

Chapter 5

Health Care Professional Impairment

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Health care professionals who are drug impaired are referred to in this chapter as patients. Patients, including physicians, who suffer from addictive disorders frequently have great difficulty finding and obtaining the treatment that they need for their medical illnesses. Many of these patients do not receive the “state-of-the art” care that is available to them. Most of these patients are unaware of or do not comprehend their rights, as patients, under the law. This chapter will discuss the following: first, the evidence-based best practices to treat these patients; second, the approach to ensure that these patients are receiving the care that they need and deserve; and third, the rights that they have, as do other patients who suffer from other chronic medical illnesses, under the law. Patients with addictive disorders need access to appropriate medical care and their ability to pay for these services should be supported by their medical insurance products.

ADDICTIVE DISORDERS ARE CHRONIC MEDICAL ILLNESSES

Alcohol and other addictive disorders have been viewed over the years as resulting from “willful misconduct.” More recently, however, with the advances made in addiction research and treatment, it has become clear that addictive disorders are chronic medical illnesses like diabetes, hypertension, and asthma.¹ Addictive disorders have identifiable biological, genetic, and neurochemical components and markers that are found in other well-known and studied chronic medical illnesses.² When treated appropriately, addictive medical disorders actually have better treatment outcomes than those we find with other chronic medical illnesses. Research has shown that, when appropriate diagnosis and treatment is applied, more than 70% of those with addictive disorders recover as opposed to approximately 50% of diabetics who remain under good glucose control over the same study period of one year.³

DIAGNOSIS AND TREATMENT OF ADDICTIVE DISORDERS

The best treatment outcomes are highly dependent upon obtaining the correct and complete diagnosis. The diagnosis of addictive disorders is best accomplished by using the medical standard established by the Diagnostic Statistical Manual-IV-Text Revision (DSM-IV-TR). The DSM-IV-TR allows for an accurate diagnosis to be made along the spectrum of use, abuse, and addictive disorders. Consequently, the appropriate treatment can be applied in accordance with the diagnosis. Also, it is important to have a complete diagnostic problems list, which includes psychiatric and psychological problems that need to be effectively addressed in order to ensure a favorable outcome.

Treatment of addictive disorders should be provided in accordance with the severity of illness and the level of care indicated by the American Society of Addiction Medicine Patient Placement Criteria-2 (ASAM-PPC-2). The ASAM-PPC-2 will direct the patient to the level of care (outpatient versus inpatient) under which the likelihood of a successful outcome is possible. When individuals achieve a full treatment experience, which includes detoxification or pharmaceutical stabilization, rehabilitation, and maintenance, the potential for a successful outcome is greatly enhanced. In the Professional Assistance Program of New Jersey, a monitoring and treatment program for impaired health care professionals, the five-year success rate has been 96.3% when these treatment principles have been applied.⁴ Ongoing monitoring of addictive disorders, as has been observed in the treatment of other chronic medical illnesses, improves the treatment outcome.

PATIENT MEDICAL RECORDS ARE PROTECTED

The patient’s rights in addiction treatment are well protected by three federal regulations. The Americans with

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Disabilities Act (ADA) forbids discrimination against individuals who are in recovery from their impairing medical conditions. The ADA has been used very effectively for patients in recovery who have employment issues.

The ADA rights have been bolstered by the Rehabilitation Act of 1973, which forbids any government agency receiving any federal funding to engage in discrimination of any kind. This law has been very helpful to patients who are employed in the health care field, principally because many of their jobs are related to hospitals that usually receive federal funding.

Patient treatment records are protected by 42 C.F.R. Part 2 and can only be accessed through written authorization by the patient specifically for specified information; it does not allow for redisclosure of the confidential information protected.

Perhaps just as important as any of these rights is the patient's right to get well. Patients who are engaged in treatment for their medical illnesses are entitled to the same insurance considerations that other patients enjoy as they recover from their impairing medical conditions.

ADDICTION AS A DISABLING ILLNESS

Disability insurance benefits have unquestionably become an extremely important component of the recovery process. Oftentimes as a result of addiction, the patient would have suffered significant financial and other related consequences in addition to suffering the addictive illness itself. The receipt of disability insurance benefits allows the insured to dedicate his or her energy and effort to the recovery process and restoring the insured's health.

Both the disability insurance companies, as well as the courts, do accept the disease model of addiction, and regard addiction as a disabling illness. However, the issue is whether or not there is impairment as a result of addiction and whether that impairment satisfies the insured's policy requirements. It is important to understand the policy provisions and the issues that are likely to arise when the claim is filed. Considering these provisions and issues before and throughout the claims process increases the likelihood that the claim will be honored and maintained.

POLICY PROVISIONS: INDIVIDUAL DISABILITY INCOME POLICIES

Total Disability

Most policies issued are "own occupation" policies. Total disability is usually defined as the inability to perform either the "material or substantial," the "essential," or the "important" duties of the insured's own occupation. In addition, there is always a physician's care requirement.

Residual or Partial Disability

Residual or partial disability is usually defined as the inability to perform one or more of the material and substantial,

essential, or important duties of the insured's own occupation or the ability to perform all of the duties but for less time than prior to the disability, and a loss of income. Once again, there is a physician's care requirement.

Preexisting Condition

A preexisting condition is a "medical condition or impairment" that was not disclosed in the application before issuance of the policy and was not excluded by name, but which will be excluded from coverage by the company.

