

U.S. DEPARTMENT OF LABOR  
ADVISORY COUNCIL ON EMPLOYEE WELFARE AND PENSION BENEFIT PLANS

TESTIMONY OF MALA M. RAFIK

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My name is Mala Rafik. I am a partner at Rosenfeld & Rafik, P.C. I am here today to discuss the discrimination individuals living with mental illness suffer in the provision of benefits under long-term disability policies.

For over twenty-seven years, our firm has represented thousands of individuals who are chronically ill and disabled in accessing private disability benefits. Most of those individuals suffer from mental illness, whether singly disabling, or secondary to a physical condition. For these individuals, each of whom paid the same premiums for disability insurance coverage as their fellow employees, benefits have been largely limited to two years. For individuals whose disabilities are rooted solely in physical conditions, benefits are available until age 65 or retirement age.

We have long been told that the two-year mental illness limitation is justified because individuals suffering from mental illness generally recover within in two years and premiums would rise and enrollees would opt out of coverage if the limitation was removed. However, no insurer – and we have litigated this issue – has been able to explain why individuals with mental illness would be the singular cause of this catastrophe. The financial impact of these claims, and an individual's recovery, can be managed by disability insurers in the same way they manage claims for physical illnesses: if the individual improves such that they are no longer disabled, benefits will be terminated. A binding contractual limitation is not required to manage these claims.

I am testifying today on behalf of my clients who are unable to do so. While the past few years has seen more of an understanding of mental illness, the stigma is still real. It is perpetuated by discriminatory limitations such as the ones we see in these insurance policies. To not be able to work due to your health, regardless of the cause, is devastating. To then be faced with the likelihood of losing your financial security is destructive.

Three of my clients have died by suicide. According to their treatment providers, and one who left a note, they died because their benefits were terminated after two years, they were not well enough to return to work, they lost their financial security, and they could not bear to be a burden to their families. Many more lost everything. Like their colleagues who suffer from a physical disability, they have families, often young children, who relied on their income to survive. When their benefits were terminated not because they were no longer disabled, but because of an arbitrary limitation on how long they should be disabled, they lost more than their health. Given the financial devastation wrought by the termination of disability benefits, many of my clients exhaust their life savings before losing their homes and declaring bankruptcy. For others, the support of family members is the only protection against total financial ruin. All of them lose their private health insurance, making the benefits offered by Social Security Disability, inevitably far less, in some cases as little as ten percent of their former income, their only option for any support.

The existence of this limitation also impedes recovery. The knowledge that benefits will end in two years, regardless of their ability to work, only serves to worsen an individual's health. Long-term disability benefits for most provide a bridge to an eventual return to work. If disability benefits are terminated too early, however, return to work becomes less certain. This is the very situation in which many of our clients find themselves.

Let me be clear: each individual suffering from mental illness I have had the privilege of representing in my practice has been a contributing member of society. There is no aspect of their employment background, or indeed of their backgrounds generally, that places them in a disfavored status, other than the fact that their conditions have been labeled mental rather than physical. There is no indication that they will remain disabled longer, will respond to treatment more slowly, are less committed to returning to work, or in any other way is less worthy of continued benefits than their colleagues labeled as physically disabled. It is the label alone that determines the outcome. The historical basis for singling out individuals who suffer from mental illness for disparate treatment is not hard to find. The insurers did not create it, but by maintaining an exclusionary policy they do perpetuate it. We recognized and addressed this injustice in health insurance. To deny the same protection in disability insurance is particularly wrongheaded.

It is significant that the relief we seek already exists for thousands of other disabled employees living throughout the country. The only distinction? They suffer from physical conditions. It bears mentioning that many employers who have the bargaining power due to their size and sophistication to negotiate favorable contracts, purchase policies without a mental illness limitation with no financial impact. In Massachusetts, if you work for MIT, Massachusetts General Hospital, or a few large law firms, for example, you are not subject to such discrimination. This has been the case for at least 20 years with no associated premium increases. Smaller organizations, small business owners, and solo employers do not have such leverage. And if unlimited coverage is requested and offered to these individuals, it is done so at such a high cost so as to discourage its purchase. If providing equitable disability benefits for individuals suffering from mental illness was cost prohibitive, this practice by large employers would have ceased. These employers chose to treat their employees equitably without a negative financial impact. Others do not have that ability, nor is it made available to them. Relevantly, the Social Security Administration does not treat individuals who are disabled due to mental illness any differently than individuals whose disability has a physical cause.

Also important is that disability policies provide benefits without time limits to participants who require a hospital-level of services to treat their mental illness. If an individual is being treated in the community on an outpatient basis, she would have her benefits terminated on day 731 of such treatment. That same person, if in a hospital, would continue to receive disability benefits after the second year elapsed. It is not rational to use unverified adverse financial consequences as a justification for a discriminatory program when the program adopted is actually less cost-effective than a non-discriminatory benefits program would be.

Mental health treatment is often provided as a continuum of care. The onset of an acute exacerbation of mental illness may necessitate hospitalization. The patient's condition may improve through the hospital course to the point that she is ready for discharge, but nevertheless

may need intensive outpatient treatment before being ready to go back to work. However, like a person receiving disability benefits due to a physical illness, discharge from the hospital does not always equate with immediate fitness to return to work. Requiring verification of disability through hospitalization is not rational. We have made strides in this country legally, and in practice, to treat individuals suffering from mental illness in the least restrictive environment. This limitation cuts against the legal and moral underpinnings of those efforts.

The only question is whether limiting benefits for individuals who faithfully paid the same premiums as their colleagues simply because they suffer from mental illness is defensible. It is not financially defensible: the claims can be managed in the same way as physical claims, thereby negating any financial impact on the plan or its participants. These individuals need, and deserve, the protection of the law to avoid financial and emotional ruin to themselves and their families. Given the changes we have made to do so in other areas, ending discrimination here is long overdue.

Respectfully submitted,

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