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# **MEDICAL EXPERT TESTIMONY IN ADMINISTRATIVE HEARINGS**

**Daniel F. Solomon\***

This discussion is intended to address common issues in expert witness testimony in administrative hearings. Some of the material is derived from Social Security Administration, United States Department of Labor and other sources, but is used only as an example rather than as black letter law. Each agency has its own internal rules and regulations. In fact, some agencies have several unique statutes to enforce. United States Department of Labor Judges may hear cases under the Longshore Act, Black Lung and certain workers' compensation claims. State Administrative Law Judges in a central panel may hear workers' compensation claims, disability retirement cases for state employees, domestic relations related cases, involuntary commitments, etc. Medical experts may be necessary in all of the above and the purpose of the testimony may vary greatly. Although the materials stem from seminars produced by and for judges, these materials are intended for the general reader. The opinions expressed do not represent the views of the Office of Hearings and Appeals, Social Security Administration or any other group. However, Social Security practice is emphasized.

## **Why There Is Confusion:**

Jury trials are part of the American culture and are celebrated in fiction. Experts often have more experience in civil litigation than in administrative hearings and are exposed to the popularization of trials for their entertainment value. The right to a trial by a jury of one's peers is celebrated in literature, art and movies. There isn't a lot of folklore about administrative hearings. Administrative hearings are less formal and often less dramatic than jury trials. In a jury trial, it is a given that the jury has to be educated on an issue, and experts are often used to

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meet a point of law, but they are often selected for their persuasive value rather than for a learned opinion. Sometimes it seems the true value of a case is not in liability or damages, but in the comparable values of dueling experts. Sometimes form triumphs over substance.

In most administrative settings the judge is both trier of fact and law, and often the judge has some considerable administrative expertise. Expert medical opinion is taken to assist the judge as the trier of fact.<sup>1</sup> On one hand the judge usually does not require the kind of explanation that a jury would need, but on the other, the judge needs to develop and protect the record. In some settings an expert will testify only by deposition, whereas in others live testimony is always needed. It is possible that opinion evidence can be provided by someone other than a qualified expert.<sup>2</sup> Medical testimony often comes from dentists, psychologists, chiropractors, social workers, physical and other therapists and other medical related practitioners.

Are there limits to the admissibility of expert medical opinion? Does *Daubert*<sup>3</sup> apply in administrative settings? How is alternative medicine evaluated? *Daubert* is an exploration of what evidence can be shown to a jury. Usually, wide latitude is given to the admission of evidence in administrative proceedings. As a general rule, a judge can admit almost any testimony into evidence and cull the evidence in terms of weight in discussion. A judge is empowered to expedite

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<sup>1</sup> See 29 C.F.R. § 18.702 Testimony by experts in OCALJ, Department of Labor hearings. See also FED. R. EVID. 702.

<sup>2</sup> See 29 C.F.R. § 18.701. The witness' testimony "is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact at issue." See also FED. R. EVID. 701.

<sup>3</sup>*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), establishes a two-part test for the admissibility of scientific evidence (quoting FED. R. EVID. 702). First, the court must decide whether the subject of the expert's testimony is truly "scientific . . . knowledge." *Id.* at 2794. This requires an exploration of the theoretical underpinnings of the proffered evidence to ensure that it is grounded in the methods and procedures of science and constitutes more than mere unsupported speculation. *Id.* Only evidence that is "derived by the scientific method" possesses sufficient evidentiary reliability to be admissible under Rule 702. *Id.* Second, the court must determine whether the expert testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 2795. See also FED. R. EVID. 702.

testimony.<sup>4</sup>

Therefore, even if "junk science" is admitted into the record, the judge must learn the language of medicine to be able to understand the evidence and to articulate a reasoned decision. The expectation is that a decision is based, in part, on the reliance of the expert. To justify credibility, the medical expert must express an opinion in the language of the law of the jurisdiction, since the reason for the testimony is to establish the basis for decision.

The law at hand may be similar to some other body of law, but the testimony, to be useful, has to address the matter directly at issue. In some settings, such as before the Social Security Administration Office of Hearings and Appeals, one expert is often called to four or more hearings in a single day. The issues may vary from direct to abstract, for example, whether the condition meets specific criteria to whether there may be reasonable (or unreasonable) inferences gleaned from evidence of record.<sup>5</sup>

One rationalization often given for the divergence between the points of view of physicians and lawyers is the method of education. Lawyers are taught to argue, through Socratic debate, while doctors are taught through the scientific method.

An administrative hearing yields a legal determination subject to appeal. Therefore, whether scientific method is superior is irrelevant, since the judge must, in administrative hearings, have the last word and reduce the decision to writing. Although the evidence comes from medical sources and the proof must meet a medical standard, the final decision is a legal determination set forth by findings of fact and conclusions of law.

### **Medical/legal Perspective:**

In some jurisdictions the parties do all of the questioning. In others, such as before the Social Security Administration, the judge has a duty to develop the record, and must inquire of the witness.

