

# DENIED Disability by Aetna

*How to Fight Back and  
Prove Your Claim*



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## INTRODUCTION

You will learn how and why to prove your Aetna claim.

Life and business are fundamentally unpredictable. However, when we become ill or hurt, we depend on our support systems to protect our needs and treat us fairly and with respect. Whether you injured your back in a sudden work accident or slowly developed a debilitating condition, such as chronic fatigue, fibromyalgia or a motor or nerve disorder, you are no longer able to work and live your life with ease. These restrictions have made it hard, if not impossible, to earn a fair wage. Complicating the picture, you're struggling to get fair treatment from your long term disability insurance company, Aetna.

This short ebook explains and demystifies long term disability denials. It offers strategic insight into how to approach your case effectively, so that you can obtain a fair outcome, respond the right way, and regain peace of mind.



## HERE'S A SYNOPSIS OF WHAT WE WILL DISCUSS:

1. The History of Aetna
2. What You Should Know about the Disability Insurance Industry
3. Understanding Your Disability Coverages
4. How Much Will Your Disability Check Be?
5. Pre-Existing Conditions Could Impact Your Benefits
6. The Appeals Process Varies for Individual and Group LTD Policies
7. Nine Ways to Improve Your Chances of Receiving Disability Benefits
8. Winning Approval of Your Disability Claim
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12. Lose Your Administrative Appeal? How to File a Lawsuit.
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## 1. THE HISTORY OF AETNA

### Aetna Timeline

1868 - Introduced first renewable term life policies

1913 - Aetna introduced group life insurance

1916 - Aetna was largest multiline insurance company in the U.S.

1919 - Aetna introduced group disability policies

1967 - Company re-organized

1991 - Company narrowed insurance lines

1996 - Aetna merged with U.S. Healthcare

Today - Aetna continues to evolve from an insurance carrier to health company.

After losing control of the first insurance company they started (Connecticut Mutual Life Insurance), Eliphalet Bulkeley and a group of businessmen in Hartford, Connecticut, tried again. In 1853, they started Aetna Life Insurance as a spinoff of Aetna Fire Insurance, which had been founded in 1819. (The fire insurer had adopted its name as a way to invoke the active Mount Etna volcano.)

The company grew through the 1860s, fueled by increased buying of life insurance policies due to the Civil War and by its innovative products. For example, Aetna introduced the first renewable term life policies in 1868. From the 1890s through the first decade of the 20th century, Aetna added accident, health, workers compensation and auto and property insurance to its offerings.

- Aetna was one of the first companies to write group coverage insurance for business. It introduced group life insurance in 1913 and group disability policies in 1919. Three years later, it was the largest multiline insurance company in the U.S.

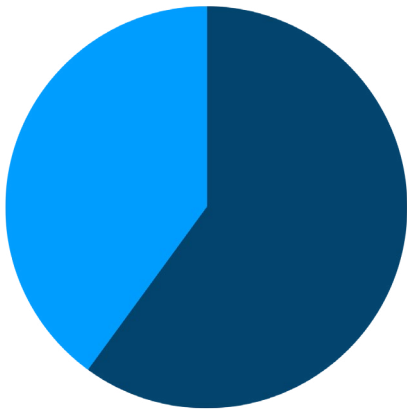
Despite an overexpansion of its automobile insurance and other non-life lines, Aetna did manage to survive the Great Depression by limiting its underwriting and building up its reserves.

- Aetna entered the group market--life, health and accident--after World War II. A re-organization in 1967 produced a holding company, Aetna Life and Casualty, and several subsidiary companies.

From the 1960s until the late 1980s, Aetna continued to expand at a fast pace, entering many new markets and expanding services. In 1991--after a bust in the economy--the company narrowed its insurance lines, withdrawing from the auto insurance market. It also stopped selling individual health care policies.

By 1995, the health care business accounted for 60 percent of Aetna's sales. The company restructured again in the late 1990s, selling off its property/casualty lines, individual life insurance business, and behavioral managed care business. In 1996, Aetna merged with U.S. Healthcare.

By 1995, the health care business accounted for 60% of Aetna's sales.



- In 1998, several hundred dissatisfied doctors in Texas and two other states left the Aetna system. Consumers also complained about Aetna's refusal to cover some treatments.
- Dissatisfaction with Aetna's policies continued to grow until the company signed an agreement to end a lawsuit brought against it by more than 700,000 physicians and medical societies. Aetna pledged to improve communications with providers, to reduce administrative complexity, and to improve the quality of its health care system.

Throughout the 2000s, Aetna continued to acquire new health-related companies, including the disability and leave management business of Broadspire, which provided claims management services. It is continuing to evolve from an insurance carrier to a health company.

## **CASE STUDY #1: Stephens v. Aetna Life Insurance Company (United States District Court for the Southern District of Ohio, Western Division); Decided July 9, 2012**

Plaintiff James Stephens hurt his back in May 2004 while trying to lift an 80 pound mold at work for Paxar Corporation. His slip and fall led to a herniated disc and strain in his lumbar area. He went back to work after rehabilitating but ultimately had to stop working in June 2004 because of the back pain.

