Vocational Testimony in Social Security Hearings

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This discussion is intended to address recurring issues in vocational expert witness testimony in administrative hearings before the Office of Hearings and Appeals, Social Security Administration. The views expressed are those of the author, and are not the official view of the Social Security Administration or any other group. Emphasis is placed on 11th Circuit case law, practice and treatment of these issues, but references are made to majority and minority trends from other Circuits. Case references to the law of other Circuits is used only as example rather than as black letter law. In fact, the Administration has a policy of nonacquiescence in that it does not automatically grant precedent to case law. These cases are presented because they outline issues that regularly come up at hearing, for while they may not have precedential value, they highlight points of contention. In many cases, SSA has no stated policy on a given subject. In other cases, these issues have not been tested at the Circuit court level.

The ALJ is both trier of fact and law, and often the judge has some considerable administrative expertise. Expert opinion is taken to assist the judge as the trier of fact. On one hand the judge usually does not require the kind of explanation that a jury would need in a trial, but on the other, the judge needs to develop and protect the record. A judge has to guard against putting personal knowledge into the decision without a basis in the record.

In part, the judge must learn the language of medicine and vocational rehabilitation, to be able to understand the evidence, and to articulate a reasoned decision. In part, an expert must learn the law of the jurisdiction, since the reason for the testimony is to establish the basis for decision. The law may be similar to some other body of law, but the testimony, to be useful, has to address the matter at issue. It is expected that the cases come in high volume, but a complete record must be made in every case, without incorporation by reference from

* Administrative Law Judge, Miami
other hearings. In some settings, one expert is often called to six or more hearings in a single day. Half of my disability hearings require translation; more than half involve nonexertional impairments.

This paper is intended for the general reader. Experience dictates that those who spend time educating themselves by reading on a subject are usually those who already are competent. But hopefully there is new material that will stimulate your interest. It is intended to highlight areas of vocational evidence and testimony that I think can be crucial in a given case. I hope that some of it can be beneficial to representatives, Vocational Experts (VEs) and to other ALJs.

In order to get to vocational testimony, it is presumed that the claimant’s impairments are not medically disabling at Step Three of the sequential evaluation. The sequential evaluation will be discussed in detail, *infra*.

Prior to the filing of the request for hearing, the chance that a claim has been fully evaluated at Step Five of the sequential evaluation is quite remote. The state agency rarely develops this issue. Because we have so many “snowbirds” and others who relocate from other states, I can compare the development in transfer cases from the ones I get from the Florida state agency. The neglect I see in Florida cases is probably also present in Georgia and Alabama case files.

**Definition of Disability**


[A]s the inability to do any substantial gainful activity[^3]

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[^1]: ALJs from other states advise me that office receipts are down and so are backlogs. Ours are worse. Process Unification Training has helped some state agencies have an “attitude adjustment”, but I don’t see much progress from our state agency. I do not have as many dead claimants cases “come” to hearing as I once did, but I expect that this is a function of new HIV medications such as protease inhibitors as it is better screening and development by the Florida state agency.

[^2]: Although there are companion regulations for Supplemental Security Income under Title XVI of the Social Security Act, the standards are the same and duplicate references will not be used.

[^3]: Substantial gainful activities are defined in various CFR sections. The Railroad Retirement Board defines it as follows:

Substantial gainful activity is work activity that is both substantial and gainful:

(a) **Substantial work activity.**

Substantial work activity is work activity that involves doing significant physical or mental activities. The claimant’s work may be substantial even if it is done on a part-
by reason of any medically determinable physical or mental impairment 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. To meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you are able to do any other work, we consider your residual functional capacity and your age, education, and work experience.

In order to expedite large numbers of cases, the agency established a sequential evaluation, a methodological way to provide due process. 4

4 In a typical case involving adult claimants, the following is a rendition of the evaluation process:

**ISSUES**

The general issues are whether the claimant is entitled to a Period of Disability and Disability Insurance Benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s), which can be expected to either result in death or last for a continuous period of not less than twelve months. The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement.

**APPLICABLE REGULATIONS**

Pursuant to the Act, the Commissioner has established Regulations No. 4. The Regulations provide steps for evaluating disability (20 CFR 404.1520(a)). In addition, a claimant's impairment must meet the twelve month duration requirement before being found disabling. A set order is followed to determine whether an individual is disabled. If it is determined that a claimant is or is not disabled at any point in the review, further review is not necessary. Social Security Administration Regulations No. 4 and No. 16 require consideration of the following in sequence:

1. An individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings (20 CFR
The claimant bears the burden of proving the inability to perform his or her previous work. *Lucas v. Sullivan*, 918 F.2d 1567, 1571 (11th Cir. 1990); *Cannon v. Bowen*, 858 F.2d 1541, 1544 (11th Cir. 1988); *Jones v. Bowen*, 810 F.2d 1001, 1005 (11th Cir. 1986). The claimant must show the inability to do the type of work performed in the past, not merely the specific job he or she held. *Jackson v. Bowen*, 801 F.2d 1291, 1293 (11th Cir. 1986). Whether a claimant's past job or the occupation as generally performed is "past relevant work" for purposes of evaluation under Step 4 of the sequential evaluation, Social Security Ruling 82-61 sets forth, in pertinent part:

Whether the claimant retains the capacity to perform the particular functional demands and job duties peculiar to an individual job as he or she actually performed it.

Under this test, where the evidence shows that a claimant retains the RFC to perform the functional demands and job duties of a particular past relevant job as he or she actually performed it, the claimant should be found to be "not disabled."

Once the claimant proves an inability to perform previous work, the burden shifts to the Commissioner to prove that the claimant is

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2. An individual who does not have a "severe impairment" will not be found to be "disabled" (20 CFR 404.1520(c)).

3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals a listed impairment in Appendix 1" of Subpart P of Regulations No. 4, a finding of "disabled" will be made without consideration of vocational factors (20 CFR 404.1520(d)).

4. If an individual is capable of performing work he or she has done in the past, a finding of "not disabled" must be made (20 CFR 404.1520(e)).

5. If an individual's impairment is so severe as to preclude the performance of past work, other factors including age, education, past work experience and residual functional capacity must be considered to determine if other work can be performed (20 CFR 404.1520(f)).

The rules set out in Appendix 2 of Subpart P of Regulations No. 4 are considered in determining whether a claimant with exertional impairments is or is not disabled. The regulations also provide that if an individual suffers from a non-exertional impairment as well as an exertional impairment, both are considered in determining residual functional capacity (20 CFR 404.1545). If a finding of disabled cannot be made based on strength limitations alone, the rules established in Appendix 2 are used as a framework in evaluating "disability." In cases where the individual has solely a non-exertional impairment, a determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in Appendix 2.
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capable of engaging in another kind of substantial gainful employment which exists in the national economy. *Cannon v. Bowen*, 858 F.2d 1541, 1544 (11th Cir. 1988). The administrative law judge must articulate specific jobs that the claimant is able to perform, and this finding must be supported by substantial evidence. *Allen v. Sullivan*, 880 F.2d 1200, 1201 (11th Cir. 1989). The Eleventh Circuit Court of Appeals has required that "a full and fair record" be developed by the Administrative Law Judge even if the claimant is represented by counsel. *Cowart v. Schweiker*, 662 F.2d 731, 735 (11th Cir. 1981). The grids may be used in lieu of vocational testimony on specific jobs if the nonexertional impairments are not so severe as to prevent a full range of employment at the designated level. *Passopulous v. Sullivan*, 976 F.2d 642, 648 (11th Cir. 1992). The vocational grids may not be used in lieu of vocational testimony if the claimant is unable to perform a full range of work at a given residual functional level, or if a claimant has significantly limited basic work skills due to a nonexertional impairment. *Marbury v. Sullivan*, 957 F.2d 837, 839 (11th Cir. 1992); *Allen* at 1202.

"[T]he preferred method of demonstrating job availability when the grids are not controlling is through expert vocational testimony." *Francis v. Heckler*, 749 F.2d 1562, 1566 (11th Cir. 1985). If the claimant does not, in fact, have the Residual Functional Capacity for a full range of sedentary work, the case must be evaluated within the framework of the vocational rules. The functional restrictions which limit the claimant to less than the full range of sedentary work must be specified. It must then be determined whether, considering all of the functional limitations, a "significant number" of sedentary jobs which the claimant can perform exists in the national economy. Social Security Ruling 86-8. Age is a positive factor for claimants who are under age 45 and is usually not a significant factor in limiting such an individual's ability to make a vocational adjustment, even an adjustment to unskilled sedentary work, and even where the individual is illiterate or unable to communicate in English. 20 CFR Pt. 220, App.2, 200.00 (h), (Railroad Retirement), 20 CFR Pt. 404, Subpart P, App.2, § 201.00 (h) (Social Security).

An ALJ may need to "articulate specific jobs that exist and that the claimant is capable of performing." *Cowart*, 662 F.2d at 736 n. 1. See also 20 CFR sec. 404.1569 ("give full consideration to all relevant facts in accordance with the definitions and discussions under
vocational considerations.

Nature of VE Testimony

Prior to 1978, whether a claimant was precluded from the performance of substantial gainful activities usually went to the issue whether there was "any other substantial gainful activity which exists in the national economy" that a claimant could perform without reference to a sequential evaluation. In a typical hearing, the ALJ would call a vocational expert (VE) to present opinion evidence whether the residual functional capacity permitted work related activities.

As part of the Social Security 1978 regulations, the agency developed a matrix of medical-vocational guidelines (Appendix 2 to the regulations) in an effort to improve the uniformity and efficiency of disability determinations. The "grids" significantly reduced the need for vocational testimony as the rules dictate whether disability is dispositive in many fact patterns. For example, if a claimant is fifty

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5 20 CFR § 404.1569 Listing of Medical-Vocational Guidelines in Appendix 2. The Dictionary of Occupational Titles includes information about jobs (classified by their exertional and skill requirements) that exist in the national economy. Appendix 2 provides rules using this data reflecting major functional and vocational patterns. We apply these rules in cases where a person is not doing substantial gainful activity and is prevented by a severe medically determinable impairment from doing vocationally relevant past work. The rules in Appendix 2 do not cover all possible variations of factors. Also, as we explain in § 200.00 of Appendix 2, we do not apply these rules if one of the findings of fact about the person's vocational factors and residual functional capacity is not the same as the corresponding criterion of a rule. In these instances, we give full consideration to all relevant facts in accordance with the definitions and discussions under vocational considerations. However, if the findings of fact made about all factors are the same as the rule, we use that rule to decide whether a person is disabled.

§ 404.1569a Exertional and nonexertional limitations.

(a) General. Your impairment(s) and related symptoms, such as pain, may cause limitations of function or restrictions which limit your ability to meet certain demands of jobs. These limitations may be exertional, nonexertional, or a combination of both. Limitations are classified as exertional if they affect your ability to meet the strength demands of jobs. The classification of a limitation as exertional is related to the United States Department of Labor's classification of jobs by various exertional levels (sedentary, light, medium, heavy, and very heavy) in terms of the strength demands for sitting, standing, walking, lifting, carrying, pushing, and pulling. Sections 404.1567 and 404.1569 explain how we use the classification of jobs by exertional levels (strength demands) which is contained in the Dictionary of Occupational Titles published by the Department of Labor, to determine the exertional requirements of work which exists in the national economy. Limitations or restrictions which affect your ability to meet the demands of jobs other than the strength demands, that is, demands other than sitting, standing, walking, lifting, carrying, pushing or pulling, are considered nonexertional. Sections 404.1520(f) and 404.1594(f)(8) explain that if you can no longer do your past relevant work because of a severe medically determinable impairment(s), we must determine whether your impairment(s), when considered along with your age,
five years of age,\(^6\) and has formerly performed unskilled work,\(^7\) has a

...
limited or marginal education, and formerly has done medium work,

(e) Information about your age.
We will usually not ask you to prove your age. However, if we need to know your exact age to determine whether you get disability benefits or if the amount of your benefit will be affected, we will ask you for evidence of your age. (Compare 20 CFR 404.1563 (Social Security Old Age, Survivors and Disability Insurance))

20 CFR § 404.1568 Skill requirements.
In order to evaluate your skills and to help determine the existence in the national economy of work you are able to do, occupations are classified as unskilled, semi-skilled, and skilled. In classifying these occupations, we use materials published by the Department of Labor. When we make disability determinations under this subpart, we use the following definitions:

(a) Unskilled work.
Unskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. For example, we consider jobs unskilled if the primary work duties are handling, feeding and offbearing (that is, placing or removing materials from machines which are automatic or operated by others), or machine tending, and a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed. A person does not gain work skills by doing unskilled jobs.

20 CFR § 404.1564(b) How we evaluate your education.
The importance of your educational background may depend upon how much time has passed between the completion of your formal education and the beginning of your physical or mental impairment(s) and by what you have done with your education in a work or other setting. Formal education that you completed many years before your impairment began, or unused skills and knowledge that were a part of your formal education, may no longer be useful or meaningful in terms of your ability to work. Therefore, the numerical grade level that you completed in school may not represent your actual educational abilities. These may be higher or lower. However, if there is no other evidence to contradict it, we will use your numerical grade level to determine your educational abilities. The term education also includes how well you are able to communicate in English since this ability is often acquired or improved by education. In evaluating your educational level, we use the following categories:

(1) Illiteracy. Illiteracy means the inability to read or write. We consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name. Generally, an illiterate person has had little or no formal schooling.

(2) Marginal education. Marginal education means ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs. We generally consider that formal schooling at a 6th grade level or less is a marginal education.

(3) Limited education. Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. We generally consider that a 7th grade through the 11th grade level of formal education is a limited education.

(4) High school education and above. High school and above means abilities in reasoning, arithmetic, and language skills acquired through formal schooling at a 12th grade level or above. We generally consider that someone with these educational abilities can do semi-skilled through skilled work.

(5) Inability to communicate in English. Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who
and the claimant has a residual functional capacity for light or sedentary work, Rules 202.01, Table Number 2, Appendix 2 and 201.01 or 201.02, Table Number 1, Appendix 2 direct a conclusion that the claimant is "disabled". There is no need for expert testimony.\(^\text{10}\) The guidelines indicate whether there are a significant number of jobs in the national economy that an individual is capable of performing when residual functional capacity, age, education and work experience correspond to one of the Medical-Vocational Rules. The Appendix 2 Guidelines indicate in grid form whether a significant number of jobs exist in the national economy for individuals with various impairments of physical capacity, ages, education, and work experience. See \textit{Heckler v. Campbell}, 461 U.S. 458, 103 S.Ct. 1952, (1983). Where an individual's medical profile and vocational characteristics correspond to factors on the grid, the Guidelines direct a finding of disabled or not disabled.

If the claim does not fall within these guidelines, a VE is called. In the 11th Circuit, a VE is called:


\(^\text{10}\) In the 11th Circuit, the grids may be used in lieu of vocational testimony on specific jobs if none of the claimant's nonexertional impairments are so severe as to prevent a full range of employment at the designated level. Walker v. Bowen, 826 F.2d 996, 1002-03 (11th Cir.1987); Reeves v. Heckler, 734 F.2d 519, 524 (11th Cir.1984); compare Sryock v. Heckler, 764 F.2d 834, 836 (11th Cir.1985) (recognizing that an administrative law judge should make specific findings on job availability when the claimant's nonexertional impairment is severe enough to preclude a wide range of employment at the designated level).

3. Where age factors should not be applied mechanically. *Patterson v. Bowen*, 799 F.2d 1455, 1458-1459, 15 S.S.R.S. 20, 23-24, CCH ¶ 16,975 (11th Cir. 1986). Other considerations include:

4. Mental impairments. Generally, a "moderate" impairment in the "B" portion of the PRTF\textsuperscript{13} signifies that VE testimony is needed.\textsuperscript{14} The reaction to the demands of work (stress) is highly individualized, and mental illness is characterized by adverse responses to seemingly trivial circumstances. The mentally impaired

\textsuperscript{11} "Exclusive reliance on the grids is not appropriate either when claimant is unable to perform a full range of work at a given functional level or when a claimant has nonexertional impairments that significantly limit basic work skills." *Francis v. Heckler*, 749 F.2d 1562, 1566 (11th Cir. 1985). The grids may be used only when each variable on the appropriate grid accurately describes the claimant's situation. *Smith v. Bowen*, 792 F.2d 1547, 1554 (11th Cir. 1986); see 20 CFR § 1416.969; 20 CFR pt. 404, subpt. P, app. II, § 200.00(a). The grids also may not be used when the claimant's non-exertional impairments are severe enough to preclude a wide range of employment at the level indicated by the exertional impairments. *Smith*, 792 F.2d at 1554; 20 CFR pt. 404, subpt. P, app. II, § 200.00(e). Nonexertional impairments include 'postural and manipulative limitations, and must be considered in determining a claimant's residual functional capacity.' 20 CFR § 416.945(b)."

\textsuperscript{12} "In *Reeves* [Reeves v. Heckler, 734 F.2d 519 (11th Cir. 1984)], we held that in cases where the ALJ has applied the age grids in a mechanical fashion, the claimant should be given an opportunity to make a proffer of evidence on his ability to adapt. 734 F.2d at 526. If the claimant 'makes a proffer of substantial evidence that an ALJ could find credible and tendering to show that the claimant's ability to adapt to a new work environment is less than the level established under the grids for person his age,' the district court is required to remand the case to the Secretary for reconsideration of the age/ability to adapt issue. *Id.* If, on the other hand, the claimant does not make such a proffer, the ALJ's mechanistic use of the grids would be harmless error and there would be no need to remand to the Secretary. *Id.* See also, *Hutchison v. Bowen*, 787 F.2d 1461, (11th Cir. 1986)."

