

Psychiatric Disability.

James Reich, MD, MPH

Clinical Professor UCSF

Adjunct Professor Stanford

Founder Association for research in personality disorders (ARPD)

Conflict of Interest.

- **I have no conflicts of interest related to this presentation.**
- **Contact information:
jhreich1@comcast.net**

Goals.

- **We are going to look at the area of forensically assessing psychiatric disability.**
- **We will start with a case and questions about it to the fellows. Later, after we review the area, we will come back to it.**

Case (1).

- **Joe works as a computer programmer. His boss decides that to save money the programmers should rotate taking out the trash.**
- **Joe has had a back issue for which he sees a chiropractor. He asks to be relieved of trash duty. His boss tells him no, it is part of his job requirements and everyone does it.**
- **Question for fellows: What rationale do you think would support the supervisors stance? Do you think it is correct?**

Case (2).

- **Joe continues to empty the trash but his back is aggravated and he requires more frequent visits to the chiropractor. His back problems are frustrating and he starts seeing a previous therapist who he used to see for depression.**
- **Question for fellows: Does Joe have a recourse? If so, what law or regulations may apply?**

Case (3).

- **Joe files a workers compensation claim for back and psyche which HR begins to process. He tells his boss about an alcohol problem that he had ten years ago that has not recurred. His boss sends him for a fitness for duty evaluation related to the alcohol.**
- **Question for fellows: Is this an appropriate referral? Is alcohol an ADA disability?**

Case (4).

- **Before the workers compensation evaluations are complete Joe's boss asks him to drop off a work report at the post office on the way home. Joe clocks out and drives to the post office. Arriving at the post office Joe is t boned by another car and suffers significant orthopedic and psychiatric symptoms.**

Case (5).

- **Question for fellows: Is this a workers compensation case? A federal government case? A civil case?**

Case (6).

- **Joe's workers compensation evaluations, done prior to the auto accident, come back and find him unable to return to his old job but is not totally disabled by workers compensation definitions.**
- **Question for fellows: Is Joe qualified for Social Security Disability? Why? How will his workers compensation evaluations relate to this.**

Case (7).

- **It turns out Joe has five private disability policies that in total would pay twice his working salary.**
- **Question for fellows: Is this legal? Does it change your opinion of Joe's disability?**

Background (1).

- **Disability.**
- **The purpose of disability related evaluations is to gather information that an organization or system can translate into a specific course of action, such as providing workplace accommodations, authorizing health care benefits, arranging for medical care, making changes in employment status, and awarding damages or disability benefits.**

Background (2).

- **Disability evaluations are among the most common psychiatric evaluations requested for non therapeutic reasons. Each year, mental disorders affect approximately one in five Americans between the ages of 18 and 54.**
- **In the United States in 2010, mental illness was the second most frequently reported cause of years lived with disability (YLD), exceeded only by musculoskeletal conditions.**

Background (3).

- **Many disability evaluations require an Independent Medical Examination (IME). IMEs differ from evaluations conducted for therapeutic purposes in many respects, including differing terms of confidentiality, involvement of third parties, and the potential of discovery and use in future litigation.**

Background (4).

- **Disability is a legal term of art, defined by statute, case law, administrative regulation, or insurance policy contents. There is more than one legal definition.**
- **The Americans with Disabilities Act, the Social Security disability program, and private insurance plans all define the term differently.**

Background (5).

- **Psychiatrists most typically translate disability into the clinical concept of “functional impairment” as it applies to vocational and occupational skills.**
- **DSM-5 no longer recommends any specific functional assessment scale, but it includes in the manual the World Health Organization Disability Assessment Schedule 2.0 (WHODAS 2.0)**

Background (6).

- The terms impairment and disability are often incorrectly used interchangeably.
- The applicable definition of disability is context driven and specified by the legal arena from which the assessment has arisen. The definition of disability for Workers' Compensation will differ from the definition arising from private disability contracts.

Background (7).

- **American Medical Association Guides to the Evaluation of Permanent Impairment, define impairment as “a significant deviation, loss, or loss of use of any body structure or body function in an individual with a health condition, disorder or disease”**
- **The definition does not presume any causal relationship.**
- **Disability is defined as “activity limitations and/or participation restrictions in an individual with a health condition, disorder or disease”**

Background (8).

