

Disability benefits adjudication: Attorney representing disability claimants

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Forensic neuropsychological testing is growing in importance in the adjudication of disability benefit claims. Although the majority of courts have ruled that claimants are not required to provide strictly “objective” evidence of disability (*Mitchell v. Eastman Kodak*, 1997), neuropsychological testing bolsters a disability claim and substantially increases the likelihood of benefit payments. Moreover, although the Social Security Administration does not differentiate between physical and mental disabilities, some self-funded disability plans refuse altogether to cover “mental” impairments, and most long-term disability insurers limit the length of time disability benefits may be paid to claimants suffering from “mental” disorders. Such distinctions have survived challenges under the Americans with Disabilities Act (2008) based on court rulings (*EEOC v. Aramark Corp.*, 2000; *EEOC v. Staten Island Savings Bank*, 2000; *Weyer v. Twentieth Century Fox*, 2000), finding that the ADA does not regulate the content of insurance policies. Thus, the principal means of challenging the applicability of such exclusions and limitations, which are usually applied only to functional mental impairments, is for the claimant to come forth with evidence of an organic impairment, the proof of which may be established or corroborated by neuropsychological testing.

A groundbreaking legal opinion on this issue in *Fitts v. Federal National Mortgage Association* (2007) is instructive. In *Fitts*, the plaintiff suffered from a bipolar disorder of such severity that she qualified for disability benefits. However, the disability insurer terminated payment of benefits after 24 months based on a policy provision limiting the payment of benefits for “mental and nervous” disorders to no more than two years’ duration. The policy defined mental illness as a “mental, nervous or emotional disease[] or disorder[] of any type,” a definition the court found unhelpful since it failed to clearly “specify whether a disability qualifies as a mental illness based on its causes, symptoms, forms of treatment, markers, or other aspects.” The court found that classifying mental illnesses based on symptoms was unconvincing since many illnesses and conditions, such as brain damage from an accident, Alzheimer’s disease, brain cancer, or a stroke, manifest psychological symptoms. The court also rejected the insurer’s argument that its limitation applied, simply because bipolar disorder is listed in the *Diagnostic and Statistical Manual of Mental Disorders–IV* (1994). *Fitts* noted that the DSM–IV itself cautions against a strict distinction between physical and mental disorders:

The term *mental disorder* unfortunately implies a distinction between “mental” disorders and “physical” disorders that is a reductionistic anachronism of mind/body dualism. A compelling literature documents that there is much “physical” in “mental” disorders and much “mental” in “physical”

disorders. The problem raised by the term “mental” disorders has been much clearer than its solution, and, unfortunately, the term persists in the title of DSM–IV because we have not found an appropriate substitute. Moreover, although this manual provides a classification of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of “mental disorders.”

Thus, the court ultimately precluded the insurer from utilizing the policy limit applicable to mental disorder. Nor is *Fitts* a unique court ruling. According to *Phillips v. Lincoln National Life Ins. Co.* (1992), an insurance policy containing limitations relating to mental illness that fails to define the meaning of “mental illness” is ambiguous. Therefore, under the rule of *contra proferentem*, a legal principle that construes an ambiguity in the insurance policy against the insurer that drafted the contract, the court ruled that mental disorders caused by organic trauma or disease could not be excluded from coverage due to ambiguity as to the policy’s meaning of mental illness.

Likewise, in *Patterson v. Hughes Aircraft Co.* (1993), the court relied on psychological evidence to conclude, “the Plan does not make clear whether a disability qualifies as a ‘mental disorder’ when it results from a combination of physical and mental factors.” Thus, [s]ince this ambiguity must also be resolved in [plaintiff’s] favor, he is not within the limitation for mental disorders if his disability is caused in any part by headaches.” Finally, *Lang v. Long Term Disability Plan of Sponsor Applied Remote Technology, Inc.* (1997) rejected an insurer’s efforts to characterize as a mental disorder a claim of disability caused by fibromyalgia, a condition described in the case of *Sarchet v. Chater* (1996) as:

a common, but elusive and mysterious, disease, much like chronic fatigue syndrome, with which it shares a number of features. Its cause or causes are unknown, there is no cure, and, of greatest importance to disability law, its symptoms are entirely subjective. There are no laboratory tests for the presence or severity of fibromyalgia. The principal symptoms are “pain all over,” fatigue, disturbed sleep, stiffness, and—the only symptom that discriminates between it and other diseases of a rheumatic character—multiple tender spots, more precisely 18 fixed locations on the body (and the rule of thumb is that the patient must have at least 11 of them to be diagnosed as having fibromyalgia) that when pressed firmly cause the patient to flinch.