\textsuperscript{13} Psychiatric Review Technique Form. 20 CFR 404.1520a.

\textsuperscript{14} In the 10th Circuit, if the PRTF includes RFC findings greater than "slight" with respect to activities of daily living and socialization, greater than "seldom" with respect to attention, concentration, persistence or pace, or greater than "never" in decompensation, VE testimony is required at step five of the sequential evaluation. *Hargis v. Sullivan*, 945 F.2d 1482 (10th Cir. 1991).
may cease to function effectively when facing such demands as getting to work regularly, having their performance supervised, and remaining in the workplace for a full day. A person may become panicked and develop palpitations, shortness of breath, or feel faint while riding in an elevator; another may experience terror and begin to hallucinate when approached by a stranger asking a question. Thus, the mentally impaired may have difficulty meeting the requirements of even so-called "low-stress" jobs. Social Security Ruling 85-15.

5. Maintaining body equilibrium; using the fingers and finger tips to work with small objects; using the eyes and ears to see and hear; and using the vocal apparatus to speak are considered nonexertional activities. Limitations of these functions can affect the capacity to perform certain jobs at all levels of physical exertion. An entire range of jobs can be severely compromised. For example, section 201.00(h) of Appendix 2 calls attention to the fact that bilateral manual dexterity is necessary for the performance of substantially all unskilled sedentary occupations. Social Security Ruling 83-14. "Fingering" involves picking, pinching, or otherwise working primarily with the fingers. It is needed to perform most unskilled sedentary jobs and to perform certain skilled and semiskilled jobs at all levels of exertion. As a general rule, limitations of fine manual dexterity have greater adjudicative significance -- in terms of relative number of jobs in which the function is required -- as the person's exertional residual functional capacity decreases. Thus, loss of fine manual dexterity narrows the sedentary and light ranges of work much more than it does the medium, heavy, and very heavy ranges work. Social Security Ruling 85-15.

6. Pain, as well as the side effects from medication, that is not precipitated or exacerbated by exertion may/may
not be considered to be a nonexertional impairment.\textsuperscript{15}
7. When there is an issue regarding the level of skill or whether there is an issue of transferability.
8. When the past relevant work falls between grid rules or between two levels of work.
9. Where a claimant has performed a job not recognized by the DOT or differently than it is normally performed.
10. When a combination of impairments affect several anatomical areas.

Internal Office of Hearings and Appeals (OHA) procedures for deciding whether a VE may be needed and the logistics for providing VE testimony are set out in HALLEX\textsuperscript{16} §1-2-550 et. seq., appended to this article at pp. 259-271.

Generally, in order to elicit opinion testimony, questions are phrased to incorporate hypothetical situations, assuming the facts as presented to be true. There is an argument to be made that hypothetical questions are no longer necessary. See Federal Rule of Evidence 701 et. seq. Rule 704 permits opinion evidence even when it goes to the ultimate issue. In cases involving medical testimony, certain determinations are "reserved to the Commissioner."\textsuperscript{17} Social Security rulings advise that "treating source opinions on issues reserved to the Commissioner are never entitled to controlling weight or special

\textsuperscript{15}The Eleventh Circuit has established a three part standard that applies in a consideration of pain or other subjective symptoms to establish disability. This test requires (1) evidence of an underlying medical condition and either (2) objective medical evidence that confirms the severity of the pain from that condition or (3) that the medical condition is of such a severity that it can be reasonably expected to give rise to the alleged pain. Holt v. Sullivan, 921 F.2d 1221, 1223 (11th Cir. 1991). The claimant's subjective testimony supported by medical evidence which satisfies the standard is sufficient in itself to support a disability finding. \textit{Id.} at 1223. The Administrative Law Judge must set out explicit and adequate reasons for not crediting such testimony. The failure to articulate the reasons for discrediting subjective pain testimony requires, as a matter of law, that the testimony be accepted as true. \textit{Id.} at 1223.

\textsuperscript{16}HALLEX—the Hearings, Appeals and Litigation Law (LEX) manual. Through HALLEX, the Associate Commissioner of Hearings and Appeals conveys guiding principles, procedural guidance and information to the Office of Hearings and Appeals (OHA) staff. HALLEX includes policy statements resulting from an Appeals Council en banc meeting under the authority of the Appeals Council Chair. It also defines procedures for carrying out policy and provides guidance for processing and adjudicating claims at the Hearing, Appeals Council and Civil Actions levels.

\textsuperscript{17}Social Security Ruling 96-5p. Medical Source Opinions on Issues Reserved to the Commissioner.
significance....[but] That opinions from any medical source about issues reserved to the Commissioner must never be ignored, and that the notice of the determination or decision must explain the consideration given to the treating source's opinion(s)." By analogy, the same treatment should be given to expert vocational testimony. Therefore, in an abundance of caution, the best practice is to admit such opinions but allocate weight to them as is done with any other piece of evidence. And the best practice is to use hypothetical questions.

It is the ALJ's responsibility to render a decision that includes factual determinations regarding the claimant's residual functional capacity for work, age, education, the nature of any past relevant work, skill level of any work, and language skills; all of which become the predicate for hypothetical questions.

In order to rely on a vocational expert's opinion, "the hypothetical question posed to a vocational expert must fully set forth a claimant's impairments." Totz v. Sullivan, 961 F.2d 727, 730 (8th Cir. 1992) (citing Shelltrack v. Sullivan, 938 F.2d 894, 898 (8th Cir. 1991)). Residual functional capacity is the degree to which an individual can function limited by the physical or mental impairment. 20 CFR §404.1545(a). This expression usually encompasses the medical profile of the claimant and is the basis for the hypothetical question. The Commissioner must then evaluate the physical and mental demands of the claimant's past relevant work. 20 CFR §404.1560(b). The VE is generally not called until the issue of whether past relevant work may be performed is exhausted. If a hypothetical question does not include all of a claimant's impairments, limitations and restrictions, or is otherwise inadequate, a vocational expert's response cannot constitute substantial evidence to support a conclusion of no disability. See Greene v. Sullivan, 923 F.2d

18 Id.

19 Testimony from a VE based on a properly phrased hypothetical question constitutes substantial evidence. See Miller v. Shalala, 8 F.3d 611, 613 (8th Cir. 1993) (per curiam); cf. Hinchey v. Shalala, 29 F.3d 428, 432 (8th Cir. 1994) (when hypothetical question does not encompass all relevant impairments, VE's testimony does not constitute substantial evidence to support the ALJ's decision). The ALJ's hypothetical question need "include only those impairments that the ALJ finds are substantially supported by the record as a whole." Id. (citing Stout v. Shalala, 988 F.2d 853, 855 (8th Cir. 1993)); see also Morse v. Shalala, 32 F.3d 1228, 1230 (8th Cir. 1994).

20 This is not true in the 4th Circuit.
99, 101 (8th Cir. 1991):

But when the hypothetical question is adequate, a vocational expert's response to a hypothetical question provides substantial evidence where the hypothetical question sets forth with reasonable precision the claimant's impairments. *Starr v. Sullivan*, 981 F.2d 1006 (8th Cir. 1992); See *Jelinek v. Bowen*, 870 F.2d 457, 461 (8th Cir. 1989).

The credibility of the vocational expert's testimony was fully probed at the hearing, and credibility was properly within the province of the ALJ to determine. *Sias v. Secretary of Health & Human Servs.*, 861 F.2d 475, 480 (6th Cir. 1988). The ALJ's credibility findings are subject to substantial deference on review, *King v. Heckler*, 742 F.2d 968, 974 (6th Cir. 1984), and a court cannot say the ALJ clearly erred by accepting what the expert said. *Barker v. Shalala*, 40 F.3d 789, 795 (6th Cir. 1994).

In questioning a vocational expert the ALJ must propound hypothetical questions to the expert that are based upon a consideration of all relevant evidence of record on the claimant's impairment. *Walker v. Bowen*, 889 F.2d 47, 50 (4th Cir. 1989).

**About hypothetical questions**

1. An expert who does not have personal knowledge regarding the claimant or the facts must render an opinion through hypothetical questions. A hypothetical question asks an expert to assume certain facts and express an opinion based upon those facts contained in the question. In this way, the claimant may be characterized, but is not the direct object of expert testimony.

2. In answering the witness is limited to the fact pattern contained in the hypothetical question.

**Expert witness anxiety**

The expert in an adversarial setting knows that there will be an attack on credibility. Social Security Disability hearings are not supposed to be adversarial, but the expert must know that opinion testimony will be tested. The VE is first subject to *voir dire* on qualifications; second to the content of the testimony. In a perfect world, the record would be complete prior to hearing and there would

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21 The following sections are taken from my paper *Medical Expert Testimony in Administrative Hearings*, 17 J.NAALJ 285 (Fall, 1997).
not be the surprise and suspense that takes place currently. See “moving target,” pp.217-18, infra. A VE would have an opportunity to know all of the pertinent facts prior to hearing and reduce the opinion to writing. Because of the need to evaluate cases in high volume and because this would skyrocket the cost of evaluation, VE anxiety is a tradeoff.

**Cross-examination of the expert**

Attack on qualifications:

Counsel often attack the vocational expert's qualifications to offer an opinion or to address a particular case. A noticed exhibit may include a curriculum vitae for a witness with whom you have had past experience. If there is an objection to qualifications, please let the ALJ know beforehand. Most judges permit full voir dire, but don't want a one and a half hour hearing to last four hours. Experience and training

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22 QUALIFICATIONS OF VOCATIONAL EXPERTS

The HALLEX requires a judge:

After administrating the oath or affirmation...

a. "qualify" the VE by eliciting information regarding his or her impartiality, expertise, professional qualifications, etc.

b. ask the claimant and the representative if they have any objections to the VE testifying; and

c. rule on any objection.

OHA selects a vocational expert based on the following criteria,

1. Current and extensive experience in:

   a. counseling and/or job placement of adult handicapped people who have worked;
   
   b. the use of occupational materials developed for vocational counseling, including information about the requirements of jobs such as duties, skills, physical demands, working conditions and occupationally significant characteristics. A working knowledge of the DICTIONARY OF OCCUPATIONAL TITLES...and its supplement;
   
   c. the utilization of the concept of transferability of skills.

2. Ability to evaluate age, education and prior work experience in light of residual functional capacities.

3. Well rounded, up to date knowledge of, and experience with, industrial and occupational trends and local labor market conditions.

Many of the VE's hired by the Administration come from settings where they are advocates for or against an applicant. They are asked to render an opinion that will promote a viewpoint or affect the value of a case. They are supposed to be trained in their field, but also know Social Security law and policy. VE's shouldn't have a personal agenda or bias against claimants or a class of claimants, should not have personal knowledge about the case or have a conflict of interests, or have an inability to answer a direct question. Many people feel an expert is a witness who comes from more than a hundred miles away and will say whatever the
carry great weight as to the qualifications of a witness.

For many years in Miami, we had testimony from dueling vocational witnesses in many hearings. In many cases, the "duel" was unnecessary. VEs called by OHA are supposed to be impartial. By calling the second expert, the claimant set the stage for the duel by anticipating hostility. By calling a second witness, hostility was assured.

**The usual attack, the frontal assault:**

1. If the expert has tendered a written report, the attack will be to elicit a contradiction. The expert is usually asked whether prior testimony was taken, or the document in question is presented to the witness, and then the inconsistency is identified.

2. The diagnosis is based on purely subjective complaints/or the claimant wasn’t given any credibility. In some areas of the law there must be an accident or injury, or an underlying medical impairment that paying party wants to hear.

   Actually a vocational witness should have skill, knowledge or experience in the field to make it likely that an informed inference will aid to determine the case. The authority to call a VE stems from 20 CFR Section 404.1566(e) and 416.966(e). Since our hearings are non-adversarial the VE is a "court" witness, who is to be disinterested and impartial.

   VEs are independent contractors who apply to the regional offices for annual contracts. Renewal is not automatic, and many contracts are scrutinized each year. The contract relationship does not automatically give the VE expert status to "qualify" for testimony.

   Qualifications are kept on file and can be used as an exhibit. Some judges ask counsel or the claimant to identify the statement prior to admission into the record. In this way, if counsel has had experience with the same VE, and has accepted the qualifications in past hearings, there may be no reason to extend *voir dire*.

   On the other hand, some counsel use *voir dire* as an object lesson to the witness. Should counsel be permitted to test regarding an issue that will be brought up during hypothetical questioning? Can the judge hold the determination in abeyance if the witness is qualified until all the evidence is in?

   When there is no representative an ALJ has a duty to present the VE's qualifications to the claimant.

24 Compare 29 CFR Section 18.613, prior statements of witnesses.

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel. (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Section 18.801(d)(2). (Labor Dept. Regs).
can be established objectively. Legal causation must be factored into the fact pattern. That is not true in Social Security practice.

(3) The expert was not furnished a complete and accurate case history.

When a question is phrased so that a "yes" or "no" response is expected, the witness must answer the question. But a witness has a right to explain an answer after answering. If the medical expert feels incapable of a "yes" or "no" answer, the witness has a right to respond that the question cannot be answered yes or no. If the witness feels the response requires an explanation, the witness has the right to ask the judge whether he or she might explain.

**Attack through books or articles:**

1. The approach is to ask whether an expert agrees with the statement found in prestigious literature. The statement, of course, contradicts the previous testimony of the witness. It is extremely effective where the expert is the author of the text and is caught in a contradiction. The usual method is to compare the DOT with another definitive text.
   a. The witness is asked to enumerate the physical and mental demands for each job with a view to impeaching the testimony.
   b. How current are the sources?²⁵
   c. Does the claimant have personal knowledge of job duties?

2. The predicate to utilize this procedure, is recognition of the book as authoritative in its field or a standard text used in the field of expertise. If the expert does not acknowledge the book or article, the cross-examining lawyer may not read from it. Only when the expert identifies the book or article as authoritative in the field and "relies" upon it should he or she so admit it.

**Attacking the hypothetical answer:**

(1) Attack the question: If any of the underlying facts presented in the hypothetical were not correct, the expert's opinion must be incorrect.

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²⁵ Townley v. Heckler, 748 F.2d 109 (2d Cir. 1984): "The differences between the Third and Fourth Editions [of the DOT] are substantial. The Fourth Edition requires a much higher level of mathematical and verbal skills for most of the jobs at issue than did the Third Edition." *Id.* at 113 (citation omitted). The Townley court went on to hold that an expert's use of the outdated version was a failure to apply the Social Security regulations as mandated.
(2) Different Assumptions. The expert is asked to assume a different fact pattern or a series of them rather than those originally contained in the hypothetical question. Particular attention must be paid to the facts in the question.

(3) Two Schools of Thought. The argument is made that there is no universally accepted view on the particular matter but that there are, in fact, two competing theses or trains of thought in medicine on the subject. The minor variant is to phrase hypothetical questions with different standards; possibility, probability, certainty, or even beyond a reasonable doubt.

(4) Art vs. science. The approach is to suggest that medicine and vocational rehabilitation are not exact sciences and there is judgment involved.

(5) Dealer's choice. Another attempt is to show that the witness is simply saying what one expert personally would/would not have done. The attempt is to determine/obscure a bright line of discretion. It may be there are no defined standards involved, or that an expert simply disagrees with the premise.

(6) Attack based on personal interest in case:  
a. A treating source may be attacked for being personally interested in a claimant.

b. In many cases the bill has not been paid; the implication is that the source has an expectation of recovery to ensure payment of the bill.

c. An expert may be asked about his or her fee for testifying, with the implication that the expert is a "paid witness." This is less effective in an administrative hearing than before a jury.

The standard argument.  

26 Whereas this is an effective tactic before a jury, it may be an exercise in futility in an administrative hearing. Another variation is to assert an economic or social bond between the expert and claimant or counsel.

27 Below are some tips from one of my articles on how to handle a hearing:

Rules of evidence

The Federal Rules of Evidence are not strictly enforced. Wide latitude is given the admissibility of documents or testimony that would otherwise be objectionable.

Objections.

If there are objections, please give the basis.
Counsel argues:

(1) The expert failed to adequately address the hypothetical.
(2) The expert is stating anecdotal experiences rather than scientific fact.
(3) There was an inability/refusal to provide a basis for testimony.  

Typical Issues in VE examination

An ALJ must remain impartial, Miles v. Chater, 84 F.3d 1397 (11th Cir. 1996). The impartiality of the ALJ is thus integral to the integrity of the system. See Johnson v. Mississippi, 403 U.S. 212, 216, 91 S. Ct. 1778, 1780, 29 L. Ed. 2d 423, 427 (1971). The expert must

Relevance and materiality.

I realize that many claimants can't tell a story. I expect that there are ways to explain the case to me without stream of consciousness exposition or without an exercise in the theater of the absurd. If there will be a problem in the narration, please advise me. Some lawyers present most of the case through lay witnesses. Physician reports are used in lieu of testimony. If there may be a threat of violence, or a unique problem, just let me know. On the other hand I expect that some claimants have a problem with expressing themselves, and I will accept testimony for what it is worth, even if not on point or germane to the case.