Stephens had participated in his employer's Aetna plan, which was supposed to pay disability benefits. However, Aetna's plan administrator decided that Stephens was not disabled, per the insurer's long term disability plan requirements. Stephens responded by filing a claim pursuant to the Employee Retirement Income Security Act (ERISA), claiming that the administrator's decision was "arbitrary and capricious because it was not the product of a deliberate principled reasoning process and because it was not supported by substantial evidence."

The court agreed, granting his motion for judgment on the administrative record, remanding the case to Aetna to do a proper review of the evidence, saying "it was clearly unreasonable for the reviewer to interpret a physician's statement that plaintiff was limited to a sedentary lifestyle as a recommendation that plaintiff could perform sedentary work, and the reviewer overlooked or ignored evidence showing the plaintiff had a lumbar disc herniation."



## 2. WHAT YOU SHOULD KNOW ABOUT THE DISABILITY INSURANCE INDUSTRY



When insurers came up with the idea of disability insurance about 30 years ago, they thought it would be a good source of revenue. Who wouldn't want to sign up for a policy—either individually or through an employer—that would offer income protection if they became disabled and couldn't work at their regular jobs?

However, just a few years after they started selling these policies, insurers realized they were in trouble. As people got older and suffered more medical problems, they made more claims under their disability coverage. New premiums weren't covering insurers' outlays for disability payments.

During the booming stock market of the 1990s, other profitable investments helped insurance companies cover their disability policy losses. But when the market hit a downturn, they started looking for other ways to make the disability market profitable. Their solution was to deny disability claims by searching for every loophole to get out of making payments, to reduce benefits and/or to cut off payments as soon as possible.

This approach has had a negative impact on many people who have become disabled and who thought they had good disability coverage. Instead of receiving the benefits that they expected (and that they had paid for, often for years) they watched their claims get denied. Unable to pay their basic living expenses (e.g. rent, mortgage, utility bills, auto payments), they suffered real financial hardships.

**Working with an attorney who understands the disability system is your best hope for fair treatment.**

The lawyers employed by the insurance companies know every trick for denying claims under the administrative appeal process. That's why you need a knowledgeable, experienced attorney who can guide you through the disability application and appeals process. The Employment Retirement Security Act (ERISA), which governs group disability policies, has strict requirements for filing an appeal of a disability claim. For your best chance of success, don't go through this appeals process alone.



## IMPORTANT!

You cannot add any evidence to your case once it has gone through administrative appeal? That's why it's so essential that you have every bit of necessary information to prove your claim when filing an administrative appeal.

### **You have only one chance to present your claim appeal.**

You can take an insurer to court if the company has denied your disability claim.

Working with an attorney who knows all the ins and outs of ERISA can ensure that your case is as strong as possible. If an insurer has denied your initial claim, and you're ready to appeal, retaining an experience attorney should improve your chances of winning the disability benefits that you deserve.



### 3. UNDERSTANDING YOUR DISABILITY COVERAGES

Some companies sell disability policies that individuals can purchase on their own, Aetna does not.

Ask your employer for a copy of your policy, and read through it carefully.

#### Did you know?

Before you can apply for LTD benefits, you must first apply for STD and exhaust all those payments.

If you have disability coverage through Aetna, by definition, you're covered under a group benefit policy through your employer.

The terms of a disability policy vary with each employer and with each state. You'll need to read your own policy very carefully to determine what level of benefits you have and what procedures you need to follow if you're filing a claim. Ask your employer for a copy of your policy, and read through it carefully.

Here's an overview of the three different types of disability coverage.

**Short term disability (STD)** pays some percentage of your salary or weekly pay, usually for a few weeks or a few months. Since your employer (and not the insurer) will be covering the expense of STD, you'll probably find it easier to obtain these benefits.

Gaining approval for **long term disability (LTD)** is harder, because the insurer—in this case Aetna—must pay your benefit.

It doesn't matter if you and your employer know that your injury or illness will make it impossible for you to do your job any more. You still have to go through these steps.

Like STD benefits, LTD payments will only cover a part of your regular paycheck, and the benefits usually last only 24 months. To qualify, you have to meet the "own occupation rule," which means that you won't be able to do your own job during that time.

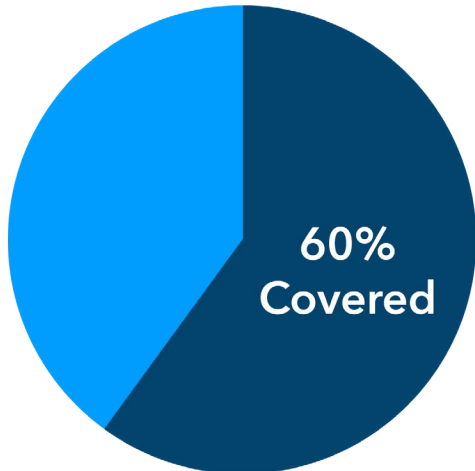
However, if your injury or illness will prevent you from returning to work after two years, you may qualify for benefits until you reach age 65.

**Catastrophic coverage** kicks in when your disability is so severe that you need help to perform even the simple tasks of life each day. In this case, you'd qualify for a home health aide or a similar helper to assist you with bathing, dressing and eating.



