Disclaimer and autonomy in medical expertise social security in Brazil

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Abstract

The medical examination is a mandatory requirement for the granting of most of the benefits granted by the National Social Security Institute. It is a complex activity that requires extensive knowledge of medicine and law and aims to ensure the maintenance of the insured worker when incapacitated.

It was found that several elements are modifiable and which would benefit the work of the expert. The adequacy of the physical environment, clarification of the population about the particularities of expert activity, the end of the obligation by the physician to deliver the Communication of Results, the improvement of the computerized system available, the discussion about the number of scheduled activities per day that respects the ability of the expert, away from the exhaust and thus the errors, as well as respect for the rules that guide the best medical practice issued by the medical council, would allow the work to the exemption and the necessary autonomy.

Key words: Medical autonomy. Expertise. Ethics.

Resumo

Isenção e autonomia na perícia médica previdenciária no Brasil

A perícia médica é requisito obrigatório para a concessão da maioria dos benefícios concedidos pelo Instituto Nacional do Seguro Social. Trata-se de atividade complexa, pois exige amplos conhecimentos de medicina e de legislação, e que tem por finalidade garantir a subsistência do trabalhador segurado quando incapacitado. Verificou-se que diversos são os elementos passíveis de modificação e que beneficiariam o atuar do perito. A adequação do ambiente físico, o esclarecimento da população acerca das particularidades da atividade pericial, o fim da obrigatoriedade da entrega da Comunicação de Resultado de Requerimento pelo médico, a melhora do sistema informatizado disponibilizado, a discussão acerca do número de atividades agendadas por dia que respeite a capacidade do perito, afastando-o da exaustão e, portanto, dos erros, bem como o respeito às normas balizadoras da atividade médica emanadas dos conselhos de medicina, permitiriam o labor com a isenção e a autonomia necessárias.

Palavras-chave: Autonomia médica. Perícia. Ética.

Resumen

Imparcialidad y autonomía en el examen médico de la seguridad social en Brasil

El examen médico es requisito obligatorio para la concesión de la mayor parte de los beneficios otorgados por el Instituto Nacional de la Seguridad Social. Se trata de una actividad compleja que requiere un amplio conocimiento de la medicina y la ley, y tiene como objetivo garantizar la subsistencia del trabajador asegurado cuando incapacitado. Se comprobó que muchos elementos son modificables y que beneficiarían la labor del experto. La adecuación del entorno físico, la clarificación de la población acerca de las particularidades de la actividad pericial, el fin de la obligación del médico perito entregar la Comunicación de Resultado de Requerimiento, la mejora del sistema informático disponible, la discusión sobre el número de actividades programadas por día que respete la capacidad del experto, alejándole del agotamiento y como consecuencia de posibles errores en sus evaluaciones, así como el respeto a las normas delimitadoras de la actividad médica emitidas por los consejos médicos, permitiría la labor con la imparcialidad y la autonomía necesarias.

Palabras-clave: Autonomía médica. Peritaje. Ética.

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The Social Security is the oldest insurance company of the Brazilian worker, as well as the biggest income distributor in the country. Its history dates back to 1888, with the Decree 9.912-A which regulated the retirement right of the employees of the post and established 30 years of effective service and the minimum retiring age of 60 years old as requirements[1] for obtaining the benefits. Throughout the years, the Brazilian Social Security has undergone several conceptual and structural changes, involving its comprehensiveness, coverage degrees, portfolio of offered benefits and the way of financing the system[2]. In the Constitution of 1888[3], the Social Security is officially admitted as a *social right* (art. 6th) and, along with the right to health and social assistance, it appears as a species of the security gender, explained in the article 194 of the constitutional letter.

The social Security is defined as the social insurance for the taxpayer, being a public institution whose objective is to recognize and grant rights to the people it insures. The National Institute of Social Security (INSS, in Portuguese) is a federal autarchy, linked to the Ministry of Social Security, whose purpose is to promote the recognition of the right to receive the benefits that it administrates [1].

