

## **ROLE OF THE VOCATIONAL EXPERT (VE) IN SOCIAL SECURITY DISABILITY HEARINGS**

Supportable vocational testimony is critical in disability claims. Without well-supported testimony, an Administrative Law Judge's decision may not withstand an appeal. Claimants, primarily through their representatives, have the right to cross-examine vocational witnesses (VE) in disability claims as part of their due process rights. A VE may be questioned about their underlying qualifications or they may be questioned about the content of their testimony. A VE is not a witness for Social Security, but testifies as an impartial expert, who is there to provide testimonial evidence based on the education, expertise and commonly used vocational reference materials. This evidence is weighed by the ALJ when making a decision.

### **QUALIFICATIONS OF THE VE**

A VE provides both factual and expert opinion evidence based on the knowledge of:

- The skill level and physical and mental demands of occupations.
- The characteristics of work settings.
- The existence and incidence of jobs within occupations.
- Transferable skills analysis and SSA regulatory requirements for transferability of work skills.

Up-to-date knowledge of, and experience with, industrial and occupational trends and local labor market conditions.

An understanding of how we determine whether a claimant is disabled, especially at steps four and five of the sequential evaluation process.

Current and extensive experience in counseling and job placement of people with disabilities.

Knowledge of, and experience using, vocational reference resources, including:

- *The Dictionary of Occupational Titles (DOT) and the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCO);*
- *County Business Patterns* published by the Bureau of Census;
- *The Occupational Outlook Handbook* published by the *Bureau of Labor Statistics*; and
- And any occupational surveys of occupations prepared by SSA by various state employment agencies.

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## **SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME: VE TESTIMONY AND THE SEQUENTIAL EVALUATION OF DISABILITY**

With some exceptions, an ALJ should obtain Vocational Expert (VE) testimony in adult disability claims. Before the vocational questioning begins, an ALJ must consider the medical opinions, and other medical evidence and the testimony in an individual case and prepare questions for the VE based on the evidence of record. Often, an ALJ will prepare more than one question to assess how the limitations stated by the record will affect an individual's ability to perform the duties of their past work, at Step 4 and other work at Step 5. Individual ALJ's may phrase the question differently but they are encouraged to phrase the question in "functional" terms. A judge may use a form to assist in phrasing the questions asked. (See attachment A)

**STEP 4:** Where an adult has performed work activity that is both substantial and gainful in their past work history, an ALJ first determines what past occupations are relevant, generally looking back fifteen years in the claimant's work history at jobs performed at the Substantial Gainful Activity (SGA) level. The certified earnings record and the WHAT report exhibited in the "D" section of the claimant's file are particularly helpful in assessing which past occupations were performed at the SGA level. A VE may only receive the vocationally relevant materials in a file, or may be provided with the entire record.

At Step 4 of the sequential evaluation, the ALJ must determine whether an individual can return to this past work. A claimant has the obligation to show that their impairments prevent them from performing their past relevant work. Vocational testimony is necessary to determine the demands of the past work activity, both as the individual claimant has actually performed it, and as it is generally performed, as reflected in the DOT. A vocational witness should be prepared to respond to questions about the past work activity as described in the individual record.

The ALJ will usually elicit vocational testimony to determine whether an individual with certain limitations can perform these past occupations, either as they are generally performed as described in the DOT, or as the claimant performed them.

**STEP 5:** Social Security has the burden of demonstrating that jobs exist in significant numbers in the national economy that an individual can perform in light of their age, education, skills and limitations. The ALJ must determine the claimant's limitations, and the claimant's residual functional capacity (RFC), what they can still do despite these impairments. The RFC must be based on the overall evidence of record. Through a series of hypothetical questions presented to a vocational expert in the hearing, the ALJ obtains expert opinion testimony to determine whether an individual with specified limitations can perform jobs and how many of those jobs exist in the region, in several regions of the country or in the national economy.

A VE is called upon to consider the limitations posed in a specific question and offer testimony about whether jobs exist that a person with these stated limits can perform. In addition, a VE should be able to access information and vocational resources to state, within a reasonable degree of certainty, how many such jobs exist, in the region identified, and in the national economy.

## **TRENDS IN VE CROSS EXAMINATION**

### **QUESTIONING THE PROFESSIONAL QUALIFICATIONS OF THE WITNESS**

Representatives in disability hearings are increasingly questioning VE's about their underlying education and professional background and experience. A VE's Resume should reflect the relevant education, including continuing education, as well as the educational and professional attainments. The previous session discussed how the Vocational professional should describe and explain their background and experience.

Vocationally Relevant Experience:

- Work in vocational rehabilitation services,
- Performance of vocational placement services
- Conducted labor market surveys
- Trained other vocational consultants
- Conducted corporate vocational training programs
- Has knowledge and experience with the DOT, SCO, other vocational publications, and OCCUBROWSE
- Has experience as a VE for SSA
- Has attended continuing education programs

Please remember you may be questioned about your relevant experience and the SSA identifies the following as essential elements of a VE's qualifications.