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<sup>4</sup>See, e.g., C.F.R. § 18.611(a) Control by judge. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting witness as to: (1) Make the interrogation and presentation effective for the ascertainment of truth, (2) Avoid needless consumption of time, and (3) Protect witnesses from harassment or undue embarrassment.

<sup>5</sup>See Social Security Ruling 83-20.

These materials stem from the American Bar Association, Judicial Division, National Conference of Administrative Law Judges 1997 Spring and Fall Symposiums, "A Judicial Approach to Technical Evidence and Expert Witnesses" presented in Washington, D.C., and Minneapolis, Minn. Panelists included judges and lawyers as well as experts from several disciplines. Our panelists were chosen because they work as medical experts in several levels of administrative law. Two of them are involved in establishing medical policy for the Social Security Administration. A third appears regularly as an expert witness in many jurisdictions. As expected, completely different perspectives were presented.

As lawyers, we often are confronted by two types of experts. The first wants to tell the narrative from a single perspective. We would be told what questions to ask them at trial or hearing. The second would ask, "What should I say?" As judges, we want to be able to rely on testimony that is cogent, thorough and given in context of the proceeding. In every Social Security hearing I ask the medical expert whether it is understood that the testimony must be impartial.<sup>6</sup>

In most jurisdictions, a judge has discretion whether expert medical opinion is necessary. In an adversarial setting, the parties can, in fact, request that an expert medical witness be appointed, or that an independent medical examiner be appointed to give an examination.<sup>7</sup> Social Security hearings are a nonadversarial setting, comparable to a proof of claim. The case proceeds until the claimant has proven "an

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<sup>6</sup>That is because Administrative Law Judges in Social Security hearings have a duty to develop a full record. A Social Security disability hearing is a nonadversarial proceeding, in which the ALJ has a basic duty of inquiry, "to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts." *Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983) (Brennan, J., concurring). The duty of inquiry also extends to the district court in its review of the ALJ's determination. *Hill v. Morton*, 525 F.2d 327, 328 (10th Cir. 1975) (placing "an affirmative duty upon a district court reviewing administrative action to engage in substantial inquiry of the relevant facts as developed in the administrative record and then to define, specifically, those facts which it deems supportive of the agency's decision.").

<sup>7</sup>See, e.g., 29 C.F.R. § 18.706 Judge appointed experts. An ALJ may appoint an expert on the motion of either party. In the Social Security Administration there are several layers of expert witnesses. There are disability determination medical experts who review a case at the initial and reconsidered determinations. There are consultative evaluators to the DDSs and State Agencies who perform hands-on examinations and render reports. There are medical advisors who are called by ALJs in certain situations. The expert is called to help at steps two and three of the sequential evaluation.

inability to perform substantial gainful activities".<sup>8</sup> However, in order to process cases at high volume, judicial discretion is limited by the law and regulations. The sequential evaluation method is a five-step process that is to be used in every disability case.<sup>9</sup> Other regulations proscribe how evidence is to be evaluated.<sup>10</sup> In addition,

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<sup>8</sup>See 20 C.F.R. § 404.1520(a) and § 416.920(a).

<sup>9</sup>See 20 C.F.R. § 404.1520 and § 416.920 et seq. Social Security Administration Regulations Nos. 4 and 16 require the 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 C.F.R. § 404.1520(b) and § 416.920(b));
- (2) An individual who does not have a "severe impairment" will not be found to be "disabled" (20 C.F.R. §§ 404.1520(c) and 416.920(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 C.F.R. § 404.1520(d) and § 416.920(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 C.F.R. §§ 404.1520(e) and 416.920(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 C.F.R. §§ 404.1520(f)(1) and 416.920(f)(1)).

<sup>10</sup>See 20 C.F.R. § 404.1527 Evaluating medical opinions about your impairment(s) or disability. (a) General. (1) You can only be found disabled if you are unable to do any substantial gainful activity 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. See § 404.1505. Your impairment must result from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. See § 404.1508. (2) Evidence that you submit or that we obtain may contain medical opinions. Medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions. (b) How we consider medical opinions. In deciding whether you are disabled, we will always consider the medical opinions in your case record together with the rest of the relevant evidence we receive. (c) Making disability determinations. After we review all of the evidence relevant to your claim, including medical opinions, we make findings about what the evidence shows. (1) If all of the evidence we receive, including all medical opinion(s), is consistent, and there is sufficient evidence for us to decide whether you are disabled, we will make our determination or decision based on that evidence. (2) If any of the evidence in your case record, including any medical opinion(s), is inconsistent with other evidence or is internally inconsistent, we will weigh all of the evidence and see whether we can decide whether you are disabled based on the evidence we have. (3) If the evidence is