## 4. HOW MUCH WILL YOUR DISABILITY CHECK BE?

### Your Normal Paycheck



Although STD and LTD payments vary according to your policy, you can usually expect to receive about 60 percent of your normal paycheck. Aetna also uses a formula for determining benefits for those who work on commission.

### Offsets reduce your disability checks

Offsets are other payments that reduce your disability payments from Aetna. For example, if you were injured while on the job, you might be eligible for benefits under Workers Compensation Insurance. You might be able to receive retirement benefits, retirement disability benefits, federal disability benefits (e.g. Social Security Disability) and/or state disability payments. You could win a settlement in a lawsuit related to your injury.

Aetna will reduce your disability payments by the amount of money you receive from any and all of these other sources.

Even if you can't carry out your normal work responsibilities due to your disability, your employer might try to find another job that you can do. If the wages you receive in this new position are 20 percent lower than what your usual paycheck position would be, Aetna might pay you a residual or partial disability benefit.

If all of these offset payments total to an amount greater than the benefit you'd be entitled to under your disability policy, Aetna still has to make a minimal payout. You're entitled to \$100 or 10 percent of the full disability the insurer would usually have to pay.

### Watch out for overpayments

Under the terms of most disability policies, you have to apply for Social Security Disability benefits when you apply for LTD. However, it can take a long time before you find out if you qualify for SSD; the government reviews each claim very carefully. In the meantime, Aetna will be sending you a disability check. So what happens if SSD approves your claim?

When you finally receive your SSD checks (and they should include back payments from the time you filed), Aetna will expect repayment of the total amount that you have received from SSD. Unfortunately, many people have already spent this money trying to keep up with their bills.

If you don't want to be faced with the prospect of paying Aetna back, you can ask the insurance company to withhold from your disability check the amount that they expect SSD will pay you.

It's very important to understand all of these offsets, so that you will not be surprised by Aetna's demands for repayment when other disability income sources start providing benefits to you.

## **CASE STUDY #2: Berkoben v. Aetna Life Insurance Company (United States District Court for the Western District of Ohio, Western Division); Decided February 21, 2014**

Jason Berkoben had been working for Dell, Inc. as a computer programmer for three years before developing Schizoaffective Disorder and Bipolar Disorder in 2010. These issues forced him to stop working in March 2010, and his psychiatrist, Dr. Lekhwani advised him to stay home from work because of the mental illness.

Aetna approved 180 days of short term disability and then approved long term disability starting on August 29, 2010. Aetna never questioned Berkoben's diagnosis; from August 2010 through June 2012, Dr. Mary Galonski treated him and "consistently opined" that his Schizoaffective Disorder made it impossible for him to work. Berkoben used psychotherapy along with medications such as Lithium, Risperal and Zyprexa to get control of his symptoms, which included depression, suicidal ideation, anxious thoughts and hallucinations.

Nevertheless, Aetna made a decision to terminate his long term disability benefits. Berkoben then filed suit, and the court granted his Motion for Summary Judgment in part, recommending that "Aetna's decision to terminate Plaintiff's long term disability benefits be vacated and the case remanded to the plan administrator for further consideration in light of this Report and Recommendation."

## 5. PRE-EXISTING CONDITIONS COULD IMPACT YOUR BENEFITS

Insurers may try to make a connection between your disability and the pre-existing illness or condition, even if one doesn't exist.

If you've had a condition or an illness any time in the 12 months before you apply for long term disability, Aetna might try to deny you benefits based on the pre-existing condition clause. Sometimes the company will even look at any health problems you've had extending back three years.

### For example:

- Suppose you applied for disability because you injured your back when you were working. Aetna might look back over your medical records for the past year and discover you were on pain medicine a few months before. Even if you argue that the medicine was for a wrist injury you suffered while playing sports, Aetna might argue that the fact you were taking medication indicated that you were actually having back problems long before you applied for LTD. Based on this reasoning, the insurer will try to deny your LTD claim.
- Feeling depressed because you're getting behind in your bills due to your disability? If your doctor gives you medication to help you through this difficult time, the insurer may try to stop your disability payments, justifying the decision by arguing that your problem isn't physical, but psychological in nature.
- If you're having trouble concentrating because of the prescription medicine your doctor prescribed to alleviate pain from an injury, the insurance company may try to stop paying LTD benefits after 24 months. They'll claim that your impairment is mental, not physical.

### **Symptoms can be difficult to prove**

It can be difficult enough to qualify for disability benefits when you have an illness or injury that your physician can document with MRIs, X-rays and blood tests. What if you have an illness like chronic fatigue syndrome, which is a legitimate problem but which can't be diagnosed with a lab test? Physicians must rely solely on the symptoms that you describe to them.

Insurers, convinced that many claimants strive to take unfair advantage of the disability system, often ignore patients' descriptions of their symptoms. Aetna might claim, for instance, that an illness is really a mental health issue, and could deny your application for LTD benefits or try to discontinue them after 24 months.





