A Victory for Long Term Disability (LTD) Benefits Applicants:
"*Independent" Physician Review Without Physical Examination Found Arbitrary and Capricious and Reversed*

By:
Elliott Andalman, Esq.

The Court of Appeals for the Sixth Circuit's decision in *Kalish v. Liberty Mutual/Liberty Life Assurance Company of Boston*, 2005 U.S. App. LEXIS 17510, which issued last month, August 2005, gives a big boost to persons seeking long-term disability benefits as well as their advocates.

The Court held that a claims administrator may not disregard a treating physician's opinions and simultaneously rely exclusively on a paper-only review. A paper-only review is a review of the claim by an insurance plan's "independent" physician without a physical examination of the claimant. Such reliance on a paper-only review, while ignoring a treating physician, was found to be arbitrary and capricious and thus grounds for the Court to reverse the insurance company's denial of benefits.

The Appellant in this case, Mr. Kalish, suffered from a heart condition and depression and began receiving disability insurance benefits under a group insurance plan through his employer. The insurance company later determined that Mr. Kalish was no longer disabled under the terms of the Plan. In reaching its decision, the insurance company hired a consulting company to evaluate Mr. Kalish's medical records. While the consulting physician did interview Mr. Kalish's main treating physician, the consultant never physically examined Mr. Kalish.

Attorneys fighting for disabled workers are all too familiar with the tendency of insurance company physicians to take a position favorable to the company. Here, the Court validates this tendency and allows it to be considered as a factor in determining whether the claims administrator acted arbitrarily and capriciously. Specifically, the *Kalish* Court considered the consulting physician's potential *incentive* to make findings for their employer insurance company as a factor in whether the claims administrator's decision was arbitrary and capricious. The Court explained, "Although 'routine deference to the opinion of a claimant's treating physician' is not warranted, we may consider whether 'a consultant engaged by a plan may have an incentive to make a finding of 'not disabled' as a factor in determining whether the plan administrator acted arbitrarily and capriciously in deciding to credit the opinion of its paid, consulting physician.'" *See Kalish at p. 17* (emphasis added).

The Court also held that whether a doctor has physically examined the claimant is also a factor that it may consider when deciding whether a plan administrator acted arbitrarily and capriciously in giving greater weight to the consultant physician. *See Kalish at page 19.* The Court additionally found that the consulting physician's report, upon which the insurance company exclusively relied, was inadequate on other grounds; Specifically, the report contained only one page of analysis and failed to discuss the findings of the treating physician and the insurance company's own field investigator, among other inadequacies. For these reasons, the

Elliott Andalman • *Mary Ellen Flynn* • *Daniel A. Katz* *Principals*
Lee Plaza • 8601 Georgia Ave. • Suite 604 • Silver Spring, MD 20910 • Tel: 301.563.6685 • Fax: 301.563.6681 • E-mail: andalmanflynn@a-f.net
Website: www.andalmanflynn.com

Court found the company's denial of insurance benefits to be arbitrary and capricious and reversed its denial.

The Sixth Circuit Court of Appeals reinforced what LTD advocates and practitioners have experienced for years. Hopefully, we can gain wide acceptance of the principles set forth in *Kalish* by other courts. Nonetheless, legal practitioners should pay close attention to this case and use it as fuel for future appeal battles.