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consistent but we do not have sufficient evidence to decide whether you are disabled, or if after weighing the evidence we decide we cannot reach a conclusion about whether you are disabled, we have the provisions of §§ 404.1512 and 404.1519 through 404.1519(h). We will request additional existing records, recontact your treating sources or any other examining sources, ask you to undergo a consultative examination at our expense, or ask you or others for more information. We will consider any additional evidence we receive together with the evidence we already have. (4) When there are inconsistencies in the evidence that cannot be resolved, or when despite efforts to obtain additional evidence the evidence is not complete, we will make a determination or decision based on the evidence we have. (d) How we weigh medical opinions. Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source's opinion controlling weight under paragraph (d)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion. (1) Examining relationship. Generally, we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you. (2) Treatment relationship. Generally, opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed below, as well as the factors in paragraphs (d)(3) in determining the weight. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion. (i) Length of the treatment relationship and the frequency of examination. Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it if it were from a nontreating source. (ii) Nature and extent of the treatment relationship. Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided and at the kinds and extent of examinations and testing the source has performed or ordered from specialists and independent laboratories. For example, if your ophthalmologist notices that you have complained of neck pain during your eye examinations, we will consider his or her opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain. When the treating source has reasonable knowledge of your impairment(s), we will give the source's opinion more weight than we would give it if it were from a nontreating source. (3) Supportability. The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion. The better an explanation a source provides for an opinion, the more weight we will give that opinion. Furthermore, because nonexamining sources have no examining or treating relationship with you, the weight we will give their opinions will depend on the degree to which they provide supporting explanations for their opinions. We will evaluate the degree to which these opinions consider all of the pertinent evidence in your claim, including opinions of treating and other examining sources. (4) Consistency. Generally, the more consistent an

certain Social Security Rulings have been promulgated to interpret the Regulations. Most recently Social Security Rulings 96-1p to 9p were the subject of training sessions to attempt to have adjudicators decide cases "on one page." Included are provisions directing administrative law judges to give weight to opinions of nonexamining state agency

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opinion is with the record as a whole, the more weight we will give to that opinion. (5) Specialization. We generally give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist. (6) Other factors. When we consider how much weight to give to a medical opinion, we will also consider any factors you or others bring to our attention, or of which we are aware, which tend to support or contradict the opinion. (e) Medical source opinions on issues reserved to the Secretary. (1) Opinions that you are disabled. We are responsible for making the determination or decision about whether you meet the statutory definition of disability. In so doing, we review all of the medical findings and other evidence that support a medical source's statement that you are disabled. A statement by a medical source that you a "unable to work" does not mean that we will determine that you are disabled. (2) Other opinions on issues reserved to the Secretary. We use medical sources, including your treating source, to provide evidence, including opinions, on the nature and severity of your impairment(s). Although we consider opinions from treating and examining sources on issues such as whether your impairment(s) meets or equals the requirements of any impairment(s) in the Listing of Impairments in Appendix 1 of this subpart, your residual functional capacity (*see* §§ 404.1545 and 404.1546), or the application of vocational factors, the final responsibility for deciding these issues is reserved to the Secretary. We will not give any special significance to the source of the opinion on these issues. (f) Opinions of nonexamining medical and psychological consultants and other nonexamining physicians and psychologists. We consider nonexamining physicians and psychologists to be opinion evidence. Opinions of nonexamining sources on the nature and severity of your impairments, we apply the rules set forth in paragraphs (a) through (e) of this section. In addition, the following rules apply to State agency medical and psychological consultants, and to medical advisors we consult in connection with administrative law judge hearings and Appeals Council review. (1) At the initial and reconsideration steps in the administrative review process, except in disability hearings, State agency medical and psychological consultants are members of the teams that make the determinations of disability. A State agency medical or psychological consultant will consider the evidence in your case record and make findings of fact about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or equals the requirements for any impairment listed in Appendix 1 to this subpart....These administrative findings of fact are based on the evidence in your case record but are not themselves evidence at these steps. (2) ALJs are responsible for reviewing the evidence and making findings of fact and conclusions of law. ALJs are not bound by any findings made by State agency medical or psychological consultants. However, these findings are considered at the hearing level. *See* § 404.1512(b)(6). When ALJs consider these findings, they will evaluate them using the rules set forth in paragraphs (a) through (e) of this section. Also, ALJs may ask for and consider the opinions of medical advisors on the nature and severity of your impairment(s) and whether your impairment(s) equals the requirements of any listed impairment in Appendix 1 to this subpart. (3) When the Appeals Council makes a decision, it will follow the same opinion evidence as ALJs follow. *See also* 56 Fed. Reg. 36932 (1991).



examiners.<sup>11</sup> In other agencies the regulations are more flexible and the law provides a framework for decision making rather than direction.<sup>12</sup> To medical experts, the standard is often ephemeral, nebulous and ponderous. It may be that the proof leads to the need to develop a case from another perspective: vocational ability.

### 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

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<sup>11</sup>See Social Security Ruling 96-6p. ...In appropriate circumstances, opinions from State agency medical and psychological consultants and other program physicians and psychologists may be entitled to greater weight than the opinions of treating or examining sources. For example, the opinion of a State agency medical or psychological consultant or other program physician or psychologist may be entitled to greater weight than a treating source's medical opinion if the State agency medical or psychological consultant's opinion is based on a review of a complete case record that includes a medical report from a specialist in the individual's particular impairment which provides more detailed and comprehensive information than what was available to the individual's treating source.

