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Bruggen bouwen over de kenniskloof

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2019

document version

Publisher's PDF, also known as Version of record

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citation for published version (APA)

Faas, W. A. (2019). *Bruggen bouwen over de kenniskloof: De inzet van medisch deskundigen in arbeidsongeschiktheidsgeschillen door de bestuursrechter.*

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Summary

Research questions and design of the study

Administrative judges can seek advice from an independent medical expert in the event of employment disability disputes. Some judges do this regularly, others rarely. The judge almost always follows the expert's advice in the final decision. Chances that an appellant will be proved right turn out to be considerably greater when an expert is called in. The contribution of that expert is invariably decisive for the outcome of the dispute. Therefore, it is of great importance that the process runs accurately, comprehensibly and transparently. In practice, it appears that there are a number of things at odds with this principle.

On what basis does the judge decide to involve or not to involve an expert? Does that depend on the quality of the reports from insurance physicians of the Dutch Employee Insurance Agency (UWV)? Can the judge appreciate the value of those insurance medical reports and subsequently the report of the medical expert? How does the administrative judge review a medical report and how does s/he relate this to the medical data that the litigant contributes to the proceedings?

The central aim of this exploratory research is to gain insight into the knowledge gap between the medical and legal domain in disability disputes; and subsequently, whether and if so, how this knowledge gap can be bridged. Given this objective, it was decided to focus on the precise situation where the two disciplines meet: the moment the court has taken cognizance of the medical data that form the basis for the decision on incapacity for work, and the moment the court has the choice whether or not to call in (extra) medical expertise.

The research focuses on:

- the (possible) knowledge gap between medical and legal domains (specifically: how does the administrative judge review or deal with medical reports);
- the deliberative process of the administrative judge as to whether or not to engage a medical expert;
- the judgment(s) and the quality of the processing of medical data in the judgment of the administrative court;
- the quality of the process in connection with the applicable laws and regulations (specifically: does the process meet the requirements of the applicable disability legislation i.e. WIA and 'Schattingsbesluit', the AWB, and the requirements of Article 6 of the ECHR).

Various questions are addressed in this study. These are in part of a quantitative nature: what is the origin (which legislation) and what are the numbers, throughout times and outcomes of appeal cases, with or without engaging a medical expert? Is there a development to be seen over the years? In addition, there are questions of a more qualitative nature: how does the administrative judge assess and rate medical data and reports? This includes data and reports from insurance physicians, from handling physicians and from the engaged medical expert. On the basis of which criteria or considerations – if any – does the administrative judge decide to call in a medical expert? What is the influence of (the quality of) the questions put to the expert on the quality of the procedure as a whole? Which factors influence the administrative judge to follow the expert's advice? How does the judge weigh the recommendations of the medical expert and the insurance physician against each other and how does the judge process the medical data in his ruling?

Are there any bottlenecks that can be identified throughout this whole process? Assuming that there is a knowledge gap between judges and medical experts, which elements of specific aspects are problematic? Can this gap be bridged and how? In this context a bottleneck is defined as follows: 'a situation or (decision) moment in the course of the process, where the action or omission or the choice made by the administrative judge or other actors in the process brings about a substantial risk of loss of quality in the legal proceedings'. Quality must be viewed here based on the principle of truth finding.

Various research methods were used to answer the research questions: literature review; (system) data analysis; file research; focus groups and interviews; and analysis of case law.

During the integration phase of the investigation, the results of the analysis of the inter-relationships between the answers to the research questions were examined. A comparison with findings from previous research in civil law was part of this analysis. Themes such as: truth finding in conjunction with the active or passive attitude of the administrative judge; '*de vrije bewijsleer*' or the freedom of evidence principle; the lack of clarity regarding the provision of evidence; and the legal requirements for the expert's opinion are discussed here.

The final question is whether there are recommendations or proposals to be made for improving the quality of the legal procedure in the event of disability disputes. Recommendations are made mainly based on the identified bottlenecks in the whole process and the observed effects of the knowledge gap, with the administrative judge as the most important beneficiary. These recommendations are intended to enhance the quality of the procedure and to bridge or reduce the knowledge gap. This also applies to the proposals and alternatives formulated in the final chapter of this thesis for adapting the structure of the (current) disability disputes system.

The questions put to the expert

After the introduction in Chapter 1, Chapter 2 contains the first article that was published as part of the study in April 2014 (Note: all articles of this thesis have been published in *Expertise en Recht*). This article deals with the questions put to the expert. It identifies a number of bottlenecks and contains proposals for improving these questions. A high-quality and legally useful report by an independent medical expert is only possible when good-quality questions are asked. A further question the judge should ask themselves is whether the expert is competent and able to answer the questions put to him/her. In order to answer the questions, the medical expert must in turn limit their advice to the area of their own expertise. Does the administrative judge take this into sufficient account when asking the questions? And are the right questions asked?

