

ASSESSING FITNESS FOR WORK

William Davies

Sociolegal implications of assessing fitness for work

- Security of employment
- Rejection at recruitment
- Occupational ill health or injury
- Justifiable or unfair discrimination
- Retirement due to ill health
- Termination of contract
- Claim for unfair dismissal
- Industrial tribunal
- Medical appeals
- Litigation for personal injury
- Criminal prosecution
- Professional liability

Assessments of fitness for work can be important for job applicants, employees, and employers. Unfitness due to an acute illness is normally self evident and uncontentious, but assessing other cases may not be straightforward and can have serious financial and legal implications for those involved. Commercial viability, efficiency, and legal responsibilities lie behind the fitness standards required by employers, and it may be legitimate to discriminate against people with medical conditions on these grounds. Unnecessary discrimination, however, is counterproductive if suitable staff are overlooked and may be costly in cases of unfair dismissal. In addition, the Disability Discrimination Act 1995 makes it illegal for employers of 20 or more staff to discriminate without justification against those with disability as defined by the act.

Fortunately, balancing these often complex socioeconomic and legal issues to achieve a sustainable decision on fitness is not primarily a medical responsibility. Doctors do, however, have responsibilities to assess the relevant facts competently and provide helpful medical advice when required.

Basic principles and responsibilities

Key concepts of health and safety

Hazard

The potential of a thing, condition, or situation to cause harm

Risk

The probability of harm occurring from a hazard

Negligible risk

The most widely held view of negligible risk in the context of health and safety is an annual risk of less than one in a million

Competent assessment

A competent assessment requires a level of detail, consultation, and consensus broadly commensurate with the nature of identifiable hazards and the extent of reasonably foreseeable risks

Staying on track

This article deals with assessing fitness for "identified employment." To avoid confusion with related issues, the following points should be noted at the outset:

- Fitness for work in relation to retirement benefits for ill health will depend on the specific provisions of the pension scheme, and general guidance is available¹
- The recently introduced "all work test" of fitness is not related to identified employment but concerns entitlement to social benefit (incapacity benefit) and is the responsibility of the Benefits Agency Medical Services' doctors²
- The Disability Discrimination Act 1995 does not in principle change good medical practice in assessing fitness for work but obliges employers to be more accommodating to those covered by the legislation
- Key concepts of health and safety, risk assessment, and risk management—hazard, risk, negligible risk, and competence—apply to assessing fitness for work and should be clearly understood.

Medical responsibilities

General and hospital practitioners

To patient

- Act in patient's best health interests

To Department of Social Security

- Apply the "own occupation test"*
- Complete forms med3, med4, etc, when required
- Supply on request relevant clinical information

*The test is whether the person by reason of some specific disease or bodily or mental disablement is incapable of work which that person could be reasonably expected to do in the course of their occupation

Detailed advice on the above is available in the guide IB204² and from regional Benefits Agency Medical Services Centres

Occupational health practitioners

To patient

- Act in patient's best health interests

To employer

- Assess functional ability and occupational risks
- Make recommendations on fitness in accordance with valid predetermined standards
- Provide information and advice that enables management to make an informed decision on compatibility of subject with employer's requirements and legal responsibilities

Detailed advice on the above is available in *Fitness for Work. The Medical Aspects*¹ or from accredited specialists in occupational medicine

Medical responsibilities

Doctors' responsibilities vary according to their role. General practitioners and hospital doctors have direct responsibilities to the patient and also obligations to the Department of Social Security associated with applying the "own occupation test." Occupational health practitioners have direct responsibilities to the employee or job applicant and the employer.

These groups may take different approaches but have important common ground. If patients, employees, and job applicants are to be treated fairly every medical opinion on their fitness for a job should be based on a competent assessment of relevant factors and should satisfy the same basic criteria. Patients' interests will be best served when there is, between doctors, clear understanding, due consultation, and, as far as possible, agreement.

