

MANAGING THE MAZE: LTD, RTW AND THE DUTY TO ACCOMMODATE

Employers take note: just because an employee has been denied LTD benefits does not mean the person is not disabled. So you may need to search for ways to accommodate the employee before taking further action. **By Marg Creen**

In many workplaces today, a major disconnect still exists between the duty to accommodate under human rights legislation and the principles in return to work (RTW) when managing long-term disability (LTD) claims. This can lead to trouble for employers, who may find themselves inadvertently discriminating against an employee who is absent from the workplace.

For example, when trying to manage someone who is off work, some workplaces believe they can expect an immediate return to work when an insurer denies or terminates an employee's benefits, and if the employee does not return immediately, they consider the employee to have abandoned the job. Their thinking is that, if benefits have been denied or terminated, the employee must no longer be disabled and must be 100-per-cent fit to return to work.

Similarly, some workplaces believe that they can dismiss an employee on LTD benefits when the employee passes the "own occupation" period — which is usually after two years (that is, at the two-year point or some other specified period, the employee must be unable to carry out the duties of "any

occupation" in order to remain eligible for LTD benefits). Some employers resort to dismissal because they believe the employee is unlikely to return to work and are concerned about having to pay health, dental and other benefits until the employee turns 65 or 70.

But these beliefs or assumptions are not always correct. Employers in these circumstances should tread softly and get all of the information before proceeding. Given the human rights duty to accommodate and case law today, termination is not necessarily the next step when disability insurance benefits come to an end. That's because an LTD plan is defined by a contract, whereas the duty to accommodate arises under human rights law. Each imposes its own unique obligations.

Understanding LTD plans

An LTD plan is a contractual agreement usually between the employer and insurer. The contract defines the terms upon which benefits will be provided, including definitions of disability, durations, any mandatory rehabilitation provisions, exclusions, etc. As such, a person may be denied LTD benefits for a number of reasons other than the person not being "totally disabled" according to the terms of the LTD contract.

For example, it may be that, although the employee has a disabling condition, he or she has not yet provided adequate proof of this condition; that is, he or she may not have provided objective medical evidence from a physician. Or he or she may not have completed the appropriate forms. It is

important to know that, in the insurance industry, the "onus of proof" to support a disability with objective medical evidence is on the employee at the onset of the claim. The employee must supply or facilitate the information needed to support a claim that he or she is disabled.

In another example, it may be that an employee is denied benefits because of a pre-existing condition that makes the person ineligible for benefits under the terms of the LTD contract. This often comes into play with a new employee who has joined a workplace with an LTD contract that contains a six- or 12-month "pre-existing clause." That is, the new employee is not covered for a condition or related condition for which he or she has seen a physician during the previous six or 12-month timeframe mentioned.

And, finally, an employee may be denied ongoing benefits at the point of entering into the "any occupation" phase of LTD. Although the person can no longer do his or her job, the person may be deemed capable of performing some other work that pays an amount similar to the benefit amount under the terms of the insurance contract.

In all of the examples above, although the employee's LTD claim may be denied, the person may still have a condition that meets the definition of "disability" under human rights law. So, although some employers contemplate termination when an employee is denied benefits or an employee's LTD benefits come to an end, termination may be discriminatory.

The scope of accommodation

Just because an employee is denied benefits under an LTD contract does not mean that the employer has met its duty to accommodate under human rights laws. The employer must consider the three-part test for meeting the duty to accommodate as set out by the

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Supreme Court of Canada in its landmark 1999 decision commonly referred to as the *Meiorin* decision. Key to this test — and of most significance in these situations — is the third part: an employer must demonstrate that it is impossible to accommodate the employee affected without imposing undue hardship on the employer (see *Back To Work*, October 1999). Therefore, each case must be managed individually, based on the unique circumstances of the case, the size of the employer and the functional abilities of the employee.

A union environment does not change this duty. In fact, unions are required to play a role in looking for accommodation for the disabled employee. In the past, many collective agreements provided for automatic termination of an employee after a specific period on LTD, often after the two-year period to co-ordinate with the change in LTD status from "own occupation" to "any occupation." But these types of provisions have been successfully challenged by employees and their unions on the grounds that they violate human rights. Employers and their unions cannot make arbitrary decisions based on a provision in a contract or policy.

Many workplaces still believe that the duty to accommodate only applies to employees with permanent restrictions. But that is not the case. The duty to accommodate still arises when a disability is temporary. For example, a recent federal arbitration found that an employer had a duty to accommodate an employee who requested modified duties before surgery and again after surgery, even though the disability was temporary. Similarly, the duty to accommodate also arises when a disability leads to fluctuating or deteriorating abilities. Even if an employer has already accommodated an employee, it

may still need to revisit the employee's accommodation requirements many times over the future employment period should the needs of the employee change.

Therefore, an employer that is faced with an employee on LTD who is denied benefits or is no longer qualified for benefits must ensure it has met its duty to accommodate up to the point of undue hardship before taking any further action such as termination. First,

EXPERT ADVICE

Tips for meeting the duty to accommodate

To meet the duty to accommodate up to the point of undue hardship, employers should heed this advice:

- I Educate the workplace parties so they understand that the duty to accommodate covers both work-related and non-work-related conditions.
- I Adopt an integrated approach when it comes to return-to-work and accommodation policies and procedures, so that all parties understand their responsibilities when responding to restrictions supported by objective medical evidence (and, at times, this may mean that the employer arranges for an independent medical examination or functional abilities evaluation in order to get a better handle on the restrictions).
- Determine if an employee's condition/situation is covered by human rights legislation, even if LTD benefits have been denied or terminated.
- I Implement a process (including documentation procedures) that ensures all avenues for accommodation are explored and all appropriate parties are involved.
- Remain flexible during the accommodation process by ensuring a wide scope of jobs is reviewed.
- I Document any accommodation in a formal agreement, which includes times for review.
- I In cases when no suitable accommodation exists, document the conclusion and inform those involved while continuing to look for opportunities in the future.

the employer should determine if the employee is disabled according to the definition of "disability" under human rights laws, which tend to define disability more liberally than insurance contracts do. Depending on the jurisdiction, a disability can include any previous or existing mental, physical or learning disability, as well as a *perception* that a person has a disability.

Next, if the employee is disabled (or perceived as disabled), the employer must ensure it meets its duty to accommodate the employee up to the point of undue hardship. This means seeing if the employee can be accommodated in his or her own job and, if not, in another job within the organization, even within other bargaining units in unionized workplaces.

The point of undue hardship will only be reached when, relative to the size and nature of the workplace and weighed against the benefits to the disabled worker, the accommodation becomes too expensive, jeopardizes the health and safety of the employee, his or her co-workers and/or the public, causes too much disruption within the organization (e.g., because there is little interchangeability within the workforce), has too big of a negative impact on morale due to workload changes, etc. The employer must be prepared to defend a conclusion that no position is available, even if modified, that is within the employee's capabilities. Remember, the onus is on the employer to prove it has tried to accommodate to the point of undue hardship (see box).

Human rights tribunals, courts and arbitration boards continue to place a high value on accommodation in workplaces. It is critical that, even when an LTD claim is terminated or declined, an employer takes steps to meet its duty to accommodate in a very broad sense. The situation is often not as straightforward as an employer might hope. •