The Social Security's taxpayers are subjected to the General Social Security Regime (RGPS, in Portuguese), instituted by the Law 8.212/91 [4]. It is a regime of mandatory affiliation, according to the writing on the article 201 of the Constitutional Amendment (CA) 20 of 1998 [5]. Thus, the social security benefits are paid by all the taxpayer workers, independently of whether they have ever received the benefit in their lives.

The law is imposing when it establishes the right of the insured (the assistance will be duly provided) when the legal requirements are met. Among these requirements, the State understood that it should establish, with the Decree 3.048/99 [6], the need of medical examination performed by the social security autarchy. The medical report is the designation of the medical-legal piece written by the expert, in which the medical examination is described.

The verification of the right to receive the social security benefits depends, then, in many cases, on the medical examination, that is, the applicant must be examined by an expert doctor designated by INSS, in order to determine whether there is or not any condition that indicates if the person needs and fulfills the requirements for receiving the right to the benefit requested. There are requirements defined for the expert's examination: nosological diagnosis, according to the International Disease Classification (IDC); determination of the disease's initial date; the incapacity's initial date, if the person is insured; exemption of deferred period, exemption of income tax; whether the incapacity exists or not; of technical nexus and social security epidemiological technical nexus (NTEP, in Portuguese); estimating termination and possibility of recovery (prognostics); result issuing and delivery and, still, the awareness of the result by the examinee for legal purposes.

Among the benefits that may be required by the workers, it is important to mention the illness aid, pointed out in the articles 59 to 63 of the Law 8.213/91 [7]. The illness aid is characterized by being a *short-duration social security benefit which is renewable in any opportunity that the insured might need it. It is a paid benefit in case of temporary incapacity* [8] instead of mere existence of the disease.

Whether it has judicial or administrative insertion, the medical examination is a tool of legal medicine. The several types of examination should be understood as performance areas of legal medicine, mater specialty to which all the others are connected [9]. Recently, Brazil has recognized the Legal Medicine and Medical Examination as a new and unique specialty, according to the Resolution 1.973/11 of the Federal Medical Council (FMC) [10].

Nevertheless, social security examination is something different than others. It is an administrative examination with the purpose of evaluating, among other things, the existence of temporary or permanent labor incapacity on behalf of the applicant, aiming at substantiating the granting of benefits by the INSS. In this case, the examination has judicative character, since it issues value judgment regarding the elements obtained with examination and does not only report them. Therefore, social security examination moves away from the adagio *visum et repertum*, ancient expression that became the motto of experts and that means "well seen (examined in detail) and refered to (described, documented) exactly what was seen [11].

Even though the most frequent benefit of routine examination evaluations is called illness aid, this is not the judicial asset insured by INSS, but the labor capacity [9]. This mistake in nomenclature is what confuses the applicant, giving the notion that an illness would be enough for the benefit to be granted.

The medical examinations of INSS do not aim at diagnosing an illness, but it aims at evaluating the repercussion of this illness on the applicant's labor capacity. These examinations take into consideration

the existence of labor incapacity generated by an illness, which must be duly informed by the applicant, who should also provide documentation that proves such pathology and includes, for example, among others, a certificate issued by their assistant physician, as well as the result of complementary tests. The proof of lack of treatment may cause the non-granting of the benefit, based on the article 77 of the Decree 3.048/99 [6]. When the lack of treatment is confessed, it is reasonable enough for denying benefit due to non-compliance with legal requirements [2].

Ethical Questions

Medical examination cannot be confused with medical aid. The relationship between the expert and the applicant is completely different than the doctor-patient relationship. The latter is based on mutual trust, empathy, search for diagnosis, treatment, relief. In turn, the expert-applicant relationship is based on mutual distrust, the commitment to the truth and to an objective opinion. The difference is so relevant that the Medical Ethics Code (MEC) [12] has a chapter that is specifically dedicated to the theme [9]. According to the Chapter XI of the MEC (Audits and Medical Examinations), the doctor is forbidden to:

Art. 93. Be the expert or auditor of their own patient, relative or any other person with whom they have relationships that are likely to influence in their work or any other company they have worked on.
Art. 98. Stop working with absolute exemption when chosen to serve as an expert or auditor, as well as surpassing the limits of its tasks and competence [12].

