

Be the Strongest Link:  
Strengthening Forensic Testimony -  
In Social Security Hearings with  
Applications to other Venues

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Explaining and Defending VE  
Experience as a Basis for  
Your Opinion

Julie Sawyer-Little  
MS OT/L CRC. CLCP ,ABVE/F

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Education, Training and Certifications:

- Master's Degree, PhD and/or EdD
- Are your certifications current?
- What certifications do you currently hold which define you as a professional in the field?
  - Certified Rehabilitation Counselor
  - Certified Vocational Evaluator
  - Fellow or Diplomat of ABVE
  - Certified Disability Management Specialist (add any more that you think of)
  - Be prepared to define and defend the requirements to maintain these certifications

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Current Requirements for Social Security  
Office of Disability Adjudication & Review

2011 Contract Period-outlined the following "minimum requirement"

- Graduate degree in vocational rehabilitation (provide paper copy)
- Current and extensive experience obtained from being actively engaged as a principal, employee or private consultant in counseling and the actual job placement of adult handicapped people
- Up-to-date knowledge of, and current experience with, industrial and occupational trends and local market conditions

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Current Requirements for Social Security  
Office of Disability Adjudication & Review

2011 Contract continued

- Current knowledge and use of a variety of vocational reference sources
- An offerer who is teaching in the vocational rehabilitation field at the university or college level or administrators in the field of rehabilitation should also possess the required credentials or qualifications
- Persons who have retired or left the field of vocational rehabilitation are not eligible for award

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**Additional Training**

- In addition to your education, what additional training or specialties have you received?
- Do you regularly attend conferences which provide continuing education sessions focusing on social security testimony and methodology

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### Current Practice

- How is your current practice divided?
- What types of services do you provide in your practice which serve to further support your opinions and ability to provide testimony as a vocational expert?
- Be able to define and educate counsel as to goods and services provided; i.e. job task analysis, vocational evaluation, placement, case management, etc.
- In addition, the expert should be able to outline the venues in which these services are provided such as; Personal Injury, Worker's Compensation, Long Term Disability, Medical Malpractice, OWCP, Employment Law, Long-Shore, Maritime Law, Family Law, etc.

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### Suggested Strategies for Increasing the Toolbox of Knowledge

- Collaboration with other professionals on a regular basis
- Research and maintain a list of articles, etc. to further support your opinions
- Volunteer to provide placement services in the community
- Active participation in networking with peers
- Invite a guest speaker from BLS or ESC to present to your local group of SSVE's
- Schedule job site tours of local industries and offer to provide "complimentary" consultation

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### When Testimony Differs from the DOT

Dale A. Thomas  
MTS, CRC, CCM, ABVE/D

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Testimony that Differs with the DOT

Why we use the DOT

CFR: 20 404.1566 (d)

"...we take administrative notice of reliable job information available from..."

DOT	Census Reports
CBP	OOH
	Occupational Analyses

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Testimony that Differs with the DOT

CFR: 20 404.1566

- Addresses work in significant numbers in the region or in several regions of the country (i.e. the national economy).
- States that if work exists and meets the RFC the clmt. is not disabled.
- Addresses the use of the VE.

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Testimony that Differs with the DOT

SSR OO-4p  
(Effective date 12/4/00)

- ALJ must identify and obtain a reasonable explanation for conflicts between the DOT / SCO and VE testimony.
- "...we rely primarily on the DOT..."
- VE evidence must be **consistent** with the DOT.
- Inconsistent evidence must have a reasonable explanation for the **conflict**.

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### Testimony that Differs with the DOT

- Neither the DOT or the VE testimony "trumps" when there is a conflict.
- This would imply that the DOT is not the standard to which the VE must rise.

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### Testimony that Differs with the DOT

Reasonable Explanations (not limited to):

- Information is available from other reliable sources;
- Obtained directly from employers;
- VE experience in job placement or career counseling.

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### Testimony that Differs with the DOT

Reasonable Explanations (cont.)

- DOT lists maximum job requirements as generally performed, not the range of requirements, therefore
- VE may have more specific information about jobs or occupations than the DOT.

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Testimony that Differs with the DOT

“Consistent” with the DOT

Occupational evidence provided by a VE generally should be consistent with the occupational information supplied by the DOT

- e.g. DOT classifies a particular occupation as Semi-skilled; VE does the same

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Possible Consistency Issue

372.667-030 GATE GUARD Light/3  
Guards entrance gate of industrial plant and grounds, warehouse, or other property to control traffic to and from buildings and grounds...

If <30 days to learn job, then SVP 2

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Testimony that Differs with the DOT

“Conflicts” with the DOT

- Exertional levels – regulatory definitions apply.
- Skill levels – regulatory definitions apply.
- VE testimony on Transferability of Skills must be consistent with SSA policy on transferability.