## 6. APPEALS PROCESS VARIES FOR INDIVIDUAL AND GROUP LTD POLICIES

Although Aetna doesn't sell individual disability policies, if you had purchased such a policy from another carrier, the laws of the state where you live would govern your appeals process. Once the carrier denied your appeal, you would be able to file suit in a state court. You could ask for a jury trial if you desire, where you could present all your evidence, including any new evidence that you had gathered after the appeals process. Your attorney could challenge the insurance companies' witnesses in court. In short, you'd have all the rights you'd expect when taking a case to court.

Those same rules do not apply when you have employer-provided group disability insurance through Aetna. Federal ERISA (Employee Retirement Income Security Act) laws govern these cases. It's harder to make your case under ERISA, because the laws are written to favor the insurance companies.

- Even if the insurance company has denied your claim for no good reason, it won't face any penalties; you have no way to sue for damages under ERISA. You will receive only the benefits that the insurer should have paid you in the first place; if you're fortunate, the judge will order the insurance company to pay your attorney's fees, too.
- Even if your own physicians present a strong case in favor of your disability claim, insurers like Aetna don't have to give their testimony any weight in making a decision about your disability claim.



## **Before You Can File an ERISA Claim**

According to the ERISA regulations, you can't file a lawsuit appealing a denial of your disability claim, unless you have taken all of the necessary steps to resolve the matter out of court including exhausting your administrative appeals.

- After Aetna initially denies your claim, you must go through the company's appeals process, making sure to meet all deadlines.
- If Aetna denies your appeal, you can take the insurer to federal court. Be aware, however, that consumers don't get the same protections in federal court as they receive in state courts. The assumption under ERISA is that the insurance company made the right decision, and you have to prove that they did not. (In state court, by contrast, you'd only have to prove to the judge or the jury that you should receive benefits because you really are disabled.)

### **CASE STUDY #3: Carrier v. Aetna Life Insurance Company (United States District Court for the Central District of California); Decided July 24, 2015**

Gloria Carrier began working for Bank of America in 2010 as a Credit Administrator, where her duties included supervising and coordinating loan activities. During this time, she developed uterine cancer, which required extensive medical treatment and led to the development of neuropathy, which subsequently left her very depressed. Her condition led her to take time off work, and she filed for short term disability (STD) in August 2011.

Aetna granted her STD and shortly thereafter evaluated her eligibility for long term disability, which the insurer granted on February 10, 2012. However, just a year later, on July 11, 2013, Aetna determined that Carrier no longer qualified for the benefits, per Aetna's definition of disability. Carrier subsequently appealed the decision, and the insurer rejected the appeal to reinstate benefits on February 7, 2014. She then filed a court action to compel a review of Aetna's decision to terminate the benefits.

The District Court found that Aetna's administrator "improperly terminated" Carrier's benefits "because the treating physician's reports provided persuasive evidence that the participant was disabled during the applicable time-frame [and that] the physician's conclusions were sounder than those presented by the peer reviewers." As such, the Court found a judgment for Carrier and remanded the action.

## 7. NINE WAYS TO IMPROVE YOUR CHANCES OF RECEIVING DISABILITY BENEFITS



To create the strongest possible case when you file:

### 1. Understand what your policy says.

What pre-existing conditions could disqualify you from receiving disability benefits? Will your benefits be offset (reduced) by payments from Workers Comp, SSD, or lawsuit awards? How long will your STD payments last? When should you apply for LTD benefits?

### 2. Fill out forms accurately. Stay consistent in your answers.

You may notice that the form seems to ask the same question again and again, phrased slightly differently each time. Make sure you answer those questions consistently. Take the time to think each question through, and don't use words like "always" or "never" in your answers.

### 3. Focus your claim on conditions that your policy doesn't exclude.

Claims that concentrate on medical issues and functional problems are more likely to win you benefits.

### 4. Get started on your SSD application.

Aetna will require you to file for SSD within a year, so it is best to get that application process moving as well.

### 5. Ask your doctor to support your claim.

It's a good idea to inform your physicians that you have applied for disability, so that they will be on the lookout for forms and letters from Aetna regarding your case. Explain to your doctors why they need to complete and return any paperwork from Aetna promptly. Be polite.

### 6. Provide Aetna with updated contact information for all your doctors.

Make sure Aetna has the correct addresses and phone numbers for each of your medical providers. That way, the company representatives won't be able to claim they couldn't reach your doctors.

### **7. Make sure your employer's description of your job matches your own description.**

Your disability claim depends in part on whether or not you can perform the requirements of your job. Once you're sure your description matches your employer's, ask your physicians to write a summary explaining why it's not possible for you to do that job any longer.

### **8. Watch out for video surveillance**

Aetna may hire a private investigator to take video, hoping that the videographer catches you doing something your disability wouldn't allow. Aetna may also send someone unannounced to your home to talk with you. Be advised that it's your right to insist that the representative make an appointment and return at that time.

### **9. Get professional help.**

The process of making a claim can be filled with pitfalls; insurers don't want to make it easy, because they don't want to pay benefits. Work with an attorney experienced in ERISA law before you file a claim to ensure that you present the best possible case initially. If your claim is denied, consult with a knowledgeable attorney; your appeal could also serve as the basis for a lawsuit if you have to take the insurer to court.