Concerning medical secrecy, examination also differs from medical aid, as Fraraccio mentions in his contemporary forensic medicine work: *Effectively, if there is medical act devoid from the obligation of maintaining professional secrecy, it is a legal-medical examination. It must be this way, because usually the patient does not request the medical examination (a contractual relationship is not established with the professional), since the examination is requested by the authority [13].*

Factors that affect the INSS expert's autonomy

The attentive analysis of the social security medical examination in Brazil reveals several factors that affect more or less the INSS expert's autonomy, such as: 1) limitations regarding the issuing of the examination report; 2) time constraints; 3) lack of exclusive area for examination; 4) subordinated relationship with INSS and; 5) lack of institutional equipment. It is worth pointing out, however, that besides the aspects discussed in the topics below, there are several others that also deserve more attention in order to be identified and corrected, in order to improve and professionalize the social security examination activities in our country.

Limitations regarding the issuing of the examination report

The limitations regarding the issuing of the examination report occur due to the obligation of using a computer application, the Incapacity Benefits Administrative System (Sabi, in Portuguese). Sabi consists of a computer system that analyzes previously the administrative variables, such as insurance validity, deferred period, among others, allowing, after submitting the social security examination data, the conclusions to be encoded and sent to central computers, for benefit processing and the generation of cash holdings that will paid to insured employees at the bank [2].

The System has several factors that circumscribe the expert's autonomy. Among others, it limits the number of characters that can be typed in each field and does not allow attaching documents, the experts, then, have to type all of the relevant elements presented by the applicant. Currently, the report must be restricted to one page – many times, the examination reports lack in information and are questioned regarding their quality afterwards.

The system also denies benefits automatically for certain IDCs, that is, when a certain IDC is used there will be an automatic denial for the benefit request, regardless of what is written or concluded by the expert in their report. Yet, this system does not recognize several IDCs listed in the current classification, demanding the exchange of the most appropriate ICD for another one that exists in the system.

Time constraints

The time constraints determined by the institution for the performing the social security examination is related to a pre-set schedule with 18 to 24 examinations/day/expert. Thus, the tasks of identifying the examinee, researching their history, performing a physical examination, analyzing documentation and the items listed in the questionnaire, formulating answers, consulting bibliography, issu-

ing the report and typing it on Sabi are supposed to be done in only 20 minutes, which is the deadline for the immediate delivery of the result. Obviously, such determination makes it impossible to fulfill the medical-legal act with the necessary peace of mind, and the consequences are the issuing of weaker reports and the doctor's feeling of urgency. An activity that, due to its own complex nature and the undeniable importance of its results, that may mean the worker's subsistence during an incapacitated period, should be developed with maximum care and serenity by the expert.

Lack of exclusive area for examination

The lack of exclusive area for examination, which is physically separated from the insured workers' waiting room, may be considered a chronic reality. In most of the agencies, the free access of any individual, at any time, to the medical examination rooms, exposes the expert to frequent interruptions of their activity and, even, to possibly aggressive situations by the unsatisfied applicants. Such fact generates, during working hours, a constant feeling of vulnerability and insecurity, which disturbs the experts' performance, since doctors avoid leaving their rooms to discuss doubtful cases, which would be extremely beneficial to the examination work.

Subordinated relationship with INSS

The subordinated relationship with INSS becomes clear when we think that the expert is paid by the institution, where he does services. It is a relevant aspect that is still ignored by INSS. Due to one of the parties' employment bonds with INSS, a precedent is installed which allows questioning the exemption of the examination report [9]. It makes room for a possible conflict of interests when the institution that pays for the benefits is the same one that hires and establishes the norms for the work of the expert who will be responsible for granting the benefits or not. This way, the medical act is subjected physically and administratively to the control of the administrative head offices and norms, which may be a source of lack of exemption in the examination.