Key principles of assessing fitness for work

1 The primary purpose of the medical assessment of fitness to work is to ensure that the subject is fit to perform the task required effectively and without risk to the subject's or others' health and safety

2 The subject's fitness should be interpreted in functional terms and in the context of the job requirements

3 Employers have a duty to ensure, so far as is reasonably practicable, the health, safety, and welfare of all their employees

4 Legal duties of reasonable adjustment and nondiscrimination in employment are imposed by the Disability Discrimination Act 1995

5 Good employment practice involves due consideration of the needs of all job applicants and employees with disabilities or medical conditions

6 It is ultimately the employer's responsibility to set the objectives for attendance and performance and to ensure compliance with the law on health and safety and employment

Key principles in practice

The first principle establishes three basic criteria for fitness—attendance and performance, health and safety risk to others, and health and safety risk to self. In this context “without risk” reflects a fundamental ethical concept of occupational medicine which limits medical discretion: doctors should not presume to decide for others that risks are acceptable; employers must take this responsibility and require medical advice on the nature and extent of risk to make informed decisions.

The second principle means that an appraisal of the subject's medical condition and functional ability—that is, a medical-functional appraisal—together with a review of the relevant occupational considerations should provide an empirical assessment of ability and risk. This assessment may be judged against the required fitness criteria to determine what the outcome should be.

The third, fourth, and fifth principles point to the potential there may be for preventing or controlling risk and for accommodating the needs of people with disabilities or medical conditions. Such measures are effectively enabling options, which, if available, may justify a conditional recommendation of fitness.

The sixth principle means that technically all decisions on fitness rest with the employer. This is because the employer determines what is required of the employment and ultimately carries responsibility for the risks.

Reporting the outcome as a medical recommendation—or, when appropriate, as medical conclusions and medical advice—should enable management to make an informed decision on the compatibility of the subject with the employer's requirements and responsibilities

Outcome

When fitness criteria are defined and the assessment clearly satisfies or fails to satisfy the employer's requirements and responsibilities, a “medical recommendation” of fitness can be made (see green columns in desktop aid at end of article). When fitness criteria are uncertain—when the employer's requirements and responsibilities cannot be predetermined or presumed—the “medical conclusions” of the assessment should be made clear to the employer. In addition, a medical view on the potential for enabling options or on the appropriateness of employment or continued employment may be given as “medical advice” (red columns in desktop aid).

Assessment of ability and risk

Medical-functional appraisal

History and examination

- Pre-employment questionnaire or health declaration
- Health interview—occupationally relevant direct questions
- Physical examination focusing on job requirements

Work related tests and investigations

- Perceptual—Snellen's, Ishihara's, City University, voice tests, audiometry
- Functional—spirometry, peak flow, strength tests
- Physical endurance and aerobic capacity—step test, bicycle ergometer
- Diagnostic (health on work)—exercise electrocardiography, drug and alcohol tests
- Diagnostic (work on health)—haematology, biochemistry, urine analysis, radiographs
- Functionally specific questionnaires—respiratory (MRC), pre-audiometry

Consultation and research

- Details from general practitioner and medical specialist
- Details from other specialists—such as psychologist, audiologist
- Advice or second opinion from specialist occupational physician
- Advice or second opinion from independent specialist—such as cardiologist, neurologist
- Review of texts, journals, and research

Data sources for standards of fitness

- Key publications^{1,3,4}—For drivers, divers, pilots, food handlers, and many other occupations
- Health and Safety Executive⁵⁻⁷
- Government departments—For teachers⁸
- Professional associations—ALAMA (Association of Local Authority Medical Advisors) for firefighters, police, teachers, etc, and ANHOPS (Association of National Health Occupational Physicians) for health care professions

Medical-functional appraisal

Doctors should always have a basic knowledge of the job demands and working environment before undertaking a medical-functional appraisal so that the extent and emphasis of the appraisal may be tailored accordingly. Any medical conditions that could pose a risk to the subject's or others' health and safety or that could affect attendance and performance should be identified and evaluated.

A suitably constructed questionnaire is the simplest form of assessment, and, for pre-employment screening, a questionnaire or health declaration will be sufficient to permit medical clearance in many categories of employment.

Some occupations have statutory standards, and appraisals must include measuring necessary factors. Others have standards set by authoritative recommendations or guidance. If no guidance exists doctors must judge how extensive the assessment should be by taking account of the nature of any medical conditions identified, the type of work, and the reasons for management's request for medical advice.