The standardised questions that are frequently used in practice, appear to be problematic and in some cases outdated. For example, the questions are not in line with the development of medical guidelines. Administrative judges appear to have little regard for this and often settle for the authoritative opinion of the individual medical expert. Chapter 2 addresses a number of bottlenecks along with a proposal to adjust the questions put to the expert.

File study

Chapter 3 includes the article which reported on the pilot file study carried out at the start of the research. The question here was: *what secrets do process files reveal?* This article was published in December 2016 together with an appendix (B).

One of the findings is that the administrative judge, when assessing medical reports, strongly focuses on the accuracy of the procedure; attaching great value to the inclusion of data from handling physicians into consideration. This can be deduced from a very striking finding in the files. In almost all cases where the administrative judge decided to engage a medical expert, the claimant introduced new medical documents in the proceedings. Most of these documents came from a general practitioner or medical specialist. These appear to be important means to make the judge doubt the correctness of the medical assessment. The conclusion is that there appears to be a greater chance that an expert will be called in when doubts are sown by the submission of new medical documents.

The pilot file study did not provide any insight into the criteria applied by the administrative judges for engaging a medical expert. In only one of the forty investigated files was a substantive argument found for involving the expert. Administrative judges mainly use standard formulations and justifications in written documents (file documents and court decisions). These do not provide insight into actual motives. This is problematic because in this way the choice to engage an expert – at least on the basis of the written documents – is not imitable and verifiable. With only a few exceptions, a standard set of questions was used in the overwhelming majority of the files which were examined. On a content level, this fails to make a strong impression. After all, every case is unique. Furthermore, there were

only a limited number of cases in which litigants attempted to exert influence on the questions put to the expert. All such attempts failed. The administrative court dismissed the requests for adjustment of the questions without stating any reasons. It was also impossible to distil from the file documents what the usual procedure is around the delivery (investigation phase) and commentary (comment phase) of the expert's report. The administrative court also uses standard formulations in its deliberations regarding whether or not to follow the expert's opinion. Therefore, based on an extensive case investigation, no answer can be expected to the question of which factors determine whether and to what extent the administrative court follows the expert's advice in its judgment. The same applies to the question of how the administrative court deals with the medical data from the expert(s) in its decision.

What is significant is the difference found in percentages of court rulings in favour of litigants versus UWV in the case of medical experts of a different type of medical specialisation. In the case of using a psychiatrist as an expert, the claimant was proved right in more than 50 % of the cases; where a somatically-focused specialist was used, this was only 27%. A possible explanation for this is that the interpretation and appreciation of psychological complaints differ more than with somatic complaints. Another possibility is that the outcome is related to the identity of the expert.

The conclusion of the dossier study was that since finding out the considerations and motivation of administrative judges at relevant decision moments in the various phases of the process turned out to be impossible from the procedural documents and court rulings; other research methods, for example qualitative research were required. Chapter 5 reports on that research by means of focus groups and interviews.

Data analysis

Chapter 4 presents the results of the research into the historical quantitative data on the use of medical experts by the administrative courts and the Administrative High Court. This resulted in an article that was published in June 2014. This article also has an appendix (B), containing the detailed findings with tables and figures.

How often is a medical expert called in by the administrative court in disability disputes? Are there any recognisable trends and differences between courts? What influence does the involvement of an expert have on the outcome of the dispute? What is the relationship between engaging a court-appointed expert and the decision whether or not to appeal? Which kind of expertise does the court particularly need? What is the effect of using an expert on the throughput time? These and other issues are addressed in this article, which reports on the research into the origin (which law), the numbers, the course, outcomes and processing times of administrative disability disputes with and without the involvement of a medical expert. The study is based on an analysis of the databases of the courts and of the Administrative High Court for the period from 1992-2010 and 1996-2010 respectively.

The numbers of concluded appeals are in line with the relative reduction of WAO share and increase of Wajong and WIA share in relation to the introduction of the latter's disability laws. Since 2007, the Appeal share of the Sickness Benefits Act has risen sharply. In absolute numbers, the number of engaged medical experts at the courts has been between 300 and 500 since 2001. Relatively speaking, the figures decreased until 2005. After that, the number of settled cases appears to have stabilised at around 5%. In the period 2006-2010, the largest number of cases in which an expert was deployed can be found with WAO cases. In the years just before 2010, there is a noticeable increase in the proportion of cases with the assistance of a medical expert at the Administrative High Court, but little or no increase at the administrative courts. Additionally, there are striking differences between courts in the deployment of medical experts. In the courts: psychiatrists, neurologists and orthopaedists are most often used as expert. Over the years, psychiatrists have become increasingly involved as a percentage; in the period 2006-2010, it amounts to almost half of the cases. At the Administrative High Court, the proportion of psychiatrists is significantly more than half. The use of an expert influences the procedural duration considerably: the average rises from almost nine months (without an expert) to over 22 months (with an expert). This is similar at the High Court. The UWV is more often found in the wrong in court if an expert is called in than if no expert is involved; especially when withdrawn cases in which an expert was engaged are also taken into account. The analysis also shows that the extra attention paid to the case by the administrative judge by involving an expert does not guarantee that the outcome will be accepted by the claimant upon appeal.

