Disability: Legal not Clinical

- Disability is a legal / social concept, not a clinical determination.
- There are no "diagnostic criteria" for disability.

Broad Disability Definition: World Health Organization

**Interaction** between body/mind and adaptive demands, comprised of:

[a] **Impairment** – problem in physical or psychological function, or structure

[b] **Activity limitation** – difficulty executing a task or action

[c] **Participation restriction** – resulting limits to involvement in life situations.
Politically Correct Terminology

When speaking of disability, refer to “a person with (diagnosis)” rather than conflating the person and their impairing condition.

- Example: “A person with schizophrenia” rather than “a schizophrenic” or “a person with intellectual disability” rather than “a retardate.”

U.S.A. Disability Statistics

- ~ 50M impaired, plus stakeholders (friends, family, employers)
- One-quarter to one-third of the disabilities are mental
- 11% affect employment
- Increased risk: minorities; lower education, social isolation, poverty

Psychiatric Disability

- 7% of U.S. population
- Second largest single category of disability awards
- 50% mental retardation; 15% schizophrenia
- Doubled proportion of total disability cases in two decades – from 11% (1980) to 22% (1999).

Disability Systems: Access and Compensation

- Access
  - A.D.A. – public accommodations, work
  - Education
- Compensation
  - Private insurance
  - Worker’s comp: private or government
  - Veteran’s Administration
  - Social Security
Does Compensation Matter?
- NEJM, April 20, 2000, 342(16), 1179–1186
- Compared 7462 whiplash-injured persons under tort system and under no-fault system
- Claim incidence decreased under no-fault
- Claim closure time decreased under no-fault
- Pain intensity, functional level, and depressive symptoms predicted closure time equally under both systems

Variations Across Systems
- Definitions of disability vary across legal contexts and systems.
- Causation analysis varies across legal contexts and systems.

Definitions of Disability
- Private insurance
- Worker’s Compensation: Private or Government
- Veteran’s Administration
- Social Security

Relevance of Causation Varies
- Private insurance
- Worker’s Compensation: Private or Government
- Veteran’s Administration
- Social Security
Determination of Causation

- Treating physicians are in weak position to evaluate causation.
- Issues:
  - Is alleged cause accurately reported?
  - Are other clinically sufficient causes present?
  - Are any necessary causes absent?

Social Security Programs

- SSD (Disability Insurance)
- SSI (Means-tested Supplemental Security Income)
- ~ Three million annual applications
- Everything you could ever want to know is at www.ssa.gov

History I

- 1950, P.L. 734: “Aid to the permanently disabled” – grants to states
- 1958, P.L. 85–840: benefits for dependents
- 1960, P.L. 86–778: benefits for workers under age 50

History II

- 1965, P.L. 89–97: Defined disability as \( \geq 12 \) months
- 1967, P.L. 90–248: Required that impairments be demonstrable by acceptable diagnostic techniques
Substance Abuse

- Sally Satel, M.D. – 1993 – *Hospital and Community Psychiatry*
  - Weekly drug tests of schizophrenic patients showed monthly fluctuation of cocaine use paralleling receipt of disability checks, and correlated with increased symptoms and hospitalization.

Substance Abuse Exclusion

- 1994 – P.L. 103–296
  - Limited DA&A benefits to 36 months and required treatment
  - Prohibits benefits if DA&A is “material” to determination of disability.
  - “Material” means disability would cease if substance abuse ceased

History III


Disability Application Process

- Claim filed (in person, phone, on-line) and records obtained.
- State DDS assigns case to an adjudicator.
- Adjudicator makes findings of fact on basis of records only.
- Independent exams may be required (SSA pays)
- If denied, Request for Reconsideration by new adjudicator may be filed.
- If Reconsideration denied, ALJ hearing option.
**ALJ Hearing**
- Independent from DDS
- May pay case on record, without hearing.
- Claimant entitled to attorney or non-atty rep (contingent fee, max 25% / ~$5300, ALJ approved)
- Hearing may include ME’s and/or VE
- Denial may be challenged: Appeals Council, Federal Court
- All appeals have 60-day deadline from notice

**SSA Disability Definition: Adult**
“...inability to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment(s) 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.”