The court applied the doctrine of *contra proferentem* to conclude, “the phrase ‘mental disorder’ does not include ‘mental’ conditions resulting from physical disorders.”

What these cases highlight is the need for evidence to support a physiologic (i.e., biological) cause for claimed disabilities that arguably fall within disability policy exclusions and limitations. While some disorders may be demonstrable on an MRI or other radiological or electrophysiological tests, in the absence of positive findings on such tests, the most persuasive evidence is only obtainable from neuropsychological evaluations. This is because studies have proven the value of neuropsychological evaluations in documenting the functional status of the brain and the ability of such testing to either prove or disprove claims of brain injury or disorder. Thus, it becomes crucial for counsel representing disability claimants to present demonstrable proof that can either be clinically correlated with other evidence such as an MRI or EEG showing brain abnormalities or can independently demonstrate functional deficits.

However, while the issue of the underlying etiology of an impairment is important, the major value of neuropsychological testing in disability claim adjudications is that, unlike medical tests such as x-rays or MRI scans, or even blood tests, the data themselves directly establish functional limitations in areas such as memory, comprehension, information processing, language, and perception. The utility of such evidence is that it directly correlates to a claimant’s ability to work. Therefore, both claimants and insurers have come to rely on such testing and evaluation as the gold standard in proving a claim of disability.

THE VALUE OF NEUROPSYCHOLOGICAL TESTING

Two recent court rulings conclusively demonstrate the value of neuropsychological testing. In *Smith v. Reliance Standard Life Ins. Co.* (2004), the plaintiff alleged disability due to chronic fatigue syndrome, a condition described in the medicolegal literature (Social Security Ruling 99–2p, 1999) as “a systemic disorder consisting of a complex of symptoms that may vary in incidence, duration, and severity. It is characterized in part by prolonged fatigue that lasts 6 months or more and results in substantial reduction in previous levels of occupational, educational, social, or personal activities.” Because there are no known diagnostic laboratory tests for chronic fatigue syndrome, and since the insurer alleged it could not assess the insured’s self-reports of fatigue, the disability determination turned on the severity of the claimant’s claimed cognitive impairment associated with his physical condition. The plaintiff submitted a detailed neuropsychological evaluation, which the insurer had a psychiatrist review. The court determined that the psychiatrist completely overlooked many of the findings made by the neuropsychologist and offered no rebuttal at all to the following finding made by the neuropsychologist:

Neuropsychological testing revealed a variety of cognitive deficits, inconsistencies or relative weaknesses most suggestive of executive dysfunction. Specifically, he demonstrated inconsistent sustained attention and concentration abilities. Alternating attention and logical sequencing abilities were in the borderline range. Speed of auditory information processing was inconsistent. Verbal fluency was mildly to moderately impaired and response inhibition was mildly impaired. In addition, he demonstrates several motor deficits suggestive of executive motor dysfunction. Executive dysfunction is common in individuals with the chronic fatigue immune deficiency syndrome diagnosis.

Because of such glaring deficiencies in the insurer’s review and consideration of the neuropsychological evidence, which so convincingly demonstrated the insured’s disability, the court ordered benefits to be paid.

Likewise, the court’s analysis of the proof of the claimant’s disability in *Hunter v. Federal Express Corp.* (2004) proved the value of neuropsychological testing. There, an employee of FedEx became disabled due to a stroke, which occurred shortly after the claimant gave birth. Although disability benefits were subsequently paid for a period of time, FedEx terminated benefit payments after concluding Ms. Hunter had sufficiently recovered to be able to work at an occupation. The court overruled that determination based in substantial part on a neuropsychological evaluation that correlated with an MRI of the brain showing the infarct. The court specifically relied on the neuropsychological test results, which demonstrated significant deficits in “visual perceptual and visuospatial reasoning,” “difficulty judging relationships, reproducing them, reasoning in visuospatial terms and engaging in rapid visual scanning,” “weak conceptual rule learning and difficulty with coordinated movements” and “reduced mental speed and flexibility.” Ms. Hunter also demonstrated “reduced scores in both visuospatial and verbal memory,” including “most notably . . . reduced retention for the material over time.” Hence, based on the objective evidence of cognitive impairment, the court ordered benefits reinstated with interest and also found the insurer’s actions “culpable” and awarded attorneys’ fees.

From the foregoing discussion, it is evident that neuropsychological testing has proven its value in the forensic arena of disability evaluations and has been unquestionably accepted by the courts as a valuable tool in determining benefit eligibility.

NEUROPSYCHOLOGICAL ASSESSMENT

The utility of neuropsychological testing in disability evaluation is enhanced both by the quality and specificity of the test instruments utilized. A well-designed battery of neuropsychological tests affords near-conclusive proof in a disability case, while a poorly designed battery can often be harmful to the claimant's efforts to establish disability, as shown in the following examples.

