

ERISA & DISABILITY BENEFITS NEWSLETTER

ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

For more Information about Eric Buchanan & Associates, PLLC, visit our website at www.buchanandisability.com.

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MANAGING THE IMPACT OF ADVERSE FUNCTIONAL CAPACITY EVALUATIONS BY: R. SCOTT WILSON

Whether obtained by an insurer, or worse yet, requested by a treating doctor unwilling to continue filling out attending physician statement forms, functional capacity evaluations ("FCEs") are some of the most common negative pieces of evidence in long term disability cases. And because they purport to be an objective, scientific demonstration of what a claimant is physically capable of, courts are frequently inclined to defer to FCE results. See, e.g., *Huffaker v. Metropolitan Life Insurance Company*, 271 Fed. Appx. 493 (6th Cir. 2008) (describing FCEs as "a reliable and objective method of gauging the extent one can complete work-related tasks").

If at all possible, I prefer to avoid FCEs altogether. However, if one has been conducted, there are arguments that can limit their negative impact.

Firstly, though FCEs are often accepted in workers' compensation contexts as definitive objective proof of an individual's physical capacity, there is actually very little scientific evidence to support such an assumption. Research has failed to show FCEs to be a reliable predictor of ability to return to work. Reneman and Dijkstra, "Introduction to the Special Issue of Functional Capacity Evaluation: From Expert Based to Evidence Based," 13 *The Journal of Occupational Rehabilitation*, No. 4, p. 203 (2003). This article explains that the reliability and validity of FCE's have been scarcely studied in the past, and research shows that FCE's may never be a scientifically reliable predictor of a person's work ability. *Id.* at 205. The article explains that prior articles discussing the reliability and validity of FCE's suggest the validity of FCE's is questionable. "All reviews published in the 1990s have concluded that the quantity and/or the quality of published FCE research was insufficient to support claims of reliability and validity." *Id.* at 203. The article later explains, "The ability of

FCEs to predict a safe and lasting return to work has been studied scarcely. . . It may be questioned whether FCEs will ever be found predictive of a safe and lasting return to work." *Id.* at 205. The article further explains that because FCE's do not measure all the dimensions required in a return to work, "[i]t is, therefore, by definition incorrect to suggest or to claim that the results of an FCE should be able to predict a person's work ability or even more complex a successful return to work." *Id.*

There are not only medical doubts, but also legal doubts about the reliability of FCE evidence, at least in certain circumstances. FCE's often last less than a day, even only a couple of hours, and then try to extrapolate an individual's physical capacity over a greater period of time. In *Stup v. Unum Life Ins. Co. of America*, 390 F.3d 301 (4th Cir. 2004), the court questioned the validity of an FCE based on the facts in that case, noting, "first, and most obviously, the FCE lasted only two and a half hours, so the FCE test results do not necessarily indicate Stup's ability to perform sedentary work for an eight- (or even four-) hour workday, five days a week". 390 F.3d at 309. Because an FCE takes place on only one day, it may fail to adequately appreciate a medical condition that fluctuates over time, or a patient who experiences good days or bad days. See *Dorsey v. Provident*, 167 F. Supp. 2d 846 (E.D. Pa. 2001) (court deemed FCE of highly questionable validity in determining whether a fibromyalgia patient is disabled; "direct contact with a patient over an extended period of time seems especially important for reliable evaluation of a disease as subjective and variable as fibromyalgia"); see also *Boardman v. Edwards Center, Inc. Long Term Disability Plan*, 2004 WL 1098942 (D.Or. 2004) ("I find that the opinion of an occupational therapy assistant, who saw the plaintiff upon only one occasion for the purpose of evaluating his

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claim, is insufficient to overcome credible evidence from a physician who has examined and treated this patient on numerous occasions over the course of 12 years”).

Our anecdotal experiences are consistent with these medical and legal doubts about the reliability of FCEs. In a recent case, we took the sworn statement of a physical therapist who administered an FCE to our client. He explained that, under his test protocol, sedentary is the lowest category he can place a patient in; there is no “less than sedentary” category. He also testified that having administered over 10,000 FCEs, he had never categorized someone as incapable of sedentary work. He explained that his statement that the claimant could sit up to two thirds of a work day was based upon his own estimate having observed the claimant need to stand twice over the course of a 52-minute background interview. He also agreed that the FCE only measured physical functioning, and did not take into account the impact of pain or pain medications on the ability to concentrate.

All of these flaws inherent in FCEs are more useful and effective advocacy tools in the presence of evidence that contradicts the FCE findings. After all, if the insurer has some evidence in its side, even if flawed, and your client has no evidence on his side, the insurer will likely still come out

ahead. I particularly like to focus on aspects of functioning not properly measured by an FCE: the impact of pain on attention and concentration, particularly where the relevant jobs in a disability dispute are highly skilled; impaired bilateral manual dexterity, as this is often not tested on FCEs; and inability to sustain physical capacities over the course of a full work day or work week. Treating physician opinions, given in assessment forms or in a sworn statement, are always important. Additional objective vocational testing, such as the Minnesota Rate of Manipulation or Purdue Pegboard, can effectively document deficits in bilateral manual dexterity. And don't forget to parse the FCE report: a “headline” conclusion that the claimant can perform, for example, sedentary exertion, might be contradicted by some of the individual test results.

None of these ideas is a magic bullet. Evidentiary development is still required: get an opinion from an acceptable medical source to give the court or the insurer another option besides the FCE; get your client to describe good days and bad days to make the one-time FCE less probative. However, they should provide a road map for arguing around the notion that an FCE is definitive objective proof of physical capacity.

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING ARTICLES

The Social Security Administration Has Created a New Malpractice Trap for Attorneys Who Handle Workers' Compensation Cases - By: Eric Buchanan - Published in TTLA 2009

ERISA Subrogation and Recoveries - By: Eric Buchanan - A new chapter to be added to the upcoming addition of Thomson West's Auto Tort Litigation Manual

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will speaking at the Memphis Bar Association CLE, “Navigating the ERISA Mine Field: How to Avoid or Limit ERISA Subrogation in PI Cases and How to Litigate an ERISA Insurance Claim” in Memphis, TN on September 11, 2009.

Eric Buchanan will be speaking at the American Association for Justice's Conference on Social Security Disability to be held at the Venetian in Las Vegas, NV September 24-25, 2009.

Eric Buchanan will be speaking at the Tennessee Association for Justice Seminar on ERISA and Subrogation claims in Johnson City, TN on December 11, 2009.

Eric Buchanan will be speaking at the NOSSCR Social Security Disability Spring Conference on ERISA LTD claims to be held in New Orleans, LA May 12-15, 2010.

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates are available to speak to your organization regarding Social Security Disability, ERISA Long-term Disability, Group Long-term Disability, Private Disability Insurance, ERISA Benefits, Denied Health Insurance Claims and Life Insurance Claims.

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