COVID-19 and Disability Insurance for Individuals Living with ME/CFS

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Ripon and Torrance, CA
Our Speakers

Andrew M. Kantor  Associate

Andrew's practice is focused primarily on helping individuals obtain wrongfully denied disability and life insurance benefits in both the ERISA and non-ERISA (bad faith) policies. Since beginning his career at Kantor & Kantor, Andrew has helped hundreds of clients secure wrongfully denied disability. Andrew has recently been named as a member of the Community Advisory Council at the Solve ME/CFS Initiative. Andrew also serves on the Board of The Elder Law and Disability Rights Center. In addition, his efforts have been recognized by Super Lawyers, being named a 2019 and 2020 Rising Star in Southern California.
Our Speakers

CHRISTOPHER R. SNELL, PH.D.

Dr. Christopher Snell has over 25 years’ experience studying ME/CFS and in particular the post-exertional fatigue and malaise that typifies this illness. He is part of a group that was among the first to advocate for use of cardiopulmonary exercise testing to measure fatigue in conducted more exercise tests with patients than anyone. Their two-day exercise testing protocol has potential to be a biomarker for both pathology and function in ME/CFS. Dr. Snell is a former chair of the Chronic Fatigue Syndrome Advisory Committee (CFSAC) to the U.S. Secretary for Health. He has published extensively on ME/CFS and lectured in the USA and abroad, including invited presentations for the National Institutes of Health and the Food and Drug Administration.
Overview

- Connecting COVID-19 and ME/CFS
  - What We Know
    - What Dr. Snell and Workwell have learned from past epidemics (SARS, etc.)
    - How investigative tools such as CPET are vital
Nervous Disorder (ME/CFS?)

Exclusion

No payment will be made under this insurance for any one benefit period in excess of 2 years for any disability contributed to or caused by any mental disorder, including but not limited to, anxiety, depression, stress, fatigue, exhaustion, psychiatric complications of physical disorders, drug or alcohol abuse, cognitive impairment, behavioral disorders or any complications thereof.
Post Exertional Malaise

Post-exertional malaise (PEM), the cardinal feature of ME/CFS, occurs after exposure to a stressor. It is characterized by the worsening of symptoms, aggravating the course of the disease and the quality of life of patients.

J Transl Med 18, 246 (2020).

Patients who experience major post-exertional malaise have a greater burden of psychological distress than those whose PEM is minimal or non-existent. Unsurprisingly, the sicker people are, the more likely they will experience depression or related emotional turmoil for any number of reasons.

Virology Blog, 12.29.2019
The Gold Standard

CPET testing is administered over 2 days when the patient pedals on a stationary bike with increasing resistance.

It monitors cardiovascular, respiration and recovery responses, workload, effort and metabolic response/oxygen consumption.

Decreased performance on day two objectively documents functional impairment (PEM).

CPET is considered the “gold standard” to objectively document PEM in ME/CFS patients.

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Objective Evidence

CPET can help differentiate between pulmonary, cardiac, neurologic, muscular and psychological basis of dyspnea (breathlessness) that limits exercise performance.

Two-Day CPET to document functional capacity on Test-1 and Test-2; identify bio-markers consistent with PEM.

American College of Cardiology
# CPET & PEM

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<tr>
<td>V/AT Watts</td>
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Conclusions/Prognosis

Low peak oxygen consumption, early onset of oxygen consumption at the ventilatory/anaerobic threshold (V/AT) and symptom exacerbation post activity indicates significant impairment.

The safe limit for sustained activity is an oxygen consumption of around 5.4 ml/kg/min.

The estimated oxygen requirement for seated office or computer work is 5.25 ml./kg/min.

For normal office tasks, the energy cost rises to 10.5 ml/kg/min which is above the V/AT.

Energy expenditures at or close to this level risk symptom exacerbation and delayed recovery.

Even a sedentary job would require more energy than can be safely sustained.
CPET & ME/CFS: The Story So Far

Review of two-day CPET studies and meta-analysis of the differences between ME/CFS patients and controls. Mean values for oxygen consumption and workload at peak and at ventilatory [anaerobic] threshold were lower on the 2nd day CPET in ME/CFS patients and increased in the controls. The difference between patients and controls was highly significant for workload at ventilatory [anaerobic] threshold which may reflect the functional impairment associated with PEM.

J Clin Med. 2020 Dec 14;9(12)
Covid 19: A Forever Disease?

A significant proportion of COVID-19 patients discharged from hospital experience ongoing symptoms of breathlessness, fatigue, anxiety, depression and exercise limitation at 2-3 months from disease-onset.

Four gastroenterologists, an infectious disease specialist, a hematologist, a cardiologist, an ear, nose and throat specialist, a physiatrist, an integrative doctor, a neuropsychologist, a neurologist, an acupuncturist, an occupational therapist.