**SGA**
- Physical or mental activities for pay or profit, or of a type generally performed for pay or profit. Earning > $800/month (2003 figure: $1330 for blind persons) is “substantial” even if it is performed on a part-time basis, or even if the individual does less, is paid less, or has less responsibility than in previous work.

**SGA**
- Activities involving self-care, household tasks, nonremunerative training, hobbies, therapy, school attendance, clubs, social programs, etc., are not generally considered to be SGA.
**SSA: Child Disability Definition**
- Strict definition
- Not working
- Condition(s) cause “marked and severe functional limitations” (> 2 S.D., two areas)
- Condition(s) have lasted or are expected to last > 1 year or are expected to result in death.

**Sequential Evaluation Process**
Five-step decision process that considers:
- Step 1: Non-medical evidence of eligibility
- Steps 2 & 3: Medical evidence of impairment / listings / RFC
- Steps 4 & 5: Vocational evidence

**Administrative Determinations**
- Whether an impairment meets or equals a Listed impairment
- Parameters of an individual’s residual functional capacities
- How vocational factors apply and whether past relevant work remains possible
- Evaluation of credibility
- Conclusion: whether an individual is “disabled” under the Social Security Act

**Sequential Evaluation Process**
Step 1: Non-medical eligibility
- Is claimant insured and, if so, what is last date of insurance? (SSD vs SSI)
- Is claimant performing SGA?
Does claimant have a impairment that is medically determinable and severe, that is expected to meet or has met the 12 month duration? [Past impairment may qualify for closed period of benefits]

Impairment(s) must result from anatomical, physiological, or psychological abnormalities ("signs") which are objectively demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

A "symptom" is not a "medically determinable physical or mental impairment" and no symptom by itself can establish the existence of such an impairment.

Symptoms (e.g. perceived pain, fatigue, shortness of breath, nervousness) must be consistent with objective medical evidence and have no weight without such consistency.

Inconsistencies must be addressed and resolved. Credibility is a factor.

There must be a logical explanation of the effects of symptoms on an individual's ability to perform specific work-related functions.

Sitting, standing, walking, lifting, carrying, handling, reaching, pushing or pulling; seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; use of judgment, responding appropriately to supervision, coworkers, and usual work situations; and adapting to changes in a routine work setting.
Example: Pain

Alleged symptoms may be supported if imaging shows compression of nerve root, if EMG/NCV studies show muscle or nerve abnormalities, if physical exam shows atrophy, spasm, contracture, abnormal reflexes.

Example: Depression

- Alleged depression may be supported by observations (not mere reports) of weight loss, poor hygiene, haggard appearance, impaired eye contact, psychomotor agitation or retardation, crying, self-injury or overdose, thought process disorder, impaired concentration affecting interview, etc.

Credibility Decisions

A determination or decision must contain specific reasons for any finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight.

Base-Rate of Malingering


- > 50% rate of malingering on forced-choice effort tests (such as TOMM) in sample of > 200 consecutive DDS examinees.
Evaluating Credibility

The intensity, persistence, and functionally limiting effects of alleged symptoms must be evaluated to determine the extent to which the symptoms affect the individual's ability to do basic work activities. This requires the adjudicator to make a finding about the credibility of the individual's statements about the symptom(s) and its functional effects.

Credibility Factors

Consistency across domains / providers
- OFIDAACS
- Treatment, compliance, side effects
- Non-medical coping procedures
- Daily activities
  Evidence of malingering

“Severe” Impairment

‘Severe’ is defined as an impairment or combination of impairments that has “more than a minimal effect on the individual’s physical or mental ability(ies) to perform basic work activities.”

Severity Determination

The severity requirement cannot be satisfied when medical evidence shows that the person has the ability to perform basic work activities.
Basic work activities include both exertional and nonexertional elements.
In determining whether severe impairment exists, all impairments must be considered in combination.
Severity Determination: Non-medical sources

- Non-medical sources may be used to determine the severity, but not the existence of an impairment.

Treatment Response and Noncompliance

- Successful treatment, even of a severe condition, precludes award of disability benefits.
- Disability may be denied despite severe impairment if there is evidence of noncompliance with reasonable treatment that could be expected to improve an individual’s ability to function.