- **The final determination of disability rests with a fact-finder, such as a court, a governmental agency, or an insurance company panel. Disability evaluators opine, but do not decide.**
- **Restrictions are most easily understood as what a claimant “should not do.” In contrast, limitations can be described as what a claimant “cannot do,” because of the severity of psychiatric symptoms.**
- **The presence of a psychiatric illness or diagnosis does not necessarily indicate that an individual has significant functional impairment.**

Ethical Duties (1).

- The psychiatrist has a duty to the referral source to provide a thorough, objective, probative evaluation.
- There are also doctor patient duties to the person being evaluated:
- These include: respect for persons, informed consent, objectivity, abstinence from foreseeable harm to those evaluated, maintaining limited confidentiality and to respond to a clinical emergency (e.g., acute suicidality).

Ethics (2).

- AAPL's ethics guidelines advise,
- “A treating psychiatrist should generally avoid agreeing to be an expert witness or to perform an evaluation of his patient for legal purposes,”
- There are exceptions such as Social Security Disability.
- However, in civil litigation, the goals of forensic disability assessment and clinical treatment often present irreconcilable role conflicts for a single professional.

Ethics (3).

- **Psychiatrists should not compromise their opinions due to financial bias. They are ethically bound to be honest and objective.**
- **Communicating the limits of confidentiality in a disability evaluation is part of the process of obtaining informed consent.**
- **The Genetic Information Nondiscrimination Act of 2008 (GINA) was passed to prevent employers from discriminating against a worker's present capacity to work based on genetic information. Including family history.**

Ethics (4).

- The parties who created the records and not the evaluator are responsible for the production and release of these original records.
- Those evaluated have rights of access to their IME report under HIPAA and by state and federal discovery. Reports are best written in accessible, objective, non pejorative language.
- If the report involves information that is harmful to the evaluated or others it may be withheld.

Ethics (5).

- The issue of relationship drift.
- There is a difficulty of being personable and professional but not giving the evaluated the impression you are there to help them.

General Concepts (1).

- **Clarify the specific questions and goals that are to be addressed in the assessment. In writing if possible.**
- **Possible information sources: patient, medical records, collateral interviews and psychological testing.**
- **Requests for collateral information should be directed to the referral source to the extent possible.**

General Concepts (2).

- **No single narrative can be assumed to be reliable and complete, per se.**
- **Types of information:**
- **Job Description, Psychiatric, Substance Use, and Medical and Pharmacy Records, Employment Records, Academic Record, Other Experts' Evaluations, Personal Records.**

General Concepts (3).

- **Prior and recent disability claims and criminal, military, and financial records. Information from third parties can be useful in corroborating the evaluated persons accounts of their history, symptoms, and functioning.**
- **The evaluated can at any time refuse to answer questions, can terminate the evaluation, or can refuse the requested information.**

General Concepts (4).

- Evaluators should use the schema categorizing function and disability specified by the requesting party.
- Specific behavioral examples and clear descriptions of the evaluated's functioning and impairment are essential to an objective assessment of impairment.
- Psychological and neuropsychological tests often contain embedded validity scales to assess the consistency, reliability, and effort of the evaluated.
- However, no single test can resolve a question of impairment.

General Concepts (5).

- **Alternative Explanations for Alleged Disability**
- **Claimants may not understand the difference between “being too upset to work” and having a psychiatric disorder that causes work impairment.**
- **Noncompliance with efforts at rehabilitation, medication, and other treatment, along with an early decision that the person would never work again, should raise suspicion about the role of choice versus impairment in the claim.**
- **Is the evaluated using a disability claim to avoid the consequences of poor workplace performance or misconduct?**

General Concepts (6).

- Research from the past 25 years suggests that the prevalence of malingering in disability evaluations may be as high as 20 to 30 percent.
- Malingering is the conscious feigning of illness, motivated by external incentives. The illness itself or the intensity of symptoms may be malingered.
- Symptom exaggeration or magnification can also be unwitting and unpremeditated. Magnification of true symptoms or impairment is much more common than outright malingering.

General Concepts (7).

- **The diagnosis of malingering is serious, and it should be based on convincing, objective evidence. Collateral corroborating information is essential.**
- **There are ways to state possible malingering without stating malingering. For example, “I find the level of the evaluated’s symptoms inconsistent with the amount of disability claimed.”**

General Concepts (8).

- **Opinions that psychiatric illness has caused work impairment are founded, within reasonable medical certainty.**
- **Reasonable degree of medical certainty is a legal term of art, meaning more likely than not.**
- **The diagnosis of a psychiatric disorder does not necessarily prove either the presence or the causation of impairment.**

General Concepts (9).