<sup>12</sup>In U.S. Department of Labor Black Lung practice, a judge is given broad discretionary authority. The ALJ need not accept the opinion of any particular medical witness or expert, but must weigh all the evidence and draw his/her own conclusions and inferences. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The adjudicator's function is to resolve the conflicts in the medical evidence; those findings will not be disturbed on appeal if supported by substantial evidence. *Lafferty, Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *Peabody Coal Co. v. Lowis*, 5 BLR 2-84, 708 F.2d 266 *aff'd* (7th Cir. 1983).

In considering the medical evidence of record, an ALJ must not selectively analyze the evidence. *Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Crider v. Dean Jones Coal Co.*, 6 BLR 1-606 (1983); *Peabody Coal Co. v. Lowis*, 5 BLR 2-84, 708 F.2d 266 *aff'd* (7th Cir. 1983); *Stevenson v. Windsor Power House Coal Co.*, 6 BLR 1-1315 (1984). The weight of the evidence, and determinations concerning credibility of medical experts and witnesses, however, is for the ALJ. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985); *Peabody Coal Co. v. Benefits Review Board*, 1 BLR 2-133, 560 F.2d 797, *aff'd* (7th Cir. 1977).

hypothetical question.

### **Expert witness anxiety:**

The expert in an adversarial setting knows that there will be an attack on credibility. The expert is subject first to voir dire on qualifications, second to the content of the testimony.

### **Cross-examination of the medical expert<sup>13</sup>**

Attack on qualifications:

Counsel often attack the medical expert's qualifications to offer an opinion or to treat a particular type of medical problem. If an expert is a generalist, questions suggesting that a specialist in the field would be in better position to treat the patient or give an opinion on the matter are offered. Usually the law does not distinguish the qualifications of an expert physician based upon medical specialties.<sup>14</sup> Experience and training carry great weight as to the qualifications of a witness.

The usual attack, the frontal assault:

(1) If the expert has tendered a written report or has been deposed, the attack will be to elicit a contradiction.<sup>15</sup> 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

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<sup>13</sup>LARRY S. POZNER & ROGER J. DODD, *CROSS-EXAMINATION: SCIENCE AND TECHNIQUES* (1993); DAVID M. HARNEY, *MEDICAL MALPRACTICE* (3rd ed. 1993).

<sup>14</sup> But see 20 C.F.R. § 404.1427 and § 416.927, *supra* n.7.

<sup>15</sup> See 29 C.F.R. § 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 § 18.801(d)(2).

must be an accident or injury, or an underlying medical impairment that can be established objectively. Legal causation must be factored into the fact pattern.

(3) The expert was not furnished a complete and accurate case history. It may be that a medical expert does not know of an underlying predisposition, prior impairments or injuries or other factors bearing on credibility. Counsel's approach may be that the symptoms are due to controverted causation or that another disease has caused the impairment at issue.<sup>16</sup>

(4) The medical examination/or treatment was inappropriate. Either the testing was not appropriate or was gross rather than detailed medically accepted testing.

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 some prestigious medical 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.

2. The predicate to utilize this procedure is recognition of the book as authoritative in its field or a standard text used in the medical field. If the medical 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"

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<sup>16</sup>Among common issues encountered are contributory/comparative fault/assumption of risk, preexisting conditions, merger of several accidents or impairments, a combination of impairments, compensability (for example whether an injury arose within the course and scope of employment or cause came from an independent intervening source), or whether prescribed treatment has been followed.

upon it should he or she so admit it.

3. However a medical expert is entitled to reject any opinion. This is especially true when an expert refers to a unique claimant, and the reference is to a general situation.

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.

(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 is not an exact science and there is judgment involved in treatment. The issue may be whether a procedure was medically necessary or was within the discretion of an expert.

(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) Act of God. In cases that require proof of legal causation, a tactic is to direct the expert whether or not the ultimate result would occur even where due care and skill is being exercised. The argument is, "It's nothing but the natural course of events."

Attack based on personal interest in case:<sup>17</sup>

1. A treating source may be attacked for being personally interested in a claimant who has been a patient of many years standing.
2. In many cases the patient's bill has not been paid; in some cases the witness actually has a lien against any judgment. The implication is that the source has an expectation of recovery to ensue payment of the bill.
3. An expert may be asked about his or her fee for testifying in court with the implication that the doctor is a "paid witness." This is less effective in an administrative hearing than before a jury.

### **The standard argument.**

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.<sup>18</sup>

### **The language of confusion:**

The following are some terms that engender confusion in medical testimony. Some are statutorily defined, while others are terms that are common expressions. Some bear several shades of meaning. Some are ambiguous. Much of the following discussion is based on materials from Social Security Administration practice. But some of the concepts can be used in other settings.

### **Confusing Terms:**

Teleology vs. legal causation.  
Cause and effect.

