

Legal Issues - Hiring A Lawyer / Tips

Accessing Justice: Selecting and Instructing a Legal Adviser

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There are several factors that must be considered when selecting and instructing legal counsel to advise you with respect to the denial of a claim for benefits, either by a long-term disability insurance carrier, the Canada Pension Plan, The Workplace Safety and Insurance Board, or some other source. For people with Chronic Fatigue Syndrome and Fibromyalgia, these factors take on an even greater significance in view of the effects of the disability on the individual, the complex nature of the disability, the serious need of the individual for funds from the source and the fact that this is often an individual's first contact with the legal community at a time when they are quite vulnerable and desperate.

In selecting a legal advisor, one should identify the qualifications and experience one is looking for. For people with Chronic Fatigue Syndrome, they will often be looking for someone with experience in insurance law, pension and benefits, personal injury, employment and general civil litigation. Few lawyers have experience dealing with cases specifically involving Chronic Fatigue Syndrome and Fibromyalgia. The National ME/FM Action Network has a directory of lawyers who do have experience with its members. It is obviously advantageous to have a lawyer who is knowledgeable about the medical research as well as the legal precedents relating to Chronic Fatigue Syndrome and Fibromyalgia and entitlements to benefits. Selecting a lawyer with this detailed knowledge and experience will cut down the time required by you as clients to explain the nature of your condition as well as the time required by the lawyer to review the medical documentation you will provide to them, and the relevant legislation and case law precedents applicable in your situation.

Another significant issue is the timing of the selection of a lawyer and their first involvement in your fight to obtain benefits to which you are by law entitled. There are a variety of situations which are common to many people with Chronic Fatigue Syndrome and Fibromyalgia. Often, people will be denied their entitlement to benefits from the start upon application for the benefit. Alternatively, people may receive a response that additional information is required and requesting that the individual submit to an Independent Medical Evaluation (IME), or a Functional Capacities Assessment. These assessments are with physicians or other health care providers selected by and paid for by the insurance company. In the vast majority of cases, the independent medical examination involves painfully grueling assessments that will leave you sore for days and weeks to come. In the vast majority of cases, they will result in

assessment reports from a physician or health care expert indicating that you are not totally disabled and are able to engage in some kind of work. Rarely will they identify what that kind of work is, how it could be obtained or whether or not it even exists.

It is my belief that early intervention from a legal advocate is usually in the best interests of the individual battling an insurance company or Canada Pension Plan for benefits. The reason for this is two-fold. First, it puts the insurance company or Canada Pension Plan on notice that you have a legal advocate to represent your interest in any process relating to your benefit entitlement. Second, it relieves for you the stress of dealing personally with the insurance carrier or other party on a matter which is emotionally and physically draining on you at a time when you are medically least able to afford this.

It is not uncommon that a letter or telephone call from a lawyer may assist to resolve an insurance claim immediately and after a denial letter has been received. Alternatively, it enables you to learn and understand the reasons behind the decision to deny your benefits and to pin the insurance carrier or Canada Pension Plan down on their reasons for rejection of your claim and their position with respect to medical and other supporting evidence which you have provided to date.

With respect to situations where benefits are not refused, but rather an insurance carrier has taken a delay tactic and required additional medical evidence from you, or your physicians, a legal advisor can assist in ensuring that necessary and appropriate medical evidence is obtained from your physician, or another appropriate specialist. In situations where the carrier demands an independent medical assessment by a physician selected by them, having a legal representative will enable you to ensure that the process of the assessment is as fair and unbiased as it can be. It may enable you to object to an assessor whom you know has a history of working with a particular insurance company and of denying claims to benefits in their assessment reports. Having a role to play in the assessment process can ensure a fairer and less biased assessment process which may assist an insurance company to make the determination that your claim is valid. Alternatively, a legal advisor can advise you of the wisdom of submitting yourself for an IME and provides a buffer between you and the insurer with respect to this and other decisions.