## **CASE STUDY #4: Cole v. Aetna Life Insurance Company (United States District Court for the District of South Carolina, Rock Hill Division); Decided January 26, 2012**

Janice Cole worked as a nurse at Springs Memorial Hospital for 31 years prior to stopping work on June 5, 2006 to go on short term disability (STD). Aetna certified her benefits from the beginning of June through September 3, 2006. Cole also applied for long term disability benefits through her Aetna plan (she was enrolled in a plan through her employer, CHS/Community Health System, Inc.) and received notification on December 19, 2006 that she would, indeed, qualify for those benefits.

Cole continued to collect long term disability for nearly two years, before Aetna notified her that she would need to qualify as disabled per the "any occupation" standard.

Cole provided updated clinical and medical records, per the insurer's request, but Aetna still decided to terminate the benefits on November 4, 2008, because it concluded that she failed to pass the "any occupation" test. She appealed.

As part of the appeals process, Aetna asked Dr. Benjamin Lechner, a doctor Board Certified in Internal Medicine and Rheumatology, to conduct an independent review. Dr. Lechner determined that Cole lacked a functional impairment that would prevent her from working. Thus, Aetna upheld the termination of her disability benefits. However, disturbingly, "the documents listed by Aetna in the letter as those that it reviewed in coming to its decision were those of another claimant rather than those pertaining to Cole."

Cole understandably went to court to remand Aetna to review her case further. The court determined that Aetna did indeed make a "procedural error," and the court "remanded the case to the plan administrator for a full and fair review of plaintiff's claims as required by ERISA."



## 8. WINNING APPROVAL OF YOUR DISABILITY CLAIM

Aetna will not make it easy for you to get your disability claim approved, and the company has a great deal of control over how the process goes. It not only gets to define in your policy what a disability is; it also gets to interpret that definition.

Aetna can also rely more heavily on the company's own doctors' descriptions of your condition. Since the insurer offers only group LTD policies, governed by ERISA law, it does have to place "great weight" on your own doctors' opinions. However, that constraint doesn't mean Aetna can't overrule those opinions.

### How ERISA Stacks the Deck in Aetna's Favor

- **Company doctors and nurses can make a diagnosis without even seeing you.** They look at your medical records to make determinations, and they can overrule your own doctor who has actually spent time examining you.
- **Aetna can ignore SSD's findings in your disability case.** Insurers will argue that the criteria for SSD is different than for disability, so they don't have to follow the lead and pay you disability, even if the Social Security Administration (SSA) rules that you are disabled. However, since Aetna would like the SSA to pay for your disability claim, it still insists you file for those benefits.
- **Using vocational reviews, Aetna might find different jobs you can do to reduce or eliminate your disability payments.** Its vocational analyst will determine your residual functional capacity (RFC) to determine your fitness for other jobs.

### RFC Levels



#### Sedentary

(i.e., office jobs) - lift up to 10 pounds; sit up to six hours a day



#### Light

(i.e., security guard) - lift and carry 10-20 pounds; stand or walk up to six hours a day



#### Medium

(i.e., nursing) - Lift and carry up to 50 pounds; stand or walk all day



#### Heavy

(i.e. construction worker) - lift up to 100 pounds



#### Very heavy

(i.e. dock worker) - lift more than 100 pounds

## 9. FILING AN ADMINISTRATIVE APPEAL AFTER YOUR CLAIM IS DENIED

Make sure you read the denial letter carefully. You must comply with every requirement that Aetna outlines in the letter (i.e., meeting deadlines and sending the right forms) to have your administrative appeal considered.

**Remember:** the information you present in your administrative appeal will also be the basis for your lawsuit against the insurance company, should that become necessary. Under ERISA rules, you can't add any new evidence to support your claim after the administrative appeals process.

The process begins when Aetna sends you a letter turning down your claim. The letter must include:

- The reason Aetna is denying your claim.
- The evidence that it reviewed in making that determination.
- The name of the physician, nurse or claims representative who made the decision to deny your benefits application.
- The date by which you must file an appeal of the denial.
- The location where your appeal should be sent.

### **When Aetna denies your claim, appeals can take a long time.**

ERISA regulations dictate the timetable for moving your claim through Aetna's appeals process.

- When you first file an LTD claim, Aetna can take up to 45 days—and sometimes as long as 60 days—to decide whether or not it will pay benefits to you.
- After you submit your appeal, Aetna can take up to 45 days—and sometimes up to 90 days—to make its determination on your administrative appeal.
- Your policy will dictate how long you have to file a lawsuit if Aetna denies your claim. The length of time can vary from a few months to as long as three years.

### **An experienced ERISA lawyer can provide the support you need**

You can't afford to make a mistake when you're preparing and filing your appeal of a disability claim denial. Unless you follow every step of the process properly, you could lose your chance of ever collecting the disability benefit you are due. This is why retaining the services of a knowledgeable ERISA attorney is so important.