Occupational considerations

Ability in the workplace

Consider actual effect of physical or medical condition on performance

- Confirm job requirements—perception, mobility, strength endurance
- Ask employee what the work entails
- Review job description or inspect worksite
- Field tests of specific abilities or structured job simulation exercises
- Trial of employment with feedback from management

Nature of hazards

Consider interaction of occupational factors and medical condition

- Harm from demands—heart attack, back strain, prolapsed disc, "RSI"
- Harm from exposures—asthma, dermatitis, hearing loss
- Harm from situations—seizure-trauma, accidents
- Harm from infections—food handling, surgical procedures
- How much harm likely?—temporary, permanent, minor, major, fatal
- Who may be affected?—self, colleagues, clients, public

Extent of risk

Focus on facts and avoid presumption

- Question employee on relevant details
- Obtain management report on material facts
- Examine documentation—exposure records, accident reports, etc
- Observe work, workplace, and working practices
- Identify frequencies and duration of hazardous exposures or situations
- Request technical data if required—from hygienist, ergonomist, etc
- Review relevant literature, journals, and research

Enabling options

Unexplored treatments

- Medication or surgery
- Physiotherapy or occupational therapy
- Counselling or psychotherapy

Rehabilitative measures

- Graded resumption of responsibilities
- Refamiliarisation training
- Temporary reduction of workload
- Management appraisal or progress reports
- Scheduled or self request medical reviews

Reasonable adjustments

- Modification of duties or working hours
- Redeployment to existing vacancy
- Modifying or providing equipment
- Time off for rehabilitation or treatment
- Providing supervision

Risk prevention and control

- Elimination or substitution of hazard
- Personal protection or immunisation
- Information, instruction, and training
- Health and medical surveillance

Occupational considerations

In straightforward cases a medical-functional appraisal and the doctor's existing knowledge of the job demands and working environment may be sufficient for a recommendation of fitness. However, a closer look at occupational factors is often needed to determine the precise requirements of the job, the subject's real abilities in a working environment, the nature of any hazards, and the probability of harm occurring (the actual risk in the workplace).

- A subject may be able to show satisfactory ability in a job simulation exercise despite a physical impairment that might have affected fitness—for example, a work related test of manual dexterity for an assembly line worker with some functional loss due to a hand injury
- In teaching, health care, and many other occupations perceived hazards of epilepsy are often found to be negligible when the potential for harm to others is properly assessed
- If diabetes is well controlled the risk of injury from hypoglycaemia may be found to be very remote when the true frequency and duration of hazardous situations are taken into account.

Enabling options

A subject's potential fitness often depends on intervention. There may be unexplored treatments that can be provided. Rehabilitative support may be needed to achieve or speed recovery. Employers can make reasonable adjustments, temporary or permanent, to meet the needs of people with medical conditions. Prevention and control measures can reduce or eliminate health and safety risks that would otherwise prohibit a recommendation of fitness.

- Unexplored treatments that are often identified during assessments include physiotherapy, anxiety management, psychotherapy, and hormone replacement therapy
- A tailored, stepwise rehabilitative programme can make the prospect of returning to work after serious illness less daunting and may be vital for recovery from anxiety, depression, occupational stress, and other demotivating conditions
- Modifying a job specification may allow a recommendation of fitness with minimal inconvenience to the employer—for example, removing the requirement to undertake occasional lifting for an arthritic subject
- Substituting a sensitising or irritant product may, with other sensible precautions, enable an asthmatic or eczematous employee to continue working as, say, a paint sprayer or cleaner.

These measures may be applicable under the Health and Safety at Work Act. The Disability Discrimination Act 1995 may also require reasonable adjustments to be made. Even if intervention is not obligatory, employers may recognise the benefits of positive action. Doctors should therefore always bear these options in mind as it may be possible to give a conditional recommendation of fitness that the employer would be willing to accommodate.

Fitness criteria in difficult cases

The parameters of the fitness criteria may be uncertain when

- Attendance or performance limitations due to medical conditions are identified, but the employer's willingness to accommodate them cannot be prejudged
- Health and safety risks to others exist, but they seem remote enough to ignore
- Health and safety risks to self are identified which do not seem to justify a recommendation of unfitness

The above approach should produce a reliable opinion in most cases, but further steps may be needed if the parameters of the fitness criteria are uncertain. In a fitness assessment this may occur with one, two, or all three of the criteria. Dealing with the issues in turn is advisable.

