

**Description: Analyze a Functional Capacities Evaluation which concludes the plaintiff was not cooperative and is exaggerating complaints and can work full time.**

**Analysis:**

Enclosed please find a letter I would suggest you have your doctor consider reviewing with articles purchased for you regarding these issues and printouts from websites referred to in the document. This letter sets forth some of the problems with the FCE's interpretation by the defense.

After reviewing the \_\_\_\_\_ Clinic's functional capacity's evaluation. I must express concern with reference to relying on any of the conclusions.

The page entitled Symptom Magnification Test seem to be resulting in a misunderstanding with regards to the actual tests themselves. For example, the Waddell's non-organic signs; under the chart the \_\_\_\_\_ Rehabilitation Clinic concludes, "Three or more positive tests equal positive symptom magnification. The Waddell signs were created by an individual by the name of Gordon Waddell referenced in Spine Journal, Vol 5, No. 2, March/April 1980. In this article Dr. Waddell states, "Initially these signs were intercepted as evidence of "malingering" although with increasing psychological knowledge this appears to be an over simplification and the signs were in danger of being discredited and ignored"

Furthermore, in order to even determine whether or not an individual has "overreacted" when the Waddell's signs were conducted in the first place, Dr. Waddell admonishes, "Judgment should however be made with caution minimizing the examiner's own emotional reaction. There are considerable cultural variations and it is very easy to introduce an observer bias or to provoke this type of a response unconsciously" (see page 119).

Please note also (page 123) that non-organic signs were equally common in cases involving no litigation whatsoever.

Recent research entitled 'structured evidence based review of the meaning of non-organic physical signs: Waddell signs reveal that there are eight physical findings divided into five categories and it is clear from the review of the functional capacities evaluations that the Waddell signs did not consist of eight potential findings but only five. Therefore, the "Waddell" signs were not administered properly nor is there anything in the Waddell signs literature that suggests that a non-medical doctor should perform the test.

Furthermore, as stated previously in Pain Medicine, the official journal of the American Academy of Pain Medicine, Vol 4, No 2, in June 2003, six authors concluded that after applying the Waddell signs (see page 1) "do not discriminate organic from non-organic problems and Waddell signs may represent an organic problems and "Waddell signs are

not associated with secondary gain.” This very well researched article carries with it 99 references to Waddell’s and in fact makes it clear that this should not be used as a “malingering” test which is exactly what \_\_\_\_\_ Rehabilitation has done. In fact Waddell himself stated that positive Waddell signs do not indicate the absence of physical pathology (See Forensic Pain medicine, Vol 4, No 1. March 2003

As you can see from the enclosed, from the JMAR website, the hand dynamometer was not created as a malingering test but in fact the JMAR Hand Evaluation Kit reveals that it was created to assess grip strength irrelevant in a low back injury.

Furthermore, the Clinical Journal of Pain in December 1999, created an article called ‘Chronic pain Exaggeration Malingering – Sub-maximal Effort Research.’ (See attachment #5) A literature search of 328 references to references to malingering, etc., concluded that current data on the prevalence of malingering in chronic pain conditions are not consistent and no conclusions can be drawn from that data.

Furthermore, “pain is subjective. As a consequence all the approaches to evaluation that have purported malingered pain that are mentioned above are ultimately invalid.” See attachment #6) Malingered Pain in the Mediological Context, the Clinical Journal of Pain, vol XX, no 6, November 2004 (see JMAR Folder).

Unfortunately, I cannot read the name of the therapist that allegedly performed this to verify that they have appropriate training and licensure nor is there any address or phone number on the document to confirm where this company even exists. A review of those individuals affiliated with \_\_\_\_\_ (see attached) reveal that with the exception of the massage therapist there doesn’t appear to be any other licensure associated with this organization. The clearest evidence of the subjective nature of pain was found recently in an article entitled (See PNAS, Vol. 100, No. 14, July 8, 2003 Attachment #7) wherein multiple individuals were all given the same exact painful stimuli and was found via functional MRI that in fact the actual pain was truly experienced by the individuals differently.

I would also point out that the \_\_\_\_\_ seeks to use the Oswestry Low Back Questionnaire which was also not ever created to determine the existence or significance of malingering. The Oswestry Disability Index simply is a questionnaire which asks individuals their perception of disability and should not be used for malingering. For example, with reference to pain intensity, the individual receives a point under the Oswestry for indicating under Section 1 “The pain is bad but I manage without taking painkillers.” This does not mean in anyway ? that the individual is actually malingering.

I would also like to point out with regard to the hand dynamometer that many people don’t fit a “bell-shaped curve” and the variance of a bell-shaped curve is not equal malingering. Many individuals may try very hard for an initial performance of a particular test but due to pain secondary to that performance be unable to replicate the performance based on any kind of consistent degree.

The McGill Pain Questionnaire has the same problem which is also apparently relied upon by \_\_\_\_\_ to reach the conclusion of malingering.

Malingering accuses this client of committing a felony which is insurance fraud and further seems to implicate that an individual performed on a test and the individual who gave the test knew exactly why the plaintiff performed poorly on the test. This being the case, it doesn't appear as though there are any records to support that the plaintiff was ever asked indeed why he wasn't able to do some of these activities. The McGill Pain Questionnaire was not created to diagnose or determine malingering and in fact frankly there is no way for an injured, disabled individual to ever "win" when utilizing the pain scales because if an individual endorses painful items they have a legitimate condition it appears as though they are malingering. If they don't endorse painful symptoms then the defense may take the position that there is nothing wrong with the plaintiff. Either way they lose.

Therefore, I must reject, and urge you to, as well, the alleged "science" behind the conclusion of malingering as set forth in the FCE.