Focus groups and interviews: views and experiences of administrative judges

The file study of Chapter 3 was the stepping stone to the focus groups and interviews that were held with administrative judges. The impact of the views on and experiences with the deployment of medical experts from administrative judges can be found in Chapter 5. The article included in that chapter was published in June 2017. This article also has an appendix (C), containing a more detailed account of the findings. The design and research method of the focus groups and interviews can be found in this appendix.

Based on the research findings, four aspects can be identified that determine the quality of the expert's advice: 1. the expertise and competence of the expert; 2. the procedural quality of the assessment (process); 3. the quality of the expert's report: is it correct in terms of comprehensibility, consistency and is it conclusive; and 4. the quality of the expert's report in terms of the quality of the medical content. In addition to these aspects, the judge also forms an opinion on the expert's attitude. He expects a professional, businesslike, non-biased attitude during substantive medical discussions.

A clear conclusion in this dissertation is that most administrative judges have insufficient information about and pay insufficient attention to the identity of the expert to be involved (aspect 1). This is an alarming observation. Hardly any questions were asked about how this 'expertise' and competence can or should be es-

tablished. In addition, litigants have little or no influence on the choice of the individual expert.

Judges gradually (through trial and error) form an opinion based on positive and negative experiences with individual experts. Judges place a great deal of emphasis on the quality of the process itself (aspect 2), the accuracy of the medical examinations and the inclusion of data from handling physicians in the considerations. They also consider themselves capable of testing the quality of the medical reports (aspect 3) in terms of comprehensibility, consistency and conclusiveness. A report must be comprehensible in an argumentation sense. Upon closer inspection, it is questionable whether the judge is in such a good position to assess the deductive consistency and quality of a medical report. Aspects of a medical report such as its structure, reasoning, the question of whether the considerations can be followed based on the aforementioned facts, the question of whether the conclusions follow logically, etc. cannot be so strictly separated from the medical-technical quality of the report (aspect 4) as people apparently believe. This is particularly not the case when it comes down to substantive medical reasoning. An argumentation structure or scheme may well be correct, but the cause-and-effect arguments used may not necessarily be correct. That is why the quality of the reporting is also a problem area for the administrative judge. The fact that the judges interviewed do not perceive this as such does not detract from the following: ‘the judge does not know what he does not know’.

This qualitative part of the research confirms the earlier observation that the process of (the justification of) whether or not to engage experts, whether to actively involve parties to these proceedings — also with regard to the identity of the expert and his proven competence —, the comments on the expert’s report by parties and the justification by the administrative court of whether or not to follow the expert comes across as a regimented and standardised process, lacking in critical approach. As a result, the process is also a flawed one. Administrative judges often use standard formulations, which impede scientific insight by preventing examination of choices and considerations that have been made.

The investigation did not establish specific criteria on the basis of which the administrative court is obliged to engage a medical expert. The opinions of the administrative judges themselves do not point in one specific direction. There are, however, identifiable factors that contribute to the choice in favour of or against the involvement of a medical expert. There are usually more factors at play at the same time, which together determine the final choice. It is all in the heads of the administrative judges, but it is not always expressed and explained in a transparent manner.

In practice, the accuracy and quality of the process leave much to be desired on essential points. These bottlenecks are addressed and specified in more detail in the analysis in Chapter 9.

The subject of Chapter 6 is what the administrative court expects from the insurance physician in the comment phase after the medical expert has issued the report. This also concerns data obtained from the same focus groups and interviews, but

which have not been published before. Chapter 6 contains recommendations for insurance physicians on how to act effectively in the comment phase.

Equality of arms

Chapter 7 contains an analysis of the case law of the ECtHR on Article 6 of the ECHR — the right to a fair trial — and the consequences of this for work disability disputes. The article included in that chapter was published in June 2018. This article also reports on a study of national case law and in particular of its application of the assessment framework that the Administrative High Court introduced in June 2017 following the ECHR case law.