Example 1

Mr. J.J. worked as a commodity trader until he suffered a series of transient ischemic attacks. Although Mr. J.J.'s claim for benefits was initially approved by his insurer, benefits were terminated after approximately one year of payment following the administration of a battery of neuropsychological tests, which included the Test of Malingered Memory, which was interpreted by the examiner to demonstrate malingering with respect to claimed memory impairments. A second examiner administered a different battery of tests, which included the following: the Wechsler Abbreviated Scale of Intelligence (WASI), portions of the Halstead-Reitan neuropsychological battery (Finger Tapping Test, Trail Making Tests A and B, Tactual Performance Test, Computer Category Test, Fingertip Number Writing Test, and Grip Strength Test) the Gordon Diagnostic System Model-III (GDS), which included the Adult Vigilance Test and Adult Distractibility Test, Memory Assessment Scales (MAS), the Stroop-Color Word Test, the Hooper Visual Organization Test, the Digit Vigilance Test, the Ruff Figural Fluency Test, FAS Letter and Category Fluency Test, Grooved Pegboard Test, Computerized Assessment of Response Bias (CARB), Word Memory Test (WMT), the Rotter Sentence Completion Test, and the Minnesota Multiphasic Personality Inventory (MMPI-2). One of the goals of the testing was to evaluate Mr. J.J. under conditions of distraction, since the environment of the commodity exchanges involves visual, oral, and even physical distractions occurring on a constant basis. The test results showed severe decompensation under conditions of distraction, and the claimant conclusively established the validity of the test results and an absence of malingering. Benefits were reinstated.

Example 2

Mr. K.K. was a practicing attorney whose professional career was focused on courtroom litigation. After experiencing a closed head injury in an automobile accident, Mr. K.K. complained of memory and cognitive deficits, withdrew from his practice, and submitted a claim for disability benefits. Although Mr. K.K.'s claim was supported by limited neuropsychological testing results and by the unequivocal opinion of the treating neurologist, a specialist in head injuries, the insurer refused to pay the claim because the initial battery of neuropsychological tests failed to include any validity testing to rule out malingering. The insurer demanded the claimant undergo a second round of testing which utilized the following tests: Wechsler Adult Intelligence Scale-III (WAIS-III), Wechsler Memory Scale-III (WMS-III), Shipley Institute of Living, Stroop Color-Word Test, Trail Making Test (Parts A and B), Gordon Diagnostic System (GDS), Test of Variables of Attention (TOVA), Paced Auditory Serial Addition Test (PASAT), Visual Naming and Controlled Oral Word Association subtests of the Multilingual Aphasia Examination, Animal Name Fluency, Ruff Figural Fluency, Wisconsin Card Sorting Test (WCST), Booklet Category Test, California Verbal Learning Test-II (CVLT-II), Tactual Performance Test (TPT), Sensory Perceptual Examination, Victoria Symptom Validity Test (VSVT), Test of Memory Malingered (TOMM), Word Memory Test (WMT), MicroCog (reaction timers 1 and 2), Finger Tapping, Grip Strength, Grooved Pegboard,

Behavioral Inattention Test (BIT), Beck Depression Inventory–II (BDI–II), Beck Hopelessness Scale (BHS), Beck Anxiety Inventory (BAI), Minnesota Multiphasic Personality Inventory–2 (MMPI–2), Spatial Relations, and the Behavioral Dyscontrol Scale (BDS). This battery included several formal tests of malingering, tests of executive decision making, tests of functioning under conditions of distractibility, as well as timed tests relating to memory and recall in order to evaluate Mr. K.K.'s abilities to work as a trial lawyer. Although the testing showed many of the claimant's abilities were preserved, he functioned poorly on tests that correlated to courtroom work. In particular, Mr. K.K. was unable to recall information quickly and process disparate facts and legal principles, as he would have to do in taking a deposition or conducting a trial. Because there was absolutely no evidence of a malingered performance on testing, benefits were paid.

Example 3

Like Example 2, the claimant, Mr. L.L., a business executive, alleged disability due to a closed head injury suffered in a car accident. He underwent a battery of neuropsychological tests that showed significant impairment in memory, concentration, and executive functioning. However, as was the case in the previous example, the examiner administered no testing that would validate the results and rule out malingering. When Mr. L.L. refused to undergo additional testing, the insurer determined the claimant was grossly exaggerating his impairment and benefits were denied.