- **The following elements may be included in all types of disability reports:**
- **1) Identifying information**
- **2) Referral source**
- **3) Reason for the evaluation: specific questions to be answered**
- **4) Informed consent and authorized release of information.**

General Concepts (10).

- **5) Sources of information:**
 - a) All records and other materials reviewed**
 - b) Interviews, with date and duration of each one and whether conducted in person or remotely (telephone, computer, etc.)**
 - c) Collateral sources**
 - d) Psychological tests**
- **6) The evaluator's responses to the referral source's questions with supporting data.**

General Concepts (11).

- **7) Detailed history; Onset and course of current symptoms; Review of systems; Claimed or observed impairments; Recent occupational status and relationship to impairments; and Workplace dynamics.**

General Concepts (12).

- **Psychiatric and mental health treatment history; Social history: substance use, history of abuse or trauma, criminal history; Medical history and current medications;**
- **Educational and occupational history; job history, reasons for leaving a job, grievances.**
- **Workers' Compensation claims for work-related illnesses and injuries, and any previous public or private disability insurance claims, or employment-related litigation.**

General Concepts (13).

- **Relevant sexual, relationship, and marital history; Current social situation;**
- **Mental status examination at the time of the examination;**
- **Relevant physical examination or findings obtained from medical records; Relevant imaging, diagnostic, and psychological test findings.**
- **Opinions.**

General Concepts (14).

- **Diagnoses should follow current DSM categories. They should include major psychiatric disorders, and personality disorders, where appropriate and indicated. Differential diagnoses should be given.**

General Concepts (15).

- **Also, Adequacy of and response to past treatment; Treatment recommendations;**
- **Prognosis, including the expected course of the evaluatee's disorder(s), likelihood of chronicity, and expected duration of the impairment.**
- **Opinions on restrictions or limitations and projected duration of restrictions; opinions about the reliability of the data reviewed.**

Benefits (1).

- **Evaluations for Entitlement to Compensation Benefits.**
- **Public Disability Insurance**
- **The Social Security Administration (SSA) administers two different programs that provide benefits based on disability: the Social Security Disability Insurance Program (SSDI) (Title II of the Social Security Act) and Supplemental Security Income (SSI) (Title XVI of the Act)**

Benefits (2).

- **SSDI is a public disability insurance program that provides financial support to disabled workers and their dependents. Eligibility for SSDI benefits requires that the worker's earnings have been taxed by the Federal Insurance Compensation Act (FICA) for a statutorily defined minimum period of time. Eligibility is independent of other sources of income or assets.**

Benefits (3).

- **In contrast to SSDI, SSI is a means tested social safety net disability program, with eligibility tied to an individual's assets but independent of an individual's prior work history. SSI provides a minimum income level for those of low economic status and for the aged, blind, and disabled. Financial need is statutorily defined and determines a person's eligibility for SSI benefits. Eligibility does not require prior employment.**

Benefits (4).

- **Despite their differences, SSDI and SSI share a definition of disability: the individual is currently unable to be gainfully employed.**
- **Is the claimant currently engaging in substantial gainful activity (SGA)?**
- **If a claimant is not engaging in SGA, does the claimant have a severe impairment?**

Benefits (5).

- **Does the claimant's impairment meet or equal a "listed" impairment?**
- **Does the impairment prevent the claimant from doing past relevant work?**
- **At this stage, the SSA determines whether claimants have the residual functional capacity (RFC) to do the type of work they have done in the past.**

Benefits (6).

- Does the impairment prevent the claimant from doing any other work, taking into account the claimant's residual functional capacity, age, education, and work experience?
- Treatment providers are the primary sources of information about the claimant's level of function.

Benefits (7).

- **Three basic concepts underlie the determination of psychiatric disability by the SSA:**
- **1) The claimant must have a medically determinable impairment, referred to as a listed mental disorder.**
- **2) The mental disorder must result in an inability to work.**
- **3) The inability to work resulting from the mental disorder must last or be expected to last for at least 12 months.**

Benefits (8).

- The SSA's definition of disability is the inability “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”

Benefits (9).

- **Workers' Compensation**
- **Disability Insurance in Lieu of Liability**
- **Workers' Compensation was designed to provide benefits for medical treatment, lost income, and, if necessary, rehabilitation services for workers who have a work-related injury or illness, regardless of the party at fault for the injury.**
- **Work-related injury**

Benefits (10).

