

FOCUS ON DISABILITY – FUNCTIONAL CAPACITY TESTING

By Jason Newfield

There are several investigative tools used by insurers for disability claims, including IMEs (Independent Medical Examinations), FCEs (Functional Capacity Evaluations), Peer Reviews, Field Investigations, and Surveillance.

Although each of these investigative tools can detrimentally impact the continuity of benefits, in this article I focus on the problems with FCEs and upon strategies to employ when addressing an insurer's request that a claimant undergo such testing. Generally, an FCE is a series of tests of strength, flexibility, endurance, pain, cardiovascular fitness, materials handling (lifting ability), coordination, static posturing, repetitive movements, and other tests.

Unlike an IME, which is usually contractually required, an FCE is not generally contractually required. This test is utilized by insurers to test one's maximal effort, which is then used to extrapolate whether one can work full time on a sustained basis due to the ability to successfully perform a myriad of tests. Thus, there are numerous grounds upon which to refuse to attend an FCE, and both attorneys and claimants should be vigilant about asserting rights to refuse this test.

On behalf of claimants, we take the position that an FCE is both a dangerous and inherently unreliable evaluation that does not afford a claimant a fair review of his or her claim. Case law will generally support the argument that no claimant can be required to undergo a physical examination or test if "it presents the possibility of danger to [his] life or health" *Lefkowitz v. Nassau County Medical Center*, 462 N.Y.S.2d 903 (New York 2d Dep't 1983). As long as the examination or test is even "potentially dangerous," it may not be mandated. Upon a *prima facie* demonstration of potential danger, the burden shifts to the party seeking the test to demonstrate its safety. *Id.* In such a situation, we argue that the insurer must present proof showing the necessity for such examination, the details of the procedure employed in making it, the frequency with which it has been done, together with the experience and observations that have been made by physicians as to pain, harm, or subsequent results of any nature occurring to persons so examined.

Our position regarding the safety of claimants forced to undergo FCE testing is buttressed by the medical community. In the journal *Physical Therapy*, Volume 78, No. 8, August 1998, an extensive article was published concerning FCEs. The authors of this article concluded that there are significant safety issues regarding FCEs. They noted that injury can clearly occur because the patient is being asked to perform physical tasks in order to demonstrate maximal effort. The only way that exacerbation of injury and additional injury could be avoided is if a therapist were able to note an exterior visual sign that there was unsafe performance of a particular procedure. However, the authors concluded that there should be criteria available for determining when maximal effort has been put forth and when to intervene. To date, no such criteria exist. They also noted that intervention by the therapist decreases the validity and reliability of the tests. Thus, there is a built-in

incentive for the therapist to not intervene, thereby placing the patient at significant risk of harm. The authors concluded that currently there are no infallible methods for determining a safe stopping point during the conduct of an FCE.

Rather, as seen time and again in my review of claimant's FCE results, a claimant forced to stop due to health risks will be accused of "submaximal effort." Accordingly, the test cannot be viewed as safe.

In addition to the safety concerns, the lack of reliability of such testing is of great concern.

The above referenced article also contains innumerable reasons why FCEs are completely unreliable. Those reasons include lack of research, lack of protocol, lack of uniform criteria, lack of standardization, lack of an ability to project what a patient could perform during an 8-hour work day, significant safety deficiencies, and nearly no peer-reviewed journal articles regarding reliability. The authors detail these numerous deficiencies as well as many others. For example, if a patient is unable to participate in various aspects of the FCE, there is no reliable and valid method of determining, by any research whatsoever, whether the patient's lack of participation is due to the experience of pain or inability. The tester could unilaterally conclude, without any valid or reliable basis, that the patient is not putting forth maximal effort.

In addition to the article published in *Physical Therapy*, an article presented at the National Social Security Disability Law Conference by Deborah Lechner, PT, MS, David Roth, PhD, and Karin Straaton, MD, clearly corroborate the conclusions from the article in *Physical Therapy*. The article was also published in *Work*, 1991; 1,37-47. These authors concluded that "reliability of these tests needs to be established before claims of validity can be accepted." The Lechner et al. article also makes clear that there is no empirical evidence that can support the many assumptions being used regarding the amount of effort expended by the patient during the testing. Thus, any conclusions of the testers regarding secondary gain and submaximal effort are completely useless. The authors concluded that all of the current FCEs currently available "are lacking the critical components of a well designed test, specifically reliability and validity testing."

From a legal perspective, the problems inherent with FCEs were recently addressed. In *Stup v. UNUM Life Ins. Co. of Amer.*, 390 F.3d 301 (4th Cir 2004), the court was concerned about the validity of FCE testing and the insurer's reliance upon the FCE results in its claim determination. Also, in *Gannon v. Met Life Ins. Co.*, 2003 U.S. Dist. LEXIS 24930 (D. Mass. 2003), a similar issue was addressed.

Thus, courts have generally supported the position taken by our office that the FCE is not a reliable test that can be utilized in effectively evaluating a claimant's work capacity or functionality.

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