Endoscopy, colonoscopy, CT scan, brain MRI, multiple blood tests.

Lessons Learned

High rates of persistent and often debilitating fatigue are well documented among survivors of SARS, Ebola, Epstein-Barr (the “mono” virus), numerous influenzas, and multiple mosquito- and tick-borne viruses.

It is estimated that one-fifth of survivors from the 1918 Spanish flu pandemic never fully recovered but suffered reduced health with a baseline of chronic fatigue.

ME/CFS By Any Other Name

The clinical and sleep features of chronic post-SARS form a syndrome of chronic fatigue, pain, weakness, depression and sleep disturbance, which overlaps with the clinical and sleep features of FMS and chronic fatigue syndrome.


The discordance in the results of pulmonary function and exercise testing supports the recommendation to use CPET in impairment evaluation, especially in patients with symptoms inconsistent with the degree of impairment defined by resting pulmonary function testing.

European Respiratory Journal Sep 2004, 24 (3) 436-442
CPET & COVID 19

CPET is an established investigative strategy for many clinical scenarios (…). The list of indications is likely to be extended and include post-COVID-19 complications in a currently unquantified caseload of patients.

British Journal of Anaesthesia, 125 (4): 447e449 (2020)
CPET & Covid: The Story So Far

CPET was stopped due to fatigue, myalgia and dyspnea (breathlessness). Anaerobic threshold was reached earlier in patients.

Despite the use of CPET, dyspnea could not be explained by cardiac, pulmonary or ventilatory limitation in all patients.

The gap between peak work rate and peak oxygen uptake can be explained by an early switch to anaerobic metabolism. Muscular deficiency and thus metabolic limitation might contribute to dyspnea in most patients.

Multidisciplinary Respiratory Medicine 2021; 16:732
When you can’t tell if your chest tightness and difficulty breathing are due to anxiety or the coronavirus
Overview

- The Disability Lawyer’s Perspective

  - What attorneys and their clients can expect when they submit Long Term Disability (LTD) claims that are related to COVID-19
What is Long Term Disability (LTD) Insurance?

- **Provides income replacement** when disabled due to injury or illness
- **Must pay premiums** either through employer or as an individual (pre- or post- tax dollars dictate if benefit is taxable)
- **Define disabled** as inability to perform “own occupation,” “any occupation,” or have a transition from the former to the latter (usually after 24 months of benefits)
- **Elimination period** is generally between 90 days and 1 year (180 days is most common) before benefits start
What are Common Features of LTD Insurance?

- **Maximum benefit date** provides benefits for a set duration or to a set age (usually age 65 or Social Security Normal Retirement Age)

- **Benefit amount** either fixed amount or percentage of income (usually 50-70% up to a maximum amount)
  - Less “other income” – i.e., Social Security

- **Working while disabled (Residual disability)** pays a smaller benefit if working (regular occupation or different occupation) but diminished earnings due to injury or sickness
Two Legal Frameworks: ERISA v. NON-ERISA

Benefits you have through your Employer (even if you paid some or all the premium) are governed by federal statute called the *Employee Retirement Income Security Act* (ERISA)

Three common exceptions:

1. Government employee (federal, state, county, city, possibly quasi-government like Federal Reserve)
3. “Safe Harbor” – 29 C.F.R. Section 2510.3-1(j)
Two Legal Frameworks: ERISA v. NON-ERISA

A disability policy you purchased on your own, often through an insurance agent, will generally be governed by *state law*

-unless part of employee benefit plan;

i.e., individual insurance to supplement group coverage
ERISA Framework

- ERISA is a federal law that governs your rights
  - *No individual underwriting, low premiums!*
  - If you are denied, you must appeal or you may be denied the right to file a lawsuit
  - Insurers may be given great leeway in deciding claims
  - No jury trials: If you have to file a suit to get your benefits, Federal judges make decisions
ERISA Framework

- ERISA is a federal law that governs your rights
  - Offsets are taken for certain worker’s compensation benefits, social security and other disability benefits
  - *The Big Catch: Insurers are shielded from damages outside of benefits they owed you in the first place, and potentially some attorneys’ fees.*
    - This is the reason ERISA insureds often face a much more uphill climb than similarly situated individuals who purchased insurance through a broker.
  - No consequences for “bad faith”
Non-ERISA Insurance

- Typically no appeals required before you can file a lawsuit
- Juries can make the decision on your case
- Usually, no offsets are taken for social security or other disability benefits
- Insurers face the possibility of significant damages beyond the benefits owed if a jury finds bad faith.
Submitting a Claim

A. Always start with the language of the policy.

B. Exclusions and Limitations

C. How to Support your Claim.

D. Pitfalls to avoid.
A. START WITH THE POLICY: What Coverage Do You Have?

Read Your Plan or Policy

Without it, you don’t know the rules.