Example 4

Mr. M.M. ceased working as a commodity trader due to severe depression, which he claimed prevented him from making timely and accurate decisions on the floor of the exchange where he worked. He was under the care of a psychiatrist who certified disability; however, the insurer refused to pay benefits claiming a lack of sufficient supporting evidence. Neuropsychological testing showed diminished capacity for processing information and decision making; and a highly experienced forensic psychiatrist conducted a probing forensic psychiatric examination that corroborated the test results. The neuropsychological test battery included several measures to detect malingering, which the claimant passed. However, despite the evidence presented, the insurer refused to pay benefits, and only had the claimant examined after suit was filed. Instead of retaining a neuropsychologist, however, the insurer hired a psychiatrist, who administered the Millon Clinical Multiaxial Inventory (MCMI) test and several malingering tests that are not part of the standard neuropsychological test battery. Despite test results showing the claimant was not malingering, the insurer's examiner nonetheless characterized the claimant as a malingerer and opined that his impairment was due to excessive consumption of alcohol. Needless to say, when the test results proved contrary to the examining doctor's opinion, the case was quickly settled.

Example 5

Mr. N.N., in his late fifties, worked as a physician in a highly stressful university hospital setting. He became severely depressed and applied for disability benefits, which were approved. After several years of benefit payment, based on a psychiatrist's suspicion that Mr. N.N. was suffering from dementia, he underwent several rounds of neuropsychological testing. Although one psychologist confirmed dementia, others did not. The insurer also demanded that Mr. N.N. undergo testing and a psychiatric evaluation. The insurer's psychiatrist confirmed there were clinical duties the insured could not perform due to psychiatric symptoms; however, the insurer's psychologist formulated an opinion that the MMPI test results supported malingering and that memory testing was also

indicative of malingering. Further examination of the test results by Mr. N.N.'s consulting psychologist, however, contradicted the insurer's psychologist by pointing out that the claim of malingered memory was contrary to the manual developed by the author of the memory test; and the MMPI score was well below what most experts would consider the cutoff for a finding of malingering. The claim settled.

Example 6

Mr. O.O. was a business executive who suffered a stroke. An initial round of neuropsychological testing validated cognitive impairments due to the stroke; however, a second round of testing performed approximately one year later by the same psychologist suggested a malingered profile. The insurer demanded the psychologist's data, and its reviewing psychologist suggested the evidence of cognitive impairment due to a stroke was not persuasive, even though an MRI showed a lesion in the brain. Subsequent neuropsychological testing corroborated the finding of a malingered profile on psychological testing, even though other physical impairments appear to be of sufficient severity to qualify him for benefits.

Example 7

Mr. P.P. was a financial analyst in his early fifties, who began experiencing symptoms of severe memory loss as well as loss of bladder control and unexplained falls. His neurologist suspected either partial-complex seizures or early dementia, particularly since PET scan results showed abnormal brain activity. The insurer initially accepted that the claimant was disabled; however, the determination was based on finding that the claimant suffered from depression, since three rounds of neuropsychological testing failed to demonstrate a definitive cognitive abnormality. Consequently, benefits were terminated after two years of payment due to insurance policy provisions limiting the payment of disability benefits for depression to 24 months.

Discussion

These examples illustrate several different types of claims in which neuropsychological testing played a significant role in disability benefit disputes. What these examples also demonstrate is that neuropsychological testing, when properly performed, yields irrefutable objective proof of functional abnormalities supporting the payment of disability benefits. So long as the data are consistent and malingering can be ruled out, the insurer is left with no legitimate basis to deny benefit payments.

Our experience has shown us that many insurers employ highly qualified consultants experienced in reviewing neuropsychological test data. They focus on test results consistent with established criteria and are quick to seize on any data suggesting a malingered profile. Thus, it is crucial for the claimant to present validated test results that support the claimed disability and rule out any issues relating to secondary gain.

Further, to the extent the disability insurance policy is of the type that pays benefits if the claimant cannot perform the duties of his or her occupation, it is important for the neuropsychologist to select test instruments that come as close as possible to simulating the particular demands of the occupation. The first example, where testing of performance under conditions of distraction was crucial to success, is illustrative of this point. Likewise, the second example shows how test instruments focused on evaluating the occupational duties performed by the claimant were decisive in establishing an entitlement to benefits. However, no matter how well chosen the test instruments, the

testing is worthless without rigorous testing of response bias or potential malingering in view of the risk of secondary gain as shown in the third example.

The fourth and fifth examples further demonstrate the significance of testing aimed at detecting malingering. The elimination of malingering as an explanation for abnormal neuropsychological test results provides powerful corroboration of the substantive findings, while detection of malingering clearly undermines those findings.