Use of learned treatises.

These should not be used as a basis for decision, but can be used to amplify on a medical point. Medical proof is best presented through medical testimony. If the issue is the Listing Level of an impairment, and it is bothersome, I will consider calling a medical advisor. Please let me know prior to hearing.

Present recollection refreshed.

Some lawyers want to testify. There are permissible ways to direct a witness to the record, or the judge, for that matter, but counsel will have ample opportunity to argue after the testimony is presented. It's not a good idea to be a witness and a lawyer in the same case.

28 29 CFR 18.703 Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Also FRE 703.

29 An ALJ has the basic duty of inquiry "to probe and explore scrupulously all the relevant facts." Poulin v. Bowen, 260 U.S. App. D.C. 142, 817 F.2d 865, 871 (D.C. Cir. 1987); Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983). The ALJ's responsibility to develop evidence takes on heightened significance when the claimant is mentally impaired. Deblois v. Secretary of Health & Human Services, 686 F.2d 76, 81 (1st Cir. 1982); see also Poulin, 817 F.2d at 870-71. Failure to create an adequate administrative record constitutes good cause for remand under 42 U.S.C. § 405(g). See, e.g., Poulin, 817 F.2d at 870; Carrillo Marin v. Secretary of Health & Human Services, 758 F.2d 14, 17 (1st Cir. 1985); Cannon v. Harris, 651 F.2d 513,
also remain impartial.\textsuperscript{30} Professional conduct, courtesy and attire are expected, but there are no rules to govern witness conduct.

In addition to the law and regulations, the Social Security Administration (SSA) has promulgated several rulings that every judge, VE and representative should know. Chief among these are:

1. SSR No. 82-61: Past relevant work -- the particular job or the occupation as generally performed.
2. SSR No. 82-62: A disability claimant's capacity to do past relevant work, in general.
3. SSR No. 96-8p: Assessing residual functional capacity in initial claims.
4. SSR No. 83-10: Determining capability to do other work -- the medical-vocational rules of Appendix 2.
5. SSR No. 96-9p: Determining capability to do other work--implications of a residual functional capacity for less than a full range of sedentary work.
6. SSR No. 96-7p: Evaluation of symptoms in disability claims: assessing the credibility of an individual's statements.
7. SSR No. 96-3p: Considering allegations of pain and other symptoms in determining whether a medically determinable impairment is severe.
8. SSR No. 85-15: Capability to do other work -- the medical-vocational rules as a framework for evaluating solely nonexertional impairments.
9. SSR No. 84-25: Determination of substantial gainful activity if substantial work activity is discontinued or reduced -- unsuccessful work attempt.
10. SSR No. 84-24: Determination of substantial gainful activity for persons working in special circumstances -- work therapy programs in military service -- work activity in certain government-sponsored programs.

\footnote{519 (7th Cir. 1981) (per curiam).} \footnote{In my hearings experts are reminded that they are to remain impartial. They are asked, on the record, whether anyone has discussed the case with them or whether they have any first hand information about the claimant.}
exertional limitations within a range of work or between ranges of work.
11. SSR No. 83-11: Capability to do other work -- the exertionally based medical-vocational rules met.
12. SSR No. 82-63: Medical-vocational profiles showing an inability to make an adjustment to other work.
13. SSR No. 82-52: Duration of the impairment.
14. SSR No. 82-41: Work skills and their transferability as intended by the expanded vocational factors regulations effective February 26, 1979.
15. SSR No. 82-40: The vocational relevance of the past work performed in a foreign country.

Unfortunately, there are contested issues, controversies and disputes and it is expected that some of the following issues will arise:

(1) The moving target. VEs have to be flexible. The record rarely reflects the work history presented at hearing. If the VE is not a quick study, it makes for a long day.

The Vocational Report (SSA-3369) and Disability Report formerly in use were far superior to current forms and are recommended for use. Most of the judges in my office ask representatives to produce these prior to hearing.

In many cases any resemblance between the job duties listed in the file and portrayed by the claimant’s testimony are merely coincidental. The record may show that the claimant was a skilled tradesman. At hearing, testimony is presented that the claimant was merely a helper, or a common laborer, or never performed key aspects of the job as described in the DOT. I have many cases where work outside the United States has not been developed. The claimant may have worked in entry level work in this country, but in the native country performed as a professional.31

I realize that this setting can make it difficult for a VE. Many of them bring a computer to hearing to enter the data as the claimant is giving testimony. Counsel often argue that testimony is only as good as the VEs computer software. Sometimes I have the VE print the screens

31 See SSR No. 82-40: The vocational relevance of the past work performed in a foreign country.
that are the basis of testimony and enter them as exhibits.

(2) **Common factual disputes.**

a. Age.

b. Literacy.

c. Work experience.

Claimants are supposed to be asked their date of birth, whether they have a command of English, or are literate. These become factual issues that affect the claimant's credibility in *all* testimony. This paper is dedicated to vocational evidence, and therefore a complete rendition of these issues is reserved for another article. However, I hear numerous "age" cases where the claimant's birth date is in dispute. The Administration has a list of primary and secondary sources that it will accept. See 20 CFR 404.709, 404.715 *et. seq.* I find that the District Offices do not do a good job of investigating these claims. Many of the claimants in my cases were born in Cuba or other countries where good record keeping was not done. Although the United States does not have diplomatic relations with Cuba, the Cuban government had several *parroga*rs, or amnesty periods when adjustments could be made to birth certificates. Likewise I have difficulty in obtaining records from rural counties in Alabama, Florida and Georgia. Florida has a procedure whereby birth certificates are easily amended. Priority is given to those amended prior to age 5.32 These factual determinations are extremely difficult. Many years ago I held hearings for Hmong claimants who came from countries, principally Laos, where no records were kept. The claimants did not have a written language. Creole, the language of Haiti, has just recently been reduced to writing.

Generally, prior to hearing I ask for anything and everything that may be probative.

"Age" refers to chronological and not physiological age. However, in the 11th Circuit this must not be applied absolutely, as it may be a separate factual issue.33 As set forth in *Patterson, supra*, age categories are not supposed to be applied mechanically.

Illiteracy means, "Inability to communicate in English."34 This

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32 *Id.*

33 Acquiescence Ruling 88-1.

34 See 20 CFR 404.1563. Both former Associate Commissioner Daniel Skolar and current Associate Commissioner Rita Geier have issued written instructions that claimants who can not
becomes crucial where claimants allege they can not speak, read or write in English. At age 45, an illiterate claimant limited to sedentary work, with no transferable skills is “disabled.”  

Without a complete history, substantial evidence does not support a finding as to educational level, *Wolfe v. Chater*, 86 F.3d 1072, 1076 (11th Cir. 1996).

Work history issues are discussed in full detail *infra*, but many cases rise and fall on the characterization given to past relevant work. Competent counsel who recognize the issue often obtain testimony from lay witnesses, such as supervisors and fellow employees. When the work history is analyzed, reference can be made to numerical levels for reasoning, mathematical requirements and language, commonly known as the GED levels.  

If a person has performed all the duties of past relevant work that requires a certain educational skill level, most VEs testify that it is reasonable that a claimant who has done the work at that level has a commensurate educational level. However, it can not be assumed that if a claimant completed a certain grade or performed a particular job that (s)he has a commensurate level of ability in reasoning, math or language.

Claimants are often questioned closely about these issues. VEs should not read into the examination of the claimant and should only answer as requested in the hypothetical.

(3) **Failure to respond directly or adequately.** It is the judge's job to make sure that evidence is relevant and material to the controversy. Some witnesses may be otherwise erudite and expert but can not follow or will not respond to the questions as put to them. They must be directed to respond appropriately. Counsel has a right (and probably a duty) to inquire about relevant issues. Witnesses can not take cross examination personally. Moreover, the witness (and counsel) must not be argumentative or antagonistic.

According to Regional Chief Judge Frank Cristaudo,  

the following are common errors made by VEs:

a. Being too familiar. . . . fraternizing with the ALJ,

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35 *See* Table Number 1, Appendix 2 to the regulations.

36 *See* SELECTED CHARACTERISTICS OF OCCUPATIONS, APPENDIX C of the DOT.

37 *Wolfe*, 86 F.3d at 1076.

hearing assistant, claimant, or claimant’s representative at hearing; advising claimant after the hearing of physicians, rehabilitation programs, etc.; advising representative of additional questions which may be asked.

b. Not being prepared.
c. Giving wrong occupation information.
d. Assuming facts not included in the hypothetical.
e. Volunteering information.
f. Not being familiar with the medical vocational guidelines and other relevant regulations and rulings.
h. Not asking ALJ, claimant, or claimant’s representative to clarify unclear questions, or to include functional limitations in hypothetical situations.
i. Using an outdated version of the DICTIONARY OF OCCUPATIONAL TITLES [English v Shalala 10 F.3d 1080 (4th Cir. 1993)]
j. Not using the 1993 edition of the SELECTED CHARACTERISTICS OF OCCUPATIONS DEFINED IN THE REVISED DICTIONARY OF OCCUPATIONAL TITLES.

I would add “k” to Judge Cristaudo’s list. Many VEs are intimidated by the ALJ or counsel and tailor their testimony accordingly. It becomes apparent in similar fact patterns when one claimant had competent counsel and another does not, that I do not always get the truth and nothing but the truth. I should not have to bolster the VEs testimony. I should not have to impeach by comparing current testimony with prior inconsistent statements. I wear several “hats” in this process. Sometimes I have to ask questions on behalf of a claimant. And sometimes I have to be the Devil’s advocate for SSA.

VEs should have a valid basis for their opinion testimony. Besides the DOT, VEs testify that they use labor market surveys, and other reference materials. Some are part of the documents that are

39 This is why our roster of VEs changes over time.
incorporated by administrative notice by the Commissioner. Some are not. Many come from private vocational companies who produce reports and some come from governmental sources. Many are in the public domain on the Internet. Services such as EMPLOYMENT STATISTICS QUARTERLY are often given as part of the basis. Testimony advises that newspaper classifieds, and VE attempts at placement are considered. VEs testify that they have checked on certain jobs locally to make their own survey of what kinds of jobs exist and how many. I hear arguments challenging or buttressing statistical methods, mathematical sampling, and the validity of extrapolation. Because of the "moving target" problem, I often give counsel an opportunity to provide rebuttal or submit a memorandum of law on these issues post hearing.

Some vocational witnesses will testify that no work exists at step 5 of the sequential evaluation for a "younger individual" because of the claimant's past relevant work experience. However, the real issue is whether the claimant can perform any work, including unskilled work.

(4) The VE applies "special knowledge" to the case. Each case is supposed to rise or fall on the evidence of record. There are certain legislative facts subject to administrative notice taken by the Commissioner. However, witnesses are not to take notice of personal facts that may not be applicable to a given claimant.

Sometimes VE testimony attributing special accommodations, attributing special traits, or qualifications that were not of record must be discounted. Testimony regarding whether a claimant would actually be hired if (s)he applied for a job, whether job openings exist, or whether work exists in the immediate area where the claimant lives are not relevant and must be discounted. VEs should not question the

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40 Bureau of Labor Statistics reports can be found at HTTP://www.bis.gov; Department of Labor at HTTP://www.dol.gov.

41 In Eback v. Chater, 94 F.3d 410, 411 (8th Cir. 1996), a VE testified: "I'm saying that would be a reasonable accommodation that an employer could or should make, particularly considering the ADA [Americans With Disabilities Act]." The Associate Commissioner of Social Security issued a statement that the ADA and the disability provisions of the Social Security Act have different purposes and have no direct relationship to each other. 94 F.3d at 412.

42 20 CFR 404.1566.
claimant directly. VEs should not be asked whether the claimant is credible or disabled. VEs should not be asked for medical opinions even if they are psychologists.

(5) The magic number. There is continuing controversy regarding what constitutes a "significant" number of jobs that exist in the national economy. The definition is not contained in the law and regulations.

The expert is to testify to the number of jobs without consideration of whether that number may be "significant." Please see "More Numbers," supra. Whether the number of jobs is significant is a legal determination. The VE is asked to identify the specific occupation and identify the approximate number of jobs. If the ALJ relies on the number all must be set forth in the decision.

In many cases, counsel asks the question, "If you accept the claimant's testimony, are there any jobs (s)he can perform?" In a reported case, at the hearing, appellant's counsel sought to question the vocational expert about what, in the expert's opinion, constitutes a significant number of jobs. The ALJ refused to permit the question, stating, "No, it's my job to determine what's significant and what isn't."

While the ALJ could have allowed the question, the decision to refuse it was not error. See Solis v. Schweiker, 719 F.2d 301, 302 (9th Cir. 1983) ("a claimant in a disability hearing is not entitled to unlimited cross-examination, but rather 'such cross-examination as may be required for a full and true disclosure of the facts.'") (quoting 5 U.S.C. § 556(d)).

With respect to an absolute number that signifies what is "significant," there is little help in 11th Circuit case law. In Allen v. Bowen, 816 F.2d 600, 602 (11th Cir. 1987) the court found that 1600 general appliance repair jobs in Georgia, and 80,000 jobs nationally are sufficient. In the ninth circuit, the existence of two "isolated jobs" is not adequate to support a finding that there is a significant number of jobs

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43 HALLEX 1-2-674.
44 HALLEX 1-2-555.
45 HALLEX 1-2-548.
47 Social Security Rulings 83-12, 83-14, and 83-15.
the claimant is able to perform. *Walker v. Mathews*, 546 F.2d 814, 820 (9th Cir. 1976). 48 In the 7th Circuit 1400 jobs in the greater Milwaukee metropolitan area that has a total workforce of 750,000, was held to be a significant number. 49

The circuits typically circumvent establishing precise guidelines. In the Third Circuit, 200 jobs in the region may be a "significant" number; 4000-5000 in the national economy may not be significant. 50 In *Barker v. Secretary of Health & Human Services*, 882 F.2d 1474, 1478-79 (9th Cir. 1989) the same court that found two jobs as insignificant said:

This Circuit has never clearly established the minimum number of jobs necessary to constitute a "significant number." In *Martinez v. Heckler*, 807 F.2d 771, 775 (9th Cir. 1986), the court upheld the ALJ's finding that 3,750 to 4,250 jobs were a significant number. The Sixth Circuit has found that 1,350 jobs in the local economy constituted a significant number. *Hall v. Bowen*, 837 F.2d 272, 275 (6th Cir. 1988). The Eighth Circuit has held that as few as 500 jobs were a significant number. *Jenkins v. Bowen*, 861 F.2d 1083, 1087 (8th Cir. 1988). Decisions by district courts within

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48 There is no trend. Berna v. Chater, 101 F.3d 631, 633 (10th Cir. 1996). "With respect to this hypothetical person, the vocational expert described five different jobs with approximately 10,000 positions in Oklahoma. R. at 186. This is sufficient to carry the Secretary's burden at step five." (citation omitted). See also, Johnson v. Chater, 108 F.3d 178 (8th Cir. 1997) "[T]here are 200 positions in Iowa and 10,000 positions nationwide." ALJ Op. at 10. The ALJ specifically noted that the vocational expert had stated that these figures were just a representative sampling of a larger number of jobs the claimant was capable of doing, including telemarketing, a job in which the claimant was employed at the time of the hearing." Id. (affirmed); Morse v. Shalala, 16 F.3d 865, 874 (8th Cir. 1994). The ALJ relies on the opinion of a vocational expert who testified that Ms. Morse could perform sedentary unskilled positions and that there were 5,000 positions of sedentary work in Iowa (250,000 positions in the United States) which the claimant could perform. When informed that the claimant could not stoop, bend repetitively, climb, kneel or crawl, must alternate sitting with standing with no more than forty-five minutes in one position, and could do only simple repetitive tasks, the vocational expert altered his opinion and said there were only 500 positions in Iowa (25,000 in the United States). (Affirmed); Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992), (650 to 900 such jobs exist in the state of Oklahoma). (Affirmed.)

49 Lee v. Sullivan, 988 F.2d 789 (7th Cir. 1993).

50 Cragie v. Bowen, 835 F.2d 56, 58 (3rd Cir. 1987).

this circuit are also consistent with the Secretary's finding in this case. See, e.g., *Salazar v. Califano*, Unemp. Ins. Rep. (CCH, para. 15,835) (E.D. Cal. 1978) (600 jobs is significant number). *Uravitch v. Heckler*, CIV-84-1619-PHX-PGR, slip op. (D.Az. May 2, 1986) (even though 60-70% of 500-600 relevant positions required experience plaintiff did not have, remaining positions constitute significant number).

In *Hall v. Bowen*, 837 F.2d 272, 275 (6th Cir. 1998), the District Court had misread an earlier case, *Graves v. Secretary of H.E.W.*, 473 F.2d 807 (6th Cir. 1973), and applied a test based on the percentage of jobs the claimant could perform versus all jobs in the geographical area. The court set out some criteria to be used in establishing what may be a significant number.

1. The level of claimant's disability;
2. The reliability of the vocational expert's testimony;
3. The reliability of the claimant's testimony;
4. The distance claimant is capable of traveling to engage in the assigned work;
5. The isolated nature of the jobs;
6. The types and availability of such work, and so on.