Lack of institutional equipment

Given the conditions explained above, especially those that concern time and space, some of them increase the expert's difficulty when establishing the examination report. The lack of institutional equipment restricts the consultation of other doctors' opinions or test requests, in more complex cases, even though it is predicted by the *Expert Physician's Manual*, version 2, 4.3, item c: *requesting, when necessary, complementary tests and specialized opinions* [14].

Before such conditions which are so adverse to the good development of the examination activities and considering, yet, the importance of the examination for granting benefits to the worker, it is worth discussing the current model from activity's normative planning.

Discussion

Concerning the previously identified topics, the Regional Council of Medicine of the State of Rio Grande do Sul (Cremers, in Portuguese) has spoken in a report from 2010:

1. The medical examination in the scope of Social Security aims at issuing a technical report (the doctor's opinion) that will support or not the final decision on granting benefits:
a. Therefore, the space dedicated to the elaboration of the medical examination report must be unlimited, allowing each physician to perform this activity autonomously, answering its technical quality criteria;
b. In order to better qualify this technical report, it is considered the need for making available the necessary resources in order to attach the original documents presented to the report, as well as other elements gathered during the exam (images, pictures, etc.);
c. Besides, it is considered the need for a report model that complies with the minimum standards of medical-legal documentation, as well as allows an appropriate filling on behalf of the expert physicians.
5. It is necessary that the code table used by INSS is based on the IDC 10 contemplated as a whole, without limiting the diagnoses used for granting benefits [15].

The characteristics of the examination activities pointed out by Cremers are also supported by the Chapter II of MEC, which defines as being the physician's right: *VII – Deciding, in any circumstance, taking into consideration their professional experience and capacity, the time dedicated to the patient, avoiding that the accumulation of responsibilities or consultations become harmful* [12]. Therefore, it becomes clear that MEC assures the physician their autonomy to establish the necessary time for fulfilling the necessary medical acts, including the medical examination.

Still concerning the time the physician needs to have in order to fulfill their activity, whether it is an consultation or the examination, several enquiries were made by expert physicians of different states of Brazil to the CRM (Regional Council of Medicine) and, also, to the World Health Organization (WHO). The answers are adamant, pointing out that there should not be a discussion regarding minimum, average or maximum time for the medical activity. Indeed, WHO has spoken unequivocally in an email signed electronically by Dra. Rachel Pedersen (Assistant, Disability and Rehabilitation (DAR), Department of Violence and Injury Prevention and Disability, Noncommunicable Diseases and Mental Health, World Health Organization): *The evaluation time are also dependent on the condition and treating physician, I am afraid there are no specific recommendations on this*. This same authority has already spoken in a previous communication attempt informing that WHO does not propose recommendations for time of treatment due to the peculiarity of each case.

The item four in the report of the Technical Chamber of Examination (PG 09-036/09) defines: *The physician as an examiner must not accept any type of embarrassment or restriction that may influence the development of their duty, that must be fulfilled with absolute exemption, impartiality and autonomy, which is the reason why there should not be a fixed period of time for the medical examination activities* [15]. In the same way, the consultation process of the Regional Council of Medicine of the State of Paraná, regarding the medical examinations, issued a report clarifying that: *Note that no worker must remain in highly demanding activities during their work hours, especially in high cognitive demand tasks, as the medical consultations and examinations, under the risk of intense fatigue and, consequently, the increase of possible mistakes* [16].

From the response to the questions made to the CRM and the brief description of examiners' activity in the scope of INSS, it becomes evident that, as a consequence of the factors listed above, the physicians are not provided with the ideal work conditions (or even the appropriate ones), that should contemplate the autonomy and take precedence in exemption. From the group of problems mentioned, it is understood that as a result of these adverse conditions, not only the examiners are being harmed, but these circumstances affect, especially, the population that needs this service and, as required by law, cannot look for other bodies to obtain it.