The remaining examples demonstrate how testing can be used to either validate physical findings of disability or to support a conclusion that an identifiable physiological cause is not the basis of a claimed disability. Hence, the final example illustrates that the test results were so contrary to what is seen in patients suffering from dementia that the initial theory was confidently ruled out. However, it is important to keep in mind the following common-sense observation made in a leading text on forensic neuropsychology (Sweet, 1999):

Not all insufficient effort is malingering. There are multiple dimensions of insufficient effort; determination of insufficient effort as caused by malingering occurs within a real life context, not simply examination of test performances. Malingering can have variable degrees of intention, selectivity in presentation, variable degrees of exaggeration, and more than one strategy on the part of the malingerer or across malingerers. Moreover, malingering need not be an all or none concept; co-occurrence of malingering and brain dysfunction is possible although not commonplace.

Thus, the guiding principle is that each case presents unique facts and circumstances and must be evaluated from a multidimensional perspective utilizing the tools of both medicine and neuropsychology.

THE LIMITS OF NEUROPSYCHOLOGICAL ASSESSMENT IN VOCATIONAL ASSESSMENT

Although neuropsychological testing has tremendous value in disability evaluation, it is important to point out its limits, particularly if the results of testing are not clear-cut. The direct utility of neuropsychological test results in disability determination also depends on the nature of the disability claim: whether the claimant's disability is being evaluated from the perspective of an ability to perform a particular occupation or whether the definition of disability is more generalized, i.e., the inability to engage in any occupation. While neuropsychologists are highly qualified to furnish opinions on impairment, they are not vocational experts or lawyers; and it is important to keep in mind that the determination of "disability" is a legal construct, made up of both medical and vocational components. "Disability" is a term defined either by statute or by contract. For example, the Social Security Act (2008) defines "disability" as the "inability to engage in any substantial gainful activity." A typical insurance policy, on the other hand, might define "disability" as the "inability to engage in the material duties of your occupation." In order to answer the question of whether an individual meets either of those definitions, one has to analyze the medical (or neuropsychological) findings in relation to the specific physical and mental requirements of an occupation.

Unlike the private disability insurance sector, the Social Security Administration, in a policy statement, Ruling 85-15 (1985), has furnished far more detailed guidance on the evidence necessary to establish an inability to perform unskilled work:

The basic mental demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work

setting. A substantial loss of ability to meet any of these basic work-related activities would severely limit the potential occupational base. This, in turn, would justify a finding of disability because even favorable age, education, or work experience will not offset such a severely limited occupational base.

The Social Security guideline also notes:

Stress and Mental Illness—Since mental illness is defined and characterized by maladaptive behavior, it is not unusual that the mentally impaired have difficulty accommodating to the demands of work and work-like settings. Determining whether these individuals will be able to adapt to the demands or “stress” of the workplace is often extremely difficult. This section is not intended to set out any presumptive limitations for disorders, but to emphasize the importance of thoroughness in evaluation on an individualized basis.

Individuals with mental disorders often adopt a highly restricted and/or inflexible lifestyle within which they appear to function well. Good mental health services and care may enable chronic patients to function adequately in the community by lowering psychological pressures, by medication, and by support from services such as outpatient facilities, day-care programs, social work programs and similar assistance.

The reaction to the demands of work (stress) is highly individualized, and mental illness is characterized by adverse responses to seemingly trivial circumstances. The mentally impaired may cease to function effectively when facing such demands as getting to work regularly, having their performance supervised, and remaining in the workplace for a full day. A person may become panicked and develop palpitations, shortness of breath, or feel faint while riding in an elevator; another may experience terror and begin to hallucinate when approached by a stranger asking a question. Thus, the mentally impaired may have difficulty meeting the requirements of even so-called “low-stress” jobs.

Because response to the demands of work is highly individualized, the skill level of a position is not necessarily related to the difficulty an individual will have in meeting the demands of the job. A claimant’s condition may make performance of an unskilled job as difficult as an objectively more demanding job. For example, a busboy need only clear dishes from tables. But an individual with a severe mental disorder may find unmanageable the demands of making sure that he removes all the dishes, does not drop them, and gets the table cleared promptly for the waiter or waitress. Similarly, an individual who cannot tolerate being supervised may not be able to work even in the absence of close supervision; the knowledge that one’s work is being judged and evaluated, even when the supervision is remote or indirect, can be intolerable for some mentally impaired persons. Any impairment-related limitations created by an individual’s response to demands of work, however, must be reflected in the RFC [residual functional capacity] assessment.

The Social Security guidelines therefore make it evident that neuropsychological evaluations can be of tremendous value in assessing disability. However, *Heinrich v. Prime Computer Long Term Disability Plan* (1996) points out:

The physician, of course, is qualified to determine a claimant’s physical condition, which the administrator may properly rely upon in reaching its own determination as to whether the claimant is disabled under the terms of the plan. But we know of no reason, nor do the defendants offer one, why a physician has any expertise in determining employment qualifications, which is a wholly separate question from physical condition.