Under *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982), a claimant's ability to perform sheltered work activity does not necessarily establish an ability to engage in substantial gainful work within the meaning of 42 U.S.C. § 423(d)(2)(A):\(^5\)

In the instant case, the expert testified that approximately one third of the hospital laundry worker jobs in Los Angeles/Orange County are performed by retarded or otherwise handicapped people under "lenient supervision." The expert explicitly declined, however, to classify these jobs as "sheltered." In addition, appellant has presented no evidence to show that he would be ineligible for jobs with such "lenient supervision." Indeed, appellant's description of his impairment and residual mental capacity suggests that

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\(^5\) Even sheltered work can be SGA. 20 CFR 404.1573 (c).
he might be eligible for such positions.

Appellant argues that despite the expert's refusal to characterize the hospital jobs as "sheltered employment," this court should nonetheless exclude them from its calculation of the number of jobs appellant could perform. If these numbers are discounted, and the 1,200 gatekeeper jobs are also excluded based on counsel's hypothetical questions to the vocational expert, appellant argues that the remaining 1266 jobs do not constitute a "significant number" in the context of the Los Angeles/Orange County area.

The court need not reach the issue of "semi-sheltered" employment, however, for even if one third of the hospital laundry jobs and an analogous one third of the garment worker jobs, as appellant urges, are excluded from the total as "semi-sheltered," the remaining 2,466 jobs constitute a significant number under the case law from other circuits and district courts within this circuit. The court declines to exclude the gatekeeper jobs from consideration because the ALJ's determination that the record does not support appellant's inability to perform those jobs is supported by substantial evidence. Even if the 1,200 gatekeeper jobs are excluded, however, the remaining 1,266 jobs are within the parameters of "significant numbers" found in Hall, [and other cited cases]. Barker v. Secretary of Health and Human Service, 882 F.2d 1474, 1479 (9th Cir. 1989).

The suggestion that the number of jobs must be considered in the context of the geographical area at issue, or in light of the population of the area, was considered and rejected in Martinez, 807 F.2d 771, 775 (9th Cir. 1986).

The claimant urges us to ignore the number of jobs he is able to perform with his limitations and to analyze the ratio of jobs to the general population of the Greater Metropolitan Los Angeles and Orange County area. We decline. Even if we had credible numbers on total existing light jobs, an analysis of the ratio of light jobs
the claimant could perform to the total existing light jobs, as applied in *Graves*, is unwarranted. The plain language of the regulations do [sic] not contemplate a ratio analysis. The regulations speak in terms of whether a significant number of jobs exist that the claimant is capable of performing.

"Despite the logic of appellant's argument, that a number which is significant in a relatively small area such as Dayton, Ohio (the area in question in *Hall*), is not necessarily equally significant in the Los Angeles metropolitan area, this court is foreclosed under *Martinez* from revisiting it. The court therefore concludes that the Secretary's determination that there exists a significant number of jobs appellant could perform is supported by substantial evidence."

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53 Barker, 882 F.2d 1479 - 1480. Counsel repeatedly try to discredit *Hall* and *Martinez* and distinguish *Graves*, the "ratio theory" case overturned by *Hall*. In an Internet discussion on the Social Security Advisory Service (hereinafter SSAS) page, one comment was:

1. *Hall* holds that the legal conclusion as to whether a particular number of jobs is significant is within the sound discretion of the fact finder. If *Hall* is correct, then it is correct that absolutely identical claimants receive inconsistent decisions solely because different fact finders (or the same fact finder on different days) differ in their interpretation of "significant" numbers. Indeed, *Hall* explicitly holds that a smaller number may be significant in one case and a larger number insignificant in another.

2. *Hall* holds that "significance" is determined based solely upon the absolute number of available jobs without regard to the number of jobs in the same region or the size of the region for which jobs are identified. Is this rational?

3. After determining the number of jobs actually available, *Hall* says a fact finder should consider the following factors (among others) in deciding whether that number is significant: a) the level of the claimant's disability; b) the reliability of the VE testimony; c) the reliability of the claimant's testimony; d) the ability of the claimant to travel; and e) the availability of the identified jobs. Does the statute permit consideration of the claimant's ability to travel to a job or the availability of a job? Do the other factors make any sense?

4. Fortunately, *Hall* does not consider or foreclose [whether] a number of jobs is insignificant if a claimant with the same vocational factors and the ability to perform the same number of jobs would receive a directed finding of disability under the grid rules.

I do not accept the "relativist" conclusion, but it may be a valid argument in some circuits.
Counsel regularly argue the "ratio theory." I have counsel proffer to me Appeal Council decisions (usually from another Circuit) that limit the number or address a specific geographic location. These are not precedent, but I consider them in my rationale of the case.

(6) **Failure of the judge and counsel to give a complete medical profile in the hypothetical.** An ALJ has a duty to develop the record appropriately even if counsel is present, *Cowart, supra*. This does not mean that counsel does not also have a commensurate duty.

(a) The hypothetical should express the residual functional capacity in terms of each impairment, symptom and maximum exertional capacity. But the limitations must be expressed as a functional predicate.\(^5^4\)

(b) Sometimes there are medical conditions that may be severe and others that are not.\(^5^5\) If a condition is nonsevere, it is expected there are no restrictions imposed on work related activities. By definition, severe impairments are competent to produce some restrictions. The judge and counsel must identify the extent, severity and duration of the restrictions.

(c) Attributing a credibility issue to claimant's testimony when it is the medical evidence that establishes the residual functional capacity. Typical case: Claimant lies about age, address, job description, impairment, has "excess" pain not documented in the records, attributes severe limitations to anatomical areas that haven't been treated. But the claimant's treatment records establish a condition competent to produce some limitation. There is a tendency of the VE to read into the hypothetical. The VE is to listen to the question and not attribute *any* weight to the testimony unless directed by the hypothetical question.

(d) I generally let the representative ask additional

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\(^5^4\) For example, assume that the claimant has an extruded cervical disc that causes an inability to lift more than ten pounds with the right, dominant arm.

\(^5^5\) See SSR No. 96-3p: Considering allegations of pain and other symptoms in determining whether a medically determinable impairment is severe.
hypothetical questions before I go back to the witness to fill in any gaps. A number of representatives apparently do not realize that unless there is substantial evidence in the record, the hypothetical response may be discounted. Although decisions are reviewed on the substantial evidence standard, hypotheticals are usually asked to a reasonable degree of probability, or by a preponderance of the evidence. In some states, evidence must be proved by a reasonable degree of medical certainty. In paternity cases, SSA uses a higher standard.

(7) Application of a nonexertional impairment as an overlay to an exertional impairment. Most of the cases I hear do not involve an issue whether skills acquired in past relevant work transfer to other less strenuous or stressful jobs. They involve nonexertional impairments, the major part dealing with mental impairments. Most of the claimants have at best limited language skills and usually worked in unskilled, entry level jobs.

In such cases, reference to the grids is not appropriate. Walker, supra, 826 F.2d 996, 1002-1003, 18 S.S.R.S. 725, 731-732, CCH ¶ 17,552 (11th Cir. 1987). Walker needed an assistive device to ambulate. In Foote v Chater, 67 F.3d 1553 (11th Cir. 1995), the issue involved manual dexterity and grip strength in one hand precludes reliance on the grids.

For younger individuals, I usually identify the sedentary unskilled base of jobs, contemplated by the commissioner in Regulation

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56 I practiced law in Florida; both the state courts and Federal Courts use this standard.

57 See 20 CFR 404.721 et. seq.

58 "Exclusive reliance on the grids is not appropriate either when claimant is unable to perform a full range of work at a given functional level or when a claimant has nonexertional impairments that significantly limit basic work skills." Francis v. Heckler, 749 F.2d 1562 (11th Cir. 1985). The grids may be used only when each variable on the appropriate grid accurately describes the claimant's situation. Smith v. Bowen, 792 F.2d 1547, 1554 (11th Cir. 1986); see 20 CFR § 404.1569; 20 CFR pt. 404, subpt. P, app. 2, § 200.00(a). The grids also may not be used when the claimant's nonexertional impairments are severe enough to preclude a wide range of employment at the level indicated by the exertional impairments. Smith, 792 F.2d at 1554; 20 CFR pt. 404, subpt. P, app. 2, § 200.00(e). Nonexertional impairments include "postural and manipulative limitations," and must be considered in determining a claimant's residual functional capacity. 20 CFR §404.1545 (a), (d).
201.00 Appendix 2 as a point of least resistance.\textsuperscript{59} I find that these are

\textsuperscript{59} 20 CFR Pt. 404 App 2 to subpart P - Medical Vocational Guidelines § 201.00 Maximum sustained work capability limited to sedentary work as a result of severe medically determinable impairment(s).

(a) Most sedentary occupations fall within the skilled, semi-skilled, professional, administrative, technical, clerical, and benchwork classifications. Approximately 200 separate unskilled sedentary occupations can be identified, each representing numerous jobs in the national economy. Approximately 85 percent of these jobs are in the machine trades and benchwork occupational categories. These jobs (unskilled sedentary occupations) may be performed after a short demonstration or within 30 days.

(b) These unskilled sedentary occupations are standard within the industries in which they exist. While sedentary work represents a significantly restricted range of work, this range in itself is not so prohibitively restricted as to negate work capability for substantial gainful activity.

(c) Vocational adjustment to sedentary work may be expected where the individual has special skills or experience relevant to sedentary work or where age and basic educational competence provide sufficient occupational mobility to adapt to the major segment of unskilled sedentary work. Inability to engage in substantial gainful activity would be indicated where an individual who is restricted to sedentary work because of a severe medically determinable impairment lacks special skills or experience relevant to sedentary work, lacks educational qualifications relevant to most sedentary work (e.g., has a limited education or less) and the individual’s age, though not necessarily advanced, is a factor which significantly limits vocational adaptability.

(d) The adversity of functional restrictions to sedentary work at advanced age (55 and over) for individuals with no relevant past work or who can no longer perform vocationally relevant past work and have no transferable skills, warrants a finding of disabled in the absence of the rare situation where the individual has recently completed education basis for direct entry into skilled sedentary work. Advanced age and a history of unskilled work or no work experience would ordinarily offset any vocational advantages that might accrue by reason of any remote past education, whether it is more or less than limited education.

(e) The presence of acquired skills that are readily transferable to a significant range of skilled work within an individual’s residual functional capacity would ordinarily warrant a finding of ability to engage in substantial gainful activity regardless of the adversity of age, or whether the individual’s formal education is commensurate with his or her demonstrated skill level. The acquisition of work skills demonstrates the ability to perform work at the level of complexity demonstrated by the skill level attained regardless of the individual’s formal educational attainments.

(f) In order to find transferability of skills to skilled sedentary work for individuals who are of advanced age (55 and over), there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry.

(g) Individuals approaching advanced age (age 50 through 54) may be significantly limited in vocational adaptability if they are restricted to sedentary work. When such individuals have no past work experience or can no longer perform vocationally relevant past work and have no transferable skills, a finding of disabled ordinarily obtains. However, recently completed education which provides for direct entry into sedentary work will preclude such a finding. For this age group, even a high school education or more (ordinarily completed in the remote past) would have little impact for effecting a vocational adjustment unless relevant work experience reflects use of such education.

(h) The term "younger individual" is used to denote an individual age 18 through 49. For those within this group who are age 45 through 49, age is a less positive factor than for those who
difficult cases. I usually call a medical expert, to define restrictions. The Florida state agency has been instructed to use SSA-1152 forms with reports to help provide specific reference. One problem is the several definitions used in mental impairments.  

are age 18 through 44. Accordingly individuals; (1) who are restricted to sedentary work, (2) who are unskilled or have no transferable skills, (3) who have no relevant past work or who can no longer perform vocationally relevant past work, and (4) who are either illiterate or unable to communicate in the English language, a finding of disabled is warranted. On the other hand, age is a more positive factor for those who are under age 45 and is usually not a significant factor in limiting such an individual's ability to make a vocational adjustment, even an adjustment to unskilled sedentary work, and even where the individual is illiterate or unable to communicate in English. However, a finding of disabled is not precluded for those individuals under age 45 who do not meet all of the criteria of a specific rule and who do not have the ability to perform a full range of sedentary work. The following examples are illustrative: Example 1: An individual under age 45 with a high school education can no longer do past work and is restricted to unskilled sedentary jobs because of a severe medically determinable cardiovascular impairment (which does not meet or equal the listings in Appendix 1). A permanent injury of the right hand limits the individual to sedentary jobs which do not require bilateral manual dexterity. None of the rules in Appendix 2 are applicable to this particular set of facts, because this individual cannot perform the full range of work defined as sedentary. Since the inability to perform jobs requiring bilateral manual dexterity significantly compromises the only range of work for which the individual is otherwise qualified (i.e., sedentary), a finding of disabled would be appropriate. Example 2: An illiterate 41 year old individual with mild mental retardation (IQ of 78) is restricted to unskilled sedentary work and cannot perform vocationally relevant past work, which had consisted of unskilled agricultural work; his or her particular characteristics do not specifically meet any of the rules in Appendix 2, because they can not perform the full range of work defined as sedentary. In light of the adverse factors which further narrow the range of sedentary work for which this individual is qualified, a finding of disabled is appropriate.

While illiteracy or the inability to communicate in English may significantly limit an individual's vocational scope, the primary work functions in the bulk of unskilled work relate to working with things (rather than with data or people) and in these work functions at the unskilled level, literacy or ability to communicate in English has the least significance. Similarly the lack of relevant work experience would have little significance since the bulk of unskilled jobs require no qualifying work experience. Thus, the functional capability for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial vocational scope for those individuals age 18 through 44 even if they are illiterate or unable to communicate in English.

60 Use of a "stress test." In Morse v. Shalala, 16 F.3d 865, 874 (8th Cir. 1994), an ALJ used a test wherein a numerical score was assigned to stress levels. One of the most disturbing aspects of the hypothetical is the use of a stress test. In posing the hypothetical, the ALJ asked the vocational expert to assume that the claimant could handle a stress level of six on a scale of one to ten. There is no psychological test in evidence to support such an assumption. The ALJ admittedly created this test from his own determination of what stress levels certain jobs might involve and picked the score of six as the amount of stress that the claimant could endure. There is no medical evidence to support the ALJ's assumptions, and a
(8) Skills. When testimony is taken regarding transferability, the issue of identification of skills comes into play.\footnote{61}

A hypothetical question based solely upon the ALJ's assumptions, without medical corroboration, is devoid of usefulness or meaning. See Mitchell v. Sullivan, 925 F.2d 247, 249-50 (8th Cir. 1991) (rejecting the ALJ's assignation of a stress level of five on a one to ten scale because there was no medical corroboration that claimant could withstand a moderate level of stress); Douglas v. Bowen, 836 F.2d 392, 396 (8th Cir. 1987). More importantly, Dr. Davis's opinion reflects that the claimant is unable to handle the stress which results from exertion: she becomes very depressed, cannot sleep and cries. See Delrosa, 922 F.2d at 484 (improper for ALJ to substitute his "own unsubstantiated conclusions" regarding claimant's medical condition for that of the treating physician).

\footnote{61} Besides the exertional level and reasoning, math and language skill level, DOT titles describe worker functions that may be comparable to a claimant's residual functional capacity. There are numerical references to the following from Appendix C and D to the DOT:

<table>
<thead>
<tr>
<th>DATA (4th Digit)</th>
<th>PEOPLE (5th Digit)</th>
<th>THINGS (6th Digit)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 Synthesizing</td>
<td>0 Mentoring</td>
<td>0 Setting Up</td>
</tr>
<tr>
<td>1 Coordinating</td>
<td>1 Negotiating</td>
<td>1 Precision Working</td>
</tr>
<tr>
<td>2 Analyzing</td>
<td>2 Instructing</td>
<td>2 Operating-Control</td>
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<tr>
<td>3 Compiling</td>
<td>3 Supervising</td>
<td>3 Driving-Operating</td>
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<tr>
<td>4 Computing</td>
<td>4 Diverting</td>
<td>4 Manipulating</td>
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<tr>
<td>5 Copying</td>
<td>5 Persuading</td>
<td>5 Tending</td>
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<tr>
<td>6 Comparing</td>
<td>6 Speaking-Signalling</td>
<td>6 Feeding-Offbearing</td>
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<td>7 Serving</td>
<td>7 Handling</td>
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<tr>
<td>8 Taking Instructions-Helping</td>
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Definitions of Worker Functions
DATA: Information, knowledge, and conceptions, related to data, people, or things, obtained by observation, investigation, interpretation, visualization, and mental creation. Data are intangible and include numbers, words, symbols, ideas, concepts, and oral verbalization.

0 Synthesizing: Integrating analyses of data to discover facts and/or develop knowledge concepts or interpretations.
1 Coordinating: Determining time, place, and sequence of operations or action to be taken on the basis of analysis of data; executing determinations and/or reporting on events.
2 Analyzing: Examining and evaluating data. Presenting alternative actions in relation to the evaluation is frequently involved.
3 Compiling: Gathering, collating, or classifying information about data, people, or things. Reporting and/or carrying out a prescribed action in relation to the information is frequently involved.
4 Computing: Performing arithmetic operations and reporting on and/or carrying out a prescribed action in relation to them. Does not include counting.
5 Copying: Transcribing, entering, or posting data.
6 Comparing: Judging the readily observable functional, structural, or compositional characteristics (whether similar to or divergent from obvious standards) of data, people, or things.

PEOPLE: Human beings; also animals dealt with on an individual basis as if they were human.

