ADA Issues in Return-to-Work Testing and Functional Capacity Evaluations

Be Careful What You Test!

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UNLESS YOU READ CASE LAW ON A regular basis, you may not be aware of recent Americans with Disabilities Act (ADA) discrimination cases that have changed the way you should be conducting functional capacity evaluations (FCEs). Some of the cases might make you want to give up performing FCEs entirely! However, having a clear understanding of how the ADA affects the design of an FCE and how to write your professional opinion will both help the employee and help you avoid legal liability.

The ADA[1] restricts an employer's ability to make disability-related inquiries or require medical examinations of incumbent employees unless the exam is "is shown to be job related and consistent with business necessity."[2] Therefore, employers can be liable for ADA violations merely by requiring an employee to submit to a medical exam or FCE. Even when the employer can justify requiring a medical exam, the exam must be narrowly tailored to answer the job-related question, not a fishing expedition to uncover impairments or disabilities that are irrelevant to the employee's ability to perform the essential job functions.[3] An employee need not be disabled to challenge the propriety or scope of a medical examination.[4]

Court cases have challenged the scope of a medical examination primarily where the medical provider's opinion that the employee could not do the job was based on tests and measures that were not directly related to the essential job functions. If the FCE provider does not review a job description and base the return-to-work opinion purely on the employee's ability to safely perform the essential job functions, a court may infer that the provider's opinion was based on results of tests and measures that were not job-related. In *Green v CSX Hotels*, the employer required the plaintiff to have 3 FCEs before returning to work after an injury. The plaintiff complained that the 3 FCEs the employer required were broader than necessary because they included tests of activities that were not essential job functions in her position as a waitress. From the description of the FCEs in the case, it appeared that a standardized protocol of tests was administered each time. The plaintiff was terminated after the third FCE provider's opinion was "inconclusive" because the plaintiff had refused to lift or carry more than 30 pounds, even though the job only required the ability to lift 30 pounds. The FCE provider reported on the plaintiff's "refusal to complete the FCE to her maximal safe abilities" instead of reporting whether her performance met her job demands. The court held that the employer's failure to provide the physical therapist (PT) with a job description coupled with the employer's failure to offer the employee another position after subjecting her to a wide range of non-work-related FCE tests created a question for a jury as to whether the employer *regarded* the employee as disabled. Other cases have questioned the job-relatedness of conclusions drawn from physiological and medical tests and measures, such as

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magnetic resonance imaging, treadmill tests, blood pressure, and heart rate.[5]

Most proprietary FCE testing protocols advocate performing a set of standardized work-related tasks according to a specific test procedure in an effort to ensure that the provider's opinion will be based on reliable tests that meet the court's standards for admissibility of expert testimony. However, when opinions and conclusions are based on tests that are not a valid reflection of the essential job functions, the provider can lose credibility and place the employer at risk of an ADA claim. Below are some tips for avoiding ADA liability

If other standardized tests and measures are performed as part of the FCE, the PT's opinion regarding the employee's ability to return to a specific job should be based only on tests related to that job's essential functions.

Perform job-specific FCEs whenever possible. If other standardized tests and measures are performed as part of the FCE, the PT's opinion regarding the employee's ability to return to a specific job should be based only on tests related to that job's essential functions.

If a musculoskeletal exam or screening is performed prior to the FCE, the exam should be limited to the tests required to assess the medical stability of the injury. However, PTs must take care to avoid negating their duty to ensure the employee's safety by neglecting to perform medically prudent tests in fear that the scope of their exam may exceed what the ADA permits. The risk of a malpractice claim increases if the PT breaches the duty to ensure the employee's safety during the FCE. As long as the scope of the exam is not a broad-based effort to identify impairments and disabilities, and the PT's ultimate opinion is based only on the musculoskeletal exam findings that are job-related, the scope of the exam can be defended.

"Safe" performance should be defined as the employee's ability to perform the task without being a direct threat to him- or herself or others. In determining whether an individual would pose a direct threat, the factors to be considered include (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. Mere use of poor body mechanics is not necessarily a direct threat if the potential harm is not clearly imminent.

PTs should provide a written rationale for their ultimate work capacity opinion, stating on which tests and measures they base their opinion so that if additional data not necessary to the opinion were collected, the report will clearly state that the opinion was based only on tests that were job-related and consistent with business necessity.

As cases are litigated and courts interpret the ADA, our thoughts about how we design our services must change. Although the employer is the party liable for ADA compliance, lawyers rely on PTs to design ADA-compliant medical exams. Even though it may be difficult to keep up with the case law affecting this area of practice, your knowledge of the legal issues in this area can be a great asset to your marketing efforts! ■

References

[1] 42 U.S.C. §§ 12101-12117, 12201-12213 (1994)(codified as amended).

[2] 42 U.S.C. § 12112(d)(4)(A).

[3] *Tice v. Centre Area Transportation,* 247 F.3d 506, 518 (3rd Cir. 2001).

[4] *Conroy v. New York Dept. of Correctional Services,* 333 F.3d 88, 94-95 (2d Cir. 2003).

[5] *Indergard v. Georgia-Pacific Corp.,* No. 08-35278 T9th Cir. Sept. 28, 2009).

TALENT POOL

Phone Interviews

INTERVIEWING CANDIDATES FOR your team takes time—and lots of it. Candidates should be interviewed multiple times and by multiple representatives of your practice, which is neither quick nor inexpensive. However, dedicating the resources necessary to find the best candidates is one of the most important investments you will make as a practice owner.

Organization of the interview process is the key to efficiency, and wise administrators of the hiring process invest time incrementally with new candidates.

The phone interview should be the first investment of time. By conducting a phone interview before the candidates step foot into the clinic, the hiring administrator can minimize time spent on ineligible candidates. Set the expectation that the interview will be short—20 minutes or less—allowing the administrator to promptly exit the call if the candidate is not likely to be the right fit for your team. Of course, if the phone interview goes well, time can always be added to the call.

Candidates who pass the initial phone interview are invited to visit the practice for a second interview. At this point, whether or not the candidate ends up on your team, you should be comfortable knowing that your 20-minute investment in a phone interview has likely saved you from a prolonged face-to-face encounter that could have been easily and efficiently avoided. ■

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