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### Possible Conflict Issue

372.667-030 GATE GUARD Light/3

What if the Guard never lifts more than 10#  
and  
Sits half the time; Stands half the time

If there a DOT conflict?

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### Testimony that Differs with the DOT

Be prepared to explain testimony that:

- Is *inconsistent* with the DOT  
(e.g. PRW performed at a different exertional or skill level than the DOT states).
- Is in *conflict* with the DOT  
(e.g. describing work using terms defined differently than the DOT).

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### Testimony that Differs with the DOT

Be prepared to explain testimony when the RFC/Hypo adds information not contained in the DOT.

- S/S option
- Absence
- Work in close proximity to others
- Etc.

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### DOT Does Not Address Type Issues

372.667-030 GATE GUARD Light/3

What if the Guard **alternates sitting and standing** throughout the day?

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### Testimony that Differs with the DOT

Is it reasonable to opine that Gate Guard  
As Generally Performed:

- Unskilled
- Perform work >Sedentary and <Light
- Can Sit and Stand alternately

Based on VE experience, not the DOT.

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### Cross Examination Questions

Potential questions from Reps:

"Is the DOT/SCO out of date and unreliable?"

"If so, why should you depend on them to base your opinion?"

"Have you ever seen that job performed?"

"If so, is it performed that way everywhere?"

"What *specific* experience do you have which supports your opinion?"

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## Cross Examination Questions

Potential questions from Reps:

"VE, if your classification of the occupation is different from the DOT,

then what source did you use to determine numbers?"

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## What do the DOT and SCO contain?

### DOT

- Strength
- SVP
- GED

### SCO

- Strength
- SVP
- Physical Demands
- Environmental Conditions

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## WHAT TO DOT/SCO DON'T CONTAIN

Temperaments (used with mental RFCs)  
Aptitudes (including some physical aptitudes used with RFCs)

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## Basis for Knowledge to Address Difficult RFCs

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MA, CRC, CCM, NCC, MSCC, ABVE/D

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## Absences

The typical question posed is:

“What are the standard acceptable number of days allowed by employers for sick time/time off work.”

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## Absences – Government Data

- There is a great deal of information available through the U.S. Bureau of Labor Statistics, U.S. Census Bureau and U.S. Department of Labor. You can review data for specific types of jobs and absences and further sort by reasons for the absence, sick time, etc.
- Highlights will be provided but it is recommended that each VE review the documents in detail.

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### Absences – Government Data

#### Selected Paid Leave Benefits March 2013

<http://www.bls.gov/news.release/ebs2.to6.htm>

- 61% of all private industry workers receive paid sick leave
- 77% of private industry workers are paid vacation leave
- 89% of state and local government workers receive paid sick leave
- 59% of state and local government workers receive vacation leave

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### Absences – Government Data

#### National Compensation Survey 2012

<http://www.bls.gov/ncs/>

- Paid sick leave benefits mostly offered to full time workers in medium to large establishments
- Offered to 72% of employees in medium and large establishments
- Offered to 51% of workers in small establishments.
- Mean number of sick days is 8 days after 1 year of employment

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### Absences – Government Data

#### Community Population Survey 2012

<http://www.census.gov/cps/>

- Total lost time is 6.5 hours per month, which is .8 of one day per month or 9.75 days per year.
- For illness and injury the total lost work time is 4.33 hours per month, .54 of one day per month and 6.5 days per year.
- For other reasons, total lost work time is 2.166 hours per month, which is .26 of one day per month or 3.25 days per year.

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**Absences**

*Paid Leave in Private Industry over the Last Twenty Years.* Published 2013, Bureau of Labor Statistics.

<http://www.bls.gov/opub/btn/volume-2/paid-leave-in-private-industry-over-the-past-20-years.htm>

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**Absences**

The article by Mr. Van Geisen highlighted that the eligibility for paid leave has undergone change over the last 20 years. While fewer workers enjoy paid vacations, employers are increasingly providing access to sick leave, personal leave and family leave

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**Absences**

The Van Geisen article highlighted that full time workers in private industry average:

- 77% paid holidays
- 77% paid vacations
- 61% paid leave
- 37% paid personal leave
- 11% paid family leave

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## Absences – Other Resources

- Mercer Kronos Study 2008  
average unplanned absences per year = 5.4
- Mercer Kronos Study 2009 (published 2010)  
Confirmed average unplanned absences remain at 5.4 per year.