0 Mentoring: Dealing with individuals in terms of their total personality in order to advise, counsel, and/or guide them with regard to problems that may be resolved by legal,
scientific, clinical, spiritual, and/or other professional principles.
1 Negotiating: Exchanging ideas, information, and opinions with others to formulate policies and programs and/or arrive jointly at decisions, conclusions, or solutions.
2 Instructing: Teaching subject matter to others, or training others (including animals) through explanation, demonstration, and supervised practice; or making recommendations on the basis of technical disciplines.
3 Supervising: Determining or interpreting work procedures for a group of workers, assigning specific duties to them, maintaining harmonious relations among them, and promoting efficiency. A variety of responsibilities is involved in this function.
4 Diverting: Amusing others, usually through the medium of stage, screen, television, or radio.
5 Persuading: Influencing others in favor of a product, service, or point of view.
6 Speaking-Signaling: Talking with and/or signaling people to convey or exchange information. Includes giving assignments and/or directions to helpers or assistants.
7 Serving: Attending to the needs or requests of people or animals or the expressed or implicit wishes of people. Immediate response is involved.
8 Taking Instructions-Helping: Attending to the work assignment instructions or orders of supervisor. (No immediate response required unless clarification of instructions or orders is needed.) Helping applies to "non-learning" helpers.

THINGS: Inanimate objects as distinguished from human beings, substances or materials; and machines, tools, equipment, work aids, and products. A thing is tangible and has shape, form, and other physical characteristics.

0 Setting Up: Preparing machines (or equipment) for operation by planning order of successive machine operations, installing and adjusting tools and other machine components, adjusting the position of workpiece or material, setting controls, and verifying accuracy of machine capabilities, properties of materials, and shop practices. Uses tools, equipment, and work aids, such as precision gauges and measuring instruments. Workers who set up one or a number of machines for other workers or who set up and personally operate a variety of machines are included here.
1 Precision Working: Using body members and/or tools or work aids to work, move, guide, or place objects or materials in situations where ultimate responsibility for the attainment of standards occurs and selection of appropriate tools, objects, or materials, and the adjustment of the tool to the task require exercise of considerable judgment.
2 Operating-Controlling: Starting, stopping, controlling, and adjusting the progress of machines or equipment. Operating machines involves setting up and adjusting the machine or material(s) as the work progresses. Controlling involves observing gauges, dials, etc., and turning valves and other devices to regulate factors such as temperature, pressure, flow of liquids, speed of pumps, and reactions of materials.
3 Driving-Operating: Starting, stopping, and controlling the actions of machines or equipment for which a course must be steered or which must be guided to control the movement of things or people for a variety of purposes. Involves such activities as observing gauges and dials, estimating distances and determining speed and direction of other objects, turning cranks and wheels, and pushing or pulling gear lifts or levers. Includes such machines as cranes, conveyor systems, tractors, furnace-charging machines, paving machines, and hoisting machines. Excludes manually powered machines, such as handtrucks and dollies, and power-assisted machines, such as electric wheelbarrows and handtrucks.
4 Manipulating: Using body members, tools, or special devices to work, move, guide, or place objects or materials. Involves some latitude for judgment with regard to precision attained and selecting appropriate tool, object, or material, although this is readily manifest.
5 Tending: Starting, stopping, and observing the functioning of machines and
I find many VEs are weak in this area. The VE first must identify what skills have been acquired in past relevant work. Then the VE must show whether they transfer to other work and give an explanation how they fit. In cases involving people of advanced age an issue often arises whether there are skills that directly transfer to other work. In cases involving persons approaching retirement age the testimony concerns whether jobs may be "highly marketable".

(9) **Exertional capacity falls between two exertional levels,** such as light and sedentary work.

In *Lee v. Sullivan*, 945 F.2d 687, 692-93 (4th Cir. 1991), the administrative law judge recognized a similar problem. He sought to take a reasonable stance between the two levels of "light" and "sedentary" work by finding that "the claimant's additional nonexertional limitations do not allow him to perform the full range of light work" but that his residual functional capacity to perform was such that there were "a significant number of jobs in the national economy which [the plaintiff] could perform." "We think this was an accurate assessment of the plaintiff's work capacity and we find no inconsistency in the administrative law judge's evaluation of the plaintiff's work level in what was a reasonable adjustment between 'light work' and 'sedentary work'."

(10) **The sit/stand option.** Neither HALLEX or the Rulings elaborate on whether there are jobs that permit a claimant to alternate positions at will. The subject is briefly discussed in Social Security Rulings 83-12 and 96-9p.

In the 5th Circuit, VE input is required when a claimant is

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6 Equipment. Involves adjusting materials or controls of the machine, such as changing guides, adjusting timers and temperature gauges, turning valves to allow flow of materials, and flipping switches in response to lights. Little judgment is involved in making these adjustments.

6 Handling: Using body members, handtools, and/or special devices to work, move, or carry objects or materials. Involves little or no latitude for judgment with regard to attainment of standards or in selecting appropriate tool, object, or materials.

62 There are some jobs in the national economy -- typically professional and managerial ones -- in which a person can sit or stand with a degree of choice. If an individual had such a job and is still capable of performing it, or is capable of transferring work skills to such jobs, he or she would not be found disabled. Social Security Ruling 83-12.
unable to sit or to stand for long periods of time.63

It is commonplace in social security case law for persons who cannot sit or stand for long periods to obtain some relief in alternating these positions. *Ragland v. Shalala*, 992 F.2d 1056, 1059 n.4 (10th Cir. 1993); *DeLorme v. Sullivan*, 924 F.2d 841, 845 (9th Cir. 1991); *Burton v. Secretary of Health & Human Servs.*, 893 F.2d 821, 822, 824 (6th Cir. 1990).

"In fact, plaintiff indicated that she will sometimes stand briefly to ease the pain of prolonged sitting, though she does not know whether she could perform a job permitting her to sit and stand at will. Significantly, even where such alternation of position is a possibility, relying on the grids for light or sedentary work is inappropriate, and the ALJ must consult a vocational expert before making a determination at step five. See *Talbot*, 814 F.2d at 1463-64 & n.5; *DeLorme*, 924 F.2d at 850; *Wages v. Secretary of Health & Human Servs.*, 755 F.2d 495, 498 (6th Cir. 1985)." *Ragland*, at 1059 (10th Cir. 1993).

In *Locher v. Sullivan*, 968 F.2d 725 (8th Cir. 1992), in a hypothetical posed to the VE, the ALJ did not discuss pain but established as a given that the claimant could sit or stand for thirty minutes at a time. Nine months after surgery, a treating physician said that Locher could engage in "activities as tolerated."

Taken as a whole, we believe that this supports the finding that Locher could sit or stand for thirty minutes at a time.

Accordingly, we conclude that the ALJ properly discounted Locher's complaints of disabling pain and posed a proper hypothetical question to the vocational expert. 968 F.2d at 729.

In *Hall v. Bowen*, 837 F.2d 272, 275 (6th Cir. 1988), the court

63 Lawler v. Heckler, 761 F.2d 195 (5th Cir. 1985).
concluded that the claimant was not disabled simply based on a need to alternate between sitting, standing and walking, because the vocational expert could identify 1,350-1,800 unskilled jobs that could be performed within claimant's limitations.

(11) **Less than a full range of sedentary work.** For younger individuals, the issue goes to whether there are jobs a claimant can perform given the residual functional capacity. If the claimant does not, in fact, have the residual functional capacity for a full range of sedentary work, the case must be evaluated within the framework of the vocational rules.

The functional restrictions which limit the claimant to less than the full range of sedentary work must be specified. It must then be determined whether, considering all of the functional limitations, a "significant number" of sedentary jobs which the claimant can perform exists in the national economy. Social Security Ruling 86-8. Also see Social Security Ruling 96-9p. These rules seem to cause some representatives great consternation since there had been folklore to the effect that a claimant who had restrictions that preclude the full range of sedentary work was considered to be disabled.

According to the Social Security Advisory Service, there are 137 unskilled sedentary occupations identified in the DOT.\(^6^4\) Several VEs have provided me a list of 164 jobs identified by CAPCO\(^6^5\). The Commissioner refers to 200 such occupations in Regulation 201.00. No doubt there is a dispute over the number; but no doubt that there are numerous unskilled sedentary jobs in the national economy.

(12) **Part time jobs.**\(^6^6\) Part time work can be substantial gainful activity.\(^6^7\)

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\(^6^4\) To access them on the Internet, use, HTTP://www.ssas.com

\(^6^5\) CAPCO is a proprietary service that tracks vocational data. See, <http://www.capco-inc.com>

\(^6^6\) See 20 CFR 404.1572:

(a) **Substantial work activity.**
Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial *even if it is done on a part-time basis* or if you do less, get paid less, or have less responsibility than when you worked before. (emphasis added).

\(^6^7\) Wright v. Sullivan, 900 F.2d 675 (3rd Cir. 1990); Born v. Secretary of Health & Human Servs., 923 F.2d 1168 (6th Cir. 1990); Burkhalter v. Schweiker, 711 F.2d 841 (8th Cir. 1983); Katz v. Secretary of Health & Human Servs., 972 F.2d 290 (9th Cir. 1992).
In *Born v. Secretary of HHS*, 923 F.2d 1168 (6th Cir. 1990), a vocational expert testified that there were 800,000 full-time assembly jobs that allowed a sit/stand option in the national economy, 2,500 such jobs within the local region, and 125,000 positions within the state of Tennessee. The vocational expert essentially testified that whether a job is part-time or full-time is a matter of the employer's discretion and that part-time jobs did exist in the electrical and metal parts assembly industries. Thus, the vocational expert was unable to provide an exact number of positions that an employer would be willing to fill on a part-time basis:

However, we find that with a job base of 800,000 in the national economy, it was reasonable for the Secretary to conclude that a sufficient percentage of those jobs exist on a part-time basis that the part-time jobs would represent a significant number of jobs. See *Barker v. Secretary of Health and Human Servs.*, 882 F.2d 1474, 1478-79 (9th Cir. 1989) (1,200 jobs are within the parameters of "significant numbers"); *Sias v. Secretary of Health and Human Servs.*, 861 F.2d 475, 480 (6th Cir. 1988) (acceptance of vocational expert's opinion that employers would try to accommodate a worker who had to keep one leg elevated was not improper); *Jenkins v. Bowen*, 861 F.2d 1083, 1087 (8th Cir. 1988) (even if claimant's contention that only 500 jobs were available were accepted, this number represents a significant number under *Hall v. Bowen* criteria). Moreover, the ALJ had given claimant the benefit of the doubt that he was limited to part-time work even though his treating physician had determined that he was able to work an eight-hour shift. The types of jobs which the vocational expert identified do not appear to be of an isolated nature as he testified that there were 2,500 full-time assembly positions meeting claimant's requirements within the local region. Because the full-time assembly jobs enumerated by the vocational expert were abundant and easily accessible, under the "common sense" principle articulated in Hall, it was reasonable for the Secretary to conclude that there exists a significant number of similar part-time jobs that claimant could
perform. (Emphasis added). 923 F.2d at 1175. But Social Security Rulings 96-8p and 96-9p may be in conflict with the above decisions.

(13) **Nature of the work.** To qualify as past relevant work, it must be:

a. Recent.

b. Meet the durational requirement.

c. Have been substantial gainful activity.

To have been recent, work generally must have been performed within the past 15 years. If the date last insured is beyond 15 years, an exception is made. In certain situations, one must know whether a claimant has performed arduous labor for 35 years, or when there has been a continuity of skills knowledge, processes established between former work and current occupations.

A Detailed Earnings Query (DEQY) can list the employers that a claimant may have had.

In many cases there is a controversy over what the claimant actually did on the job. A factual dispute often arises over:

a. Particular job duties.

b. How the work is customarily performed.

In a reported case, the residual functional capacity for a claimant with a mental impairment permitted work in a noninterventionist job. The issue was whether the DICTIONARY OF OCCUPATIONAL TITLES, on which the Social Security Administration relies to find out whether a job exists, does not contain "non-intervening security guard," or some synonym therefor, among its many thousands of listings, although its definition was enough to include such a position. U.S. Dept. of Labor, DICTIONARY OF OCCUPATIONAL TITLES 252 (4th ed. 1977) (title 372.667-034):

The definition is "Guards industrial or commercial

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69 See Jozefowicz v. Heckler, 811 F.2d 1352 (10th Cir. 1987).

70 Social Security Ruling 82-62.

71 Social Security Ruling 82-63 and 20 CFR 404.1562.

72 Lopez-Diaz v. Secretary of Health & Human Servs., 673 F.2d 13 (1st Cir.1982); Bowman v. Heckler, 706 F.2d 564 (5th Cir. 1983).

73 Villa v. Sullivan, 895 F.2d 1019 (5th Cir. 1993).
[protecting] property against fire, theft, vandalism, and illegal entry, performing any combination of the following duties" -- followed by a long list that includes a number of noninterventionist duties such as "reporting irregularities" and even "tending furnace or boiler." Whether this means that counterparts to Kolman's CETA job existed in the economy -- existed, that is, as real rather than merely as makework jobs -- and whether (the same point stated differently) Kolman's genuinely relevant past work, that is, his non-CETA security guard positions, required no intervention and hence were within his psychological ability are questions too dimly illuminated by the record to allow the denial of benefits to stand. The case must be remanded to the Social Security Administration for further proceedings consistent with this opinion. *Kolman v. Sullivan*, 925 F.2d 212, 214 (7th Cir. 1991)

(14) VE testimony is in conflict with the DOT. The narrative occupational descriptions in the DICTIONARY OF OCCUPATIONAL TITLES describe the significant work activities and are supposed to represent the actual skills used in each occupation. Sometimes VEs do not fully agree with the descriptions or the details found in the DOT text or in the SELECTED CHARACTERISTICS OF OCCUPATIONS contained in Appendixes C and D of the DOT.

In the 11th Circuit, there is no clear precedent whether the DOT governs in every situation. There may be conflicting testimony how a job is performed, is customarily performed, is performed locally, or whether it completely is covered by a DOT listing. The DOT is under major reconstruction and was to have been replaced by now by O*NET. The regulations take administrative notice and ALJs and courts can take judicial notice of the DOT. In practice, whenever a

74 O*NET, the Occupational Information Network, is a comprehensive database system for collecting, organizing, describing and disseminating data on job characteristics and worker attributes. O*NET replaces the outmoded Dictionary of Occupational Titles (DOT), but offers more than merely up-dated data. O*NET provides a new conceptual framework that reflects the advanced technologies, adaptable workplace structures and wide-ranging skills required by today's changing workplace. It can be found at: http://www.doleta.gov/programs/onet/.
conflict exists I try to have the precise section incorporated into evidence and fully discussed in the decision.\textsuperscript{75}

In a situation where the VE classifies a job as semiskilled and the DOT classifies it as unskilled, the DOT version prevails in the Ninth Circuit. \textit{Terry v. Sullivan}, 903 F.2d 1273, 1276 (9th Cir. 1990). If there is conflict between aspects of work as described by a VE and the DOT, the testimony prevails if:

a. The VE is directed to the conflict,


In \textit{Bjornholm v. Shalala}, 39 F.3d 888, 890 (8th Cir. 1994), Bjornholm’s past relevant work was as a waitress in a restaurant. She served food and drinks to customers. She was required to lift twenty to twenty-five pounds frequently and fifty pounds occasionally. She was required to be on her feet much of the day. This work is classified by the Department of Labor as semi-skilled work requiring light physical exertion. DOT, § 311.477.030 (1991):

It is conceded that Bjornholm can no longer do this work because of the lifting, walking, and standing requirements of the job. It is additionally conceded that she is capable of performing sedentary work. See DOT, App. C, Part IV(c). 39 F.3d at 890.

A vocational expert testified that Bjornholm had acquired certain transferrable skills in her position as a waitress that included the ability to handle money, to deal with the public, and to record routine information. He testified that these skills could be transferred to the position of cashier in a self-service gas station where the employee is simply taking money for gas, DOT, § 915.477-010, and that of cashier at a self-service parking lot, DOT, § 211.462-010. The vocational expert testified that there were 500 jobs in these two categories in Iowa and 25,000 jobs in these two categories in the nation. He also testified that the same skills could be transferred to the position of a ticket seller at a movie theater or at different types of amusement facilities, DOT,

\textsuperscript{75} Townley v. Heckler, 748 F.2d 109 at 113 (2nd Cir. 1984), stands for the proposition that the DOT contains "every" job in the national economy.
§ 211.467-030. Within this category, the vocational expert testified that there were 750 jobs in Iowa in this category and 40,000 jobs nationally.

The difficulty with this finding lies in the scope of the statistics relied upon by the ALJ. All three of the DOT job classifications for which the vocational expert provided employment statistics are positions requiring light, rather than sedentary, physical exertion. While there may also be sedentary positions included within each of the DOT categories, each category on its face calls for activities which Bjornholm cannot physically perform. By relying on the DOT classifications for the scope of his statistical findings, the ALJ has dramatically overstated the numbers of jobs that are, in fact, available to a person of Bjornholm's skills and physical condition.

To make the matter clearer, the position of cashier in a self-service gas station is classified by DOT as light work, and the description of the position includes duties that require the person filling the position to "[c]heck[] the level of oil in crankcase and amount of water in radiator, and add[] oil and water as requested by customer." DOT, § 915.477-010. Bjornholm is not able to perform such duties. As set forth in the DOT, the other two classifications require light physical exertion as well. 39 F.3d at 890.

