

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of March 2 to 6, 2009

The Functional Capacity Evaluation Revisited: Opening The Blind Eye

Camillus Xavier and Old Republic Insurance Company, FSCO A06-002285, February 6, 2009, Arbitrator J. Rogers

June 11, 2004 collision. Insured's entitlement to income replacement benefits more than 104 weeks post-collision was at issue. Pre-collision, the insured was a welder/assembler and cleaner on weekends. He suffered a fractured right clavicle and lumbar compression fractures at the L1, L4 and L5 levels when struck by a vehicle while on his bicycle. The fractures healed, but the insured continued to report that he remained disabled by pain and the psychological sequelae caused by his injuries.

The insured's treating practitioners essentially diagnosed ongoing pain with underlying objective causes. Specific diagnosis varied including myofascial pain with secondary rotator cuff impingement and posttraumatic AC joint arthritis, soft tissue injuries to the surrounding disc and load transfer to the rest of the spinal column, and chronic pain. Psychological testing revealed valid scores showing severe depression and moderate anxiety. Diagnosis included adjustment disorder and pain disorder associated with both psychological factors and a general medical condition. It was stressed that in no way is the pain disorder synonymous with conscious symptom magnification; it is a very real disorder, associated with genuine suffering and significant disablement.

The insurer obtained an opinion from chiropractor, Dr. Emile Ramlochan, who performed a Functional Capacities Evaluation. Dr. Ramlochan noted that his conclusions are "based upon the evaluators clinical judgment based upon the existence of disabling pathology and sincerity of the claimant's efforts as measured throughout the evaluation." The insured did not complete all the exercises because of pain complaints. However, Dr. Ramlochan deemed him functional based on his opinion that failure was a result of sub-maximal effort, determined largely by measuring heart rates compared to expected rates. None of the x-rays of other imaging was reviewed.

The Arbitrator did not accept Dr. Ramlochan's opinions. He noted there was "no indication that Dr. Ramlochan has any expertise on how chronic pain, [the insured's] psychological conditions and the numerous medications he was taking, might affect his ability to complete the tests." The Arbitrator also critiqued the opinion that a failure to reach target heart rates supports lack of effort and stated, "Applying Dr. Ramlochan's logic, one would absurdly conclude that a person with two broken arms, who does not reach the expected heart rate while unable to complete the prescribed number of push-ups, is simply not trying hard enough."

Implications:

This decision outlines some of the deficiencies commonly encountered in insurer functional abilities evaluations. The qualifications of the assessor should always be determined and closely critiqued prior to agreeing to attend for the IME. This is particularly important in cases involving chronic pain and/or psychological factors. With FAE's becoming increasingly popular with insurers, it is important to continue to challenge the benefit, if any, of an insurer's FAE, and to critique the narrow approach often taken by the FAE assessors.

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