Sources of Medical Evidence

- Treating sources
- Examining sources
- Non–treating, non–examining sources

Impairment Determination

Medical Source Statements

- Statements from treating or examining physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of impairment(s), including symptoms, diagnosis and prognosis, what can still be done despite impairment(s), and physical or mental restrictions.
Therapeutic Challenges

- Managing incompatibility of therapeutic and forensic roles.
- Countertransference issues.
- Alcohol and drugs.
- Discussing opinion with the patient.
- Continuing treatment after benefits awarded.

Outreach to Treating Source

If the evidence does not support a treating source's opinion on any issue reserved to the Commissioner and the adjudicator cannot ascertain the basis of the opinion from the case record, the adjudicator must make "every reasonable effort" to re-contact the source for clarification of the reasons for the opinion.

Treating Opinion Controls – IF:

- Supported by objective evidence
- Not inconsistent with other substantial evidence in record
- Does not address a subject reserved to the Commissioner ["administrative" authority]
- A treating source opinion meeting these criteria must be given controlling weight.
- An opinion not given controlling weight may still be considered in the overall evaluation

Non-examining Experts

Opinions from non-examining consultants may be entitled to greater weight than the opinions of treating or examining sources, for example, if the consultant's opinion is based on a review of a complete case record that includes a medical report from a specialist in the individual's particular impairment which provides more detailed and comprehensive information than was available to the individual's treating or examining source.
The Listing of Impairments is a set of regulations describing impairments of a level of severity deemed to preclude an individual from engaging in any gainful activity. An applicant for title II disabled activity.

An applicant for title II disabled widow’s, widower’s, or surviving divorced spouse’s benefits or title XVI child’s benefits must have an impairment(s) that meets or equals an impairment in the Listing.

Listings organized into 13 body systems
- Adult psychiatric listings 12.02–12.10
- Child psychiatric listings 112.02 – 112.12

Other applicants who do not meet a Listing may still be found disabled by analysis which shows that their condition equals a Listed Impairment or by analysis of residual functional capacity in light of applicable vocational factors such as past relevant work, transferable skills, and numbers of jobs for which the individual remains qualified.

Remaining capacity for work-related physical and mental activities despite functional limitations resulting from medically determinable impairments. RFC is the most, not the least, an individual can do despite his or her limitations. RFC is not the same as a medical source statement. Descriptions and observations by medical and nonmedical sources in addition to those made during formal medical examinations must be considered in the determination of RFC.
RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis. A "regular and continuing basis" means 8 hours a day, for 5 days a week, or an equivalent work schedule.

Do medical and vocational factors preclude past relevant work? (Disabled at this step if > age 55)
Do medical and vocational factors preclude any SGA by precluding performance of other jobs which exist in significant numbers?

Vocational Analysis Elements
- Age (> 50 use “GRID” rules)
- Education and training
- Relevant work experience (past 15 years)
- Transferable skills

Recommendations for Clinicians
- Feel free to refer patients for independent disability exam.
- Make sure the narrative of your records includes criteria to support your diagnoses (or list diagnosis as "by history")
- Make sure your record includes objective as well as subjective data.
- Explain the basis for your GAF score.
- Address and document treatment compliance.
Recommendations for Clinicians

- Beware of the verb “to be” – nothing “is” – all information has a pedigree -- is alleged, reported, recorded, noted, observed etc.
- If you review records, list them by name in your report and cite them specifically if you rely on them.
- Don’t qualify absolutes – there is no such thing as a “relatively valid” test.

Recommendations for Clinicians

- Quantify and describe your conclusions behaviorally – stating someone has “erratic” concentration is not useful. Stating that it was necessary to repeat instructions and redirect six times during the WAIS is useful.

Recommendations for Clinicians

- Don’t offer naked conclusions about credibility, sincerity or truthfulness.
- When evidence of malingering exists in any part of the examination, don’t assume that any other part of the examination is valid.
- If you have objective evidence of malingering in any part of the exam, qualify and limit your functional assessment accordingly.

QUESTIONS AND DISCUSSION?