The case was remanded.

In Wright v. Sullivan, 900 F.2d 675 (3rd Cir. 1990), it was argued that work as a rape counselor could not be considered substantial gainful employment, because the job was not listed in the DOT. The Social Security Administration uses the DOT to "take administrative notice" of jobs in the economy. See 20 CFR § 404.1566(d)(1) (1989).

Wright cites Townley v. Heckler, 748 F.2d at 113, for the proposition that the DOT contains "every" job in the economy, and that improper use of the dictionary of occupational titles is grounds for reversal.
In *Townley*, the DOT was used for its usual purpose, determining what jobs are available in the economy. There the Secretary's vocational expert used an obsolete version of the DOT, and found that certain unskilled jobs were available in the economy when the jobs had come to require much higher skills. Here, the Secretary did not use the DOT, for the very practical reason that it was not necessary to determine whether the job Wright actually performed existed.

In the introduction to the DOT, the Secretary of Labor notes that the DOT describes "the majority of occupations" in the economy. See Dictionary of Occupational Titles, Fourth edition, at iii (Message from the Secretary). The fact that an emergency room rape counselor is not found in the DOT proves the DOT is not comprehensive, not that the job does not exist. One might as well say that Wright should never have been paid for her work since her job did not exist. 900 F.2d at 683-684.

(15) More Numbers: the existence of jobs.

20 CFR 404.1566(b) states, "Work exists in the national economy [for step-five purposes] when there is a significant number of jobs (in one or more occupations) having requirements which [the claimant is] able to meet...."

This regulation sets forth that one must consider that work exists in the national economy when it exists in significant numbers either in the region where a claimant lives or in several other regions of the country. It does not matter whether-

1. Work exists in the immediate area in which you live;
2. A specific job vacancy exists for you; or
3. You would be hired if you applied for work.

(b) How we determine the existence of work.

Work exists in the national economy when there is a significant number of jobs (in one or more occupations) having requirements which a claimant is able to meet with appropriate physical or mental abilities and vocational qualifications. Isolated jobs that exist only in very limited numbers in relatively few locations outside of the region where a claimant lives are not considered "work which exists in the national
We will not deny you disability benefits on the basis of the existence of these kinds of jobs. If work that the claimant can do does not exist in the national economy, the Commissioner will determine that the claimant is disabled. However, if work that the claimant can do does exist in the national economy, the Commissioner will determine that the claimant is not disabled.

The inability to obtain work is generally irrelevant to the issue whether jobs exist:

We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy, but you remain unemployed because of-

(1) Your inability to get work;
(2) Lack of work in your local area;
(3) The hiring practices of employers;
(4) Technological changes in the industry in which you have worked;
(5) Cyclical economic conditions;
(6) No job openings for you;
(7) You would not actually be hired to do work you could otherwise do; or
(8) You do not wish to do a particular type of work.

(d) Administrative notice of job data.

When we determine that unskilled, sedentary, light, and medium jobs exist in the national economy (in significant numbers either in the region where you live or in several regions of the country), we will take administrative notice of reliable job information available from various governmental and other publications. For example, we will take notice of-

(1) Dictionary of Occupational Titles, published by the Department of Labor;
(2) County Business Patterns, published by the Bureau of the Census;
(3) Census Reports, also published by the Bureau of the Census;
(4) Occupational Analyses, prepared for the Social Security Administration by various State employment agencies; and

(e) Use of vocational experts and other specialists.

If the issue in determining whether you are disabled is whether your work skills can be used in other work and the specific occupations in which they can be used, or there is a similarly complex issue, we may use the services of a vocational expert or other specialist. We will decide whether to use a vocational expert or other specialist. 20 CFR § 404.1566.

As set forth above, for many years, astute counsel relied on "ratio analysis" to the general working population to argue that their clients' capacity did not yield a significant number of jobs in the economy. This analysis has been completely discredited. Although a Sixth Circuit decision 76 found that the availability of jobs was limited by the employment practices of employers, Congress has explicitly determined that it is the existence of jobs that is essential, and that an administrative law judge is not required to consider the hiring practices of employers, or whether a claimant could actually obtain work if (s)he applied for it. 42 U.S.C. § 423(d)(2) states:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or

whether he would be hired if he applied for work. See also 20 CFR § 404.1566(c)(1), (3) & (7).

The plain language of the regulations do not contemplate a ratio analysis. The regulations speak in terms of whether a significant number of jobs exist that the claimant is capable of performing. *Martinez v. Heckler*, 807 F.2d 771, 775 (9th Cir. 1986); *Hall v. Bowen*, 837 F.2d 272 (6th Cir. 1988).

As the court stated in *Walker v. Mathews*, 546 F.2d 814, 819 (9th Cir. 1976), "Congress did not intend to foreclose a claimant from disability benefits on the basis of the existence of a few isolated jobs." However, when there is testimony that a significant number of jobs exists for which a claimant is qualified, it is immaterial that this number is a small percentage of the total number of jobs in a given area. *Graves* does not hold to the contrary, and the district court has misconstrued *Graves* in so reading it. *Hall*, 837 F.2d at 272.

(16) Is the use of the grids as a "framework" always appropriate? Does the presence of disabling pain preclude vocational testimony and reliance on the grids? In the 11th Circuit:

Plaintiff cites *Swindle v. Sullivan*, 914 F.2d 222, 226 (11th Cir. 1990) for the proposition that the Court of Appeals for this Circuit has noted that pain precludes the application of the Grid. In *Swindle*, the court found that because ALJ improperly discounted the plaintiff's subjective complaints of pain, weakness, and dizziness, the ALJ did not give adequate consideration to the effect the combination of her exertional and nonexertional impairments had on her ability to work. *Swindle v. Sullivan*, 914 F.2d at 226. The court went on to find that if, on remand, the ALJ determined that the plaintiff's nonexertional impairments significantly limit basic work activities, then the ALJ should not rely solely on the grids and should take evidence from a vocational expert to determine whether there exists in the national economy a significant number of jobs for someone with the plaintiff's limitations. Id. (citing *Walker v. Bowen*, 826 F.2d 996, 1003 (11th Cir. 1987); *Sryock v. Heckler*, 764 F.2d 834, 836 (11th Cir. 1985)). The court did not state that pain in and of itself
Vocational Testimony in Social Security Hearings

precludes the applications of the grids. The Swindle Court found that if a plaintiff's subjective complaints are determined to be credible and are a nonexertional impairment, then an ALJ is precluded from applying the grids when determining if there are jobs existing in significant numbers in the national economy that the plaintiff could perform. Accordingly, it must be determined if Judge Smith properly discounted Plaintiff's subjective complaints of pain pursuant to the Eleventh Circuit's "pain standard" in order to determine if Plaintiff's pain was a nonexertional impairment. *Jackson v. Chater*, 1996 (LEXIS 8551, *35-36* (S.D. Ala. 1996).

In this Circuit, the preferred method of demonstrating job availability where a plaintiff is unable to perform a full range of work at a given functional level or when a claimant has both exertional and nonexertional limitations is through the testimony of a vocational expert. *Welch v. Bowen*, 854 F. 2d 436, 440 (11th Cir. 1988), and *Jackson v. Chater*, 1996 LEXIS 8551 (S.D. Ala. 1996).

(17). Transfer of skills problems

(a) Transference of skills to unskilled work. 77

77 20 CFR 404.1568

(a) Unskilled work. Unskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. For example, we consider jobs unskilled if the primary work duties are handling, feeding and offbearing (that is, placing or removing materials from machines which are automatic or operated by others), or machine tending, and a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed. A person does not gain work skills by doing unskilled jobs.

(b) Semi-skilled work. Semi-skilled work is work which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require alertness and close attention to watching machine processes; or inspecting, testing or otherwise looking for irregularities; or tending or guarding equipment, property, materials, or persons against loss, damage or injury; or other types of activities which are similarly less complex than skilled work, but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly to do repetitive tasks.

(c) Skilled work. Skilled work requires qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity of material to be produced. Skilled work may require laying out work, estimating quality, determining the suitability and needed quantities of materials, making
The Dictionary of Occupational Titles includes information about jobs (classified by their exertional and skill requirements) that exist in the national economy. Appendix 2 provides rules using this data reflecting major functional and vocational patterns.

We apply these rules in cases where a person is not doing substantial gainful activity and is prevented by a severe medically determinable impairment from doing vocationally relevant past work. The rules in Appendix 2 do not cover all possible variations of factors. Also, as we explain in § 200.00 of Appendix 2, we do not apply these rules if one of the findings of fact about the person's vocational factors and residual functional capacity is not the same as the corresponding criterion of a rule. In these instances, we give full consideration to all relevant facts in accordance with the definitions and discussions under vocational considerations. However, if the findings of fact made about all factors

precise measurements, reading blueprints or other specifications, or making necessary computations or mechanical adjustments to control or regulate the work. Other skilled jobs may require dealing with people, facts, or figures or abstract ideas at a high level of complexity.

(d) Skills that can be used in other work (transferability).

(1) What we mean by transferable skills. We consider you to have skills that can be used in other jobs, when the skilled or semi-skilled work activities you did in past work can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work. This depends largely on the similarity of occupationally significant work activities among different jobs.

(2) How we determine skills that can be transferred to other jobs. Transferability is most probable and meaningful among jobs in which-

(i) The same or a lesser degree of skill is required;
(ii) The same or similar tools and machines are used; and
(iii) The same or similar raw materials, products, processes, or services are involved.

(3) Degrees of transferability. There are degrees of transferability of skills ranging from very close similarities to remote and incidental similarities among jobs. A complete similarity of all three factors is not necessary for transferability. However, when skills are so specialized or have been acquired in such an isolated vocational setting (like many jobs in mining, agriculture, or fishing) that they are not readily usable in other industries, jobs, and work settings, we consider that they are not transferable.
are the same as the rule, we use that rule to decide whether a person is disabled.

Transferability means applying work skills acquired in past relevant work to meet the requirements of other skilled or semiskilled jobs. Therefore, skills can not transfer to an unskilled job.

The argument that skilled work can not transfer to semiskilled work has been rejected in the 6th Circuit.78

(b) A VE must not confuse skills and aptitudes (A/K/A traits). A skill is a work activity that takes more than 30 days to learn to do at an average level of performance, and which has been learned in past relevant work.79 An aptitude is a vocationally relevant physical or mental attribute that permits a person to perform a work activity adequately. Skills attach to the occupation, while aptitudes attach to the person. Examples of aptitudes are:
2. Alertness.
3. Acute vision.
4. Feel and touch.
5. Fine finger dexterity.
6. Ability to think logically.
7. Physical stamina.
8. Ability to follow instructions.
9. Ability to pay attention.
10. Ability to do a number of things at the same time.
12. Intelligence.
13. Ability to adapt to a specific routine.
14. Ability to work independently.
15. Verbal ability.80

(c) Attributing direct transference where prohibited. I like to cut to the chase. I get a high percentage of older claimants who otherwise

78 Burton v. Secretary of Health & Human Services, 893 F.2d 821, 824 (6th Cir. 1990).
79 See Frey v. Bowen, 816 F.2d 508 (10th Cir. 1987) and Wallace v. Secretary of Health & Human Services, 722 F.2d 1150, 1156 n.1 (3rd Cir. 1983).
80 Cristaudo, "Vocational Expert Manual" an in-house seminar presented by SSA, see note 38, above.
would be "not disabled" but for application of special regulations that limit transferability. To find that an individual who is age 55 or over and is limited to sedentary work exertion has skills transferable to sedentary occupations, there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings or the industry. The same is true for individuals who are age 60 and older and are limited to light work exertion. Individuals with these adverse vocational profiles cannot be expected to make a vocational adjustment to substantial changes in work simply because skilled or semiskilled jobs can be identified which have some degree of skill similarity with their past relevant work. In order to establish transferability of skills for such individuals, the semiskilled or skilled job duties of their past work must be so closely related to other jobs which they can perform that they could be expected to perform these other identified jobs at a high degree of proficiency with a minimal amount of job orientation. Social Security Ruling 82-41. Regulation 202.00(f), Table Number 2 to Appendix 2 of the Regulations requires:

(f) For a finding of transferability of skills to light work for individuals of advanced age who are closely approaching retirement age (age 60-64), there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry.

(18). Other steps in the sequential evaluation.
(a) Decision at step one of the sequential evaluation.
The issue is whether the claimant is engaged in substantial gainful activities (SGA). Sometimes a VE must testify whether the claimant's activities are the same as work.\textsuperscript{81} Generally the claimant's

\textsuperscript{81} Pursuant to 20 CFR section 404.1572 substantial gainful activity is defined as follows:
(a) Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.
(b) Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, \textit{whether or not a profit is realized}.
(c) Generally, we do not consider activities like taking care of yourself,
personal activities do not constitute SGA, but activities for someone else, such as a friend or neighbor, church work, or work that produces between $500 per month and $300 per month must be evaluated.\textsuperscript{82} Often counsel argue that the claimant is not engaged in a "trade or business."\textsuperscript{83} However the 11th Circuit does not acknowledge that a claimant has to be "employed" to be engaged in SGA.

(b) Decision at step four of the sequential evaluation. In the 11th Circuit, the ALJ may use VE testimony to determine whether a household tasks, hobbies, therapy, school attendance, club activities, or social programs to be substantial gainful activity. (Emphasis added.)

\textsuperscript{82} In evaluating work activities the administration considers work that generates $500 per month is presumptive evidence that a claimant has performed substantial gainful activities. At this level of evaluation income relating to work is evaluated. The sections relating to evaluation cover employees (20 CFR 404.1574) and self employed persons (20 CFR 404.1575). For the period of evaluation, if earnings average more than $300 per month but average less than $500 per month, then the claimant must be evaluated as follows:

Earnings that are not high or low enough to show whether you engaged in substantial gainful activity.

If your earnings, on the average, are between the amounts shown in paragraphs(b)(2) and (3) of this section, we will generally consider other information in addition to your earnings, such as whether-

(i) Your work is comparable to that of unimpaired people in your community who are doing the same or similar occupations as their means of livelihood, taking into account the time, energy, skill, and responsibility involved in the work, or
(ii) Your work, although significantly less than that done by unimpaired people, is clearly worth the amounts shown in paragraph (b)(2) of this section, according to pay scales in your community. 20 CFR 404.1574(b)(6), for employees and for the self employed.

What we mean by substantial income.

After your normal business expenses are deducted from your gross income to determine net income, we will deduct the reasonable value of any unpaid help, any soil bank payments that were included as farm income, and impairments-related work expenses described in 404.1576 that have not been deducted in determining your net earnings from self-employment. We will consider the resulting amount of income from the business to be substantial if-

(1) It averages more than the amounts described in 404.1574(b)(2); or
(2) It averages less than the amounts described in 404.1574(b)(2) but the livelihood which you get from the business is either comparable to what it was before you became severely impaired or is comparable to that of unimpaired self-employed persons in your community who are in the same or similar business as their means of livelihood. 20 CFR 404.1575(c).

claimant can return to past relevant work (PRW). Sometimes, a VE will be called and the evidence will show, after characterization of the past relevant work by a VE, to rule in or out whether a claimant can return to former work. See *Wolfe v. Chater*, 86 F.3d 1072, 1074 (11th Cir. 1996). PRW does not have to exist in significant numbers. *Rater v. Chater*, 73 F.3d 796, 799 (8th Cir. 1996). In the Fourth Circuit, adjudicators may not use a VE or other vocational specialist when making a decision or determination at step four of the sequential evaluation process (step seven in Continuing Disability Review cases) about whether an individual can perform past relevant work. See *Smith v. Bowen*, 837 F.2d 635, 637 (4th Cir. 1987) Acquiescence Ruling (AR) 90-3(4).

(19) **Inconsistent VE testimony.** As an ALJ I have heard testimony from dozens of VEs. Most VEs are professional and come well prepared. Some have no clue regarding the issues. Some come unprepared.84 I do not want a VE to be a sycophant and testify to a result (s)he feels I would like. Given a congruent fact pattern, the results should be similar. They often are not. I have to continue some hearings to give the VE a chance to research issues that should have been anticipated. I don't always get rational responses. I am often placed in a position where I must more fully develop the record.

An ALJ is not bound by the testimony of a VE. *Cline v. Comm'r of Social Security*, 96 F.3d 146 (6th Cir. 1996). If there is a valid reason to reject the testimony, it may be discounted.

(20) **Special issues.**

a. Loss of a hand. The loss of or the loss of the use of an arm or hand is not disabling per se. Cases have held that an individual who has lost either an arm or hand or the use of an arm or hand can still engage in substantial gainful activity. See, e.g., *Knott v. Califano*, 559 F.2d 279 (5th Cir. 1977); *May v. Gardner*, 362 F.2d 616 (6th Cir. 1966); *Odle v. Secretary of Health & Human Services*, 788 F.2d 1158 (6th Cir. 1985). See also Social Security Ruling 96-9p.