- In exchange for providing this guarantee, employers are protected by the “Workers’ Compensation bar,” which aims to preclude injured employees from suing their employer for anything other than the limited, statutorily set damages.
- Unlike tort law, which may provide compensatory (e.g., lost wages, pain, suffering, medical expenses) and punitive awards to a plaintiff; an injured employee receives compensation limited to a percentage of lost wages and to the associated medical costs due to disability.

Benefits (11).

- The injury or disability must arise out in the course of employment.
- Most federal employees are similarly covered under the Federal Employee Compensation Act (FECA)
- The system is “no fault”; a finding of fault or liability is not required for awarding benefits.
- A claim that a mental illness is causally connected to employment may be disputed.
- Mental injury claims in Workers’ Compensation are typically divided into three categories; Physical-Mental Claims, Mental–Physical Claims and Mental–Mental Claims.

Benefits (12).

- **Workers' Compensation adjudication of impairment and disability most often relies on the AMA Guides.**
- **However, the measure used for impairment is statutorily defined and differs in different jurisdictions.**

Benefits (13).

- **Key Points in Conducting Workers' Compensation Evaluations.**
- **1) Determine whether a mental disorder is present (using the relevant edition of the DSM, if required by the jurisdiction's statute).**
- **2) If the referral source asks for an opinion regarding causation, assess whether the mental disorder arose out of and in the course of employment. If the evaluator believes this is the case, the evaluator's report should include specific facts upon which these opinions are based.**

Benefits (14).

- **3) If offering opinions on the causal relation of the injury to employment, use the applicable federal or state statutory definition.**
- **4) Assess whether the mental disorder leads to impairment and, if requested, to disability.**
- **5) Assess the degree of impairment, using the scale (or percentage rating system) specified by the relevant jurisdiction. If requested, use specified disability categories of temporary–partial, temporary–total, permanent–partial, and permanent–total.**

Benefits (15).

- **Address other referral questions, which may include:**
- **a) Whether the worker is impaired or disabled from performing the duties of the job where the injury occurred**
- **b) Restrictions that may be necessary to allow the worker to perform his or her own job**
- **c) Whether the worker can perform another job**
- **d) Whether the worker can perform any job at all**

Benefits (16).

- e) Whether an individual has reached maximum medical improvement, typically defined as medical end result
- f) The continuing need for treatment before and after settlement of a claim, and whether that treatment is needed to address work related mental disorder.

Benefits (17).

- **Private disability claims**
 1. **May require an IME for disputes**
 2. **Private disability policies are enforceable private contracts and are different from public disability.**
 3. **The key question is usually whether the evaluation and records support the amount of disability claimed.**

Benefits (18).

- 4. There are pitfalls when clinicians perform this role: especially role conflict between patient advocate and evaluator.**
- 1. a. Often if information is requested the insurance company will take a summary written by the clinician.**
- 5. Disability terms are determined by the language of the private contract.**

Benefits (19).

- **Key Points in Conducting Private Disability Evaluations.**
- **1) Clarify in writing the referral source's specific questions.**
- **2) Understand the evaluatee's policy terms and definition of disability.**
- **3) Obtain a thorough work history.**

Benefits (20).

- **4) If the referral source's questions cannot be answered due to lack of information, inform the referral source and suggest what additional information could or should be provided.**
- **5) Inform the referral source if opinions are reached through a review of records only.**
- **6) Provide a clear, well-substantiated report.**
- **7) Provide specific answers to the referral source's questions.**

Benefits (21).

- **Americans with Disabilities Act Evaluations.**
- **Americans with Disabilities Act (ADA) claims seek for a person to return to or remain in the work force.**
- **ADA, enacted in 1990, was designed to protect the civil rights of disabled individuals and make it possible for them to continue working despite mental or physical disabilities.**

Benefits (22).

- The ADA requires an employer to make **“reasonable accommodations”** for a **“disabled”** but qualified individual to enable that individual to perform **“essential job functions,”** unless the accommodation would impose an **“undue hardship”** on the employer.

Benefits (23).

- The ADA and Definition of Disability
- “A physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”
- The disability is not confined to the work sector.

Benefits (24).

- **Psychiatric symptoms must “substantially limit one or more of the major life activities”.**
- **“Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”**

Benefits (25).

