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Excerpts from Letter to Client on Fibromyalgia as a Disability

I enjoyed meeting with you. During our meeting you said that the fatigue and pain you are suffering from fibromyalgia is interfering with your ability to do your job. You expect that this interference will dramatically increase in the near future.

You are very concerned about your ability to continue to do your job with or without accommodation. To date, you have received excellent evaluations.

You inquire as to whether your condition would qualify you for short or long term disability and/or family medical leave. You also request some guidance on what accommodations the employer might be legally obligated to provide. I have not yet had the opportunity to review your medical records so it is difficult to answer you. Also, as I advised you, fibromyalgia is a fairly “new” disability which the courts have been struggling to better understand. I suggested that you authorize me to review the current fibromyalgia cases in order to advise you on the court’s current views on this medical condition. You requested that I do so.

There are many cases on fibromyalgia from all over the country. It is clear that insurance companies, employers, and the Social Security Administration (SSA) have denied many long term disability claims because they do not believe that the claimants’ pain is severe enough to be “disabling.” In many of the decisions in which a court reversed a decision denying disability, the courts stated repeatedly, that the patient’s testimony as to her pain, and her treating physician’s belief that this pain exists, can not be ignored without a rational basis.

I have enclosed seven cases concerning fibromyalgia for your information and review. I generally do not provide my client with cases because of my concern that a non-lawyer might misinterpret the case. The client might feel overly optimistic about his or her own situation, after reviewing a case, or overly pessimistic. The client may not appreciate that a change in a fact or in even a court, might have resulted in a different decision. This is especially true in the area of disability law.

However, I do believe that on balance, the enclosed cases and this letter might help you to understand what evidence the courts consider in deciding issues concerning fibromyalgia. I also think that by reviewing my letter and these cases, you will be able to engage in more meaningful discussions with your doctor concerning your medical condition. The cases may also give you some guidance on and whether the physical and mental challenges you are experiencing due to fibromyalgia, might qualify you for medical leave or disability benefits.

Due to the number of cases my search uncovered, I narrowed my review to mostly those

cases from the Seventh Circuit, which covers the states of Wisconsin, Illinois, and Indiana. For any dispute between an employee and her employer in Madison under federal law, a Court would look for guidance from Seventh Circuit cases.

Long-term Disability Case

One of the most helpful and authoritative cases dealing with fibromyalgia and long term disability is, Hawkins v. First Union Corp. Long-term Disability Plan, 326 F.3d 914 (7th Cir. 2003). In this case, the Seventh Circuit reversed a lower court's denial of disability benefits.

Mr. Hawkins position required him to sit at a computer most of the work day. Seven years after he was diagnosed for fibromyalgia, he stopped working and applied for total disability benefits from his employer's plan. The plan turned down his request and the district court affirmed the denial of benefits. The Seventh Circuit reversed and remanded the case to district court for further proceedings, consistent with the court's opinion.

The Seventh Circuit describes fibromyalgia as follows.

Fibromyalgia, also known as fibrositis [is] a common, but elusive and mysterious, disease, most like chronic fatigue syndrome, with which it shares a number of features. Its cause or causes are unknown, there is no cure, and, of greatest importance to disability law, its symptoms are entirely subjective. There are no laboratory tests for the presence or severity of fibromyalgia. The principal symptoms are 'pain all over,' fatigue, disturbed sleep, stiffness, and – the only symptom that discriminates between it and other diseases of a rheumatic character – multiple tender spots, more precisely 18 fixed locations on the body (and the rule of thumb is that the patient must have at least 11 of them to be diagnosed as having fibromyalgia) that when pressed firmly cause the patient to flinch. . . .

The case addresses a concern which you raised during our discussions, and that is how could you be working one day and yet the next day, claim complete and total disability. In this case, the Plan argued that Mr. Hawkins could not have been disabled because although his fibromyalgia was diagnosed in 1993, he continued to work until 2000. The Plan further noted that there was no evidence that his condition worsened over this period.

The Court found that Mr. Hawkin's actions in continuing to work was not inconsistent with a disability. The Court stated:

there [is not] a logical incompatibility between working full time and being disabled from working. . . A desperate person might force himself to work despite an illness that everyone agreed was totally disabling. * * * Yet even a desperate person might not be able to maintain the necessary level of effort indefinitely. * * * A disabled person should not be punished for heroic efforts to work by being held to have forfeited his entitlement to disability benefits should he stop working.

The Court stated that the Plan's doctor did not give a sufficient rationale for disregarding the claimant and his doctor's belief that the pain was disabling. The Court also recognized that Mr. Hawkins' rheumatologist determined that he had 14 of the 18 tender points, well above the threshold of 11 needed for a diagnosis of fibromyalgia.

In another case, Crespo v. Unum Life Insurance Company of America, 294 F.Supp.2d 980 (N.D.Ill. 2003), the district court reversed a Plan's denial of long term disability for a woman attorney suffering from fibromyalgia after the Plan had initially granted her claim for short-term benefits.

Ms. Crespo claimed that she was disabled and unable to work as a result of the severe pain and fatigue caused by fibromyalgia. The Plan insisted that she was not believable, although her treating physician certified that his examination showed that she had 18 out of 18 tender points.

After Ms. Crespo's claim was denied by Unum, she filed a disability claim with the Social Security Administration (SSA) and SSA granted her benefits.

In a very detailed analysis, the Court sharply criticized Unum's rationale for denying benefits. The Court emphasized that an individual does not have to show that she cannot perform any activities in order to be totally disabled. I direct your attention to pages 994-997 of this decision. The Court took the unusual step of granting Ms. Crespo disability rather than remanding the case to the Plan.

