By Gregory Michael Dell, Esq

# Buyer Beware

## Beware the "medical occupation" definition of total disability

A well-known insurer recently introduced the "Medical Occupation" definition of disability to the marketplace. While the "Medical Occupation" definition appears to be an innovative method to sell physicians a new long-term disability product, I still think there is nothing better than an "Own-Occupation" definition of disability.

Physicians are researchers by nature, and when supplied with enough information they will make informed, educated decisions that will allow them to sleep comfortably. So listen to the arguments, do your homework, and don't take the purchase of disability insurance lightly. Your entire financial future may one day depend on it.

As a plastic surgeon, you have probably been told that you should make sure that you purchase an insurance policy with a true "Own-Occupation" or "Own Specialty" definition of disability for the entire benefit period (to age 65 or longer).

Now, this well-known disability insurance company is challenging this "conventional wisdom"—but should it be?

### THE "OWN-OCCUPATION" DEFINITION OF TOTAL DISABILITY

A disability insurance policy with a true "Own-Occupation" definition of total disability typically states that you are totally disabled if solely due to injury or sickness you are not able to perform the "material and substantial" duties of your occupation.

Some companies will even state that if you have limited your occupation to the performance of the material and substantial duties of a single medical specialty, that specialty will be deemed to be your occupation.

Translation: If due to injury or sickness you cannot perform your duties as a plastic surgeon, and provided your predisability practice was solely limited to the duties of that specialty, then you would be considered totally disabled—even if you decide to work in another occupation or medical specialty.

**The courts: A determination of total disability does not require a state of absolute helplessness or inability to perform any task relating to one's employment.**

### THE "MEDICAL OCCUPATION" DEFINITION OF TOTAL DISABILITY

Northwestern Mutual Life is heavily marketing the "Medical Occupation" definition of total disability. The argument for this definition of total disability compared to the true "Own-Occupation" definition of total disability is that plastic surgeons have nonsurgical patient care duties in addition to performing surgery.

The company selling the "Medical Occupation" definition of total disability believes that the "Own-Occupation" definition requires a plastic surgeon to be unable to perform all of their surgical and nonsurgical duties in order to be considered totally disabled. So, this argument says that since most doctors will not satisfy the "Own-Occupation" definition of total disability, the "Medical Occupation" definition may provide greater clarity and flexibility at the time of claim.

The "Medical Occupation" definition of total disability states that if more than 50% of your time was spent providing direct patient care and services and you are unable to perform the principal procedures of your procedure-based,[1] board-certifiable medical specialty, you have the flexibility to continue working and receive benefits proportionate to your loss of income or to stop working entirely and receive your full monthly benefit.

Can a surgeon be deemed "totally disabled" if he is unable to operate? There is no black letter law that defines the material and substantial duties of an individual's occupation. Courts have used various tests to determine if an insured's occupational duties are material and substantial versus incidental or peripheral.

Whether or not a certain occupational duty is material depends on the duty's importance to that profession, the amount of time the duty consumes, and its qualitative importance to the professional mission.[2]



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A duty will be deemed material when it is so important that an inability to complete the duty equates to the insured being unable to practice his or her "regular occupation."[2]

In *Dowdle v Nat'l Life Ins Co*,[3] the court addressed the issue of whether a surgeon is entitled to total disability benefits under the terms of his disability policy where he is unable to perform surgery but able to conduct office consultations and perform other nonsurgical tasks.

In this case, John A. Dowdle, Jr, MD, purchased a long-term disability policy with an "Own-Occupation" definition of disability. On his application for coverage, Dowdle identified his occupation as an orthopedic surgeon and listed his specific duties as seeing patients, performing surgery, reading x-rays, interpreting data, and promoting referrals.

Prior to his disability he worked 50 to 60 hours per week, plus call duties. In an average week, Dowdle devoted 5 half-days to surgery and 5 half-days to office consultations, seeing 15 to 20 patients in each half-day session.

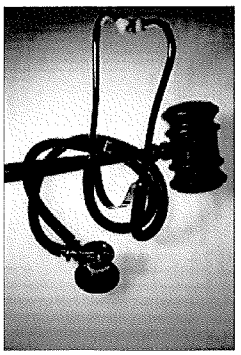
In all, surgery and surgery-related care comprised 85% of his practice. In addition to his orthopedic practice, Dowdle performed on average seven independent medical evaluations (IMEs) per week for a company he cofounded. He devoted an average of 1½ hours to an IME: a half-hour for discussion and examination and 1 hour for review of medical records and preparation of the report.

Dowdle often completed IMEs at his home during evening hours, as these were not part of his normal duties as an orthopedic surgeon.

Years later, Dowdle suffered injuries, including a closed head injury and a right calcaneal fracture, when the private aircraft he was piloting crashed shortly after takeoff. As a result of the injuries, he was unable to stand at an operating table for an extended period of time. Thus, he could not perform orthopedic surgery.

He filed a claim for total disability and was awarded benefits. Months later, he resumed performing office visits and working 6 half-days per week, as an independent contractor seeing 15 to 20 patients during each half-day session. Dowdle also resumed performing IMEs for the independent company he cofounded.

Dowdle admitted that he



could not perform orthopedic surgery and, instead, if surgery was needed he referred patients to two of his partners. He argued that he was totally disabled because he could no longer perform surgery—the main duty of an orthopedic surgeon. His disability carrier argued that he was not totally disabled because he could still care for patients with spinal injuries and illnesses and manage their rehabilitation and injections, as he had done previously.

Agreeing with Dowdle, the court held that he was entitled to total disability benefits and stated that the duties of office consultation and nonsurgical tasks are manifestly secondary or supplementary tasks incident to the primary function of an orthopedic surgeon.

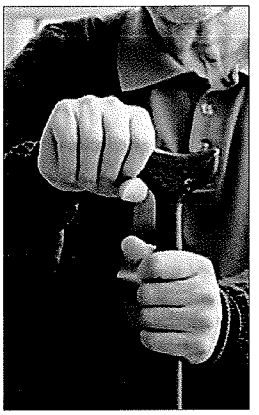
The court also noted that a determination of total disability does not require a state of absolute helplessness or inability to perform any task relating to one's employment.

## HOW IT DIFFERS

Under the "Medical Occupation" definition of disability, Dowdle would have had to either discontinue his work as an orthopedic surgeon—along with any other gainful employment—or continue working and earn less than 20% of his predisability earnings in order to qualify to receive his full disability benefit.

With a true "Own-Occupation" definition of disability, Dowdle had the ability to continue working and earn unlimited income, so long as his disability rendered him "unable to perform with reasonable continuity the substantial and material acts necessary to pursue his or her occupation in the usual and customary way."[4]

It is also important to note that while *Dowdle v Nat'l Life Ins Co* is widely accepted



in the 8th Circuit, and similar outcomes have occurred in other jurisdictions, the legal interpretation of an "Own-Occupation" definition of disability varies in different courts throughout the country. ■

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**References**

1. "Procedure-based" means more than 50% of medical charges come from performing surgical interventions and non-surgical invasive interventions.
2. *Lasser v Reliance Standard Life Ins Co*, 146 F Supp 2d 619, 636 (DNJ 2001), judgment aff'd, 344 F3d 381 (3d Cir 2003).
3. *Dowdle v National Life Ins Co*, 407 F3d 967 (8th Cir 2005).
4. California Settlement Agreement between UNUM and the California Department of Insurance.

**On the Web!**

**See also "Practice Matters: Disability Insurance" by Lawrence B. Keller, CLU, ChFC, CFP, in the October 2009 issue of *PSP*.**

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