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84 For example in one case, a VE testified that there were 25 parking lot attendant jobs in Miami Dade County Florida. The VE was directed to the window, and shown more than 25 car lots in the vicinity of the Court House where parking lot attendants were working.
F.3d 146, 150 (6th Cir. 1996) the claimant needed "three or four hours a day off to irrigate his colostomy." The VE replied that such circumstances "would reduce his ability to perform the job." Id. Cline now argues that the ALJ should have considered these circumstances and the VE's answer to Cline's hypothetical in making his factual findings. As explained in Varley v. Secretary of Health and Human Services, 820 F.2d 777, 779 (6th Cir. 1987) (quoting Podedworny v. Harris, 745 F.2d 210, 218 (3d Cir. 1984)), "Substantial evidence may be produced through reliance on the testimony of a vocational expert in response to a 'hypothetical' question, but only 'if the question accurately portrays [plaintiff's] individual physical and mental impairments.'" Cline claims that the ALJ's hypothetical was inadequate and that his own question should have been the basis for the ALJ's findings. According to Cline, the ALJ should have found no jobs available in the national economy.

We believe that the ALJ properly rejected Cline's hypothetical question. The ALJ decided that Cline's complaints regarding his colostomy were not "supported by or consistent with the evidence" and were not fully credible. Given the various inconsistencies in Cline's testimony and his evasiveness at the hearing, the ALJ could easily have found his complaints to be questionable. Moreover, the ALJ heard testimony by a medical expert, who pointed out that colostomy patients normally adapted to their condition and "managed to live very comfortably with a colostomy." Although Cline's alleged problems were unusual, the expert acknowledged that the medical records showed no indication of any difficulties with the colostomy. Cline himself admitted that he never told his treating physicians anything was wrong with his colostomy. As a result, there was ample reason for rejecting Cline's allegation that he needed three or four hours to irrigate his colostomy in any given 8-hour work period required the ALJ to assume that all of Cline's testimony was credible in questioning the VE, see Varley, 820 F.2d at 780, and thus there was substantial evidence to uphold the ALJ's findings. 96 F.3d at 150.
Future shock.

The administration recently has published proposed regulations that would amend Regulation 201.00(h) to remove the examples:

The following examples are illustrative: Example 1: An individual under age 45 with a high school education can no longer do past work and is restricted to unskilled sedentary jobs because of a severe medically determinable cardiovascular impairment (which does not meet or equal the listings in Appendix I). A permanent injury of the right hand limits the individual to sedentary jobs which do not require bilateral manual dexterity. None of the rules in Appendix 2 are applicable to this particular set of facts, because this individual cannot perform the full range of work defined as sedentary. Since the inability to perform jobs requiring bilateral manual dexterity significantly compromises the only range of work for which the individual is otherwise qualified (i.e., sedentary), a finding of disabled would be appropriate. Example 2: An illiterate 41 year old individual with mild mental retardation (IQ of 78) is restricted to unskilled sedentary work and cannot perform vocationally relevant past work, which had consisted of unskilled agricultural work; his or her particular characteristics do not specifically meet any of the rules in Appendix 2 because cannot perform the full range of work defined as sedentary. In light of the adverse factors which further narrow the range of sedentary work for which this individual is qualified, a finding of disabled is appropriate. 20 CFR Pt. 220, App. 2, § 200.00 (h).

I have never accepted the proposition that examples are binding, rather they are used to demonstrate how the fund of sedentary unskilled jobs was reduced. 85 I envision the fund of jobs as a statistical slice of

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85 One comment on SSAS's Social Security discussion group said: [T]he basis for the section 201.00(h) Example 2, which says that a finding
the 200 occupations established by the Commissioner by administrative
notice. As limitations are imposed upon the relatively narrow base,
there is a reduction of the fund proportional to the intensity, severity
and duration of competently produced symptoms. A high percentage of
claimants who have a combination of impairments and can perform
only "less than sedentary work" have conditions that equal the listings,
and therefore, vocational evaluation does not come into play. It seems
to me that this is a step toward revamping of the process envisioned by
SSA as set forth in its reengineering plans. But it will lead to more
rather than less utilization of VEs, because it limits a judge's option to
render a claimant disabled by analogy to the example.

During the organization of the SSA reengineering project, one
of the proposals was to eliminate the listings and the concept of
equivalency to create a disability "baseline." All impairments would be
evaluated functionally. One rationale for this was to cut administrative
costs. The five step sequential evaluation currently in use is supposed
to be replaced by a four step process.86 In the "Plan for a New

of disabled is appropriate for a younger individual who is exertionally
limited to sedentary unskilled work, is functionally illiterate and who has
an IQ of 78. SSA did not make up this example just to be nice to claimants
and representatives. The basis is in the DOL data as published in the DOT.
The regulations take judicial notice of the DOT. The DOT contains the
information that [name] refers to, that all of the unskilled jobs in the
sedentary base require general intellectual functioning above the bottom
10th percentile. By definition, people with an IQ below 80 are in the
bottom 10th percentile. They therefore would not have the general
intellectual capacity to perform the jobs. Other evidence may prove that
they do have this ability, but absent "other evidence," the presumption, and
the conclusion of disabled, should prevail. SSA had properly taken judicial
notice of this in section 201.00(h) and in the 1996 rulings. By removing
the example, SSA is attempting to make you prove it. Knowledgeable
ALJs, who are performing their role as judge, will not bite at this
disingenuous bait to skirt the regulations. ALJs who are playing advocate
may.

86 The Listings of impairments will be replaced by a medical index:
Index of Disabling Impairments:
If an individual has a medically determinable physical or mental
impairment documented by medically acceptable clinical and laboratory
diagnostic techniques, and the impairment will meet the duration
requirement, the decision maker will compare the individual's
impairment(s) against an index of severely disabling impairments. The
index will describe impairments so severely debilitating that, when
documented, can be presumed to equal a loss of functional ability to
Disability Claim Process,” Social Security Administration, September 1994, signed by former Commissioner Shirley Chater, the idea was to create a vocational instrument that will be in general use and eliminate the need for MA and VE testimony. A study commenced at the Medical College of Virginia to create assessment instruments for disability/rehabilitation programs. In a report after a full investigation, the researchers found that there was no single instrument that will fulfill SSA’s vision. The following findings were made:

1. The search yielded a large number of instruments currently in use.
2. The search yielded no truly global measure of function.
3. Most functional assessments in use relied upon self-reported data.
4. Self-report scales offer few mechanisms for validation of data.

Impairment(s) against an index of severely disabling impairments. The index will describe impairments so severely debilitating that, when documented, can be presumed to equal a loss of functional ability to perform substantial gainful activity without assessing the individual’s functional ability. The index will be consistent with the statutory definition of disability by limiting the presumption of inability to perform substantial gainful activity, without considering age, education and previous work, to a relatively small number of claims with the most severe disabilities. Individual functional ability will be assessed in all other cases in a consistent manner at Step 4 in the process. The medical findings in the index will be as nontechnical as possible and will exclude such things as calibration or standardization requirements for specific tests and/or detailed test results (e.g., pulmonary function studies or electrocardiogram tracings). The index will be easy to understand and simple enough so that laypersons will be able to understand what is required to demonstrate a disabling impairment in the index. Additionally, SSA will draw no conclusions about the effect of an individual’s impairments on his or her ability to function merely because an individual’s impairment(s) does not meet the criteria in the index. Finally, SSA will no longer need the concept of medical equivalence in relation to the index. Because impairments included in the index are presumed to limit functional ability so as to preclude substantial gainful activity without reference to an individual’s age, education and previous work, a combination of impairments, or an impairment closely related to one that is in the index, would be found disabling when an individual’s functional ability is assessed. Therefore, rules for determining equivalence for impairments in the index will not be necessary.

5. Automated functional capacity systems offer more mechanisms for validation of data, but require more time and equipment.

6. Self-report questionnaires can be modified to offset potential exaggeration of symptoms.

7. Predictive and concurrent validity of clinical instruments may not generalize to SSA claimant populations.

8. Specialized training for administering instruments needs to be a consideration in selection.

9. Functional assessments often include performance of social roles and expectations, not just symptoms.

Finally, much discussion between the project and SSA focused on separation of disability determination from assessing employability. From our review, it appears that the direction of functional assessment instrument development is to incorporate not just somatic complaints and symptoms, but the impact of symptoms on the fulfillment of social roles and expectations -- home management, self-care, engagement in social and leisure activities, financial self-support and well-being, and employment. Many of the instruments reviewed defined disability as either partially or totally related to the ability to engage in these types of activities.

Therefore, it looks like the need for VEs (and MEs) will increase. The underlying concept appears to be a slippery slope. VEs tell me that the job market is rapidly changing, and whereas requirements of exertional levels are less strenuous than previously, the skills required to perform the new jobs have an increased skilled vocational preparation. The report substantiates a continuing need to make a vocational assessment. What kind of assessment is another matter.

Moreover, there are unforeseen consequences in predicting the nature of advances in evaluation instruments. As time passes, the

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88 This aspect of the 1994 plan looks to me like it is "social science fiction." I would have hoped that come the millennium public policy and medical science will be able to make all Americans healthy, wealthy and wise.
population increases and life spans become longer. Medical advances can not be accurately predicted. The nature of work is changing rapidly. Is 50 years of age really "closely approaching advanced age?" Is age 55 "advanced" age? Social, economic and political change can not be accurately predicted but may have more impact vocationally than advances in medicine and technology. The unemployment rate may be more important than political "reform." I continue to apply the law as written, but VEs advise me that the grids do not reflect future shock.

Younger individuals who have traumatic injuries are often candidates for vocational rehabilitation. The Supplemental Security Income regulations permit referral for state vocational rehabilitation. I have noted in my decisions that the claim should be reviewed with a view to referral when appropriate. Many claimants have advised me that they returned to a better job after such a referral. SSA also has a prehearing intervention program. SSA produces literature on the subject. I have asked hundreds of younger claimants whether they

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89 For example see, Dunn and Growick, The Relationships Among Unemployment Rate, Case Velocity, Case Costs, and Return-to-Work for Workers Compensation Claimants Referred for Rehabilitation in Ohio, 10 NAARPS JOURNAL 147 (1995). In this study, attempts at vocational rehabilitation are less important statistically that the tenor of the job market.

90 20 CFR 416.1710. There is no equivalent in Table II disability regulations, but Section 221 of the Act discusses vocational rehabilitation.

91 Not every referral has been a success. In one case a claimant in Key West was an alcoholic. He also had a significant mental disorder and he had just started a treatment program when I heard his case. He had been placed on new medication and had high hopes. He vowed to kick his habit. I rendered a favorable decision but suggested review of the case and inserted the referral language from the regulations. An employee from the district office told me that on the date of his DVR appointment, the claimant was enthusiastic; cleaned up for the first time in years. He looked like he was a new man. Unfortunately, DVR in Key West did not have an interpreter, and when the claimant came for his appointment, no one could communicate with him, and no referral could be made.

92 How We Can Help With Vocational Rehabilitation, SSA Publication No. 05-10050, (June 1997, ICN 460280):

Referring People With Disabilities To State Vocational Rehabilitation Agencies:
When a person files an application for disability benefits, specially trained employees at the state Disability Determination Services (DDS) office review the application to see whether the person's medical condition qualifies him or her for disability benefits. At the same time, they also evaluate the person's rehabilitation potential. If it appears that the person may benefit from vocational rehabilitation services, they refer the applicant
were asked to consider state rehabilitation, but so far, none have been familiar with the procedure outlined by the literature. SSA also has a procedure to refer claimants to private rehabilitation counselors. Several VEs who appear before me say that they considered taking referrals, but that it is not economically feasible to do so. They also have the threat that they may have potential conflicts of interest if they become active.

Conclusion.

Social security disability hearings are nonadversarial in nature. ALJs are, therefore, not only finders of fact and law, but must act as prosecutor and defense attorney on occasion. This is, from experience, a difficult task. There are few hard lines and edges for guidance.

If you did not have an interest in improving professional quality you would not have made it through this paper. Professionalism is synonymous with effectiveness. To be effective is to be able to provide

to the state vocational rehabilitation agency.

SSA sends information about the applicant's medical condition and work history to the rehabilitation provider. Rehabilitation counselors evaluate this information. They may contact the person to obtain further information and may request that the individual come in for an interview. At that time, the counselor will try to find out more about the person's interests and employment goals. Clients are given an opportunity to discuss how the counselor can work with them to achieve their job goals. If the counselor believes the vocational rehabilitation agency can provide the rehabilitation services that are needed, the counselor and client will jointly develop a written plan describing the job goal and the services the vocational rehabilitation agency will provide to reach that goal. This written plan is tailored to the needs of the client.

93 While fishing for more medical records, the Florida Bureau does an excellent job in evaluation of prospective clients. They often use the same consultative examiners used by the state agency, but do a thorough job of evaluation of vocational potential. Unless I ask, I am rarely told about the existence of these records. I have yet to meet a single applicant who was referred to a DVR counselor by the district office or by the state agency.

94 If the state agency is unable to serve the individual, we may refer that individual to an alternate participant in our vocational rehabilitation program. An alternate participant is any nonstate public or private agency that is qualified to serve Social Security disability beneficiaries. Such providers must be licensed, certified or accredited to provide vocational rehabilitation services within their state and meet other requirements that assure us they can provide clients with the necessary help. SSA pays these alternate providers for the costs of their services under the same conditions that apply for state vocational rehabilitation agencies.

95 ALJ's also hear cases involving Medicare, retirement issues, income and resource issues, relation and paternity issues, and other ancillary matters. This discussion has been limited to disability evaluation.
evidence that is clear and convincing. One expects a professional presentation. As members of the bar (and other professions) we have the capacity and the duty to make Social Security practice as professional as possible.
HALLEX EXCERPTS

I-2-550 When to Obtain Vocational Expert Opinion (Revised 04/94)

A. When an ALJ May Need to Obtain VE Opinion

An ALJ may need to obtain a VE's opinion, either in testimony at a hearing or in written responses to interrogatories, when:

1. the ALJ is determining whether the claimant's impairment(s) prevents the performance of past relevant work [Exception: In the Fourth Circuit, adjudicators may not use a VE or other vocational specialist when making a decision or determination at step four of the sequential evaluation process (step seven in Continuing Disability Review cases) about whether an individual can perform past relevant work. See Acquiescence Ruling (AR) 90-3(4), Smith v. Bowen]; or

2. the ALJ is determining whether the claimant's impairment(s) prevents the performance of any other work and he or she cannot decide the case under any of the tables in Appendix 2, Subpart P of Regulations No. 4, because:
   the claimant's residual functional capacity falls between two exertional levels; e.g., the claimant may be able to perform more than the full range of sedentary work, but less than the full range of light work;
   the claimant's sole impairment is nonexertional; or
   the claimant has a combination of exertional and nonexertional impairments; e.g., back impairments with limited sitting or standing tolerance.

B. When the ALJ Must Obtain VE Opinion

The ALJ must obtain a VE's opinion, either in testimony at a hearing or in responses to written interrogatories, when directed by the Appeals Council or a court.

I-2-552 Selecting a Vocational Expert (Revised 04/94)

A. General

All ALJ contact with a VE about a case must be in writing or at an open hearing, and all correspondence with the VE must be made part of the record.

When an ALJ determines that VE testimony is needed, the ALJ or designee will inform the claimant and the representative by placing
a statement to that effect in the "REMARKS" section of the Notice of Hearing. (See I-2-315, Notice of Hearing.)

The ALJ or designee will, before the hearing, furnish the VE with copies of all evidence relating to the claimant's vocational history. If additional vocational evidence is received at the hearing, the ALJ will provide it to the VE for review before the VE testifies.

B. HO Staff Recommends Use of VE

Before scheduling the hearing, the ALJ or designee must thoroughly review the case to determine what, if any, additional evidence is needed to decide the case. If a designee performs the review and believes that VE opinion is needed, the designee will make that recommendation to the ALJ.

C. ALJ Determines that VE Opinion is Needed

If the ALJ determines (or agrees) that VE opinion is needed, the ALJ will decide the manner in which to receive the VE opinion (i.e., whether to receive the opinion in testimony at the hearing or in response to written interrogatories). (See I-2-530, Medical or Vocational Expert Opinion -- General.)

D. Selection of VE from RO Roster

Each RO maintains a roster of VEs who have agreed to provide impartial expert opinion pursuant to a BPA with OHA. (See I-2-531, Blanket Purchase Agreements.) The ALJ or designee must select a VE from the roster in rotation to the extent possible; i.e., when an ALJ selects a VE to provide expert opinion in a case, that VE will go to the bottom of the roster and will not be called again by that ALJ or any other ALJ in the HO until all other VEs on the roster are called. If an ALJ decides to use a VE from the roster, the HO staff will assign a purchase order number and complete a Form HA-590 (Contractor's Invoice).

E. Selection of VE Not on RO Roster

An ALJ may use a VE who does not have a BPA with OHA if no VE on the roster is available, or there are other extenuating circumstances which require the one-time purchase of such VE's services.

The same terms and conditions that apply to a VE providing services pursuant to a BPA also apply to a VE providing services without a BPA. Authorize payment to a VE without a BPA by completing Optional Form 347, Order for Supplies or Services.
A. Requesting VE Testimony -- Completion of Form HA-L8

To request a VE to testify at a hearing, the ALJ or the HO staff will complete Form HA-L8, Letter to Vocational Consultant Requesting Attendance at Hearing. The HO staff must modify the form as necessary to adapt it to the specific case and include:

1. all identifying information;
2. the issues to be considered; and
3. the name and telephone number of an HO staff person the VE may contact if he or she has any questions or problems.

