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# **A History of the Vocational Expert (1955 to 2014)**

*A Presentation to the  
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**Timothy F. Field, PhD**

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# A History of the Vocational Expert (1955 to 2014)

## Are You a Fox or a Hedgehog?

A history of a single professional occupation, such as that as a “vocational expert,” is not simply about dates, places, and events. So much of the historical development is contingent upon the people and personalities who moved ideas and activities within the particular demands of consumer needs, societal programs, or whatever else might shape the formation of occupation over time. The occupation of the vocational expert resulted initially from a specific legal case within the federal court system while addressing an issue related to the needs of a particular individual. With one swift decision by an Appeals court the specific need was identified for the skills of an individual who might be able to answer as a qualified professional who could help the court in future cases. The search was on to find people with inherent skills who could respond to this need – people who already possessed the necessary knowledge and skills needed for the task without having to create a whole new educational and training program. In that regard, the training for new professionals had already been put in motion during the 1960’s when the federal government, under the direction of Mary Switzer, the new director of the U.S. Office of Vocational Rehabilitation within Health, Education and Welfare (HEW), was created by President Eisenhower in 1953. The training program became known as the Rehabilitation Counselor Training Program and was a cross-department, cross-discipline masters degree level and was assigned to major universities around the country. The primary purpose of the program was to train professionals to work with people with disabilities and help them return to the world of work. These developments set the stage for the new occupational speciality of vocational expertise.

Before continuing our journey through history, let’s jump to the end game and consider what our profession (or professional) has become. Laws and rulings, and subsequent training and education had shaped the work of the professional. Likewise, newly created professional associations, such as the *American Board of Vocational Experts*, and the *International Association of Rehabilitation Professionals*, have helped provide specialized training, along with the development of ethics and activity standards that also help to define the role and functions of the expert. However, these are not the only factors that define the expert. Clearly, such factors as temperament, interest, and personal choices play an equally important role. Goodman (2010) has provided a delightful, entertaining, and yet, potent and cutting analysis of an expert who might be viewed as either a “fox” or a “hedgehog” in the manner in which they practice their craft. The basic notion is: “The fox knows many things, but the hedgehog knows one big thing” (p. 636). Within today’s milieu of offering expert testimony (considering the context of required skills and knowledge, rules and regulations, areas of specialties, *Daubert* challenges and issues of admissibility, and the use of reliable methodologies and the such), what does it take to be an effective expert? Setting aside the observation that some experts are nothing less than “hired guns” (let’s not go there), but rather, address the observation that offering expertise is not always a cookie-cutter activity. Why is it that, assuming knowledge, skills, training and experience, result in some very divergent opinions by the experts? And why is it that courts of law allow such divergent points-of-view when proffered by experts. This is where the fox and the hedgehog enter the picture and provide at least a partial

explanation. The following chart, created from the Goodman paper, helps to explain where we are today regarding the nature and essence of the vocational expert. While these characterizations are not chiseled in stone, they do help to provide an understanding of how experts reach conclusions.

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**Chart 1: Characteristics of the Fox and the Hedgehog**

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The Fox	The Hedgehog
Open minded cognitive approach	Unwavering commitment to single world-view
Sees the “grey”, tending toward self-doubt	Persists in a particular view
Considers alternative explanations	Devotion to one big idea
Tolerates complexity/ambiguity	Little tolerance for ambiguity

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The implications for the courts, especially federal courts addressing the issue of admissibility under *Daubert* and *Kumho* tend to favor the hedgehog who offers a clear, determined approach or methodology which most likely has been peer-reviewed and generally accepted. On the other hand, the fox sees things through a broader window of facts that are not always absolute or crystal clear, where divergent views come into play (i.e., conflicting medical opinions), and where opinions are not always easy to develop. The hedgehog becomes so devoted to their methodology that they run the risk of bias by forcing the facts of the case to a specific conclusion – as if the methodology is more important than the facts. The fox runs the risk of waffling when challenged on specific issues (since one methodology does not apply to all cases) unless skill and experience come to the rescue. The hedgehog has little tolerance for ambiguity, whereas the fox will thrive on the presence of the ambiguity and for the love of debate and discussion. Obviously, no one professional is exclusively a fox or a hedgehog, but rather, is somewhere on a continuum with a probable leaning in one direction or the other. Either way, the expert must be prepared to address the requirements of a *Daubert* challenge (often referred to as an *in limine motion to exclude*) involving the three pronged issues of being qualified (see *Federal Rule of Evidence 702*), and relevant and reliable testimony (see *Daubert*, *Kumho*, and *Joiner*). As we have learned, the “court’s gatekeeping obligation is chock full of discretion” (Goodman, 2010, p. 646) on determining reliability (see *Kumho*, 1998).

