Beware the “care of a doctor” term in disability policies

Introduction

A person could be forgiven for thinking that disability benefits will be paid in an “own occupation” policy if the claimant is genuinely disabled from working in his or her own occupation due to sickness or injury. As it turns out, that is not necessarily the case.

Similarly, the “care of a doctor” term that is found in virtually all disability policies is, at first glance, a sensible and helpful provision. It requires that disability claimants be under the care of a doctor, presumably so that they can undergo the treatment they require in order to recover and return to a productive state. But this term is not as innocuous as it initially appears.

In a November, 2008 decision, Andreychuk v. R.B.C. Life Insurance Co., 2008 BCCA 492 (Andreychuk), the B.C. Court of Appeal upheld a lower court decision denying benefits to the plaintiff on the basis that she had not satisfied a policy requirement that she remain under the care of a physician. In that case, the plaintiff, a lawyer, had purchased an “own occupation” policy that protected her income earnings as a lawyer. Thirteen years into a successful legal career, she experienced a series of professional setbacks and became unable to practice as a result of anxiety and severe depression. She sought and obtained appropriate medical care and her depression lifted with the administration of antidepressants. The plaintiff then moved to another town, found a new family doctor, explained her medical history to him, and in the ensuing year, attempted a return to the practice of law. Unfortunately, her ongoing and vocationally disabling anxiety prevented a successful return to work. She next visited her new family doctor a year later when she began to experience a recurrence of her depression. This year gap in treatment proved her undoing.

Several years after she first became disabled, psychiatrists retained in the litigation proceedings identified a potential treatment for the plaintiff’s anxiety which involved counseling by a highly trained psychologist focused on desensitization techniques. The claimant had been unaware of this treatment as it had not been recommended to her by either of her two family doctors or either of her two treating psychiatrists, nor was it covered under MSP. It was also clear that after the passage of so many years, this form of counseling would not likely be successful.

In a nutshell, the plaintiff had clearly been unable to work in her own occupation since the onset of her illness and had cooperated in all suggested medical treatments. Despite these considerations, the court held that the “care of a doctor” clause in her policy was unambiguous and, because she had not continued to receive medical treatment when her depression lifted (although her anxiety continued unabated), she was not entitled to disability benefits.

Care where treatment futile or not accessible
The law in B.C. is at odds with the law in Ontario\(^1\) where the courts have held that if medical treatment would be futile (or if the individual cannot reasonably access medical treatment), a requirement that the claimant remain under the care of a doctor should not deprive a genuinely disabled person of disability benefits. In Ontario, if there is compelling evidence of disability and treatment would be of little or no value, provisions requiring treatment are generally not enforced.

One can think of a variety of situations where a claimant may have a disabling medical condition but not require ongoing medical treatment. Examples include cases of chronic pain, migraines, the chronic aftermath of traumatic brain injury, arthritis, M.S., and various medical conditions involving patients who are allergic to medications. Another twist in this area of the law involves cases where medical treatment may alleviate some of a patient’s symptoms but not increase functionality or bring about recovery. One may well question why disability benefits would cease to be payable where treatment cannot impact the individual’s vocational status.

Other instances where the “care of a doctor” clause may create problems are when a claimant suffers from mental illness. In the Ontario case, *Kirkness Estate v. Imperial Assurance Co. of Canada* (supra), the claimant suffered from schizophrenia, did not accept that he had a mental illness – and therefore refused all medical treatment. The Ontario courts recognized that his failure to meet the care of a doctor requirement was a reflection of his illness, and that unless and until he gained insight into his illness, he was incapable of meeting this requirement. Consequently, the courts did not enforce the “care of a doctor” term. Other examples of mental health conditions that may potentially interfere with an individual’s ability to seek medical treatment include severe depression, psychosis, and agoraphobia.

In all of these cases, the *Andreychuk* decision stands for the proposition that in B.C., a failure to meet the “care of a doctor” requirement disqualifies the individual from disability coverage. The court did not appear to recognize the irony of a claimant losing disability coverage due to his/her disability.

The only potential relief currently available in BC where ongoing medical treatment would be futile is a provision in some policies which provides that the insurer may waive the requirement that a person be under regular medical care if it would be of no benefit to them. In these cases, it would be necessary for medical treatment to continue until such time as an explicit waiver is given by the insurer.

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The lesson to be learned from Andreychuk is that medical treatment is mandated in all disability policies which contain a "care of a doctor" clause or something similar, whether or not such care is required medically and whether or not the claimant is mentally or emotionally capable of scheduling this themselves. Failure to regularly see a doctor leads to loss of benefits and coverage.