B. Distribution of Form HA-L8

Distribute Form HA-L8 as follows:

1. Send the original to the VE, along with any necessary enclosures (See I-2-554 C., below.)
2. Send the white copies to the claimant and the representative, along with a copy of the proposed exhibits.
3. Place the green copy in the CF.
4. Place the pink copy in the HO file.

C. Providing the VE with Relevant Evidence

The ALT must provide the VE with relevant evidence that will assist the VE in providing the vocational opinion. This evidence must include:

1. photocopies of the pertinent evidence arranged in chronological order;
2. a copy of the VE's professional qualifications for verification;
NOTE: Do not include the professional qualifications of other sources.
3. a list of the proposed exhibits using Form HA-540, Exhibits List;
4. copies of all prior correspondence between the ALJ and the VE, if any;
5. a transcript or summary of any vocational testimony provided in a prior hearing on the same case; and
6. a copy of pertinent parts of the VE orientation package if there is no BPA with the VE.

During the opening statement, the ALJ must explain why VE testimony is necessary. The VE may attend the entire hearing, but this is not required.
Before the VE testifies, the ALJ must:
ensure on the record that the VE has examined all vocational
evidence of record;
ensure that the record contains an accurate statement of the VE's
professional qualifications;
give the claimant and the representative an opportunity to ask
the VE questions about his or her professional qualifications; and
summarize the opening statement or relevant testimony on the
record (e.g., testimony regarding the claimant's vocational history) if the
VE was not present.
NOTE: All VE testimony must be on the record.
The ALJ should take care to elicit useful and objective
testimony from the VE. For examples of the types of questions the ALJ
might ask, see I-2-590, Samples, Sample 5, Interrogatories to
Vocational Expert.
If the VE's reply to an ALJ's question is ambiguous or overly technical,
the ALJ must follow-up with more specific questions. An ALJ must
not question a VE about any matter which is not within the VE's area
of expertise and responsibility. For example, the ALJ must not ask a
VE about medical matters or how the ALJ should decide the case.
If certain VE testimony is based on an assumption, the VE or
ALJ must clearly describe the assumption on the record.
If a claimant raises an objection about a VE's opinion, the ALJ
must rule on the objection and discuss any ruling in the decision.
A. Identifying the Need for VE Opinion After the Hearing
Although these situations occur relatively infrequently, the ALJ
may identify the need for VE evidence during or after the hearing. For
example:
The claimant may submit evidence during or after the hearing
which establishes the existence of a severe impairment which precludes
use of the medical-vocational "Grid" regulations.
Evidence submitted after the hearing indicates that the
claimant's functional limitations differ from those covered in the
hypothetical questions to which the VE responded at the hearing.
B. Obtaining VE Opinion After the Hearing
When an ALJ decides to obtain evidence from a VE after the
initial hearing, the ALJ must determine the most appropriate method to
obtain this evidence consistent with the claimant's rights with respect
to posthearing evidence. (See I-2-700, Posthearing Actions.) Live
testimony with opportunity to question the VE is the preferred method for obtaining VE opinion, but written interrogatories may be used. (See I-2-530, Medical or Vocational Expert Opinion -- General.)

NOTE: Regardless of the method used, or whether the claimant is represented, the ALJ must question the VE in lay terms and, to the extent possible, elicit responses in terms which the claimant can understand.

C. Determining the Most Appropriate Method to Obtain VE Opinion After the Hearing

Some of the factors that the ALJ must weigh in determining whether it is more appropriate to obtain the evidence by requesting a VE to appear and testify at a supplemental hearing or answer written interrogatories are:

1. whether and when a VE is available to testify in person;
2. the feasibility of scheduling a hearing at a remote hearing site and the availability of a VE at that location; and
3. the potential for delays if the ALJ schedules a supplemental hearing.

I-2-557 Obtaining Vocational Expert Opinion Through Interrogatories (Revised 04/94)96

96 Although not directly on point, the 11th Circuit has limited the use of post hearing interrogatories in a medical setting. Demenech v. Secretary of the Department of Health and Human Services, 913 F.2d 882, 884-885, 31 S.S.R.S. 99, 101-102, CCH ¶ 15,709A (11th Cir. 1990):

This court previously has held that it violates a claimant's right to procedural due process for the Secretary to deny a claimant Social Security benefits based upon post-hearing medical reports without giving the claimant an opportunity to subpoena and cross-examine the authors of such reports. Hudson v. Heckler, 755 F.2d 781, 784 (11th Cir. 1985); Cowart v. Schweiker, 662 F.2d 731, 737 (11th Cir. 1981). The facts of this case do not compel a departure from this rule. The record demonstrates that Dr. Goldberg's report was the primary basis for the ALJ's decision that Demenech was no longer disabled. . . . In fact, the ALJ used Dr. Goldberg's report to discredit both Demenech's own testimony concerning his condition and Dr. Moore's evaluation of his condition. . . .

. . . We therefore conclude that any reliance upon Dr. Goldberg's report was crucial to the ALJ's determination and that the ALJ should have allowed Demenech to depose and cross-examine Dr. Goldberg before rendering a decision.

. . . Given the ALJ's level of reliance upon Dr. Goldberg's report, and the fact
A. General
Live testimony with opportunity to question the VE is the preferred method for obtaining VE opinion, but written interrogatories may be used. (See 1-2-530, Medical or Vocational Expert Opinion -- General.) Written interrogatories are often used when the ALJ receives posthearing evidence, but can be used at other points in the hearing process. The claimant or representative may ask the ALJ to obtain interrogatories, or the ALJ may decide to use them on his or her own initiative.

B. Preparing Interrogatories
When preparing interrogatories, the ALJ must:
1. phrase each question in a way that will not suggest any specific conclusion, but will elicit a clear and complete response that can ultimately be expressed (to the extent possible) in lay terms (See I-2-590, Sample 5, Interrogatories to Vocational Expert.); and
2. leave sufficient space between the questions for the answers.

C. Determining Whether the Claimant or Representative Has Objections
1. General
Before releasing the interrogatories to the VE, the ALJ must transmit the proposed interrogatories to the representative with a copy to the claimant, or to the claimant if not represented, to determine if they object to the use of interrogatories in general, object to any particular interrogatory, or wish to propose other interrogatories. (See I-2-590 Samples, Sample 8, Letter to Transmit Interrogatories to Claimant or Representative.)

2. Claimant or Representative Objects to Use of Interrogatories in General
If the claimant or representative objects to the use of interrogatories in general, the ALJ must consider the claimant's or

that it contradicted all the other medical evidence in the case, the ALJ should have permitted Demenech to cross-examine Dr. Goldberg, and his failure to do so constituted an abuse of discretion."
representative's reason(s) for believing that the ALJ cannot establish facts relevant to the issues in the case by means of written interrogatories, and rule on the objection. Factors that the ALJ may consider in determining whether to grant a claimant's or representative's request to question a VE at a hearing or supplemental hearing include, but are not limited to:

- the preferability of live testimony as the method for obtaining expert opinion evidence (See I-2-530, Medical or Vocational Expert Opinion -- General.);
- whether a hearing is needed to address the claimant's or representative's allegations of bias on the part of the VE; and
- whether a hearing is needed to address the VE's qualifications.

3. Claimant or Representative Objects to a Particular Interrogatory or Proposes Other Interrogatories

If a claimant or representative objects to a particular interrogatory or proposes other interrogatories, the ALJ must rule on the objection or proposal. Factors that the ALJ may consider in determining whether to revise or expand the interrogatories include, but are not limited to, whether the claimant's or representative's comments or proposed additions are material to the issues in the case and are based on the evidence of record.

4. ALJ Rules Against the Claimant's or Representative's Objection(s) or Proposal(s)

If the ALJ rules against the claimant's or representative's objection(s) or proposal(s), he or she must:
- a. inform them in writing of the ruling, and the reason(s) for it;
- b. enter a copy of the ruling into the record as an exhibit; and
- c. address the objection(s) or proposal(s) and provide the rationale for the ruling in the hearing decision.

5. ALJ Revises or Expands the Interrogatories

If the ALJ revises or expands the interrogatories, he or she must submit the revised or expanded interrogatories to the claimant or representative for further comment. (See I-2-590 Samples, Sample 9, Letter to Transmit Revised Interrogatories to Claimant or Representative.)

D. Sending Interrogatories to the VE

1. Initial Transmission of Interrogatories to the VE
After the claimant or representative has responded to the ALJ's proposed interrogatories and all issues have been resolved, or after the claimant or representative fail to respond, the ALJ will send the interrogatories to the VE along with the following:

a. A letter explaining the request and the requested method of response. (See I-2-590 Samples, Sample 6, Letter to Expert Witness, Written Interrogatories.) Include all identifying information in the letter. Request a response within 10 days. Mark one copy of the letter as an exhibit and place it in the CF. Place a copy of the letter in the HO file.

b. Photocopies of the pertinent evidence, arranged in chronological order. Include the following:
- A list of the proposed exhibits (Form HA-540, Exhibits List) and
- A copy of the VE's professional qualifications for verification.

NOTE: Do not include the professional qualifications of any other sources.

c. A transcript or summary of any pertinent testimony provided in an earlier hearing.

d. A statement of the issues in the case.

e. A Form HA-590 (Contractor's Invoice) for signature by the VE.

NOTE: If OHA does not have a BPA with the VE, provide any pertinent VE orientation materials available, and use Optional Form 347 (Order for Supplies or Services) to obtain payment.

f. The name and telephone number of an HO contact person.

g. A self-addressed, postage paid envelope large enough for the VE to return all enclosures.

2. Subsequent Transmission of Interrogatories to a VE

When an ALJ receives new evidence after a VE has provided testimony or responded to interrogatories, and decides to forward the new evidence to the VE for review with interrogatories to determine if it affects the prior testimony or response, the ALJ must:

a. Transmit the interrogatories to the representative with a copy to the claimant, or to the claimant if
not represented, to determine if they have any objection or proposal, and rule on any objection or proposal. (See I-2-557 A. through C.)

b. After the claimant or representative has responded and all issues have been resolved, or after the claimant or representative fails to respond, send the interrogatories to the VE with:
   a letter explaining the request and the requested method of response (See I-2-590 Samples, Sample 7, Transmittal Letter to Expert Witness --Evidence Received After Interrogatories. Include all identifying information in the letter and request a response within 10 days.);
   a photocopy of the new evidence;
   copies of pertinent evidentiary documents the VE previously reviewed; and
   the name and telephone number of an HO contact.

c. Distribute the letter as follows:
   send the original to the VE;
   send copies to the claimant and the representative;
   mark one copy of the letter as an exhibit and place it in the CF;
   and place a copy in the HO file.

d. Diary the case for the requested response date, and make the appropriate follow-up contacts.

I-2-558 Action When ALJ Receives Vocational Expert's Responses to Interrogatories (Revised 04/94)

When the ALJ receives a VE's response to his or her interrogatories, the ALJ must:

Provide a copy of the response to the claimant and the representative and notify them of the right to comment, submit further relevant evidence, propose additional interrogatories to the VE, and request a supplemental hearing with opportunity to question the VE at the supplemental hearing. The ALJ will provide the claimant and the representative with the opportunity to review the VE's response before making it an exhibit, unless they have waived the right to examine the evidence or the evidence supports a fully favorable decision. (See I-2-730, Proffer Procedures; I-2-735, Entering Posthearing Evidence; I-2-590 Sample 2, Letter to Representative Enclosing Copy of New
Evidence; and I-2-590 Sample 3, Letter to Unrepresented Claimant Enclosing Copy of New Evidence.)

Rule on any objection or request by the claimant or the representative regarding the VE's response to the interrogatories. The claimant or representative may propose submission of additional interrogatories to the VE or request a supplemental hearing with opportunity to question the VE at the supplemental hearing. The claimant is entitled to ask the VE questions to the extent necessary to inquire fully into the matters at issue.

If the claimant requests a supplemental hearing, the ALJ must grant the request, unless the ALJ receives additional documentary evidence that supports a fully favorable decision. If the claimant requests the opportunity to question the VE at the supplemental hearing, the ALJ should apply the provisions of I-2-530, Medical or Vocational Expert Opinion -- General, and I-2-556, Obtaining Vocational Expert Opinion After the Hearing, to determine whether live testimony is the most appropriate method to obtain the VE evidence.

If the ALJ requests the VE to appear at a supplemental hearing and the VE declines to appear, the ALJ should apply the provisions of I-2-578, Use of Subpoenas -- General, to determine if the claimant should be afforded use of the subpoena to compel the VE to appear. If a subpoena is issued, the procedures in I-2-580, Preparation and Service of a Subpoena, and those in I-2-582, Noncompliance with a Subpoena, apply.

Mark as exhibits and enter into the record all correspondence between the ALJ and the VE, admissible questions and responses, additional interrogatories and responses, and proffer documents (including responses), and include in the hearing decision the rationale for ruling against any objection.

I-2-560 Action When ALJ Receives New Evidence After a Vocational Expert Has Provided an Opinion (Added 04/94)

When an ALJ receives new evidence after a VE has provided testimony or responded to interrogatories, the ALJ may decide to request the VE to review the new evidence to determine if it affects the VE's testimony or response. If an ALJ so decides, the ALJ must determine whether to receive the additional comments from the VE via interrogatories or in testimony at a supplemental hearing. (See I-2-530, Medical or Vocational Expert Opinion -- General.) The factors in I-2-556 C. that guide the ALJ's initial decision regarding how to obtain
VE opinion after the hearing should also guide the ALJ's decision on how to obtain VE opinion in response to new evidence.

1. If the ALJ decides to forward the new evidence to the VE for review through interrogatories, he or she will use the procedures in I-2-557 D. 2., Subsequent Transmission of Interrogatories to a VE.

2. If the ALJ determines that a supplemental hearing is necessary, the ALJ will notify the claimant. The HO staff will arrange for the presence of the VE at the supplemental hearing, using the procedures set forth in I-2-554, Obtaining Vocational Expert Testimony.

NOTE: If the VE who testified at the hearing or provided responses to written interrogatories is no longer available to either review the new evidence through interrogatories or appear at a supplemental hearing, the ALJ will obtain the services of a different VE, following the procedures set forth in I-2-552, Selecting a Vocational Expert.

1-2-561 Use of Dually-Qualified Vocational and Medical Experts (Revised 04/94)

A. General

In general, the rosters of MEs and VEs are sufficient to meet OHA's needs for expert witness testimony. Except as provided below, OHA will not authorize use of an individual who possesses both medical and vocational specialties to serve as both an ME and a VE. If an individual applies to act as both an ME and VE and meets the qualification standards for both, OHA will assess the HO's expert witness needs and offer to place the individual on either the ME or the VE roster. For the duration of the one-year BPA, the HO may use that expert only in the capacity provided for in the BPA.

However, because of the lack of available MEs and VEs near some remote hearing sites and the unwillingness of some experts to travel to remote hearing sites, the RO may, in exceptional circumstances, enter into a dual BPA with individuals who are qualified as both ME and VE.

Dual BPAs are permissible only when the HO documents to the satisfaction of the Regional Chief Administrative Law Judge (RCALJ) that the ME or VE roster is insufficient to meet the HO's current needs for expert testimony. Because of OHA's recruitment efforts, this situation should seldom occur. The HO may use a dually-qualified expert as either an ME or VE, but not as both in the same case.

B. HO Justification
If an HO wishes to have an individual available as both an ME and VE or to renew a dual BPA, the Hearing Office Chief Administrative Law Judge (HOCALJ) must send a written justification to the RCALJ. The justification must contain:

1. a list of the site(s) at which the expert will be used and in what primary capacity; i.e., as an ME or a VE;
2. a resume from the expert documenting his or her qualifications to testify as both an ME and a VE and a statement of availability for the listed site(s);
3. an explanation of why psychiatrists or clinical psychologists (or VEs, if applicable) on the HO's roster or neighboring HO's rosters are unavailable to testify at the listed site(s);
4. an estimate of the number of cases on an annual basis in which the expert will be used as an ME or a VE; and
5. a summary of the recruitment efforts by the HO, within the last six months, to identify individuals or potential sources of clinical psychologists or psychiatrists (or VEs, if applicable) to serve as expert witnesses at the listed site(s).

C. RO Review of HO Justification

The RCALJ will review the justification and take the following actions:

1. Return to the HO any justification that does not comply with the requirements listed above.
2. Decline to grant a dual BPA if:
   a. the HO has psychiatrists or clinical psychologists (or VEs, if applicable) on its roster who are available to testify at the site(s) listed;
   b. neighboring HO's have clinical psychologists or psychiatrists (or VEs, if applicable) on their rosters who would be available at the site(s) listed; or
   c. the RO can recruit a qualified expert within 60 days.
3. Defer a determination if neither the RO nor the requesting HO have made any recruitment efforts within the last six months from the date of the HO request for a dual BPA, until after assessing the potential for recruiting a qualified individual(s).
4. After consultation with the Office of the Chief Administrative Law Judge, enter into a dual BPA if the circumstances demonstrate that it is the only way to obtain expert testimony at the listed site(s). The BPA will be restricted to the listed site(s).
If the RO grants a dual BPA, the RO and the HO must continue recruitment efforts. As soon as the RO recruits an additional expert(s) and there is no longer a need to use the dual expert in both capacities, the RO will notify both the HO and the expert with the dual BPA that he or she will only be used as a VE or ME (whichever is applicable) for the remaining period of the arrangement.