**The Early Years (1960 - 1970)**

The role and function of the vocational expert is undisputedly linked to the Social Security program. During Roosevelt’s administration, the Social Security program was founded in 1935 and the *Social Security Disability Insurance* program was passed into law in 1956, and later amended (1960) to eliminate the fifty year old guideline for eligibility of workers who were disabled.

A federal judicial program within SSA was established with a “hearing” format including Administrative Law Judges (ALJs) who made determinations on persons applying for disability benefits (SSA, n.d.). Until 1960, ALJs would make a determination on whether a claimant was precluded from returning to his prior and usual occupation, or if other work was available with the labor market – in spite of the claimant’s disabling condition. There was little information on the claimant’s capacity to perform work and the general assessment of related vocational factors. In terms of labor market information, the ALJs relied on government produced surveys and

summaries of labor market conditions containing information on occupations that were possible for persons with particular disabilities.

In 1960, Kerner appealed a decision that denied him benefits under the Social Security Act (Sec. 223, 42, U.S.C.A. 423, enacted in 1956) which

*provides for disability insurance benefits for certain individuals between the ages 50 to 65 in the event of an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued or indefinite duration.*

Kerner, born in 1896, possessed two disabilities: arteriosclerotic coronary thrombosis and diabetes mellitus; he had also suffered a heart attack in 1956. The essential issues was whether Kerner could still perform work given these medical conditions. A physician for the Veterans Administration noted that Kerner experienced chest pain “with moderate exertion” and a second physician for the NY State Department of Social Welfare reported that Kerner experienced occasional chest pain with moderate exertion, but the pain could be relieved with nitroglycerine and sedatives. Each of the physicians offered little or no opinion on whether Kerner could work. However, the VA “found Kerner had a general medical disability that was considered to be permanently and totally disabling,” and the NY Vocational Rehabilitation Agency “refused to accept a referral of applicant, stating ‘impairment too severe.’” Further, there was no evidence in the determinations of any reasonable employment opportunities. The Appeals Court observed:

*there was no substantial evidence that would enable the Secretary to make any reasoned determination whether applicant was unable to engage in substantial and gainful activity. Such a determination requires the resolution of two issues – what can the applicant do, and what employment opportunities are there for a man who can do what applicant can do? [In Kerner], there was basically only a catalog of the names of Kerner’s various complaints and contradictory conclusions of the vaguest sort, with no real attempt to demonstrate the extent of impairment of function or the residual capacities he yet possesses. Unsatisfactory as all this was, the evidence as to employment opportunities was even less . . . the Secretary had nothing save speculation to warrant a finding that an applicant thus handicapped could in fact obtain substantial gainful employment. A court cannot properly sanction a decision in a proceeding of this nature reached with such a lack of evidence to permit a rational determination as here (p. 3).*

The Kerner case, generally referred to as the “Kerner Criteria,” stipulated that, in addition to medical factors, such factors as age, education, and work experience would be considered. Initially, the Administration attempted to meet these requirements of determining what a claimant could do as well as the job opportunities what would be available by relying on government reports (Zinn, 1972, p. 4). Since the reports did not address the capacities and skills of the claimant, the courts soon rejected this approach (essentially ALJs making the determinations on work issues), and for this reason, **“it was decided to employ vocational experts”** (Zinn, 1972, p. 5). Louis Zinn became the first director of the *Vocational Expert Program* within SSA, Bureau of Hearings and Appeals.

In October 17-23, 1966, and with the assistance of the *American Psychological Association* and the *American Personnel and Guidance Association*, the initial training class of eight members convened in Baltimore (SSA, n.d.). Prior to this meeting, Frederick (1964) wrote a short article describing the basic elements of the vocational expert’s role. At the same time, adjudicated cases continued to define and clarify the issue of work and the role of the vocational expert. In *Cyrus v. Celebrezze* (1965), the decision required that jobs be shown to exist in the community in which the

claimant resided, and secondly, the vocational expert’s (VE) testimony was rejected because the VE relied only on the *Dictionary of Occupational Titles* (DOT) as a source of job information. The notion of “availability of jobs” was further refined in *Gardner v. Smith* (1965) by ruling that “availability as the reasonable opportunity to be hired if the job was open and applications for employment were being taken.” Subsequently, the meaning of disability was clarified by Congress to mean:

*. . . as the inability to engage in 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 twelve months. It further provides that an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work (Zinn, 1972, p. 6).*

Thus, the role definition of the vocational expert was refined and developed during these early years of the 1960s (Feingold, 1969) which has remained essentially the same over the ensuing decades (Blackwell et al., 2005). While the number of VEs stayed relatively constant (@600+) for the years of 1963 to 1971, the frequency of live testimony by experts grew rapidly during the same period (see Chart 2). More shaping of the VE’s role and activity was to come.