Although written in the context of a physical disability claim, the quotation above is equally applicable to a mental disability claim and highlights the importance of a vocational analysis coupled with the neuropsychological evaluation. While neuropsychologists may have a basic understanding of what mental tasks an attorney, a physician, or a business executive must be capable of performing in order to engage in their occupational duties, from an evidentiary standpoint, courts question the competency of neuropsychologists to furnish vocational opinions, and separate opinions from individuals trained and experienced in vocational analysis may be required. Mild impairment in memory

or cognitive abilities may have little or no effect on some individuals' ability to function in their jobs, whereas the same impairment may be catastrophic to a commodity trader, an emergency room physician, or a trial lawyer whose occupations require the ability to assemble, recall, and analyze large amounts of data in split-second timeframes. This perhaps explains why there is frequently so much disagreement in disability evaluation—while a neuropsychologist may opine that test results would preclude an individual from functioning in a particular occupation, an insurer's consulting neuropsychologist may draw just the opposite conclusion from the same data and determine that the impairments would not preclude functioning. Similarly, the insurer's own vocational expert may describe different functional demands than those understood by the neuropsychologist to be at issue. For that reason, in our experience, we frequently couple a neuropsychological evaluation with a vocational analysis.

The issue is perhaps easier to resolve with Social Security adjudications since entitlement to Social Security disability benefits requires an individual to be so profoundly impaired that all work would be precluded. In determining the question of disability, the Social Security Administration relies heavily on vocational assessments. Nonetheless, the utility of neuropsychological testing is that it directly answers the basic questions of whether an impairment interferes with a claimant's ability "(on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting." Each of these functions is capable of being tested, and the test results will yield valid data enabling the psychologist to offer meaningful opinions.

THE LEGAL LIMITS OF NEUROPSYCHOLOGICAL ASSESSMENT

In addition to the limitations of neuropsychological assessment in vocational determinations, various evidentiary requirements also affect the use of psychological testing in court. At the outset, the testing has to pass the reliability standards set forth by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* (1993), which requires, as a condition of admissibility of psychological testing, evidence that the test instrument in question has been validated by research, and has been subject to peer review and publication, and there is evidence establishing that the known or potential rates of error are minimal, and which also considers the general acceptance of the instrument. Although the Minnesota Multiphasic Personality Inventory (MMPI/MMPI-2) has been accepted as a valid test under the *Daubert* standard according to Pope, Butcher, and Seelen (2000), other test results showing cognitive abnormalities may not pass the evidentiary threshold because of the absence of sufficient research and publication in which the test has been validated. There is also a judicial suspicion of any instrument that purports to function as a detector of truth. For example, polygraph results have long been deemed inadmissible by courts due to doubts about the reliability of such testing. The Supreme Court noted in *United States v. Scheffer* (1998):

To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques. 1 D. Faigman, D. Kaye, M. Saks, & J. Sanders, *Modern Scientific Evidence* 565, n. + 14-2.0, and § 14-3.0 (1997); see also 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 8-2(C), pp. 225-227 (2d ed. 1993) (hereinafter Giannelli & Imwinkelried); 1 J. Strong, McCormick on Evidence § 206, p. 909 (4th ed. 1992) (hereinafter McCormick). Some studies have concluded that polygraph tests overall are accurate and reliable. See, e.g., S. Abrams, *The Complete Polygraph Handbook* 190-191 (1968) (reporting the overall accuracy rate from laboratory studies involving the common "control question technique" polygraph to be "in the range of 87 percent"). Others have found that polygraph tests assess truthfulness significantly less accurately—that scientific field studies suggest the accuracy

rate of the “control question technique” polygraph is “little better than could be obtained by the toss of a coin,” that is, 50 percent. See Iacono & Lykken, *The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests*, in 1 *Modern Scientific Evidence*, supra, § 14–5.3, p. 629 (hereinafter Iacono & Lykken).

Psychological testing has been subject to the same skepticism; and evidentiary issues remain about the admissibility of opinions relating to the subject of malingering.

The leading court ruling on the subject is the federal appellate ruling in *Nichols v. American National Ins. Co.* (1998), an employment discrimination case in which the plaintiff alleged she had been the victim of sexual harassment. In an effort to discredit the plaintiff’s testimony, the employer introduced testimony from a psychiatrist who had examined Nichols and administered testing. The witness testified that the plaintiff exhibited “recall bias,” and opined that her statements were affected by secondary gain and malingering, terms which were explained to mean that the plaintiff’s psychological symptoms were motivated by financial gain and that symptoms were feigned or made up for the purpose of secondary gain. The trial court ruled the testimony was admissible, but the appellate tribunal found the trial court erred in allowing such testimony to be presented to the jury. The court ruled that expert testimony couldn’t reach “conclusions within the jury’s competence or within an exclusive function of the jury.” The court then explained that the psychiatrist’s testimony “sought to answer the very question at the heart of the jury’s task—could Nichols be believed?” The danger of such testimony, according to the court, was that it could lead to the jury “substitut[ing] the expert’s credibility assessment for its own common sense determination.” In its briefing to the court, the employer argued that the testimony was not about the plaintiff as a witness, but about her psychological state. However, the court flatly rejected that argument, holding, “an expert should not offer an opinion about the truthfulness of witness testimony.”