<http://www.kronos.com/pr/unplanned-absence-costs-organizations-over-8-percent-of-payroll.aspx>

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## Mercer Kronos Study 2009

### ➤ Other Key Points:

- 68.91% of organizations had formal attendance policies varying from Exempt Employees at 69% to Union Hourly at 91%
- Tracking of absences ranged from 70-89%

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## Absences

2007 CCH Unscheduled Absences Survey conducted for CCH by Harris Interactive  
<https://www.cch.com/Absenteeism2007/>

- The absenteeism rate was 2.3% in 2007 down slightly from 2.5% in 2006. This was not converted to days per month
- The survey found that personal illness accounts for 34% of the unscheduled absences

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## Absences

2007 CCH Study (cont.)

It is important to consider that people with disabilities will still be required to take time off in addition to the sick time for personal matters.

- 66% of unscheduled absences are for other reasons:
- Family Issues 22%;
- Personal Needs 18%
- Entitlement Mentality 13%
- Stress 13%

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## Absences

*Health and Productivity Among U.S. Workers.* A study published in 2005 by the Commonwealth Fund. [www.cmf.org](http://www.cmf.org)

### Findings:

- 29% of workers had health problems
- 20% had 6 or more sick days per year
- 44% had 1-5 sick days
- Average of 5.8 sick days/lost productivity days

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## Absences

"Employer Validation of Acceptable Monthly Absenteeism Allowances "

article by Dr. Irmo Marini , et. al,  
published in *The Journal for Forensic Analysis*  
Volume 14, Number 1, Spring 2012

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### Absences

- The study was designed to obtain employer validation regarding the number of monthly ongoing absences an employee could miss without being terminated. The results indicated that employers endorsed three days per month for 10 of the 16 job titles most frequently selected by VE's without being terminated, and two days per month for three of the job titles.

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### Absences

Dr. Amy Vercillo's 2012 Survey

How many days per month can a hypothetical employee be absent from work on a regular basis before their employment would be compromised?		
Answer Options	Response Percent	Response Count
1 day per month/every month	63.8%	141
2 day per month/every month	29.9%	66
3 day per month/every month	6.8%	15
4+ day per month/every month	0.5%	1
Rationale/ basis for opinion--Professional Experience, Observation.		173
<i>answered question</i>		221

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### Time Off Task

- People can be expected to be off task during rest breaks.
- Federal Law does not require a paid lunch or coffee break. However when employers offer a short break (5-10 minutes) they should compensate and any extension of the break can be punished. Breaks lasting over 3 minutes are not work time and do not have to be compensated.

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## Time Off Task

The *Wasting Time at Work 2012*. This survey reveals a record number of people waste time at work.

<http://www.salary.com/wasting-time-at-work-2012/>

- 64% of respondents waste 1 hour or less daily
  - 22% waste 2 hours daily
  - 14% waste 3 hours or more daily
- ❖ Not specific to disability reasons but inferences can be made as to tolerances of employers.

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## Off Task

*Health and Productivity Among U.S. Workers Study 2003*

Workers with reduced productivity days = 8.6 days annually

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## Time Off Task

Work Centers (Sheltered Work) or Supported Employment vs. Competitive Employment

In considering realistically how much time someone can be off task, think about if a competitive for profit employer realistically would allow them to maintain employment. Often RFC's may be so restrictive that the only option would be for non-competitive employment.

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### Time Off Task

#### Dr. Amy Vercillo's Survey

What percentage of the work day can a hypothetical employee be off task (for example, due to pain, side effects of medication, unscheduled work breaks, difficulty with Concentration)? Responses are below:

- 5% of the workday = 22% of respondents
- 10% of the workday = 45.2% of the respondents
- 15% of the workday = 26.8% of respondents
- 20% of the workday = 9.5 % of respondents
- 25% or more = 0%

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### Sit/Stand Option

- We are often asked about jobs with a sit/stand option;
- Further we are asked about frequencies;
- Has to alter sitting and standing hourly, every 30 minutes, every 15 minutes, etc.
- Jobs that will allow a sit/stand option " at will"

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### Sit/Stand Option

Be familiar with SSR 83-12 Med Voc Rules Exertional limits between ranges:

- Persons who could alter sitting and standing at normal break times, would still be able to perform work;
- The individual may be able to sit for time, but must then get up and stand or walk for a time before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work.

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### Sit/Stand Option

SSR 83-12 continued

- Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will.
- In cases of unusual limitation of ability to sit or stand, a VE should be consulted to clarify the implications for the occupational base.

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### Sit/Stand Option

SSR 82-12 continued

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. However, most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task.

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### Sit/Stand Option

- *Attacking Vocational Expert Testimony*,  
David F. Traver, Esquire  
[www.jamespublishing.com](http://www.jamespublishing.com)

Resource for VE's in relation to cross examination of VEs.