If you don’t have it, ask for it from your employer– IN WRITING VIA A TRACKABLE METHOD.

Certified letter, UPS, FEDEX, fax, and perhaps email are all acceptable methods of communication - just make sure you can track receipt.
B. Common Exclusions & Limitations That Impact People with ME/CFS

- “Objective Evidence” requirements & “Subjective Symptom” limitations
- “Mental/Nervous” limitations
C: How to Support Your Claim

- Timely completion of required claim forms
  - Claimant’s Statement
  - Attending Physician Statement
  - Employer’s Statement (ERISA)
  - Authorization for Release of Medical Information
- Usually telephonic interview (opportunity to not just answer questions but explain your disability)
- Provide roadmap to all medical records supporting diagnosis and disabling symptoms (all doctors and medical providers) / also document all co-morbid conditions
C: How to Support Your Claim

- Detailed job description
- If supportive to you and your claim, provide:
  - Social Security Award, State Disability Award, VA rating, Disability Retirement, etc.
  - Performance reviews
  - Personal Statement or Health Journal (diary of symptoms)
  - Statements from supervisor/co-worker/subordinates, caretaker, family and friends
C: How to Support Your Claim: Treating Physician

- Is your doctor a specialist?
- Document medication side effects
- The lengthier the treatment relationship, the better – it’s OK to get a second opinion but “doctor shopping” looks bad
- Make sure your doctor understands what your job entails – physical and cognitive aspects of occupation
C: Document your symptoms in your medical records

- Be sure you are explaining changes against a baseline - “doing better” but still limited
D. Pitfalls to Avoid

- Overstating your restrictions and limitations
  - Surveillance and Social Media
- Non-specialist or uncooperative attending physicians
D. Pitfalls to Avoid: Overstating Restrictions and Limitations

- Your claim is based on your credibility; the insurer’s denial will HAVE to undermine your credibility for its narrative to make any sense.

- Protect your credibility at all costs.
  - Never say never, always avoid saying always.
  - Answer all questions honestly.
  - Assume you may be surveilled.

- There’s ONE upside to being a claimant with ME/CFS compared to many other conditions - you all have “good days and bad days,” making it hard for an insurer to rely on surveillance to terminate.
D. Pitfalls to Avoid: Social Media

- Beware of social media.
  - If your friends can see your posts or “tags,” assume the insurance company can as well
  - Nobody goes on social media to appear *more* disabled than they are- they post their best selves. Thus, people will post about the one hike they were able to go one last month- not the 29 days of agony and paralytic exhaustion they faced before and after that hike.
  - LinkedIn – do not create phony jobs just to avoid gaps in your resume
III. Claim Submission- What Happens After I Submit?

- Inform your physicians that the insurer may reach out - ideally, they will cooperate with you and only respond in writing, and in a supportive fashion.
- The insurer will order your medical records.
- “Peer Review” and contact with your attending physician. Request that it be in writing.
- Possible “independent” medical examination.
  - If the request is reasonable, you can’t avoid it. This is a big red flag. An assessment of ME/CFS in a one-time examination, usually focused on “objective evidence,” is next to impossible.
IV. THE LAW OF ERISA APPEALS

- If your claim is denied, you will be given appeal rights.
  - If your claim is governed by ERISA, the appeal is mandatory - do NOT miss the 180-day (or shorter, in certain cases) deadline proffered in the denial letter.

- Request a copy of your claim file immediately in writing from the insurer.
IV. ERISA APPEALS: THE APPEAL LETTER

- ERISA appeals are legal proceedings and are best handled by experienced legal professionals.
- An experienced legal professional will know what additional evidence is necessary and how to present it – medical and vocational evidence.
- During the claim appeal, the insurer may share adverse evidence and invite a rebuttal – an experienced legal professional is in the best position to address adverse evidence.
- The appeal may be the last opportunity to shape the record for litigation.
WHAT TO DO IF THE APPEAL IS DENIED.

- Seek counsel immediately - find someone who offers free consultations.
  - Contingency fee v. hourly fee

- Department of Insurance

- Litigation. Obtain the claim file again.
Other Concurrent Claims

- Social Security Disability – requirements and process
- Life insurance waiver of premium
- Certain other employee benefits – deferred compensation plans that may “vest” immediately due to disability
Final Thoughts

- LTD Claims and Denials are Increasing
- Our Experience Helping People Living with ME/CFS will Mirror Denials to Come
- We Can Predict Why COVID-19 Claims will be Denied
- How and When an Investigative Tool Such as a 2-day CPET will Work in Your Clients’ Favor

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