

# Employee Benefit Plan Review

## Ask the Experts

BY ANDREW I. HAMELSKY AND ZAARA B. NAZIR

### “LONG HAUL” COVID-19

**Q** How might disability insurers handle “long haul” COVID-19 claims under a long-term disability policy?

**A** Three years after the pandemic began, insurers are still grappling with assessing the effects of COVID-19 on long-term disability insurance policies. One area that does not appear to have been litigated is whether a person with long-haul COVID-19 can be considered totally disabled under a long-term disability policy entitling the person to total disability benefits.

Examples of common symptoms of long-haul COVID-19 include:

- Tiredness or fatigue;
- Difficulty thinking or concentrating (sometimes called brain fog);
- Shortness of breath or difficulty breathing;
- Headache;
- Dizziness on standing;
- Fast-beating or pounding heart (known as heart palpitations);
- Chest pain;
- Cough;
- Joint or muscle pain;
- Depression or anxiety;
- Fever; and
- Loss of taste or smell.

### OTHER SYMPTOMS

This list is not exhaustive. Some people also experience damage to multiple organs, including

the heart, lungs, kidneys, skin and brain.<sup>1</sup> While long-haul COVID-19 is still being researched and the duration of it is unknown, long-haul COVID-19 is not always considered a long-term disability. A claimant claiming long-term disability due to long-haul COVID-19 still must meet the requirements of being totally or residually disabled under the policy to secure benefits.

Confounding the long-haul COVID-19 disability analysis is the shift to working from home. While disability insurance policies do not insure the ability to travel to work, many work duties, including meetings, presentations and drafting work products, can be done seamlessly remotely. Before the pandemic, about 5% of full-time work was done from home; that share ballooned to about 60% in the early days of the pandemic and now has remained at about 27%.<sup>2</sup> Disability insurers will have to grapple with determining whether job duties that a claimant alleges they can no longer perform can instead be done at home.

The Brookings Institute recently analyzed a survey conducted by the Census Bureau that found that around 16 million working-age Americans have long-haul COVID-19 today; of those, two to four million are out of work due to long-haul COVID-19 and those numbers are likely to increase over time.<sup>3</sup> Long-haul COVID-19 presents serious implications for disability insurers and disability insurers should implement policies to evaluate long-haul COVID-19 claims as they will only increase over time.

The Social Security Administration (SSA) has begun flagging disability claims that include some mention of COVID-19, even if it is not the primary reason for the applications.<sup>4</sup> As of January 2023, the SSA has flagged roughly 44,000 disability claims that mention COVID-19.<sup>5</sup> Disability insurers should consider implementing a flagging system similar to the SSA to be able to track COVID-19-related claims to be better able to assess initial claims as well as recertifications. Further, flagging these claims overtime will allow insurers the ability to track trends and better be able to analyze long-haul COVID-19 claims.

There is an expectation that claims will continue to rise since the effects of long-haul COVID-19 are not currently completely understood. Nevertheless, the long-term disability policy language and applicable case law still provide the guideposts for assessing these claims. An assessment of long-haul COVID-19 claims will necessarily involve a determination as to whether the policy includes total versus residual disability language, as well as an assessment of the claimant's important work duties, income and what activities the claimant can still perform.

It is imperative that applications for long-term disability due to long-haul COVID-19, as well as recertifications of residual or total disability, be scrutinized to determine if a claimant continues to be residually or totally disabled. While long-haul COVID-19 may refer to

someone whose COVID-19 symptoms last longer than normal, those symptoms may subside over time, and as a result, a claimant would not continue to qualify for total disability. Further, “invisible” symptoms of long-haul COVID-19, like fatigue, brain fog and depression, are difficult for claimants to prove. Engaging medical experts to review a claimant's medical records will be vital to ensuring that only legitimate claims are paid.

It is expected that courts are likely to undertake a fact-based analysis, and as scientists begin better understand the effects of long-haul COVID-19, it is expected that there may be guidelines for diagnosis similar to chronic fatigue.

### STEPS TO TAKE

Actions that disability insurers should consider taking when evaluating a claim for disability due to long-haul COVID-19 should include:

- Comparing the claimant's pre and post-disability duties;
- Exploring working from home and other types of technology when evaluating the occupational duties and the claimant's ability to function;
- Understanding the jurisdiction to know the applicable case law concerning assessing insureds' duties and the ability to perform them;
- Utilizing medical examinations, e.g., functional capacity examinations;

- Utilizing vocational experts to understand better the labor market in a claimant's geographic area; and
- Utilizing surveillance if the insurer believes that a claimant may not be truthful or if the insurer wants to gauge a claimant's activity level.

While there is not much guidance by way of case law regarding long-haul COVID-19 disability claims, disability insurers should consider creating a plan of action now as to how they will assess these claims. 🌐

### NOTES

1. [https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html#footnote8\\_55d0f9m](https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html#footnote8_55d0f9m).
2. <https://www.cnbc.com/2023/03/03/the-future-of-remote-work-labor-experts-weigh-in.html>.
3. <https://www.brookings.edu/research/new-data-shows-long-covid-is-keeping-as-many-as-4-million-people-out-of-work/>.
4. <https://secure.ssa.gov/apps10/reference.nsf/links/12162020025416PM>.
5. <https://www.cnbc.com/2023/01/09/applying-for-social-security-disability-with-long-covid.html>.

**Andrew I. Hamelsky** is a partner and member of the litigation department of **Stradley Ronon Stevens & Young, LLP**. Mr. Hamelsky, who focuses his practice on life, health disability, and ERISA matters, as well as commercial litigation, may be contacted at [ahamelsky@stradley.com](mailto:ahamelsky@stradley.com). **Zaara B. Nazir** is counsel and a member of the firm's litigation department. Ms. Nazir, who represents health, life and disability insurers in a wide range of matters, may be contacted at [znazir@stradley.com](mailto:znazir@stradley.com).

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