Attendance and performance

The possible impact of a medical condition on a subject's ability to meet required levels of attendance and performance is a major source of employers' requests for medical opinion. The doctor's responsibility is to give the most accurate opinion that the circumstances allow. Conclusions and advice should be as positive as possible without misrepresenting the facts and discussed with the subject. This should help motivation and may improve recovery.

- Open ended statements such as "Unfit; review in three months" are not welcomed by employers, who prefer uncertainties to be expressed as probabilities—"Mr Smith has been incapacitated but is progressing well and is likely to become fit to return to work within four weeks."

- If social or motivational factors are evident discuss these with the subject, and advise management accordingly—"Mrs Jones' incapacitation is due to family commitments that are likely to continue for the foreseeable future. She realises that her employment could be at risk and would welcome an opportunity to discuss her situation with management."

- It may be necessary to ask management for an appraisal of capabilities before making definitive conclusions on the relevance of medical factors—"I will therefore require a management report on his progress after week 6 of the rehabilitation programme."

- In cases of prolonged sickness absence, do not be pressured into recommending ill health retirement for doubtful reasons—"Mr Green is likely to remain unfit for the foreseeable future, but there are not sufficient grounds for ill health retirement under the pensions scheme."

Health and safety risk to others

Employers have a legal duty to ensure the health and safety of employees and the public. In principle the doctor identifies hazards and quantifies any risks while management decides on a subject's fitness based on the medical conclusions and advice. In practice, however, doctors confirm fitness when there is no risk and unfitness if there are clearly unacceptable risks. For the many cases that lie in between, there may be confusion as to whether it is a management or medical responsibility to decide on fitness. A pragmatic approach is suggested:

- For negligible risk, the doctor may advise that the subject be considered fit provided that the judgment of negligible risk is made objectively and based on a competent assessment and that the employer applies all reasonably practicable precautions

- For greater than negligible risk, the doctor should define the type of hazard and extent of risk as clearly as possible to enable management to make an informed decision. Advice from a specialist occupational physician may be required to confirm the competence of the risk assessment or to assist management on acceptability.

Health and safety risk to self

The principles of assessing risk to others apply here, but medical advice can go further. In some cases employment may pose a risk of ill health, but the employer is satisfied that everything possible has been done to prevent or reduce risks—for example, the risk of relapse in a teacher with a history of work related anxiety-depressive disorder.

To advise that in such cases the subject should always be deemed unfit because of a risk of work related ill health is unrealistic. The benefits of employment for the subject, and possibly the employer, may considerably outweigh the risks. On the other hand, there could be issues of liability for both employer and doctor if the risks are overlooked.

The autonomy of the subject must be reconciled with the needs and responsibilities of the employer. Legal precedent does not provide clear guidance on how this should be done; the issues are complex and the implications serious. A rational basis for providing helpful medical advice involves a full discussion of the prognosis with the subject to determine where the balance of benefits and risks lies.

- If the subject thinks the benefits outweigh the risks and the doctor agrees, advice should be given in support of employment, providing the assessment and the judgment of balance between benefit and risk have been competently undertaken

- If the subject thinks the benefits outweigh the risks but the doctor cannot agree, seeking a second opinion from a specialist occupational physician should be considered before providing management with definitive advice

- If the subject thinks the risks outweigh the benefits and the doctor agrees, early retirement should be considered

- If the subject thinks the risks outweigh the benefits when the hazard and risk seem disproportionately low then motivational factors (such as a common law claim or ill health retirement incentives) may be relevant. If so, the doctor should proceed cautiously and consider obtaining a second opinion from a specialist occupational physician.

The conclusions should be presented to management in context, indicating the nature of hazard, the extent of risk, and strength of medical consensus. This will enable the employer to discharge his or her responsibility in a complex area with the benefit of such medical support as the circumstances allow.

Definitive opinion

The conclusions, recommendations, and advice outlined above are valid only for the specific fitness criterion addressed. In each case the outcomes of all three criteria should be consolidated to provide an all embracing definitive report. The desktop aid (overleaf) includes a synopsis of the outcomes commonly encountered and may be adapted as a classification guide for audit purposes.