Your lawyer will help you prepare all of the information that must be included in an administrative appeal:

- **A rebuttal of Aetna's denial of your disability**, with the expert opinions of physicians and vocational specialists providing evidence to refute each point.
- **Evidence that supports your claim.** Your appeal will need to include physician's opinions, medical records and letters from your employer and your friends supporting your claim.
- **An explanation (with supporting evidence) of why Aetna's medical review was incorrect.** You should document any attempt on the company's part to twist medical evidence in its favor.
- **References to up-to-date case studies**, articles in medical journals and other scientific findings that will strengthen your disability claim.

An experienced LTD attorney will be able to review your policy carefully and scrutinize all of Aetna's actions in your case to ensure that it handled your claim correctly, following all of the proper procedures.

## **CASE STUDY #5: : Fisher v. Aetna Life Insurance Company (United States District Court for the District of Delaware); Decided March 30, 2012**

Linette Fisher worked for Bank of America as a credit card analyst, work that was described as "mostly sedentary." On April 17, 2009, she did not come to work at the bank and instead filed for short term disability (STD) as well as Bank of America Medical Leave (BACMED) and Family Medical Leave Act (FMLA) benefits.

Aetna initially denied her STD claim. Fisher then had an MRI scan done, and her treating physician diagnosed her with migraine headaches. These headaches inhibited her ability to work and drive more than short distances. Her doctor prescribed various medications to treat them, including Celexa, Lorzepam and Topmax.

Fisher filed an action, claiming that Aetna's decision to deny her STD benefits was unlawful and arbitrary, and she sought declaratory relief of benefits as well as interest, lawyer fees and other related costs. The court granted her motion for summary judgment, denied Aetna's motion for summary judgment and "remand[ed] the decision to the claim administrator to make a claim determination consistent with this opinion."

## 10. RESIDUAL FUNCTIONAL CAPACITY (RFC): HOW AETNA DECIDES WHAT JOBS YOU COULD DO



What happens if you can't get another job? Usually, the insurer will pay disability until you turn 65 – retirement age

Aetna wants you to find a job that you could do for 40 hours a week despite your disability and its mental and physical effects. (That outcome eliminates or reduces the benefit that you would receive.) Aetna uses RFC to determine your capabilities, based on:

- Your level of pain.
- Your mental capacity. Can you still work with supervisors and coworkers effectively? Are you capable of understanding directions for a particular job, remembering them and carrying them out?
- Your medical history and observations from your physicians.
- Information gathered from reports made by social workers and/or your family and friends about your physical and mental capabilities.
- The number, timing and length of medical appointments (therapy sessions, doctor visits, medical tests, etc.) and how they might affect your ability to follow a typical work schedule.
- Your current skills and how they could apply to other types of jobs.

The difference between your “own occupation” and compatible jobs

In determining what (if any) disability benefits you'll receive during the first 24 months of your disability, Aetna will look at your RFC and at the demands of your current job. A nurse, for example, can't work if he has a severe leg injury, and he has to keep that leg elevated several hours a day. Caring for patients keeps a nurse on his feet all day long.

Things change after the first 24 months of disability, however. At that point, Aetna will want you to prove that you can't do any type of job that you are qualified to do because of your disability. The nurse with the injured leg might be able to get an administrative job involving patients' medical records that wouldn't involve any standing or moving around.

This requirement doesn't mean you have to go job hunting; it's up to Aetna to find you an alternative job, and your paycheck has to be at least 80 percent of your pre-disability income.



## 11. WHAT AETNA MAY DO TO TRY TO DENY YOUR CLAIM

### Did you know?

Insurance companies will monitor your activities and hire investigators to try to come up with video evidence that you're not as disabled as you claim.

Insurers use many maneuvers to deny claims, such as the following:

- **Giving expert witnesses only a part of your record.** By farming out the information to several different medical experts, Aetna prevents any one from getting a true picture of your disability.
- **Using investigators to take secret videos.** Venture out to a grocery store to pick up an item or two, or go through a fast food window, and the insurer may claim that such actions prove you could go back to working full time.

Investigators may not always tell their insurance bosses the truth about what's on a video—and the claims representatives might not take the time to verify their reports. If the insurer claims to have such evidence, ask to see the video (you can check if it's been edited) and find out whether the insurance representative did actually view it personally.

- **Relying on data from an unreliable functional capacity exam (FCE).** Sometimes vocational analysts don't administer the RFC tests properly, and the results can be skewed. But insurers use them to deny claims anyway.
- **Operating on the assumption that you're either faking it, or you are non-compliant.** Insurers sometimes deny claims because they say the disabled person is really malingering—pretending to have an injury because they want to get paid without working. Or they will check with your physician, discover that you're not taking a prescribed medicine and use that fact as justification to argue that you're non-compliant. Believe it or not, an insurer can even take such actions if you stopped taking a medicine because you had a bad reaction or because you didn't want to risk potentially dangerous side effects.
- **Blaming your disability on a stressful environment.** Insurance company representatives may try to get your boss or your coworkers to say that you were having problems getting along with people at work. Aetna could then say that the stressful environment caused your disability and that, therefore, it doesn't have to pay benefits under the terms of your disability policy.