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<sup>17</sup> 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.

<sup>18</sup> See 29 C.F.R. § 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. See also FED. R. EVID. 703.

### Idiopathic impairments.

Whereas medicine and law may use the same terms, legal causation is a little different than medical causation. "Teleology" is the doctrine of final causes or adaption to a definite purpose.<sup>19</sup> In the mind of most medical experts, in order for a condition to be caused by an event, the event must be the sole precipitating factor. As used in personal injury and worker compensation practice, legal causation is met as long as the accident or injury led to the medical condition.<sup>20</sup> Therefore, if a tort victim had a predisposition for a disease that is traumatically induced, it was legally caused. In some venues, an idiopathic condition, such as a mental impairment cannot be compensated without a triggering event.

Witnesses who testify in fora that must consider the effect of a preexisting condition, or whether an injury stemmed from a compensable event, often have a difficult time relating to the elements of a special statutory standard that is unique in their experience. Therefore, witnesses must often be voir dired to "agency specific" knowledge in order to ensure that the statutory standards are used.

### Medical guidelines:

- AMA Guides for the Evaluation of Permanent Impairment.
- Social Security "Listing of Impairments."
- Psychiatric Review Technique Form.
- Residual Functional capacity.

Although evaluation guides such as the American Medical Association Guides may be generally accepted in the medical community, some agencies such as the Social Security Administration have their own methods of evaluation. The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to

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<sup>19</sup>DORLAND'S MEDICAL DICTIONARY 1314 (26th ed. 1981).

<sup>20</sup>Space does not permit a full discussion of the concept of proximate cause.

prevent a person from doing any gainful activity. Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least twelve months. 20 CFR § 404.1525 Listing of impairments in Appendix 1 to the regulations.

Each section of the Listing of Impairments has a general introduction containing definitions of key concepts used in that section. Certain specific medical findings, some of which are required in establishing a diagnosis or in confirming the existence of an impairment for the purpose of the Listing, are also given in the narrative introduction. If the medical findings needed to support a diagnosis are not given in the introduction or elsewhere in the listing, the diagnosis must still be established on the basis of medically acceptable clinical and laboratory diagnostic techniques. Following the introduction in each section, the required level of severity of impairment is shown under "Category of Impairments" by one or more sets of medical findings. The medical findings consist of symptoms, signs, and laboratory findings.<sup>21</sup>

Experts are often asked to comment on whether a condition meets or equals a listed impairment. The ultimate determination on that issue, however, is reserved to the Commissioner of Social Security as expressed in the decision of the administrative law judge.<sup>22</sup> In every case involving a mental

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<sup>21</sup>See 20 C.F.R. § 404.1525.

<sup>22</sup>Social Security Ruling 96-5p. However, a determination regarding whether a medical condition is equivalent in severity to a listed impairment can not be made without consideration by a medical expert. See 20 C.F.R. § 404.1526 Medical equivalence.

(a) How medical equivalence is determined. We will decide that your impairment(s) is medically equivalent to a listed impairment in Appendix 1 if the medical findings are at least equal in severity and duration to the listed findings. We will compare the symptoms, signs, and laboratory findings about your impairment(s), as shown in the medical evidence we have about your claim, with the medical criteria shown with the listed impairment. If your impairment is not listed, we will consider the listed impairment most like your impairment to decide whether your impairment is medically equal. If you have more than one impairment, and none of them

impairment, the judge must complete a Psychiatric Review Technique form, which tracks the mental listings. In cases where the claimant's condition does not meet or equal a listed impairment, the judge must provide a residual functional capacity evaluation. The RFC assessment must be based on all of the relevant evidence in the case record, such as:

- Medical history,
- Medical signs and laboratory findings,
- The effects of treatment, including limitations or restrictions imposed by the mechanics of treatment (e.g., frequency of treatment, duration, disruption to routine, side effects of medication),
- Reports of daily activities,
- Lay evidence,
- Recorded observations,
- Medical source statements,
- Effects of symptoms, including pain, that are reasonably attributed to a medically determinable impairment,
- Evidence from attempts to work,
- Need for a structured living environment, and
- Work evaluations, if available.

The adjudicator must consider all allegations of physical and mental limitations or restrictions and make every reasonable effort to ensure that the file contains sufficient evidence to

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meets or equals a listed impairment, we will review the symptoms, signs, and laboratory findings about your impairments to determine whether the combination of your impairments is medically equal to any listed impairment. (b) Medical equivalence must be based on medical findings. We will always base our decision about whether your impairment(s) is medically equal to a listed impairment on medical evidence only. Any medical findings in the evidence must be supported by medically acceptable clinical and laboratory diagnostic techniques. We will also consider the medical opinion given by one or more medical or psychological consultants designated by the Secretary in deciding medical equivalence. (See § 404.1616.) (c) Who is a designated medical or psychological consultant. A medical or psychological consultant designated by the Secretary includes any medical or psychological consultant employed or engaged to make medical judgments by the Social Security Administration, the Railroad Retirement Board, or a State agency authorized to make disability determinations. A medical consultant must be a physician. A psychological consultant used in cases where there is evidence of a mental impairment must be a qualified psychologist. (See § 404.1616 for the qualifications we consider necessary for a psychologist to be a consultant.) See also 52 Fed. Reg. 33921 (1987).



assess RFC. Careful consideration must be given to any available information about symptoms because subjective descriptions may indicate more severe limitations or restrictions than can be shown by objective medical evidence alone.