Desktop aid – Framework for assessing fitness for work

Assessment of ability and risk

- Medical-functional appraisal
- Occupational considerations
- Enabling options

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Fitness criteria

- Attendance and performance
- Health and safety risk to others
- Health and safety risk to self

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Outcome

- Conclusions
- Recommendations
- Advice

Applying fitness criteria – Synopsis of outcomes

Attendance and performance

A	B	C	D	E
Subject's condition compatible with required levels of attendance and performance	Attendance or performance limitations due to medical conditions or disabilities identified but likely to resolve	Attendance or performance limitations due to medical conditions or disabilities identified and likely to remain for foreseeable future	Subject's performance and capabilities cannot be determined by medical assessment alone	Subject's condition clearly incompatible with requirements of post and likely to remain so
	(a) in foreseeable future because of anticipated recovery or (b) if certain enabling options can be accommodated (such as treatment, rehabilitation, reasonable adjustments, or risk prevention)	Do not overlook social or motivational factors which may be relevant. Discuss implications with subject. If necessary seek advice*	Feedback on performance is required to identify possible impact of medical conditions	Help subject come to terms with implications such as ill health, retirement, termination of contract, redeployment (if available), or rejection (at pre-employment stage)
Recommend fit	Advise of conclusions indicating (a) likely timescale and/or (b) relevance of enabling options. Review as necessary	Advise of conclusions. Review as necessary	Advise of medical issues as far as possible and of need for management appraisal. Review as necessary	Recommend likely to remain unfit

Health and safety risk to others

F	G	H	I	J
No risk to others	Risk identified but preventable	Negligible risk	Risk greater than negligible but may be acceptable	Risk to others clearly unacceptable and likely to remain so
	Identify and pursue relevant enabling options such as treatment, rehabilitation, reasonable adjustment, or risk prevention	Ensure judgment of negligible risk is made objectively and based on competent assessment (if unsure seek advice*) and that management applies all reasonably practicable precautions	Inform management of nature and extent of risk as clearly as possible. Specialist occupational physician may be able to help management in deciding on acceptability*	Help subject come to terms with implications such as ill health, retirement, termination of contract, redeployment (if available), or rejection (at pre-employment stage)
Recommend fit	Advise fit (subject to specified conditions)	Advise fit (subject to specified conditions). Review if circumstances change	Advise risk cannot be dismissed as negligible and that acceptability is for management to consider	Recommend likely to remain unfit

Health and safety risk to self

K	L	M	N	O
No risk to self	Risk identified but preventable	Risks identified which subject thinks are outweighed by benefits	Risks identified which subject thinks outweigh benefits	Risk to self clearly unacceptable and likely to remain so
	Identify and pursue relevant enabling options such as treatment, rehabilitation, reasonable adjustment, or risk prevention	If doctor agrees – Ensure assessment and judgment of balance between risk and benefit have been competently undertaken (if unsure seek advice*) If doctor disagrees – consider obtaining second opinion before advising	If doctor agrees – Consider early retirement If doctor disagrees – If risks seem disproportionately low consider relevance of motivational factors (such as common law claim or ill health retirement incentives) If present proceed cautiously and consider obtaining second opinion*	Help subject come to terms with implications such as ill health, retirement, termination of contract, redeployment (if available), or rejection (at pre-employment stage)
Recommend fit	Advise fit (subject to specified conditions)	Advise of conclusions in context	Advise of conclusions in context	Recommend likely to remain unfit

Definitive opinion

The conclusions, recommendations, and advice outlined above are valid only for the specific fitness criterion addressed. In each case the outcomes of all three criteria should be consolidated to provide an all embracing definitive report

*Advice and second opinions should be obtained from doctors with training and expertise to provide proper assistance. Specialist accreditation or status for occupational physicians (MFOM, FFOM) is awarded by the Royal College of Physicians Faculty of Occupational Medicine

William Davies is consultant occupational physician for the South Wales Fire Authority and Local Authorities Occupational Health Service.

The ABC of Work related disorders is edited by David Snashall, clinical director of Occupational Health Services, Guy's and St Thomas's Hospitals NHS Trust, London.

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