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**Chart 2: SSA Vocational Expert Activity 1963 to 1971**

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Year	# VEs*	# Cases	Live Test**	%VE Usage
1963	227	14,644	513	3.5
1964	657	18,123	3,019	16.7
1965	656	20,217	4,867	24.1
1966	650	20,101	5,045	25.1
1967	637	17,812	4,987	28.0
1968	625	23,234	6,034	28.0
1969	657	27,972	7,252	25.9
1970	647	34,501	8,142	23.6
1971	635	40,712	9,215	22.6

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*Note.* \* VEs present in adjudicated cases; \*\* Live testimony; Source: Semans (1972, p. 123).

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Early evidence of vocational experts appearing in SSA - SSDI hearings would include Dr. William Hopke of Florida State University (*Gardner v. Gunter*, 1965), Dr. Daniel Sinick of George Washington University (*Frye v. Richardson*, 1971), and Dr. Julian Nadolsky of Auburn University (*Kyle v. Cohen*, 1970). Incidentally, many of VEs in the 1960s and 1970s were the rehabilitation educators from the university training programs.

By FY 2010, live testimony by VEs in ODAR hearings, according to a report (2012) from the *Office of Disability Adjudication and Review*, indicated the following:

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**Chart 3: VE Use at ODAR Hearings**

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Category	2008	2009	2010
Dispositions Requiring a Hearing	405,691	477,749	553,355
Dispositions with VE Testimony	292,717	353,371	421,624
Percent of VE use Rates	72%	74%	76%

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Source: SSA Audit Report, A-12-11-11124, (2012).

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Obviously, the SSA/VE program has grown enormously from its inception; today there are 1,147 active VEs across the ten national regions according to a study completed by the *Vocational Expert Section of the International Association of Rehabilitation Professions* (2010, p. 14). This growth incurred in spite of the lack of corresponding growth in fees paid to VEs for their study and appearances at hearings. From the beginning of the program, VEs received \$40 for case study, and then an additional \$70 for a first appearance, and \$35 for each additional case on the same day. In 2009, there was an increase in the fees by 10%. By contrast, the study revealed that rehabilitation consultants in the private sector were billing \$135 per hour for file review, \$207 per hour for depositions, and \$354 per hour for court testimony; vocational expert fees for VEs in federal compensation programs averaged \$164 per hour (p. 17).

**The Rehabilitation Expansion Years (1965 - 1980)**

In addition to the program developments within the Social Security Program, especially the *Social Security Disability Insurance* program (established in 1956), major changes in both law and opportunity evolved over the next thirty years. Chart 4 is a summary of the major additions or adjustments in the rehabilitation climate which brought about many significant changes. For a more complete discussion of laws, see Weed & Field (2012, pp. 1–10).

The legislation and events noted in Chart 4 clearly impacted the role of the rehabilitation. Both the rehabilitation legislation and the events related to social services impacted the delivery of services for persons with disabilities – including the expansion through training of the rehabilitation consultant. In 1954, the *Vocational Rehabilitation Act Amendments* established the Rehabilitation Counselor Training Programs of which there were approximately twelve programs – mostly at land grant universities. The purpose of the university programs was to train professionals at the masters level as rehabilitation counselors for the state agency programs (private sector rehabilitation was still in the distant future). Eventually, the programs grew to 85-100 which were then accredited through the newly established *Council on Rehabilitation Education* (CORE) in 1971. Under the direction of Dr. Gregory Miller, the first president and coordinator of one of the first programs at Michigan State University, the *National Council on Rehabilitation Education* (NCRE) was established in 1955 as a professional association for the rehabilitation educators. NCRE, CORE, the *Council of State Administrators of Vocational Rehabilitation* (CSAVR), and the *Department of Vocational Rehabilitation* (Mary Switzer), by collaboratively working together along with the *National Rehabilitation Association* (under the direction of E. B. Whitten), and the *National*

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## Chart 4: Major Changes in the Rehabilitation Movement