In assessing RFC, the adjudicator must consider limitations and restrictions imposed by all of an individual's impairments, even those that are not "severe." While a "not severe" impairment(s) standing alone may not significantly limit an individual's ability to do basic work activities, it may--when considered with limitations or restrictions due to other impairments--be critical to the outcome of a claim. For example, in combination with limitations imposed by an individual's other impairments, the limitations due to such a "not severe" impairment may prevent an individual from performing past relevant work or may narrow the range of other work that the individual may still be able to do. Social Security Ruling 96-8p.

In order to make the evaluation, the medical expert may be called upon to comment based on the record. Although not binding, the testimony may be crucial in terms of weight.

**Legal terms:**

Medically Determinable Impairment.

Apportionment.

Merger.

Preexisting condition.

Independent intervening causation.

Maximum medical improvement.

Compensability.

Substantial gainful activity.

Meet a listed impairment.

Equal a listed impairment.

Heavy work.

Medium work.

Light work.

Sedentary work.

The terms set forth above are defined by regulation. Apportionment, merger, preexisting condition, maximum medical improvement and compensability are terms that are often set forth in the record but may be irrelevant to whether the claimant meets the conditions for disability. Although these terms are not part of the law, they are analogous to concepts used in Social Security Disability. It may be that decisions from a sister agency may be considered, but generally these are not binding.<sup>23</sup>

Some medical experts base their testimony, in part, from their experience in other venues or from the use of these terms from the record evidence. In a setting where the administrative law judge must sometimes develop the record to the benefit of the claimant, such testimony may be fatal error.

#### Standards:

Possibility.

Beyond a reasonable doubt.

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<sup>23</sup>The 11th Circuit Court of Appeals reviewed the former Florida Workers' Compensation Statute, FLA. STAT. ANN. § 440.02(9) (West 1984), and determined the standard for temporary total benefits is the same as "unable to engage in substantial gainful activities" under the Social Security Regulations 20 C.F.R. § 404.1505(a) (1983). *Falcon v. Heckler*, 732 F.2d 827 (11th Cir. 1984). Workers' compensation practice is adversarial whereas Social Security Disability is a nonadversarial program. The issues may include whether the accident or injury was compensable, or whether the claimant's impairment "arose out of" or was "within the scope of" the employment. "Idiopathic" impairments are generally not compensable but they may be merged with a compensable impairment. In many cases the entire workers' compensation file may be important to see whether there are treating physicians that were withheld from the evidence submitted, to determine the category of benefits the claimant had received, or to see if there had been work evaluations. In some cases, insurance carriers accept the claimant as permanently totally disabled by executing a change notice form. In settled cases there is a stipulation form. In permanent total disability cases there is an incentive for claimants not to settle, since they jeopardize receipt of a state cost of living adjustment if a lump sum is accepted. The effect of a social security decision should not have any application to the claimant's workers' compensation claim, but in 1994, the Florida Workers' Compensation statute was amended. Only claimants with catastrophic injuries are eligible for permanent total disability benefits. However, the act now holds that included are "any other injury that would qualify an employee to receive disability income under Title II of [sic] supplemental security income under Title XVI of the Federal Social Security Act effective on July 1, 1992."

Reasonable medical certainty.  
Reasoned medical judgment.  
Clear and convincing proof.  
Reasonable medical probability.  
Substantial evidence.

Although other standards may apply, the substantial evidence standard is used in Social Security disability cases. In *Richardson v. Perales*, 402 U.S. 389 (1971), the U. S. Supreme Court said this meant a decision must be "supported by substantial evidence" and that this was "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

However, court interpretations have stretched the standard, so a judge must weigh the medical evidence thoroughly. Although other standards may be used in Social Security determinations, the standard is less than the "preponderance" standard used in most civil proceedings.

#### Opinion:

Reasonable inferences.

Social Security Ruling 83-20 sets forth in part:

If reasonable inferences about the progression of the impairment cannot be made on the basis of the evidence in file and additional relevant medical evidence is not available, it may be necessary to explore other sources of documentation....The available medical evidence should be considered in view of the nature of the impairment (i.e. what medical presumptions can reasonably be made about the course of the condition). ...How long the disease may be determined to have existed at a disabling level of severity depends on an informed judgment of the facts in the particular case. This judgment, however, must have a legitimate

medical basis. At the hearing, the administrative law judge (ALJ) should call on the services of a medical advisor when onset must be inferred. If there is information in the file indicating that additional medical evidence concerning onset is available, such evidence should be secured before inferences are made.