Besides the aspects of the medical examination discussed above, the professional's situation is even worsen by the obligation, imposed by an infra-constitutional act, that requires delivering the Communication of Results (Crer) immediately after the medical examination. The Crer is the document which contains the conclusive result by INSS, after the analysis of all data from a certain order. That is, it is not examination report written by the physician, but the final result of the sum of the applicant's examination and administrative data

Imposing the doctor to perform an administrative activity, which is the institution's duty, and also forcing them to request the signature of the person who receives the document immediately after the examination ends because it personifies the physician as the only responsible for the institutional decision, brings another consequence that may compromise the exemption in the examination's conclusion: the physician may fear for their integrity delivering a result that denies the granting of the requested benefit.

This way, obviously, since they did not have their request accepted, it is normal for the applicant to not accept the result. Thus, the applicant personalizes the result, taking the physician who examined them as the only responsible for their misfortune. It is still worth highlighting that, many times, even when the applicant's incapacity is determined and registered by the physician, the benefit may not be granted, due to administrative hindrances, such as lack of necessary taxpaying time, among others.

It is also clear that this institutional determination plays an important role in the generation of conflicts between physicians and applicants, facilitating uncountable hostile situations. Many of them culminate in aggression, frequently registered in the Federal Police department by examiners all over the country, as the Report PG 09-036/09 of the Technical Chamber of Examinations [15] states. The consequence of the institution's *modus operandi* regarding Crer is the physician's inevitable and constant fear when they realize the applicant's mood, who is seeking a pecuniary benefit and relates the granting of this benefit exclusively to the examination, personifying the act. Thus, again, the reports and their results may suffer distinctive influence of structure elaborated by the institutions and compromise the examination exemptions and the result of their work.

It is worth pointing out that this *internal norm* of INSS was the object of specific questioning with the CRM/RS, that have spoken clearly in the mentioned Report 09-036/09 of the Technical Chamber of Examinations, where it affirms in item 2: *Since the physician is responsible for issuing only technical re-*

ports, it is not this professional's duty to deliver the final result of the benefit requirement to the insured, what, besides being a potential conflict generator, has been the cause of constant aggressions (including threats to the physicians' lives) [15]. However, it is taken for granted by the Council, which rules the medical activity in the state, as well as by all physicians, the position of autarchy still remains, keeping the determination that the physicians should be responsible for delivering the Crer to the applicants in the whole country.

Still, contrary to the profession's ethical sayings and with apparent unfamiliarity with the severity of the consequences of requiring that the Crer be delivered by the physician immediately after the examination, there is the Bill 7.209/10 [17] that aims at including the following paragraph: § *3rd The conclusion of incapacity or not should be communicated in writing to the insured by the examiner, at the end of the examination.*

It is agreed that, if the delivery of the Crer by the physician generates conflict, as previously stated, and considering that the decision making process and the confection of the examination report have several stages, which will not necessarily be concluded until the end of the clinical examination per se, and foremost, that the examination report and Crer are of widely unrestricted access to the applicant, as soon as all of the administrative acts involved are concluded and from the moment that the applicant requires this report to INSS, the inclusion of the paragraph in the proposed Bill is not justifiable.

Viewed in another way, under the criminal scope the Code of Criminal Procedure (CPP) defines the report's deadline for the confection and delivery in 10 days, extendable if necessary with a request from the physician: *Chapter II, of Corpus Delicti Exam, and Examinations in General:*

Art. 160. The expert shall elaborate the examination report, where they shall describe in details what they have examined, and shall answer the formulated items. (Wording by Law number 8.862, from 3.28.1994)
Sole paragraph. The examination report shall be elaborated in the maximum deadline of 10 days, this deadline may be postponed, in exceptional cases, as the physician's request. (Wording by Law 8.862, from 3.28.1994) [18]

Under civil scope, according to the Civil Procedure Code (CPC) the report may be delivered up to 20 days before the scheduled hearing [19]. Comparing the available deadline for the confection and delivery of reports under the criminal and civil scopes, it seems completely disproportional that, for the examination report delivery in social security, there would be such urgency that required its conclusion and delivery to be immediately after the medical act.