Subsequent to *Nichols*, a state appellate court in Missouri reaffirmed *Nichols*’ conclusions in a case that coincidentally involved the same psychiatrist whose opinion had earlier been rejected. In *McGuire v. Seltsam* (2004), a personal injury suit, the court found testimony on the subject of malingering prejudicial and reversed a lower court’s ruling since the testimony constituted an improper expert opinion on a witness’s credibility.

However, the conclusions reached in *Nichols* and *McGuire* are by no means the universal state of the law in the United States. In *United States v. Kokoski* (1994), the court held that a criminal defendant’s competency to stand trial was established by a forensic evaluation that included the administration of psychological tests demonstrating gross malingering. Indeed, the United States called a witness it characterized as a “malingering expert,” who testified that the defendant was faking his symptoms. The testimony related solely to the issue of the defendant’s competency to stand trial, however; it was not introduced as evidence of the defendant’s guilt or innocence, and the *Kokoski* ruling cannot be taken as support for admission of malingering evidence in a jury’s determination of guilt or innocence.

Testimony and opinions as to malingering on psychological testing are generally accepted, though, by administrative agencies such as the Social Security Administration in the course of evaluating a disability claim, according to the *Nichols* ruling. Opinions about malingering are also frequently allowed in state court proceedings; however, a recent news story in the *Lawyers Weekly USA* (2004) described how a plaintiff in a personal injury suit was able to overcome testimony charging her with malingering and received a sizable jury verdict compensating her for injuries. The article noted the plaintiff challenged the proffered testimony by having her consultant reexamine the underlying raw data, which supported a conclusion contrary to the examiner’s finding (see Example 4 above for a similar situation). The plaintiff’s consultant also offered an alternative explanation for short-term memory deficits that had been characterized as malingered—the findings could equally be explained as the consequence of traumatic brain injury. The test results were apparently quite close to the cutoff scores for a finding of malingering, and the conclusion drawn was, therefore, one of a degree of probability rather than clear certainty.

What this discussion illustrates is that while cognitive deficits may be convincingly demonstrated, opinions with respect to malingering remain controversial. It is possible that the controversy turns more on the use of the term “malingering” than on what the term represents, since characterization of a litigant’s test results as showing malingering says “liar” to a jury, whereas the term clearly presents a different meaning to the psychologist. Certainly, there are situations where a psychologist’s opinion as to malingering would be admissible although different terminology would probably be more appropriate. When neuropsychological test results support impairment, but there is an indication of a malingered performance, there is no reason to preclude the expert from testifying as to why the test results are invalid and cannot be used to support a claim of disability (see Example 3, above). There may also be situations in which experts dispute one another on the issue of the validity of test results (see Example 5, above). However, in the example given of the individual whose test results showed a malingered performance on neuropsychological testing (Example 6), such results should not be admissible solely to impugn the credibility of the remaining medical test results that demonstrate a disability separate and apart from any claim of cognitive impairment.

It becomes very tempting for insurers in disability benefit disputes to use the appellation “malignerer” as a synonym for prevaricator, yet it is well known that impairment may co-exist with malingering; and science has yet to develop an accurate lie-detector. Thus, the point made by the *Nichols* ruling is quite valid. Expert testimony that someone has been untruthful is extremely powerful evidence and may sway the jury from reaching its own independent conclusion on the issue. Certainly, it is appropriate for the lawyers to argue an inference of untruthfulness, but that is the role of the advocate, not the expert witness. The expert witness must be limited to opinions regarding the validity or invalidity of the test data and the reasons for their conclusions. Although *Nichols* involved employment discrimination rather than a claim for disability benefits, the court’s conclusion as to the improper use of the label “malignerer” would no doubt also be applied to disability benefit claims. Thus, while an entitlement to disability benefits can be proven and challenged with psychological test results, the experts must be careful not to usurp either the role of the advocate or the court.