- **The ADA does not supersede state or local laws that provide greater or equal protection for persons with disabilities, but do preempt laws that provide less protection**
- **For psychiatric claims the individual is required to have a diagnosable mental impairment. Excluded are “V codes,” compulsive gambling, kleptomania, pyromania, transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders.**

Benefits (26).

- **Substance use disorders caused by current use of illegal drugs is excluded but not past use.**
- **Past substance abuse disorders not currently present not excluded.**

Benefits (27).

- **Functional Evaluation and Essential Job Functions**
- **1) The position exists to perform that specific function.**
- **2) The number of employees among whom the performance of that job function can be distributed is limited.**
- **3) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.**

Benefits (28).

- **ADA regulations define reasonable accommodations as “modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.”**

Benefits (29).

- **Key Points in Conducting ADA Evaluations**
- **Assess whether the evaluatee meets criteria for a psychiatric disorder.**
- **2) Assess for substantial impairment of major life activities related to the disorder.**
- **3) Determine the duration of impairment of major life activities.**
- **4) Identify in the report all of the major life activities that are impaired and the duration of the impairment of each activity.**

Benefits (30).

- **5) Be familiar with the essential functions necessary for the evaluatee's job.**
- **6) Assess functional capacity related to essential and nonessential job functions.**
- **7) Assess whether an evaluatee can perform these functions with or without accommodations.**
- **8) Suggest accommodations that may enable individuals to perform essential job functions for which they are qualified.**
- **9) Assess whether evaluatees pose a direct threat of danger to themselves or others.**

Benefits (31).

- **Key Points in Conducting Fitness-for-Duty Evaluations**
- **1) Assess the appropriateness of the evaluation at the time of the referral. If it appears that a clinical evaluation for treatment purposes should precede an FFD evaluation, the psychiatrist should so advise the referral source.**
- **2) Have the referral source provide specific written questions for the evaluation.**

Benefits (32).

- **3) Before interviewing the employee, obtain information about relevant behaviors and conflicts in the workplace.**
- **4) Advise evaluatees of the evaluation and limits of confidentiality before conducting the interview.**
- **5) Carefully evaluate any differences or omissions between the evaluatee's report of events and reports from the referral source and the degree of the employee's insight into the nature of the FFD referral.**

Benefits (33).

- **6) Perform a standard psychiatric examination with a focus on the evaluatee's ability to perform relevant work functions, as explained in the job description and other relevant referral questions. Obtain psychological testing if clinical information indicates a need for such data to reach or support a conclusion.**
- **7) Limit reports to information relevant to the referral.**

Return to Cases.

- **Now let us return to our cases.**

Case (1).

- **Joe works is a computer programmer. His boss decides that to save money the programmers should rotate taking out the trash.**
- **Joe has had a back issue for which he sees a chiropractor. He asks to be relieved of trash duty. His boss tells him no, it is part of his job requirements and everyone does it.**
- **Question for fellows: What rationale would support the supervisors stance? Do you think it is correct?**

Case (2).

- **Joe continues to empty the trash but his back is aggravated and he requires more frequent visits to the chiropractor. His back problems are frustrating and he starts seeing a previous therapist who he used to see for depression.**
- **Question for fellows: Does Joe have a recourse? If so, what law or regulations may apply?**

Case (3).

- **Joe files a workers compensation claim for back and psyche which HR begins to process. He tells his boss about an alcohol problem that he had ten years ago that has not recurred. His boss sends him for a fitness for duty evaluation related to the alcohol.**
- **Question for fellows: Is this an appropriate referral? Is alcohol an ADA disability?**

Case (4).

- **Before the workers compensation evaluations are complete Joe's boss asks him to drop off a work report at the post office on the way home. Joe clocks out and drives to the post office. Arriving at the post office Joe is t boned by another car and suffers significant orthopedic and psychiatric symptoms.**

Case (5).

- **Question for fellows: Is this a workers compensation case? A federal government case? A civil case?**

Case (6).

- **Joe's workers compensation evaluations, done prior to the auto accident, come back and find him unable to return to his old job but is not totally disabled by workers compensation definitions.**
- **Question for fellows: Is Joe qualified for Social Security Disability? Why? How will his workers compensation evaluations relate to this.**

Case (7).

- **It turns out Joe has five private disability policies that in total would pay twice his working salary.**
- **Question for fellows: Is this legal? Does it change your opinion of Joe's disability?**

Thank you.

- **Thank you for you attention.**