Based on hypothetical questions.

An ALJ's hypothetical question must include all of the claimant's impairments found credible by the ALJ. *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996); *Chamberlain v. Shalala*, 47 F.3d 1489, 1495 (8th Cir. 1995). A hypothetical must precisely set out all of the claimant's impairments. *Evans v. Chater*, 84 F.3d 1054 (8th Cir. 1996). They must reflect impairments and limitations that are borne out by the evidentiary record. *Evans v. Chater*, 55 F.3d 530, 532 (10th Cir. 1995); *Decker v. Chater*, 86 F.3d 953 (10th Cir. 1996).

Expert testimony can be substantial evidence.

Testimony from a vocational expert based on a properly phrased hypothetical question constitutes substantial evidence. *Cruze v. Chater*, 85 F.3d 1320 (8th Cir. 1996). 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).

### **How Social Security Manages Medical Expert Testimony**

The Office of Hearings and Appeals, Social Security Administration, is the largest adjudication system in the world. In fiscal 1996, 12.09 percent of all OHA hearings involved medical testimony from a medical advisor under contract with SSA. The percentage was slightly

higher in prior years. Forty-two percent of all OHA hearings involved vocational expert testimony.<sup>24</sup> Considering that OHA held about a half million hearings, medical advisors participated in roughly 60,000 hearings. Given recent developments,<sup>25</sup> it is anticipated that a higher percentage will be needed in the future. Although a great deal of public attention is given to Social Security Disability and SSI cases, administrative law judges also hear Medicare part A and B cases, and other cases such as retirement, eligibility, overpayment, paternity, etc. that do not necessarily require a medical advisor. About 71.4 percent of all claimants are represented at hearing,<sup>26</sup> and the expectation is that a significantly higher percentage appear in hearings involving medical expert testimony.

**Expert medical opinion.** The following is taken from HALLEX<sup>27</sup> instructions concerning the need and procedure for calling a medical advisor:

**Obtaining MA<sup>28</sup> Opinion on Medical Equivalency.<sup>29</sup>**

In a case requiring a finding on medical equivalency, the ALJ must first ask the

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<sup>24</sup>Table 2, Participants in Hearings held National Data, OHA systems, courtesy of Thomas McGinley.

<sup>25</sup>Between 1990 and July 1, 1996, ALJs at OHA could decide listing level equivalency without calling a medical advisor.

See Social Security Ruling 96-6p, which states in part pertinent:

When an updated medical judgment as to medical equivalence is required at the administrative law judge level in either of the circumstances above, the administrative law judge must call on a medical expert. When an updated medical judgment as to medical equivalence is required at the Appeals Council level in either of the circumstances above, the Appeals Council must call on the services of its medical support staff.

Therefore, the former policy found in SSR 83-19, which had been suspended, was reinstated.

<sup>26</sup> McGinley document, *supra*, n. 24.

<sup>27</sup>OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, *HEARINGS APPEALS AND LITIGATION LAW MANUAL* (1992).

<sup>28</sup> Medical Advisor.

<sup>29</sup>See 20 C.F.R. § 404.1526(a). Equivalency can be found under three (3) circumstances: 1. A listed impairment for which one or more of the specified medical findings is missing from the evidence but for which other medical findings of equal or greater clinical significance and relating to the same impairment are present in the medical evidence. 2. An unlisted impairment, in which the set of criteria for the most closely analogous listed impairment is used for comparison with the findings of the unlisted impairment. 3. A combination of impairments (none of which meet or equal a listed impairment), each manifested by a set of symptoms, signs, and laboratory findings which, combined, are determined to be medically equivalent in medical severity to that listed set to which the combined sets can be most closely related.

ME<sup>30</sup> to describe the claimant's disease process. The ALJ must refer the ME to the Listing of Impairments (Appendix 1 to Subpart P) to ensure that the ME is familiar with how the Listings are used. Next, the ALJ must ask questions to elicit an opinion from the ME about whether the claimant had or has an impairment(s) which equals the Listing.

The question of equivalency arises when:

- o for listed impairments, the signs, symptoms and laboratory findings are not identical to those specified for that impairment, but are of equivalent severity;

- o for unlisted impairments, the signs, symptoms and laboratory findings are equivalent in severity to those of the most closely related listed impairment; and

- o for combined impairments, the combination of all signs, symptoms and laboratory findings reflect medical equivalency to a listed impairment.

Obtaining ME Opinion Which Will Help the ALJ Determine the Claimant's Residual Functional Capacity (RFC).

An ALJ may not ask an ME to decide what a claimant's RFC is, or whether a claimant is or is not disabled. Such decisions must be made by the ALJ. However, an ALJ may ask an ME to provide information and opinion(s) which will help the ALJ decide these issues, e.g., an ALJ may ask an ME to describe the impact of an impairment on the claimant's ability to concentrate, remember, or cogitate.

