*In*sight – Disability Claims Management and Litigation

Medical evidence in "invisible" condition cases – a case law review

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“INVISIBLE” CONDITIONS

- Chronic pain condition
- Fibromyalgia
- Chronic Fatigue
- Chronic Fatigue Syndrome
- Multiple Chemical Sensitivities
- Multiple comorbidities

Traditional Approach

- As these cases are based on largely subjective reports by the insured, often without the benefit of corroborating objective medical testing, they have been approached with caution and in some instances scepticism and suspicion;
- At issue: the medical evidence presented by both the insured and the insurer, and most importantly, the credibility of the insured.
- A review of the cases shows that ultimately, as in all cases, each case must be assessed on its own merits. A factual analysis is required of all the factors.

Mathers v Sun Life Assurance Co. [1998] B.C.J. No. 544

- Paper Mill Supervisor suffering from chronic muscle spasm unable to sit, stand or walk for prolonged periods of time;
- The treating physiatrist was supportive of the Plaintiff's claim that he was disabled from working in any capacity;
- The insurer's experts, being a general practitioner and an orthopaedic surgeon, disagreed;
- No adverse findings with respect to the insured's credibility;
- The Court held that the Plaintiff's symptoms were out of proportion to objective medical evidence of absence of physical findings – insufficient medical evidence to prove the pain resulted from sickness or injury, as required under the policy;

Mathers continued

- Para. 63:

> *"It is possible that even where (there) is no objective, measurable evidence of disability, an insured may establish a real and compensable total disability due to subjective pain, depression, fear of work, etc…Mr. Mathers is totally disabled from his own perspective. However, the legal question is whether Mr. Mathers is totally disabled according to the terms of the Policy description. The Policy specifies that the insured employee's total disability must result from sickness or injury. The onus is on the insured employee to prove that sickness or injury. Here there is insufficient evidence to prove that Mr. Mathers' low back pain is the result of sickness or injury…He rejects the suggestion that he is disabled as a result of depression or psychosocial factors and he is adamant that the sole cause of his disabling condition is physical back pain."*

Mathers v. Sun Life Assurance Co. of Canada 1999 BCCA 292

- The Court of Appeal upheld the dismissal of the Plaintiff's claim;
- Para. 8:

> *"…The acceptance or rejection of all or any parts of the evidence and the weight to be given to those parts which she accepted were within her proper function as a trier of fact. While it is possible that a judge could find such a claim to be proven on the plaintiff's evidence alone, it is clear in my view that the test is not entirely subjective. Sucharov establishes that proof of disability must be sufficient to satisfy the reasonable man, the traditional objective test. For that reason, acceptance by the trial judge of objective medical evidence of total disability will usually be required."*

Eddie v. Unum Life Insurance Co. 1999 BCCA 507

- Plaintiff suffered from fibromyalgia;
- Insurer denied her claim for LTD Benefits as she failed to prove that she suffered from a "sickness" in terms of the policy;
- Trial judge held that it was the fact of the sickness, not its explanation, that governed. A diagnosis was not required. It was a subjective test which depended on the credibility of the insured;
- The Trial Judge contrasted the finding in *Mathers* as follows (para. 48):

> *"Allan J. dismissed a claim against a disability insurer, on the basis of insufficient medical evidence. In doing so, however, she acknowledged that the absence of objective, measurable evidence of disability was not necessarily a bar to recovery. In terms of the result of that case, it is significant, it seems to me, that Allan J. rejected the evidence of the only medical doctor who supported the plaintiff's assertions of disability. Here, I accept the medical evidence which is consistent with disability, although not necessarily the individual diagnoses."*

Eddie concluded

- The Court of Appeal dismissed the insurer's appeal. With respect to the medical evidence, the court noted as follows (para. 46):

  "Thus, while the medical evidence called on behalf of Ms. Eddie in support of her claim that she was disabled from working was largely dependent on her subjective description of her symptoms and their effect upon her, there was evidence from others verifying the apparent effect of her condition on her day-to-day living and her ability to work. The credibility of these witnesses was not challenged. Nor was it suggested to Ms. Eddie that she was 'faking' or 'malingering' in order to obtain disability benefits, or for any other reason."

Plouffe v. Mutual Life Assurance Co. of Canada 2003 BCCA 96

- The insurer appealed a judgment of the Trial Judge holding that the Plaintiff was totally disabled in terms of the policy;
- Fibromyalgia case. The insured was self-represented;
- "Any occupation" policy;
- The insurer called three medical doctors who gave evidence that the insured could work in sales. The insured called no medical evidence.
- The Court of Appeal confirmed that the onus was on the insured to prove he was totally disabled under the terms of the policy, and that there was no evidence to contradict the evidence of the insurer's three doctors;

Plouffe continued

- The Court allowed the appeal, but did not enter judgment for the insurer. It ordered a new trial, as significant findings of fact were made in favour of the insured by the Trial Judge.

