Stup, the court was concerned about the validity of FCE testing and the insurer's reliance upon the FCE results in its claim determination. Byrum v. Delta Family Care Disability and Survivorship Plan, 2004 U.S. Dist. LEXIS 23325 (N.D. Ga. 2004) is a case where the FCE results were found not to be sufficient to support the termination of claim, where they were contradicted by support from the claimant's doctors.

Thus, in this regard, a claimant has two bad choices if attending an abbreviated, one day FCE. Either effort as great as possible and then beyond, (suffering for many hours, days, or possibly weeks) as the result of "overdoing" it, or restrict yourself to not exceed limits (which are typically deconditioned) and be accused of self limiting behavior, interpreted to mean one did not "try". Either way permits a bad result to be imparted upon a Claimant. Lamanna v. Special Agents Mut. Ben. Ass'n, 2008 U.S. Dist. LEXIS 17977 (W.D. Pa. 2008) ("We further recognize that tests of strength such as a functional capacity evaluation ("FCE") can neither prove nor disprove claims of disabling pain, nor do they necessarily present a true picture in cases involving fibromyalgia where the symptoms are known to wax and wane, thereby causing test results potentially to be unrealistic measures of a person's ability to work on a regular, long-term basis."); Nickel v. Unum Life, 2008 U.S. Dist. LEXIS 16777 (E.D. Mich. 2008)(Defendant's reliance on doctor's interpretation of the FCE is arbitrary and capricious).

Accordingly, I have ordinarily taken the position that the contract language seen in most, in fact almost all policies, does not specifically require a claimant to under a FCE, and thus, we challenge the right to such an examination, which we also note lacks safety protocols (and we have seen multiple FCE caused exacerbations), and reliability (other than something that can validly and repetitively produce actual data on performance). See Ridge v. Hartford Life & Acc. Ins. Co., 339 F.Supp.2d 1323, 1336 (M.D. Fl. 2004)(holding that insured is not required to submit to FCE where the plan fails to define terms “FCE” or examination). In Ridge, Hartford had terminated the claim based upon the refusal to attend an FCE, despite the claimant having issues and concerns with the FCE that were not addressed by Hartford. The Court found that termination upon such grounds was wrong. See also Boardman v. Edwards Ctr., Inc., 2004 U.S. Dist. LEXIS 9250 (D. Or. 2004).

Thus, when faced with an insurer requested FCE during a pending claim, careful analysis need be undertaken regarding the specific policy language and interaction with the insurer to address what contractual language is relied upon for such a request. If, and only if the contract has language appropriate for requiring an FCE should a claimant then address the other important issues including safety during the examination and the reliability (or lack thereof) of the proposed testing.

3. Additional Collateral Evidence

In addition to gathering appropriate medical support to document impairments resulting from either CFS or fibromyalgia, claimants can and should avail themselves of other evidence, including personal statements from themselves, friends, family members and/or co-workers, as well as diaries, symptom logs, or other

contemporaneous information that can document how one's condition actually impairs them from functioning.

These statements should be from "witnesses", such that they can offer anecdotal evidence of events or activities which the suffering claimant either performs, or cannot perform. Contrasting the pre-morbid claimant with the current condition can also offer valuable insight into how the claimant's activities have changed due to their condition. See Connors v. Connecticut General Life Ins. Co. 272 F.3d 127 (2d Cir. 2001). A claims administrator abuses its discretion if it discredits a plan participant's complaints of pain, weakness or fatigue without substantial evidence that the participant is exaggerating.

A well presented administrative record will typically include such statements from family, friends and co-workers, along with the claimant. If litigation becomes necessary, it is wholly appropriate to embrace this evidence and additional support for why the claimant was/is impaired.

4. Supportive Treating Providers

Having your doctor state that you are "disabled" is not going to satisfy a claimant's proof of loss obligations. Rather, a claimant must have his or her doctor articulate functional limitations and describe restrictions that can be harmonized with the occupational requirements, such that one can demonstrate that a medical condition is impairing one from working. This approach is the same regardless of one's medical condition, but is highlighted in the context of CFS/fibromyalgia claims.

The treating doctor **MUST** be in a position to address issues of functionality and to articulate how and why the patient is restricted in ability to work. The

challenges are much greater in these types of claims, because the claimant's restrictions are often based upon self report and subjective complaints. While there are certain types of materials that might work better than others for doctors to utilize, the theme nonetheless is to have the treating doctor appreciate the nature and severity of the condition's impact upon one's functionality, so that the doctor can articulate functional limitations and restrictions which can be harmonized with occupational requirements.

OTHER ISSUES/CONSIDERATION WITH CFS AND FIBROMYALGIA CLAIMS

There are many insurance contract which contain provisions which limit benefits for what is known as "self reported" claims. These policies may define various conditions, and include CFS or fibromyalgia, or may be silent and just limit benefits where no objective evidence exists for the diagnosis. This is a dangerous arena for CFS claimants, who can be ensnared in a contract provision which is essentially discriminatory but permitted nonetheless (no successful legal challenges found).

An example of policy language which could implicate the CFS/Fibromyalgia community reads as follows:

“Disabilities, due to sickness or injury, which are primarily based on self reported symptoms...have a limited pay period up to 12 months”... The Plan defines “self reported symptoms” as: the manifestations of your condition which you tell your doctor, that are not verifiable using tests, procedures or clinical examinations, standardly accepted in the practice of medicine.”