An ALJ also may not ask an ME to decide whether a claimant can work in a competitive work situation or in a particular type of employment, e.g., as a gas station attendant. The vocational aspects of a case (e.g., a claimant's non-medical reasons for leaving his or her former job, vocational difficulties a claimant might experience adjusting to a new job, or the adequacy or inadequacy of a claimant's education) are not within an ME's area of expertise. On the other hand, in a mental impairment case, an ALJ may ask an ME to comment on the impact of a claimant's impairment on his or her ability to adjust to substantial gainful activity.

**Consultative evaluations.** Often called independent medical examinations or court appointed examinations, these are performed at no cost to the claimant.<sup>31</sup> See 20 CFR §§ 404.1517 through 404.1519t for the rules governing the consultative examination process.

Consultative examinations are not required by statute, but the regulations provide for them where warranted. The regulations tell claimants: "If your medical sources cannot give us sufficient medical

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<sup>30</sup> Medical Expert. This is synonymous with the concept of medical advisor.

<sup>31</sup> Although other agencies often have provisions for performing these, funding is often not available. The parties may agree to pay for the examination, pending taxation of costs to the prevailing party. See 29 U.S.C. § 18.706.

evidence about your impairment for us to determine whether you are disabled or blind, we may ask you take part in physical or mental examinations or tests." 20 C.F.R. § 416.917. In cases where there is not substantive evidence, an ALJ has a duty to obtain a psychiatric examination. *See, e.g., Smith v. Bowen*, 792 F.2d 1547 (11th Cir. 1986); *Davis v. Califano*, 599 F.2d 1324, 1327 (5th Cir. 1979); *McGee v. Weinberger*, 518 F.2d 330, 332 (5th Cir. 1975).

**HALLEX I-2-520 Consultative Examinations and Tests (revised April 1994):**

If the claimant does not provide adequate evidence about his or her impairment(s) for the ALJ to determine whether the claimant is disabled or blind, and the ALJ or the HO staff is unable to obtain adequate evidence from the claimant's treating source(s) or source(s) of record, the ALJ may request a CE(s) and/or test(s) through the State agency.

**NOTE:** An ALJ should request only the specific examination(s) or test(s) that he or she needs to make a decision. For example, an ALJ should not request a complete medical examination if the only evidence needed is a special test (such as an X-ray, blood study or electrocardiogram) or a medical source statement of the claimant's ability to do work-related activities.

**A. Requesting a CE Through the State Agency**

When requesting a CE through the State agency, the ALJ or HO staff should provide the State agency with the following:

1. Form HA-4489, Request for DDS Assistance in Obtaining Consultative Examination(s) (and other medical evidence as indicated). The ALJ or HO staff should highlight the request for a medical source statement (medical assessment).

## **Logistics**

Physicians are recruited for Medical Expert services by the medical specialties required such as cardiology, internal medicine, orthopedic surgery, ophthalmology, psychiatry, etc.

To qualify as a Medical Expert, physicians must be currently licensed to practice and board certified in their specialty. However, under the following circumstances, exceptions may be made to the board-certification requirement:

1. when a Board certified physician is not available in a particular geographic area, a Blanket Purchase Agreement (BPA) may be issued to a Board-eligible physician who is willing to accept a BPA; or
2. when a hearing office establishes in writing that it is in the best interest of the government to issue a BPA to a Board-

eligible physician because of the individual's standing in the community.

BPA's may be issued to retired physicians, only if the individual is licensed to practice medicine.

OHA may also recruit clinical psychologists to serve as Medical Experts. To qualify as a Medical Expert, a clinical psychologist must:

1. be licensed or certified as a psychologist at the independent practice level of psychology by the state in which he or she practices;
2. hold a doctorate degree in psychology from a program in clinical psychology of an educational institution accredited by an organization recognized by the Council on Post-Secondary Accreditation; and
3. have two years of supervised clinical experience as a psychologist in health service, one of which must be at least one year after receiving a master's degree.

The following conditions prohibit issuance of a BPA to a prospective expert witness:

1. full or part-time employment by the Federal Government (An expert witness candidate may be under contract, either full or part time, to an agency of the Federal Government. This does not preclude the issuance of a BPA); or
2. the hearing office to which the expert witness is to be assigned employs a relative of the expert witness which represents potential conflict of interest ("relative" is defined as spouse, child, parent or sibling, whether related by blood, marriage or operation of law, and any other person living in the same household).

Exception to either prohibition may be made only by the Associate Commissioner for OHA when there is a compelling reason to do so, such as when the Government's needs cannot be otherwise met. Requests for exceptions must be fully justified in writing and forwarded by the Regional Chief Administrative Law Judge through the Chief Administrative Law Judge to the Associate Commissioner.

## **Conclusion**

Due process requires that a claimant have a fair opportunity to be heard. When the claim involves medical benefits or involves medical issues,



it is expected that medical testimony will be an important factor for decision making. It is also important that experts need to be directed to testify based on law and regulations. Experts should be able to characterize an impairment, in the context of the purpose of the proceeding. The material is not intended to apply to a particular agency or to a particular type of medical testimony.