Most insurance policies entitle the carrier to require you to participate in an IME as part of the contract. However, where the carrier is already in breach of the contract by refusing to pay benefits despite medical evidence of disability, or where it is not in your medical best interest to submit to an IME, it may be appropriate to refuse an IME. Such a decision has obvious legal implications and should be discussed with a lawyer.

Very commonly, lawyers are consulted once an individual is denied their claim for benefits or when they are cut off benefits after a period of time, usually after the definition change date where the definition of disability changes from disability from performing the duties of any occupation for which one is qualified by reason of education and training. One of the advantages of having a solicitor involved early in your case is that they can assist your physician in providing the kind of relevant medical information that the insurance carrier and Canada Pension Plan will require in order to substantiate your claim for disability benefits.

Clients should be aware of the time limitation which affect a legal claim. The most common is the requirement that legal actions be brought within one year of an insurer's decision to deny a claim. This is an important reason for early legal intervention.

Your first appointment with your lawyer will be one of the most significant dates in the battle to overcome the barriers to obtain benefit entitlements. It is essential to be prepared, to be alert and to understand what it is a lawyer is going to require of you in order to best advocate on your behalf. My practice is to require clients to prepare a chronological summary of their communications with the insurance carrier, the onset of their disability, their employment history, communications with physicians and other relevant information to their claim. The reason I have the client prepare this information themselves is so that they can familiarize themselves with the timeline, the events that led up to their appointment with me and to ensure that they are in the best position to provide me with the information I will require during that first appointment. Moreover, a written chronological summary provided to me by the client can then be used by me in preparing correspondence with the insurance carrier, medical practitioners and the client with respect to their case. Along with the written chronological history, I also ask my clients to provide me with copies of all insurance documentation and communications as well as all medical reports, letters, clinical notes and other information relevant to their claim. It is my practice to ensure that clients always retain copies of their documentation. I also ask that they provide me with a list of contact people, including physicians, employer contacts and insurance company contacts, with addresses, telephone numbers and fax numbers. This assists me in knowing who the client has been communicating with previously and advising me as to who I will need to be communicating with to process the case.

Given the difficulties with memory and concentration frequently associated with CFS and Fibromyalgia, it is not uncommon for my clients to bring with them a spouse, relative or a friend to be with them during the appointment so that this person can assist them to fill in gaps in information provided, or to assist them to remember what information they received from me in my office. It is also my practice to confirm in writing information received from the client and instructions and advice provided. This includes preparation of a written "To Do" list for the client before they leave the office.

It is important to remember that a lawyer is a professional who is paid for their time, knowledge, expertise and reputation. Do not expect your lawyer to work for free. If they do, it is quite possible that your case will be put on the back burner and that your interests will not be protected. It is common for lawyers to request a retainer for services they are going to render, including the initial consultation with you.

Lawyers' fees are typically based on an hourly rate. Contingency fees are prohibited in Ontario. A contingency fee is where a lawyer agrees to take on a case without pay, but agrees to accept a certain percentage of any settlement or court award granted in the case as payment for their services. If they are not successful, a lawyer will not recover any fees. If successful, the lawyer would be entitled to a percentage of the settlement or award. I do not believe that contingency fees are in the best interests of lawyers or clients in the conduct of claims for benefits entitlement. As indicated above, lawyers are professionals who earn their living based on their time, expertise and reputation. If lawyers are not compensated for their time, they will not be able to earn a living, will not be able to pay their overhead or service their clients effectively. Moreover, if lawyers are confronted with a situation where they have money on retainer from one client and only the prospect of recovery several months or years from now for you, it is quite possible that your case will be assigned a much lower priority than the client who has already paid money on retainer for the lawyer's services. This may sound rather callous given your circumstance of having no money, no employment, and no foreseeable income prospects. However, as a lawyer who is often consulted by clients who have previously entered into contingency or deferred billing arrangements with other lawyers which have broken down, it is my experience that the best legal services are provided to those clients who have committed themselves to the process by way of a financial retainer, however large, rather than simply leaving the risk and responsibility for the litigation with the lawyer alone.