By contrast, the decision by a Plan in New York to deny an employee's permanent disability claim due to fibromyalgia and depression was upheld by a New York state intermediate appellate court. Suzanne M. Ray v. H. Carl McCall, as Controller of the State of New York, 753 N.Y.S.2d 253 (A.D. 3 Dept. 2003). Ms. Ray had been employed as the Director of Park Recreation. The Court was persuaded that she "was not permanently disabled" because "fibromyalgia is a condition with symptoms that can be resolved through medication and exercise."

Social Security Disability Benefits

An example of a case from a Wisconsin federal district court which involves the denial by SSA of disability benefits from fibromyalgia is Alexander v. Barnhart, 287 F.Supp.2d 944 (E.D.Wis. 2003). In a decision by federal district court Judge Lynn Adelman (who prior to his appointment to the bench, represented employees with employment problems) the Court reversed the SSA's denial of disability benefits for fibromyalgia. The claimant was a 43 year old certified nurse's assistant who said she could no longer work due to constant pain in her neck, back and legs.

The court sets out a five-step test for determining whether a claimant is disabled for purposes of Social Security.

- (1) whether the claimant is presently unemployed;
- (2) if so, whether the claimant

has a severe impairment or combination of impairments; (3) if so, whether any of the claimant's impairments are listed by the Social Security Administration as being so severe as to preclude substantial gainful activity; (4) if not, whether the claimant possesses the residual functional capacity ("RFC") to perform her past work; and (5) if not, whether the claimant is able to perform any other work.

The Court also quotes several authorities for its description of fibromyalgia as follows.

Fibromyalgia is "a common, but elusive and mysterious, disease, much like chronic fatigue syndrome, with which it shares a number of features." See Frederick Wolfe et al., "The American College of Rheumatology 1990 Criteria for the Classification of Fibromyalgia: report of the Multicenter Criteria Committee," 33 *Arthritis and Rheumatisms* 160 (1990); Lawrence M. Tierney, Jr., Stephen J. McPhee & Maxine A. Papadakis, *Current Medical Diagnosis & Treatment* 1995 708-09 (1995).

In reversing the decision of SSA, the Court chided the Administrative Law Judge (ALJ) for rejecting the claim for want of objective proof. "When a claimant has fibromyalgia, it is inappropriate for an ALJ to reject her claims of pain because they are not verified by traditional medical tests." Judge Adelman also wrote, "there will be no objective medical evidence indicating the presence or severity of fibromyalgia. The symptoms are subjective and laboratory tests are of little value."

Unfortunately in this case, the Court did not immediately grant benefits but sent it to SSA for further consideration consistent with the Court's opinion.

Another decision on this issue from Judge Adelman is Dominguese v. Massanari, 172 F.Supp.2d 1087 (E.D.Wis. 2001). (He again reversed the decision of SSA in which it had denied a part time custodian's claim that her fibromyalgia caused permanent and total disability. He chided the ALJ for rejecting the treating physician's opinion because it was not supported by "hard evidence." He noted that the nature of fibromyalgia is such that there are no objective tests and it is essentially based on the pain experienced by the claimant.

The Court also observed that just because the claimant can perform household activities does not demonstrate she can work "eight hours a day, five days a week." (See page 1101.) The Court remanded the case to the SSA for actions consistent with the Court's opinion.

Similarly, in the case of Criner v. Barnhart, 208 F.Supp.2d 937 (N.D.Ill. 2002), the court rejected SSA's denial of the claimant's claim for disability based on fibromyalgia. The claimant worked as a service representative and in management positions for several telephone companies. The pain from fibromyalgia caused her to request flex-time and then medical leave. In reversing the decision of the ALJ to deny benefits, the Court stated that the ALJ is not permitted to disregard the opinion of the treating physician without compelling evidence. The Court emphasized that the nature of the condition is subjective and the treating physician's opinion is entitled to great weight.

Discrimination in the Work Place Based on the Disability of Fibromyalgia

The final case I am enclosing addresses an example of how a court may analyze a claim of discrimination in the workplace based on a disability of fibromyalgia. Hoover v. Norwest Private Mortgage Banking, 632 N.W.2d 534 (Minn. 2001) provides a classic example of how the court considers circumstantial evidence in determining whether the employee's disability may have been a factor in the employer's decision to terminate the employee. The lower court dismissed the employee's claim that her fibromyalgia was a factor in her termination. It was appealed to the Court of Appeals and ultimately heard by the Supreme Court of Minnesota who reversed and sent it back to the lower court for further consideration.

The employee worked for a mortgage banking company and claimed that she consistently performed at or above expectations and had no disciplinary problems until she was diagnosed with fibromyalgia in 1995. She stated that this condition caused her to suffer severe headaches, sleeplessness, fatigue, pain in her neck, shoulders, back, hips, and depression-like symptoms and impacted on her work. She testified that she told her supervisor she needed "special help." The supervisor said all of his staff needed special help, and denied that she ever linked her failure to do her work with her medical condition.

The Minnesota Supreme Court said the issues of whether she requested accommodation and whether the fibromyalgia was a disability were in dispute and needed to be addressed at a trial. The Court said the employer's argued that her fibromyalgia might not be a disability under federal law may be correct, but Minnesota has a more liberal definition which may control in this case.

If you wish further advice from me as to the next step, I would need to review your medical records from your doctor. However, I strongly recommend that whether or not you seek further counsel from me that your doctor advise your supervisor of your condition very soon. The Norwest case illustrates the problems an employee may face who is somewhat circumspect in sharing such information.

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Enclosures