Milner v Manufacturers Life Insurance Company 2005 BCSC 1661

- Principal issue: credibility of the plaintiff's subjective complaints that have led to a diagnosis of Chronic Fatigue Syndrome;
- Differentiate the *Mathers* decision:

> *"**Mather** was a case in which the claimant said that he was totally disabled because of persistent back pain. However, in a case such as the one before me, where the diagnosis is essentially founded on subjective complaints, I do not take **Mather** to suggest that, accepting as I do that there is such a disability as chronic fatigue syndrome, that syndrome cannot be demonstrated in a court of law to be the basis for a long term disability claim just because there is no objective evidence."*

Milner continued

- Despite credibility concerns, the Court held that the Plaintiff was totally disabled in terms of the policy;
- In this case, the court relied on both the plaintiff's subjective complaints, collateral evidence, and medical (specialist) expert opinion to come to its finding of total disability;
- With respect to the family physician's evidence, the Court noted as follows:

  "In my experience, family physicians are often somewhat more sympathetic to their patients than is the case with a specialist who does not have an ongoing relationship with the patient. Dr. Squire has demonstrated, particularly in her evidence given at trial, that she is at the front of the line in that department. She demonstrated that she was so much the advocate that I find that it would be unsafe to rely on her opinion"

Saunders v. RBC Life Insurance Co. 2007 NLTD 104

- Insured (37), warehouse coordinator, suffered from chronic pain syndrome, irritable bowel syndrome and prostatitis;
- Insured was treated by various doctors, and was also treated at a chronic pain clinic;
- The insurer retained a medical consultant to advise on the insured's claim. At trial, he gave the following evidence as to the role of a medical consultant retained by an insurer (para. 55):

  "Dr. Fronberg testified that the approach used by a medical consultant for an insurance company is quite different than that of a practising family physician, though the scope is the same for both. He noted that medical consultants for insurance companies do not look at the symptoms but, rather, at objective information only upon which to base their opinion. They do look at the symptoms to see if they co-relate to the objective data."

Saunders continued

- With respect to the role of a treating family physician, the Defendant's physiatrist expert made the following important comment (para. 65):

  "Dr. Mahar concluded his evidence by stating that the patient's family physician is the one who would tie together all of the individual areas of specialist review and provide his input on the opinion of disability. He testified that he agreed that these things have to be added up and he believes that the family physician is the person who is best able to marshall information from all these specialist disciplines and provide the insurer as to whether there was a disabling condition."

Saunders continued

- At trial, the insurer criticized the family physician for taking too much of an advocacy role for the insured in seeking LTD benefits. The Court held that it was satisfied that the physician's diagnoses maintained its integrity and the evidence supported that it was in the family physician's expertise and prerogative to engage the limitations on the insured as he did (para. 150);
- The insurer's position was that the insured's treating specialists did not produce demonstrable objective medical evidence by way of medical tests and bodily chemical analysis that correlated with the symptoms of which the insured complained. In this regard it relied on the statement of Finch, J.A. in *Mathers*;

Saunders continued:

- The Court considered *Mathers* and distinguished it as follows (para. 136):

  "The Defendant argues that this statement requires objective medical evidence…In my view, this statement does not exclude an assessment of the plaintiff's own evidence. Nor does it preclude the possibility of the Plaintiff's own evidence being sufficient to prove the claim. Nor does it equate the use of the word "objective", that is, the reasonable person test for disability, with the use of objective medical evidence. Indeed, in describing the evidentiary criteria in the context of the above quoted statement, Finch J.A, had quoted the Trial Judge's adoption of a physician's evidence that the alleged incapacity was not grounded in "a rational medical basis." …That noted, however, it is important, where expert medical evidence is based solely on subjective complaints, that the plaintiff's credibility be assessed."

Saunders concluded

- The Court concluded that, on the evidence of the chronic pain specialists and the opinion of the treating family physician, and on the whole of the evidence, the Plaintiff was totally disabled as contemplated by the policy.

Garriock v. Manufacturers Life Insurance Co. [2009] I.L.R. I-4859

- The insured suffered from fibromyalgia;
- The insurer's expert accepted the diagnosis of fibromyalgia;
- The matter proceeded by application. The Court noted the dispute not to be about the diagnosis but about the conclusion to be drawn therefrom and whether fibromyalgia restricted the insured from "performing the essential duties of any occupation for which he is trained or may reasonably be qualified by training, education or experience";
- The Court held that all the medical evidence available suggested that the insured was disabled within the definition of the policy. There was no medical evidence to the contrary. The Court held that, based on the medical evidence, the insured was totally disabled in terms of the policy.

Toronto (City) v. Toronto Civic Employees' Union, Local 416 (Theodoris Grievance) [2010] O.L.A.A. No. 104

- Labour arbitration hearing of a heavy equipment operator's claim for LTD benefits;
- The insurer denied the claim due to the fact that the medical information did not support the restrictions and limitations outlined by the family physician;
- A diagnosis of chronic pain syndrome was identified by the insurer's physiatrist after conducting an IME. However, he opined that his objective findings did not explain the insured's pain symptoms, and as such, there should not be any restrictions or limitations. He did agree that chronic pain syndrome was an illness;
- The union had its own physiatrist, an expert in chronic pain, conduct an IME. She found that the insured had a "Somatoform Chronic Pain Disorder primarily associated with psychological factors and much less so with any medical factors."
- The city maintained that the insured did not suffer from an "illness", and if he did, it did not cause him to be totally disabled in terms of the policy;
- The arbitrator accepted the opinion of the union's expert, who had a recognized expertise in the area of chronic pain. She referred to the Supreme Court of Canada decision in *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] 2 S.C.R. 504, where the Court, in its opening statements, noted:

Toronto Civic Employee's Union continued

"1 Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real."