Alternative to the current model

In 2001, Portugal implemented an independent, autonomous, official and self-sustainable model of legal medicine. Such model was approved by the European Community and subsequently adopted by the member-States. Australia did not only adopt the Portuguese model, but also perfected it. The model concentrates the management of every Medico-Legal Institutes (MLI) in only one body, the National Institute of Legal Medicine (NILM). This body is linked to the Portuguese Ministry of Justice, whose president is among its coroners [9].

It is a duty of NILM defining the national policy for the area of legal medicine and other forensic sciences, providing the necessary technical and laboratory support to the tribunal, managing and controlling the quality of the related services – issuing technical-scientific guidelines that promote the harmonization of methodologies, techniques and examination reports. This institution is responsible for the education, training and assessment of the necessary human resources [9].

From the organizational stand point, NILM has total technical and administrative autonomy; assigning professionals for each activity is an exclusive responsibility of the body. NILM does services not only to the judicial power, but also to any public or private entity that requests medico-legal and forensic sciences knowledge, receiving compensation that is listed and disclosed in the Official Diary, organized by procedure. The body's total autonomy, including financial, guarantees the exemption from the procedures performed, indispensable quality in medico-legal acts [9].

Final remarks

The social security medical examination is a mandatory requirement for the receiving most of the benefits granted by INSS, being, therefore, a strong pillar in the worker's protection when they are incapacitated of supplying their subsistence through their activity. This kind of activity re-

quires wide medicine and legislation knowledge, as highlighted.

The appreciation of examination and the search for a solution for the factors that prevent the best development of this activity is interesting for all of those who are involved in this issue, whether they are: the physicians who chose to dedicate their career to it, the workers insured by Social Security that seek service, and the society as a whole – that expects the qualification of their services with public funds.

The current model for exercising the examination used by INSS curtails, in many ways, the appropriate development of the expert physician's work, whether it is by influence of the institution, by suppression of the rights assured to the doctor and, consequently, also to those who receive the service. It is absolutely inadvisable for the professional being subjected to a predetermination of how long the examination lasts, as well as excessive number of consultations and tasks in the same workday. It is worth pointing out that such demand implies in a notorious infringement of ethical precepts of CEM, which defines the parameters of lawfulness of medical acts in the country.

The autonomy in exercising the examination activities is essential for quality and exemption in the elaboration of the report and its conclusion. Thus, the time spent with each medical act must be individualized, as well as the search for quality in reports, passing through the possibility of discussion in more complex cases, with researches, technical meetings or access to special examinations, as foreseen by the Law of Career [20]. The participation of experts in congresses and qualification courses that will contribute to their constant updating and education should be stimulated, perfecting the service provided.

It is worth questioning if it would not be more appropriate to allocate the medical examination in an independent body from the one that pays the benefits, as a new sector inside the Ministry of Health or the Ministry of Justice, like Portugal, Australia and other countries of the European Community.

Finally, it is paramount to consider that the determinations brought by the CFM must be followed by all doctors in the country. In its Chapter II, the MEC [12] states that it is the physician's right: *III – Pointing out flaws in internal norms, contracts and practices of the institutions where the physician works when they consider these flaws unworthy of the profession or harmful to them, the patient or others, and they should direct the flaws, in these cases, to the competent bodied and, necessarily, to the ethics committee and to the Regional Council of Medicine of their jurisdiction.* In this sense, this article's questions aim at promoting wide reflections and discussions, among the medical class, managers of the social security system and legislators, as well as the Brazilian society group, concerning the questions discussed for the examination activity to be able to fulfill effectively its assigned function and serve the Brazilians' longing for a quality service.

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