**Need insight into your Aetna claim?**

Call Marc Whitehead & Associates, Attorneys at Law, LLP at 800.562.9830, or learn more at [www.DisabilityDenials.com](http://www.DisabilityDenials.com).



## 12. LOSE YOUR ADMINISTRATIVE APPEAL? HOW TO FILE A LAWSUIT



If Aetna denies your appeal of its refusal to provide disability benefits, you still have one option. You can file a lawsuit in federal court, since your Aetna group policy falls under the ERISA laws. You have only a limited time to file your appeal; miss a deadline, and you have no possibility of winning your lawsuit (and your disability benefits).

### The rules for ERISA lawsuits

- **You can't sue for damages**—only for the benefits you're due under the terms of your policy. Those would include all back payments dating back to the time you initially filed your disability claim.
- **You can't request a jury trial;** a judge will preside over your case.
- The only evidence you can present is what you included in your administrative appeal. That's why it's essential you make a compelling case and present all evidence in that appeal.
- **The burden of proof** is on you; that is, you have to convince the judge that Aetna made a mistake in denying your disability benefits.
- **If the judge decides in your favor, he or she may decide that the insurer should pay your attorney's fees,** but that outcome doesn't always happen.

Even if you win your case, Aetna could reduce or cut off benefits at a later date. Then you'd start the whole process again, with an administrative appeal. If your appeal is denied, you'd have to take Aetna back to court.

One advantage to being covered by an individual disability policy instead of a group policy when filing a disability denial lawsuit is that a state court would hear your case. That means you could request a trial by jury, ask for punitive damages and bring in more evidence and expert witnesses to strengthen your case.

**Working with an attorney who specializes in ERISA and LTD cases will improve your chances of winning your administrative appeal or your lawsuit.**

- Your lawyer will stay on top of filing deadlines and guide you through the procedures, so that you don't lose your appeal on a technicality.
- Your lawyer will have dealt with Aetna before and will understand how the company operates. For instance, Aetna might be willing to negotiate a settlement before your case reaches court.
- Your attorney will know the relevant law and cases involving ERISA and LTD and will be able to cite those precedent cases to the judge to strengthen your case.

**CASE STUDY #6: McKenna v. Aetna Life Insurance Company (United States Court of Appeals for the Sixth Circuit); Filed April 14, 2015**

Melissa McKenna had been working for Dow Corning Corporation as an administrative assistant for the company's legal department, when a persistent lower back injury worsened. In June 2010, she got an MRI, which showed a bulging disc with spinal canal narrowing as well as facet hypertrophy. McKenna soldiered on at work, despite the pain and diagnosis until March 28, 2012, when she had to go to the hospital for her back pain, which she rated as "9/10." After being discharged shortly, she returned to the hospital on April 1, 2012 with more back pain and migraine headaches. What followed was an odyssey of doctor's visits, assessments and pain management attempts, such as surgical injections.

Ultimately, McKenna applied for long term disability benefits, which Aetna denied on October 12, 2012, citing a nurse's evaluation of her medical records, which the insurer argued "did not support any impairment with respect to the Appellant's upper extremities" and "that Dr. Adams' [her treating doctor] supporting letter provided no objective medical findings to support the restrictions" he placed on McKenna.

Despite providing long term disability benefits from September 2012 through February 2013, Aetna terminated McKenna's benefits on February 23, 2013. McKenna took action at court, and the Sixth Circuit ultimately reversed a judgment for the defendant, arguing that "the administrator's partial finding of disability was based on abnormal examination findings...[and] there was no objective evidence of improvement of any of the bulging discs, collapsed discs or annular tears that were noted in the October MRI and November discogram, and there was no record evidence of successful treatment, sustained pain relief, or even an examining physician opinion that her condition had improved or that she no longer suffered from functional limitations."

## 13. FOUR WAYS TO FIND A QUALIFIED ERISA ATTORNEY



**1.** Check credentials. Is the LTD “expert” really an attorney? Some consultants will claim to be ERISA experts, and they will charge you a fee for handling your case. However, if you lose your administrative appeal, and you want to go to court, they can’t take that step for you. You would have to find a lawyer, so why not start working with one right away?

**2.** Ask how long the attorney has been handling ERISA and LTD cases. How many people does the firm represent in LTD cases each year? Is LTD the main focus of the practice, or is it just one of many areas?

**3.** Have peers favorably recognized the attorney? Has he or she published papers in legal journals on LTD cases or received awards or other honors recognizing related to leadership in this area?

**4.** What’s the attorney’s reputation on social media? While you need to take online reviews with a grain of salt, they can give you insight into how an ERISA attorney will work on behalf of his or her clients.

- Check Yelp, Yahoo!, Google and similar review sites for the consumer’s point of view. (Look for the consensus.)
- Check out what peers think of an attorney by visiting martindale.com. (Lawyers fill out anonymous surveys expressing their opinions.)
- Avvo.com rates attorneys on a 1-10 scale, taking into consideration their experience in a field and their reputation among other lawyers.
- SuperLawyers.com rates lawyers in many practice areas, including disability law.