Toronto Civic Employees' Union concluded

- The arbitrator held that the insured suffered from an "illness", in the form of Chronic Pain Disorder, even though associated with psychological factors, and that he was as a result totally disabled in terms of the policy;
- The arbitrator accepted the chronic pain expert's evidence on these types of conditions (para. 56):

  "Dr. Mailis was clear in her evidence: in people who suffer from Chronic Pain Disorder associated with psychological factors, there comes a point where a patient's deterioration is triggered by an incident that can be quite miniscule, at times difficult to identify, after which they can no longer continue to function as they had previously."

Brennand v. Sun Life Assurance Co. of Canada 2012 BCSC 972

- The insured suffered from chronic pain;
- The insurer relied upon medical evidence, surveillance video and images taken of the plaintiff riding his motorcycle and engaging in other activities to dispute his claim for LTD benefits;
- The policy in question required that the alleged medical impairment “must be supported by objective medical evidence.”
- After reviewing the cases each party relied on, the Court held that “The cases provide helpful comments on principles and approaches, and lead to the conclusions sought by the party citing them in this action. Each case, however, is decided on their own unique facts, as must be the case here.” (para. 115);
- The Plaintiff’s reported habitual activities were not reconcilable with the medical evidence used to support his case. In particular, the activities he engaged in, such as numerous motorcycle rides on a sustained basis, for extended periods of time, were inconsistent with the pain and disability he complained of;

Brennand continued

- The insurer stated that the evidence related to the insured's activities served to undermine or limit the medical opinions tendered to support his case. The Court agreed (para. 121):

  "Further, even if I were to accept that it may be difficult to find an objective medical measurement of whether the plaintiff is experiencing pain, I also find it significant that the issues in this case do not merely concern whether the plaintiff experiences that pain or that condition. The issue that I must decide is whether that pain or condition is totally disabling such that the plaintiff cannot perform his duties of employment or any other job for which he has minimum qualifications. Evidence concerning what the plaintiff is actually capable of doing is surely able to objectively support whether any condition the plaintiff may have physically disables him from his employment. Accordingly, to the extent that the medical opinions fail to reconcile the evidence concerning the plaintiff's habitual activities, their conclusions about whether the plaintiff in fact experiences a disabling condition may be called into question."

Brennand concluded:

- And further (para. 122):

  "In context then, I find that, as argued by the defendant, limited weight can be attributed to the medical opinions relied upon by the plaintiff to establish that the plaintiff experiences chronic pain or a mental condition that in fact disabled him from working. The opinions are undermined by the evidence at trial, which, when viewed in totality, is inconsistent with the physical limitations, isolations, confinement to residence, and bleakness arising from pain that the plaintiff reported to his physicians and others, including his application for benefits from the defendant.

Eichmuller v. Provident Life and Accident Insurance Co. 2012 ABQB 690

- The insured, a welder, suffered from ongoing lower back problems and applied for LTD Benefits. The insurer denied that he was disabled from working as a welder. In particular, the insurer argued that there was no "incident of sickness or injury" that caused the insured to be unable to carry out his regular occupation . Rather, it argued that his ongoing back problems and other conditions were simply a continuation of the longstanding health problems that had successfully been controlled at his workplace;
- The court heard from numerous medical professionals for both the insured and the insurer;
- With respect to the evidence of the insured's expert physiatrist, the Court noted that she identified "subjectively and objectively all of the complaints" the insured had and reviewed her objective confirmations;

Eichmuller concluded:

- The Court found that the insured was disabled from his own occupation (para. 40):

  "I am satisfied based on the preponderance of evidence that Mr. Eichmuller was limited from performing the material and substantial duties of his regular occupation due to his ongoing lower back degenerative disc problems and the proliferation of health conditions from which he suffered, even though there was no spectacular incident that led to his leaving work on November 12 that caused injury to his back."

Conclusion

- When dealing with an “invisible” condition, an insured’s self-reporting will be closely examined by the court for consistency;
- The courts will continue to consider the whole of the evidence to find whether an insured is disabled within the meaning of a particular policy;
- The courts will understandably scrutinize chronic pain / chronic fatigue and other subjective condition cases to ensure that the insured’s evidence is consistent in the context of all of the collateral evidence, including clinical records, personal archives and witness recollection. Where the insured’s habitual activities are consistent with the reported restrictions and limitations as described by the medical evidence, such “objective” medical evidence will be given weight;
- The treating family physician does have an important role to play, especially in cases where there is a longstanding treatment relationship with the insured, and where other treating specialists have reported to the family physician, provided the family physician does not cross the line to become an advocate for the insured.