CONCLUSION

We have examined the utility and limits of neuropsychological testing in disability evaluation from the point of view of a claimant’s representative. Clearly, as the examples given point out, neuropsychological testing possesses tremendous evidentiary value. In the first place, such testing demonstrates functional restrictions and limitations that can be correlated with work duties. Neuropsychological testing can also be utilized to differentiate between mental conditions that have an organic cause, such as dementia, and functional mental impairments, such as depression. Further, like all good science, built into neuropsychological testing are instruments that can be used to either validate or invalidate results relating to deficiencies found by other test instruments. The ability to validate thereby makes the evidence exceptionally persuasive in establishing the claimant’s limitations by ruling out issues such as secondary gain and bias. Without such validation, the psychologist’s opinions are subject to being challenged.

However, even well-validated testing has its limits. As we have seen, neuropsychologists are able to demonstrate impairments in memory, concentration, language, perception, and in other areas of functioning, but do not necessarily have the appropriate credentials to furnish an opinion as to “disability,” a legal term that has both medical and vocational components. In many cases, therefore, a thorough neuropsychological evaluation should be coupled with an equally rigorous vocational evaluation.

In addition, there are evidentiary considerations that affect the admissibility of neuropsychological testing. The test instruments themselves have to be validated in order to meet the scientific requirements imposed by the courts. However, even where the validity of the test instruments can be scientifically proven, an opinion of “malingerer” has a very powerful effect in the courtroom and cannot be used to characterize the claimant’s credibility in general. On the other hand, an opinion of malingering tailored toward challenging the validity of a determination of impairment is entirely appropriate. In a close case, which many disability disputes are, there may be differing interpretations of data. Such cases should not be determined based on one side’s expert vouching for the claimant’s credibility while the other side gives the opposite opinion—neither opinion is appropriate in litigation. Instead, the opinions need to be refocused on validation of disability versus a challenge to the legitimacy of findings of cognitive impairment. By avoiding providing direct opinions upon the claimant’s credibility, the merit of neuropsychological testing and the opinions that result as a basis for evaluating claims of disability is unsurpassed.

REFERENCES

- Americans with Disabilities Act (2008). 42 U.S.C. §12117.
- Daubert v. Merrell Dow Pharmaceuticals (1993). 509 U.S. 579.
- Diagnostic and Statistical Manual of Mental Disorders-IV* (1994). At xxi.
- EEOC v. Aramark Corp. (2000) 208 F.3d 266, D.C. Cir.
- EEOC v. Staten Island Savings Bank (2000). 207 F.3d 144, 2d Cir.
- Fitts v. Federal National Mortgage Association (2007, May 7). No. 98–00617, 2007 U.S. Dist. LEXIS 33397, D.D.C.
- Heinrich v. Prime Computer Long Term Disability Plan (1996). U.S. Dist. LEXIS 12564 *14–*15, N.D. Ill.
- Hunter v. Federal Express Corp. (2004). U.S. Dist. LEXIS 13271, E.D. Pa.
- Lang v. Long Term Disability Plan of Sponsor Applied Remote Technology, Inc. (1997). 125 F.3d 794, 799, 9th Cir.
- Lawyers Weekly USA* (2004, March 1). Plaintiff contests “malingerer” test results to win verdict. LWUSA 167.
- McGuire v. Seltsam (2004, March 28). 2004 Mo. App. LEXIS 328, Mo. Ct. App.
- Mitchell v. Eastman Kodak (1997). 113 F.3d 433, 3d Cir.
- Nichols v. American National Ins. Co. (1998). 154 F.3d 875, 883, 8th Cir.
- Patterson v. Hughes Aircraft Co. (1993). 11 F.3d 948, 950, 9th Cir.
- Phillips v. Lincoln National Life Insurance Company (1992). 978 F.2d 302, 7th Cir.
- Pope, K., Butcher, J., & Seelen, J. (2000). *The MMPI, MMPI-2, and MMPI-A in court*, 2nd ed. Washington, DC: American Psychological Association.
- Sarchet v. Chater (1996). 78 F.3d 305, 306–07, 7th Cir.
- Smith v. Reliance Standard Life Ins. Co. (2004). 322 F. Supp.2d 1168, 1177, D. Colo.
- Social Security Act (2008). 42 U.S.C. §423(d)(1)(A).
- Social Security Ruling 85–15 (1985). 1985 SSR LEXIS 20 *11, *14–*16, C.E.
- Social Security Ruling 99–2p (1999). C.E.
- Sweet, J. (1999). Malingering: Differential Diagnosis. In J. Sweet (Ed.), *Forensic neuropsychology: Fundamentals and practice* (p. 277). Lisse, Netherlands: Swets & Zeitlinger.
- United States v. Kokoski (1994). 865 F. Supp. 325, S.D. W. Va.
- United States v. Scheffer (1998). 523 U.S. 303, 309–312.
- Weyer v. Twentieth Century Fox Film Corp. (2000). 198 F.3d 1104, 9th Cir.