One can easily imagine how this claimant population can fall into such contract language and suffer a limited pay period for the claim.

Moreover, because often times claimants with either CFS and Fibromyalgia suffer depression as a secondary condition, due to being unable to perform work or many other activities, typical Mental & Nervous (“M&N”) limited pay provisions often come into play. Time and again, an insurer facing a claimant with CFS or fibromyalgia will state that the claim is approved, but limited to a defined period for M&N claims.

Since many of these files are reviewed solely on the basis of a paper record by doctors hired by the insurers, it is not surprising that such providers will regularly opine as follows:

"A high percentage of fibromyalgia patients have an underlying psychiatric disorder such as depression, anxiety, somatization and malingering as the underlying etiology of there somatic complaints."

Other professionals who are often retained by insurers to review files have offered presentations to the disability insurance community suggesting that these claims are essentially all in the heads of the claimants, without any physical basis. This type of self serving “ignorance” of the conditions presents challenges to the claimant community, as it appears that insurers may rely upon doctors who fail to have the appropriate background and knowledge sufficient to provide a claimant with a full and fair review. See *Woo v. Deluxe Corp.*, 144 F.3d 1157 (8th Cir. 1998)

Next, a discussion about claimants suffering from CFS or fibromyalgia, or for that matter, any illness that is not marked by clearly impairing outward signs, is not complete without addressing the issue of surveillance. Surveillance is a common technique employed by insurers, typically in an effort to develop evidence which will

contradict information provided by a claimant or his/her treating doctors. While this “evidence” can prove significant, there are some concerns about how such material is used.

There can be little argument that where surveillance occurs over a period of consecutive days, revealing significant activity levels which are at odds with that reported by a claimant, such evidence will be highly probative against a claimant. However, what is really at the core are those situations where claimants are “captured” engaging in sporadic, limited activity, which is then utilized by insurers to refute claims. These situations are especially problematic because this claimant population is not claiming that they have “no activity” levels, but, rather, cannot sustain functioning. Many courts have chastised insurers for such conduct. Carugati v. LTD Plan for Salaried Employees, 2002 U.S. Dist. LEXIS 4774 (N.D. Ill. 2002). There, the court held that the video surveillance, which only documented Carugati walking her dog and climbing a small step ladder, did not shed light on her ability to function at a full-time job. “Under the [insurer’s] plan, total disability is not equated with a plan participant's inability to walk, care for oneself, or perform routine daily functions but a participant's inability to engage in employment.” *Id.* at *24; Morgan v. UNUM Life Ins. Co. of America, 2002 U.S. Dist. LEXIS 17663 (D. Minn. 2002), *aff’d* 346 F.3d 1173 (8th Cir. 2003).

In Morgan, UNUM’s denial of a claimant’s disability due to fibromyalgia rested upon video surveillance, which captured the claimant sitting outside, reading papers and books, speaking on the phone while sorting papers, twisting and bending at a fitness center, and having a two hour lunch with friends, coupled with exercise, including using a walking machine, stair stepper and stationary bike, doing stomach crunches and using free weights. *Id.* at * 14. In denying the claim, UNUM

determined that these activities were not compatible with fibromyalgia. Id.; see also Clausen v. Standard, 961 F.Supp. 1446 (D. Colo. 1997) (where the court held that video surveillance of the plaintiff walking her dog and driving bore little relevance to her ability to perform her occupational duties with any reasonable continuity); Thivierge v. Hartford Life & Accident Ins. Co., 2006 U.S. Dist. LEXIS 25216 (N.D. Cal. 2006) (finding that surveillance of plaintiff walking, driving, and doing errands did not mean she was able to work an 8-hour a day job); Mullaly v. Boise Cascade Corp. LTD Plan, 2005 U.S. Dist. LEXIS 387 (N.D. Ill. 2005) (holding that surveillance showing plaintiff's ability to complete certain activities for limited periods of time did not demonstrate her ability to work full time); Chan v. Hartford Life Ins. Co., 2004 U.S. Dist. LEXIS 17962 (S.D.N.Y. 2004); Osburn v. Auburn Foundry Inc., 293 F.Supp.2d 863, 869-70 (N.D. Ind. 2003)(holding that reliance upon surveillance video was arbitrary to determine ability to perform occupational duties).

Lastly, an insurer's use of vocational assessments is a critical issue for claimants who suffer from CFS and/or fibromyalgia. Typically, such vocational reviews will be conducted at the time that the claimant's benefit eligibility will transition toward a definition of disability known as "any occupation". While the definition comes with numerous variations, at its core, an insurer typically defines a claimant as being able to work in one of several physical demand capacities. For these types of claimants with CFS or fibromyalgia, a sedentary classification of physical demand tolerance is often determined. The flaw with the analysis in this claimant population, however, is that the insurer will often ignore the cognitive requirements of any position, relying solely upon physical capabilities to determine that a claimant can work a sedentary job.

Thus, when advocating a claim on behalf of claimant suffering from CFS and/or fibromyalgia, there are a number of effective advocacy tools to be utilized, as outlined above. That said, caution must be offered as to how the insurer's tools can also be neutered, and ultimately, how cases can be won or lost during litigation by the manner in which the record is created.