Whatever financial arrangement is agreed to between lawyer and client it is always wise to put this agreement in writing. This will avoid confusion and misunderstanding. It is also important for both lawyer and client to be clear about financial responsibility for the first appointment. While many lawyers have a practice of providing a free initial consultation, others are only prepared to provide the first half hour free. Some are not prepared to offer any free time. This usually occurs by way of the initial telephone conversation prior to a meeting with the client, but may entail the first one half hour of an initial meeting.

The legal process is something that is rarely understood by clients who come to a lawyer with insurance claims. The process is usually commenced where an insurance company terminated benefits or denies an application for benefits. Following an assessment of the strengths and weaknesses of the case with the client, my practice is usually to provide the insurance company with one

last chance to reconsider their decision to reinstate or grant benefits under the policy based on new medical evidence. If the insurance company refuses or fails to reinstate benefits following a reconsideration application, a statement of claim then has to be filed with the Ontario Superior Court of Justice. My practice has typically involved suing insurance companies for breach of contract. However, I have recently had occasion to sue medical advisors through insurance companies for negligence, inducement to breach of contract and tortious interference with contractual relations based on their often reckless and cavalier approach to independent medical assessments conducted on behalf of insurance companies. Once a statement of claim is filed, the defendants are then required to provide a statement of defence within twenty days. This period may be extended to thirty days. Once the exchange of pleadings is concluded, the parties then must exchange documents which are relevant to the issues in dispute. This is often the first time that complainants will receive copies of the documentation on which the insurance company relies for its denial, copies of the full text of the insurance policy and other relevant information to the case. Once the exchange of documents is concluded, parties then have the opportunity to examine the other in what is referred to as a discovery examination. During this phase of the legal process, the insurance company lawyer will have the opportunity to question you about your condition, what steps you have taken to treat and remedy your condition and about your limitations and abilities with respect to work, the activities of daily living and other relevant matters. Your counsel also has the opportunity to examine a representative of the insurance carrier as to the reasons for their denial of your claim and other relevant matters.

Following the discovery stage of proceedings comes a pretrial conference. This is a conference where parties submit their theory of the case to a judge. Counsel, either alone or occasionally with their clients, appear before the judge who then provides an independent assessment of the case usually indicating its strengths and weaknesses from both perspectives and often providing an indication as to how they would rule if they were hearing the case at a trial. Prior to the pretrial conference, or after, it is not uncommon for the parties to engage in settlement discussions or mediation in an effort to resolve the dispute. Having gone through discovery examinations, parties will have a clearer understanding of the other sides' perspective and will be in a better position to assess the strengths and weaknesses of their case as they proceed forward to a trial.

A trial of an insurance claim involving a client with Chronic Fatigue Syndrome or Fibromyalgia usually raises complex medical/legal issues. It often requires expert testimony from physicians and health care specialists who require a fee for their services, as well as from the individual claimants. As a result, trials of this kind tend to be lengthy often lasting as long as two weeks in duration. They also tend to be extremely expensive. A process leading up to and including a trial of a matter could easily cost between \$30,000 and \$80,000. That said, only about four percent of all civil litigation cases, a figure which is much less for

cases involving people with Chronic Fatigue syndrome and Fibromyalgia, actually go to trial.

The process of selecting a legal advisor, investigating their qualifications and experience and the timing of their selection, can all be critical to your success in realizing your lawful entitlement to benefits. The first appointment with your legal advisor will often set the tone for an assessment of the strengths and weaknesses of your case and a direction as to how to proceed. Discussion about fees should take place during that first appointment and even prior to it so that both parties are clear as to the cost, if any, for an initial consultation and for the processing of a claim. An initial consultation usually lasts between one and one-and-a-half hours. Lawyers as professionals need to be paid for their time. Lawyers who are not paid for their time may not be providing their best and highest quality legal services to you. The legal process can be a lengthy, emotionally, physically and financially draining process. It is not a process which should be entered into lightly and it should not be entered into without a clear understanding of the risks, implications and requirements to see the process through. There are no guarantees. However, if you plan, prepare and communicate effectively with your legal advisor your chances of success are enhanced and the likelihood of receiving your full entitlement to benefits is increased.

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