- Up-to-date knowledge of, and experience with, industrial and occupational trends and local labor market conditions.
- An understanding of how we determine whether a claimant is disabled, especially at steps four and five of the sequential evaluation process.
- Current and extensive experience in counseling and job placement of people with disabilities.

## **MUCH ADO ABOUT NUMBERS- NUMBERS OF JOBS AND THEIR RELIABILITY**

**STEP 5:** Representatives are questioning vocational expert witnesses about the reliability of the job information and about the reliability of the sources for the numbers of jobs identified. They may also question a VE about the method they used to ascertain the numbers of jobs available in an individual job category.

Representatives may ask the vocational witness to identify surveys or other materials consulted in determining the numbers of jobs. In cases where an ALJ expects a VE cross examination about the reliability of job numbers, a judge may ask for more detailed information about the VE's source of these numbers, and questions to determine the reliability of the underlying source of the information used by the witness. For example, a vocational expert may rely on the SkillTran Program for information about numbers of jobs. A judge or representative may question the VE about the data used by SkillTran to determine the number of jobs available in a particular job category.

A VE must be able to describe the reason why the data they are using is reliable and must be able to explain the methodology they used to arrive at the numbers they give in testimony. If the source(s) of information and the methodology are reliable, the judge can rely on this information to support a decision. Social Security regulations permit an administrative law judge to take administrative notice of reliable job information from the DOT, Occupational Outlook Handbook, Selected Characteristics of Occupations, and other reliable publications to determine the jobs exist in significant numbers either in the region where the claimant lives or in several regions of the country.

If the witness testimony fails to support the reliability of the source of the data or their own methodology for arriving at job numbers, the judge may not be able to rely on the testimony to issue a decision, or have evidence in the record so their decision is upheld on appeal.

#### **WHAT ISSUES ARE OUTSIDE THE SCOPE OF A VE'S TESTIMONY?**

- Determining whether a claimant is credible or disabled
- Determining the claimant's limitations based on testimony
- Providing a medical opinion
- Offering an opinion about whether the numbers of jobs existing are significant
- Consideration of impermissible factors, such as hiring practices, unemployment rates, and whether the claimant would be hired
- Whether accommodations can be made to permit jobs

#### **WHAT ARE EXAMPLES OF VE ERRORS?**

- **Not being prepared**
- Being too familiar with hearing participants including the ALJ
- Giving incorrect/ inaccurate occupational information

- Assuming facts not included in the hypothetical
- Volunteering information
- Being unfamiliar with the medical- vocational guidelines and other relevant regulations and rulings
- Lack of familiarity with the Vocational Expert Handbook (Updated in June 2011)
- Not asking for question clarification
- Failure to use updated vocational information

### **GENERAL RULES OF CROSS EXAMINATION**

- **LISTEN TO THE QUESTION**
- Answer the question you are asked
- Do not volunteer information
- Don't get defensive, answer the question
- If you do not understand the question, ask for clarification

### **RESOURCES: SOCIAL RULINGS AND VE TESTIMONY**

Several Social Security Rulings Provide guidance on vocational issues that frequently arise in Social Security Hearings. These rulings are all available at the Social Security Administration website at [SSA.gov](http://SSA.gov). The Social Security rulings table of contents lists "vocational" rulings. There are other rulings that apply. Below is a non-exhaustive reference to some of the rulings most frequently referenced:

SSR 83-10: DETERMINING CAPABILITY TO DO OTHER WORK--THE MEDICAL VOCATIONAL RULES OF APPENDIX II

SSR 83-14 THE VOCATIONAL RULES AS A FRAMEWORK FOR EVALUATING A COMBINATION OF EXERTIONAL AND NONEXERTIONAL IMPAIRMENTS

SSR 85-15 CAPABILITY TO DO OTHER WORK-THE MEDICAL VOCATIONAL RULES AS A FRAMEWORK FOR EVALUATING SOLELY NONEXERTIONAL IMPAIRMENTS

SSR-004P VOCATIONAL EXPERT AND VOCATIONAL SPECIALIST EVIDENCE AND OTHER RELIABLE OCCUPATIONAL INFORMATION IN DISABILITY DECISIONS

SSR 82-41 WORK SKILLS AND THEIR TRANSFERABILITY AS INTENDED BY THE EXPANDED VOCATIONAL FACTORS REGULATIONS

SSR 96-8P ASSESSING RESIDUAL FUNCTIONAL CAPACITY IN INITIAL CLAIMS

SSR 96-9P DETERMINING CAPABILITY TO DO OTHER WORK—IMPLICATIONS OF A RESIDUAL FUNCTIONAL CAPCTIY FOR LESS THAN A FULL RANGE OF SEDENTARY WORK.

**ATTACHMENT A:** Judge Lefebvre's VOCATIONAL EXPERT TESTIMONY form.

**ATTACHMENT B:** Listing of Social Security rulings Refining Exertional Level Definitions

**ATTACHMENT C:** SSR Table Related to Specific Limitations