## 14. SUMMARY: HOW TO HANDLE A DISABILITY CLAIM WITH AETNA

Filing a disability claim isn't easy. You're faced with multiple, difficult to understand forms, and working hard to manage an injury or serious illness. Your stress levels are already likely high, because you're not sure how to pay all your bills, and you don't know when (or if) you'll make a full recovery.

That being said, to claim your LTD benefits—the money you paid monthly premiums to receive—you must think clearly when filling out those forms and act promptly to ensure that you meet all the necessary deadlines.

Aetna's lawyers will scrutinize your claim. These people are paid well to find reasons the insurer shouldn't pay your claim. They are looking out for their employer's best interests, but who will look out for yours? When you retain a seasoned ERISA attorney, you will have someone working on your behalf fighting to ensure that you get the benefits you deserve.

Having the right representation is especially critical if Aetna denies your initial claim. Your attorney will present a robust case on your behalf supported by relevant medical records, physicians' observations and other pertinent information.

You paid for your disability benefits—isn't it only fair that you receive them now that you need them? Contact our offices at 800-562-9830, and we'll explain how we can help you make your initial claim, prepare an administrative appeal or file an ERISA lawsuit.

For more detailed information about the long term disability claims process, please download (at no charge) our ebook, Disability Insurance Policies: How to Unravel the Mystery and Prove Your Claim.

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## MARC WHITEHEAD BIOGRAPHY



Marc Stanley Whitehead is the founding partner of Marc Whitehead & Associates, Attorneys at Law, LLP which was established in 1992 in Houston, Texas. Born in Memphis, Tennessee, Marc was raised in Normangee, Texas. He graduated in 1985 from Normangee High School as class valedictorian. Marc attended Texas A&M University where he graduated in 1989 with a Bachelor of Business Administration in Finance.

Marc attended the University of Houston Law Center and received his law degree (J.D.) in 1992, graduating in the top quarter of his class. He was admitted to the State Bar of Texas in 1992. He is also admitted to practice before all U.S. Federal District Courts in Texas, the U.S. Court of Appeals-Fifth Circuit and the U.S. Court of Appeals for Veterans Claims.

Marc's areas of practice include personal injury and wrongful death, social security disability, long-term disability insurance denials, employee benefit denials, ERISA litigation and insurance claims and pharmaceutical and medical device litigation.

He is also a former adjunct professor of Law at the University of Houston Law Center teaching Civil Trial Advocacy. He has been an instructor for the National Institute of Trial Advocacy teaching Civil Trial Advocacy and an instructor for the National Business Institute teaching Social Security Disability Law.

Marc is double board certified in both Personal Injury Trial Law by the Texas Board of Legal Specialization and in Social Security Disability Law by the National Board of Social Security Disability Advocacy.

### **Professional Activities & Associations**

#### **American Association for Justice-Leader Forum Member**

- AAJ Risperdal Litigation Group Member
- AAJ Xarelto Litigation Group Member
- AAJ Transvaginal Mesh Litigation Group Member
- AAJ Toxic, Environmental, and Pharmaceutical Torts Section

### **Houston Trial Lawyers Association**

- President (2009-10)
- President Elect (2008-2009)
- Secretary/Treasurer (2007-08)
- Vice-President (1999-2007)

### **Texas Trial Lawyers Association**

- Board Member (1997-Present)
- Board of Advocates (1999-2001)

### **HBA Social Security Section Chairman (2004-2005)**

### **Memberships and Honors**

- Association of Civil Trial and Appellate Specialists
- National Organization of Social Security Claims Representatives
- College of the State Bar of Texas
- Houston Bar Association
- National Organization of Veterans Advocates
- AV Rated by Martindale Hubble
- 10.0 AVVO Rating
- Rated by SuperLawyers
- Top 100 Trial Lawyers in Texas by National Trial Lawyers Association

### **Books and Publications**

#### **Published Books:**

- The Social Security Disability Puzzle: How to Fit the Pieces Together and Win Your Claim;
- Disability Insurance Policies: How to Unravel the Mystery and Prove Your Claim
- Veterans Disability Claims: Strategies for a Winning Campaign
- Car & Truck Crashes: 10 Secrets Victims Should Know to Protect Their Rights
- Transvaginal Mesh Lawsuits: What You Need to Know If You Have Suffered Harm from Vaginal Mesh Implants
- The Fall of Testosterone: How a Vaunted "Low T" Therapy Has Backfired and Put Millions of Men at Risk for Heart Problems and Stroke
- The Xarelto Disaster: How Johnson & Johnson Failed to Warn Consumers of Deadly Internal Bleeding Risks
- The Zofran Tragedy: Marketing Anti-Nausea Drug "Off-Label" to Pregnant Women Linked to Birth Defects
- Risperdal: The Shocking Truth - Marketing Fraud Adds Up to Billion\$... While Boys & Young Men are Irreparably Harmed
- The Life Insurance Claims Kit: What To Do If Your Life Insurance Benefits Are Denied
- Published Articles
- Tort Reform As It Relates to Strict Products Liability
- A Lawyer's Guide for Determining Eligibility of Social Security Disability Claimants
- Nuts & Bolts of Social Security Disability Law
- The Five Step Sequential Evaluation Process Used in Determining Disability For Social Security Claimants