Incontestable Clause

Generally, an insurance company cannot contest a disability policy after it has been in effect for two years. However, the company's right to contest after two years is subject to the language in the incontestable clause in the policy. If the incontestable clause contains "fraudulent misstatement" language, the company retains its right to contest the policy after two years.

POLICY PROVISIONS: GROUP POLICIES (LONG-TERM DISABILITY)

Generally, group policies are subject to the Employee Retirement Income Security Act of 1974 (ERISA) that sets up the "administrative" procedures used in the claims process. These cases are usually reviewed under an "arbitrary and capricious" standard. Insurance Commissioners in some states, such as California and Illinois, have affirmatively acted to strike discretionary language from long-term disability (LTD) contracts, thereby changing that burden of proof.

Coverage

While it is assumed that the insured has coverage under an individual policy, the insured must satisfy the coverage provision in a group policy in order to receive benefits. Coverage is usually limited to an active, full-time employee.

Preexisting Conditions

Preexisting conditions are usually limited to those medical conditions or impairments that existed 3 months prior to the effective date of coverage and as a result of which disabled the insured within 12 months after the effective date. These conditions will be excluded from coverage.

Total Disability

It is common that the "own occupation" definition of total disability is limited to a specific benefit period, usually two years. After that limited benefit period, it is again common for the definition of total disability to change to a definition of "any occupation." In addition, there may be a loss of income requirement.

Residual Disability

LTD policies often incorporate a residual or partial disability benefit, which pays a benefit even if the insured is working. There is a loss of income and physician's care requirement.

Mental Illness and/or Drug and Alcohol Limitation

Group policies often contain a provision or provisions limiting the benefit period to two years for claims involving mental illness or drug and alcohol addiction.

LEGAL ISSUES/DEFENSES

Preexisting Condition

A preexisting condition is a nondisclosed medical condition or impairment that existed prior to the issuance of the policy. The company will attempt to exclude these conditions from coverage. This may work in concert with the incontestable clause.

Incontestable Clause

The critical issue is whether or not the incontestable clause contains "fraudulent misstatement" language. The second paragraph of this clause ties in with the preexisting condition clause. If the company can show that the application for the policy contains "fraudulent misstatements," it will act to either rescind the policy or deny coverage for the claim even after the two-year contestable period has ended.

Own Occupation

Own occupation, for total or residual disability, is the occupation(s) in which the insured was engaged at the onset of the disability. The company will assess all duties and potential occupations, either performed or engaged in, at the time that the insured became disabled.

Appropriate Care

The second part of the definition of total or residual disability requires physician's care. If that language requires care that is "appropriate" for the condition causing the disability, the insured must establish that the care received rises to the level of being appropriate under the circumstances.

Legal Disability

A "legal disability" is the loss of the ability to work as a result of an intentional act, as opposed to a disabling condition. Common legal disabilities are the loss of a license to work in one's occupation, or imprisonment.

Risk of Relapse

Probably the most crucial issue to any insured suffering from addiction, with a disability claim as a result of addiction, is the "risk of relapse." This issue will probably be raised by the disability insurance company as a defense to payment of ongoing benefits in most claims. Even though the disease model of addiction is accepted, it is often difficult to determine whether the insured, who is in recovery and has achieved remission, is disabled as a result of addiction.

Bad Faith

Recent federal court decisions, including that of the U.S. Supreme Court and Third Circuit Court of Appeals, have established that there is no state insurance bad faith cause of action in an ERISA-governed matter.^{5,6} Therefore, there is no right to a bad faith action stemming out of a claim brought under an employee benefit group LTD policy. In individual disability income cases, state bad faith causes of action vary from state to state. This cause of action is available depending upon the company's claims practices or the factual scenario in the insured's claim.

CONCLUSION

Patients who suffer from addictive disorders deserve the ability to access and receive the appropriate evidence-based treatment for their chronic medical illness, just as other patients who suffer from chronic medical illnesses such as diabetes, hypertension, and asthma. Many patients do not receive the state-of-the-art treatment that is indicated for their illness due to either lack of use of standards that have been developed for the diagnosis and treatment of addictive disorders or lack of access to treatment through their insurance vehicles. Much work remains to be done with regard to changing insurance practices in terms of providing adequate coverage for addiction treatment services. Patients also should become more aware of the services and policy rights that are currently available for the ongoing care of addictive disorders.

Endnotes

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2. R.K. Bachtell, Y.M. Wang, et al., *Alcohol Drinking Produces Brain Region Selective Changes in Expression of Inducible Transport Factors*, 847(2): *Brain Research* 157–165 (1999).
3. A.T. McClellan, D.C. Lewis, & C.P. O'Brien, *Drug dependence, a Chronic medical Illness: Implications for Treatment, Insurance, and Outcome Evaluations*, 269 (15): *J.A.M.A.* 1953–1959 (2000).
4. L.E. Baxter, Professional Assistance Program of New Jersey Presents: Physician Impairment, New Jersey Hospital Association, January 17, 2006. Center for Substance Abuse Treatment, National Advisory Report: Healthcare Professional Impairment, 2003.
5. *Aetna Health, Inc. v. Davila*, 124 S.Ct. 2488 (2004).
6. *Barber v. Unum Provident*, 383 F. 3d 134 (3d Cir. 2004).