Family practitioners should be aware of this requirement and both accommodate and strongly encourage regular medical attendances, regardless of medical considerations, solely to preserve disability coverage.

**Frequency and type of medical care**

How widespread is this situation? Virtually all disability policies currently issued in BC, whether “own occupation” or “any occupation”, and whether group or individual, have some provision that a claimant be under medical care.

In some instances, the policies stipulate that the care be given by a physician (which is usually, though not always defined as a medical doctor). In other instances, medical care can be given by any licensed healthcare provider, although the care would obviously need to relate to the disabling condition and the expectation would be that medical care would best come from a licensed physician.

The frequency of care is something that has not been clearly defined in BC. To be on the safe side, where the policy requires a claimant to receive “regular” medical care, a claimant would be well-advised to make a doctor’s visit once every month to six weeks.

A question arises as to what type of treatment is required. Some policies are worded in a general way as to simply require medical care. Other policies, particularly those issued in recent years, require “appropriate” medical care. What is appropriate may only emerge with the benefit of hindsight, but this would not appear to provide any justification for the failure to have obtained treatment (as evidenced in the Andreychuk decision). Appropriate medical care may also involve treatment outside of what is covered by MSP, such as counseling or chronic dental pain, for which funding may be or may not be available. It also may require services of specialists which are in short supply or otherwise difficult to access.

In Andreychuk, there was evidence of a severe shortage of psychiatrists on Vancouver Island. This did not factor into the court’s consideration. The message is that in policies which require appropriate medical care, claimants (and perhaps their treating doctors) are vulnerable to criticism that appropriate treatment was not secured in a timely manner.

**Consequences of failure to satisfy “care of a doctor” clause**
The outcome in the *Andreychuk* decision of the plaintiff’s failure to see her family doctor and/or psychiatrist (this was never clarified in the decision) when she continued to experience work-related anxiety but her depression had lifted, was that the plaintiff’s claim for benefits was dismissed and her coverage permanently lost. This loss of coverage occurs because of the way premium payments are set up: during the period an individual is entitled to disability benefits, the payment of premiums is waived. This waiver ends as soon as the individual’s eligibility for benefits ceases. This dynamic creates a rather insidious risk of loss of the entire disability coverage because a claimant can be severely disabled and still lose coverage by failing to meet the “care of a doctor” requirement. Moreover, for many claimants, not receiving disability payments makes it very difficult to pay ongoing premiums, which increases the likelihood that coverage will be lost.

An additional hardship associated with losing disability coverage is that it cannot be replaced. Insurers either refuse to issue new policies to claimants with a history of a disability claim, or they require riders excluding coverage for that disability. Claimants who have lost coverage will be unable to purchase any comparable replacement coverage.

The lesson to be learned from *Andreychuk* is that individuals whose claim for benefits is in dispute and who have not seen a doctor in more than two months would be strongly recommended to continue to pay their premiums until their claim is resolved.

**Responsibility for ensuring ongoing medical treatment**

Many individuals who have disabling conditions are not particularly aware of the “care of a doctor” requirement in their disability policy. Individuals with group disability coverage are not given a copy of the policy, and their benefit booklets may or may not explain the “care of a doctor” requirement. Although some insurance companies advise claimants that they should see a doctor, claimants often do not realize that they will lose their coverage if they fail to seek regular, appropriate medical care.

Add to this that many individuals rely on their family doctor to give them guidance as to when, how often, and for how long they should be attending for visits, and it becomes apparent that doctors may be the first or *only* advisors in a position to counsel patients about their need to schedule regular medical appointments to maintain their disability benefits. Their involvement in this process is made even stronger because doctors are inevitably engaged in providing reports and completing forms for disability benefits.

Because of this inevitable and necessary involvement, it can be argued that “care of a doctor” terms place on the medical profession some degree of responsibility for preventing loss of coverage. Family practitioners should be encouraged to not only initiate regular treatment but also continue it, whether medically necessary or not, if a disability claim is active.
Conclusion

The legal obligations imposed by disability insurance contracts for claimants to be under the care of a doctor have serious consequences. In light of the Andreychuk decision, it is important for the medical profession to support and protect their patients’ eligibility for benefits by taking steps to provide patients who have genuinely disabling conditions with regular and appropriate medical care and to continue to provide medical care, irrespective of the need for ongoing medical treatment, in order to preserve their patients’ entitlement to ongoing disability benefits.

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