Discusses the Sit/Stand Option Section 5.3 of the publication

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### Sit/Stand Option

"Employer Validation of Jobs Performed with a Sit/Stand Option,"  
article by Dr. Irmo Marini , et. al,  
published in *The Rehabilitation Professional*  
16(3), pp. 171-178

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### Sit/Stand Option

The survey by Dr. Marini, et. al. included employers and employees regarding a sit/stand option. The following jobs are sample jobs identified :

- Parking Security = 100%
- Cashier Gas Bar Island = 96%
- Telemarketer = 100%
- Security Guard School Parking = 100%
- Stock Clerk = 92%

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### Sit/Stand Option

Many of the jobs identified were further highlighted to be considered a reasonable accommodation to have the sit/stand option

Considering the same example jobs, the percentage considering it an accommodation are below:

- Parking Security = 100%
- Cashier Gas Bar Island = 88%
- Telemarketer = 95%
- Security Guard School Parking = 95%
- Stock Clerk = 88%

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### Sit/Stand Option

- When asked if they believed that the quality of the job would be negatively affected by a sit/stand option, respondents gave the below percentages:
  - Parking Security = 100%
  - Cashier Gas Bar Island = 92%
  - Telemarketer = 100%
  - Security Guard School Parking = 100%
  - Stock Clerk = 92%

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### Sit/Stand Option

Dr. Amy Vercillo's Survey

- 94.2% responded that they could identify light jobs with a sit/stand option
- 90.9% stated they could identify jobs at sedentary with a sit stand option
- 7.8% (light) and 10.8% (sedentary) based their opinions on the DOT
- 83.3% (light) and 79.7% (sedentary) based their opinions on experience/LMS

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### Contact with Others

- VE's are often asked about the amount of time a worker is required to be around co-workers, supervisors and the public. This may involve terms like "infrequent," "direct," "non-direct" and "non-adversarial supervision." If you are uncertain of these terms ask for clarification.

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## Contact with Others

### Dr. Vercillo's Survey

- No work with co-workers = 77.1% responded there would be unskilled jobs
- No work with the general public = 99.4% could identify jobs
- Occasional supervision = 13.1 % responded that they could identify jobs

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## DOT, COJ, DPT & Temperaments

- The DOT job numbers are comprised of Data, People and Things. For consideration, the 5<sup>th</sup> digit is for People. In consideration of the numbering system for "People" see the following guide:

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## Data, People and Things

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

- o. 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.

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### Data, People and Things

- 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.

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### Data, People and Things

- 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.

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### Temperament - Dealing with People

- This Temperament is found in 22.8% of jobs outlined in the DOT (*SkillTRAN Pocket Guide*)

Example:

318.687-010 KITCHEN HELPER (alternate title DISHWASHER)

The only temperament is "R" for Repetitive work  
The 5<sup>th</sup> digit of DPT is level 8 = Taking Instructions-Helping

What can we determine from this?

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### Another Example

- 311.472-010 FAST-FOODS WORKER
- Temperament of dealing with people is present
- DPT level 7 for "P" = Serving: Attending to the needs or requests of people or animals or the expressed or implicit wishes of people. Immediate response is involved.
- How can you determine the amount of time with others, coworkers, general public, supervisors?

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### Reasonable Accommodations

In any of the special scenarios, whether it be working off task, working with sit/stand option, etc. be prepared to discuss if the recommendations you make would require a special accommodation. This may not be as much of a concern in employment law, liability, workers compensation but does impact Social Security testimony.

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### Reasonable Accommodations

SSR 11-2p

"When we determine whether a person can perform his or her past relevant work, we do not consider potential accommodations unless his or her employer actually made the accommodation. This means that we cannot find that a young adult can do past relevant work with accommodations unless the young adult actually performed that work with those same accommodations and is still able to do so now."

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## Reasonable Accommodation

- SSR 11-2p  
“When we determine whether a person can do other work that exists in significant numbers in the national economy, we do not consider whether he or she could do so with accommodations, even if an employer would be required to provide reasonable accommodations under the Americans with Disabilities Act of 1990.”

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## Experience

If you have a practice where you do Labor Market Surveys and Job Analysis, add additional questions, such as follows:

- What is the attendance policy?
- What are the acceptable number of sick days/vacation days?
- How much time is involved with others, supervisor, coworkers, public?
- Does the job allow a sit/stand option?
- What are the number of breaks?

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## Experience

- If your practice does not involve “hands on” vocational rehabilitation, for example job placement assistance, labor market surveys, job analysis, consider incorporating research annually of the jobs you cite at Social Security.

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Questions?

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### Contact Information

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