The picture that emerges from that investigation is that the ECtHR case law, in particular the *Korošec* judgment, has awakened administrative judges. They have become more conscious of the need to monitor the equality of arms in disability disputes. It is still unclear whether judges decide to engage a medical expert more frequently than previously, however. The analysis of the jurisprudence after June 2017 indicates that, in the vast majority of cases, a request to engage an expert is still rejected when invoking the lack of equality of arms. In practice, the *Korošec* judgment seems to have led to the strengthening of the procedural test with, on the one hand the previously mentioned, strong emphasis on the supply of medical data from handling physicians by litigants and on the other hand, the transparent inclusion of these data into the assessment by insurance physicians. The question as to whether these data are by their very nature suitable for casting doubt is a very open one, even though it is often precisely this question that is at stake. This is and remains a weakness in the process.

Chapter 8 is a follow-up to Chapter 2, which discusses the evolution of the questions put to the expert after the publication of the article in 2014. The questions that have subsequently been adjusted by the Administrative High Court are discussed in this chapter. The chapter reports on research into practice: how do the courts and the High Court now deal with the questions put to the expert? This part of the dissertation has not been published before.

The research shows that the questions revised by the Administrative High Court have evolved. The High Court adheres rather strictly to its own new way of asking questions. Unfortunately, the same cannot be said of the courts. It is disappointing to note that in this respect no comparable development is visible at court level. The time-honoured standard questions are still asked there. Furthermore, there are hardly any indications that more room has been created to actively involve parties in formulating the questions put to the expert and to apply the principle of both sides being heard in this phase of the process.

Bottlenecks and recommendations

In the concluding Chapter 9 the mutual coherence of the articles or chapters is explained. The research results are bundled in a *bottleneck analysis*. A series of bottlenecks can be identified in the various phases of decision-making during the

process of the disability dispute. Related to this is a series of recommendations and reflections on the design of the process. These are intended to raise the quality of truth finding, the quality of the procedure and thus the quality of the final judicial verdict to a higher level and to bridge or reduce the knowledge gap.

The bottlenecks appear to be related to the design of the process itself as well as a consequence of the knowledge gap between judges and medical experts. When a single bottleneck occurs in an appeal case, this does not necessarily lead to a serious breach of the quality of the procedure and the outcome of the dispute, but when there is an accumulation of problems, these are definitely in jeopardy.

The risk of making an error increases when the administrative judge has unjustified doubts – or unjustifiably does not doubt – the medical opinion of the insurance physician. This also occurs if s/he draws the wrong conclusions when assessing, evaluating and comparing medical reports and data from the insurance physician, handling doctors and, ultimately, the medical expert involved.

Carelessness creeps into the process if, for example, the identity and the competence of the expert is not carefully considered; when standard questions are put to the expert; or when there is no room to seriously use the comment phase after the report of the expert has been released.

Creating more room in the process for a better dialogue between judges, experts and parties, including the insurance physician, can narrow the knowledge gap. At the procedural level, there is no need to make any complex improvements to the current working method. In doing so, benefits can be gained from the organisation of the procedure in civil law.

This can be done, for example, by devoting a procedural decision to the involvement of an expert. In this decision or interlocutory judgment, the identity of the expert and the questions must then be mentioned. This takes away the undesirable uncertainty that exists in the current setting about the moment when the decision is made by the judge to engage a medical expert. In this way, the parties know where they stand: which judge is responsible for the choices that are made and – on the basis of the questions raised – what reasoning was used. Another possibility is that both parties are actively involved in the appointment of the expert in combination with the formulation of the questions by introducing a round of comments and requests, as is customary in civil law.

The problems of a more fundamental nature are those that arise directly from the knowledge gap. This gap cannot be narrowed substantially without drastically reorganizing the process. To this end, a number of proposals and suggestions are made in chapter 9. In order to improve the quality of the medical content, improvements will have to be sought in decision-making on the basis of medical data and opinions in an earlier stage of the procedure, preferably at the earliest possible stage, in a satisfactory and acceptable manner. It remains undesirable that a difference of opinion on a medical issue ultimately has to be ‘settled’ by the Administrative High Court through the appointment of a new medical expert three or four

years after the date of litigation. Ways to provide the courts with more medical know-how are also discussed in Chapter 9. This can be done by adjusting the working method or by changing the composition of the courts. In addition, it may be of help to raise the epistemic level of knowledge of the administrative judges.

A serious problem is the lack of transparency regarding the proficiencies (knowledge and skills) of the medical experts involved in this process. This concerns both the 'parties' experts' who figure in the preliminary ruling phase and the 'pool' of medical experts from which the judiciary must draw in order to be properly informed. This transparency can be provided – in anticipation of official public registers – by means of public *curricula vitae* or disclosure statements. These are relatively simple ways of finding out more about the knowledge, skills and substantive visions of the experts to be deployed in their specific medical field. Administrative bodies can achieve this for the physicians to whom they give assignments. Organizations or professional associations that aim to safeguard the professional quality of their affiliated member-experts can also take care of this. Expansion of the independent public national register of experts – NRGD – to include medical experts in civil and administrative law has long been regarded as highly desirable.