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- 1954 VR amendments were passed authorizing federal funds for programs serving people with physical disabilities.
- 1963 Kennedy calls for the reduction of thousands of people confined to residential institutions for individuals with mental and developmental disabilities by making rehabilitation and community-based programs available as an alternative.
- 1964 The *Civil Rights Act* prohibited discrimination on the basis of race, religion, national origin and creed (gender was later added), and served as the forerunner to the Rehabilitation Act of 1973 and the ADA – both programs which firmly established “civil rights” for people with disabilities.
- 1965 *Medicare* and *Medicaid* were established to help subsidize costs associated with people with disabilities and the elderly.
- 1965 VR amendments authorizing federal funds for the construction of rehabilitation centers, expansion of existing rehabilitation programs.
- 1968 The *Architectural Barriers Act* prohibited barriers in any federally owned or leased building.
- 1971 The *National Center for Law and the Handicapped* was founded as an advocacy center for people with disabilities (established at the University of Notre Dame).
- 1972 *The Berkeley Center for Independent Living* was founded by Ed Roberts.
- 1972 Social Security amendments established the Supplemental Security Income (SSI) program.
- 1973 The *Rehabilitation Act* (with Sections 501, 502, 503, and 504) further prohibited discrimination in any federally funded program.
- 1973 Handicapped parking stickers (In Washington, DC), and curb cuts were established.
- 1974 *Halderman v. Pennhurst* highlighted terrible conditions and treatment for institutionalized “patients” or people with developmental disabilities, and set the stage for the de-institutionalization of people and their right to life within the community.
- 1978 *American Disabled for Public Transportation* (ADAPT) was founded which helped to establish lift-equipped buses in Denver, CO.
- 1990 The *Americans with Disabilities Act* became the most sweeping and comprehensive civil rights protection for people with disabilities.
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Source: <http://oisc.temple.edu/neighborhood/ds/disabilityrightstimeline.htm>

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*Rehabilitation Counselor Association* (a division of NRA) would help to establish the *Commission of Rehabilitation Counselor Certification* (CRCC) – a required credential if a new graduate sought to be employed in a state agency program. The certification program was established in 1974 and over the years has certified over 35,000 rehabilitation professionals. As a corollary to the CRC designation, other certifications have also been developed in such specialty areas as vocational evaluation, case management, vocational expertise, and life care planning. All of these developments are contingent upon each other as the profession has moved forward from the early days of the SSA VE. However, much of the training for the private sector vocational expert and consultant has been achieved through private seminars and the professional associations in the private sector. The federally funded university programs have been either generally reluctant

or mandated to not provide training at the masters level for the private sector professional. Nevertheless, most of the rehabilitation consultants and/or vocational experts have been granted a degree from a university rehabilitation counseling program.

## **The Evaluation Interval (1975 - 1985)**

A major development within the rehabilitation profession was the era of vocational evaluation and assessment (Pruitt, 1986; Choppa et al., 1992). This was an exciting period which included the development of several vocational evaluation systems (going beyond the pencil/pencil tests) which included products from *Valpar*, *Sage*, *Views*, *JEVS*, *VISTA*, the *Apticom*, *Hester*, *McCarron-Dial*, and much more (Roberts, 2005). In addition to these work samples, there were the more traditional measures including, the *WAIS*, the *Bennet Hand Tool*, the *Crawford Small Parts*, the *Minnesota Rate of Manipulation*, and the *Purdue Pegboard*. These were “heady” times for professionals interested in the evaluation movement – from the famous Valpar training sessions in Nogalis, AZ (or was that Mexico?) to the federal funding of four university centers for training in vocational evaluation (Auburn University, Southern Illinois University, the University of Arizona, and the University of Wisconsin at Stout). Receptions and display booths were lively draws at regional and national conferences with vendors promoting their products. This activity was also supported by a national association (*Vocational Evaluation and Work Adjustment Association*), complete with an excellent journal, and the development of professional standards and ethics statements. As part of the 1980s, assessment and evaluation also received a boost from the activities of the “compensation era” as private sector rehabilitation providers were also purchasing much needed equipment in order to properly develop a rehabilitation plan for injured workers.

## **The Compensation Era (1980 - 1990)**

During the 1980s, private sector rehabilitation was basically a national “boom town.” In addition to the continuing and growing demand for vocational experts in the Social Security program, compensation programs for injured workers created an enormous demand for “qualified rehabilitation consultants” and became the driving financial force behind vocational evaluation, rehabilitation planning, and case management (Foote & Word, 1984; Guyton, 1999). According to Berkowitz (1990) many states required that an injured worker have developed in his or her behalf a rehabilitation plan – a plan was mandated in many states by law and required the knowledge and skills of a rehabilitation professional to address this need (for a summary of each state’s compensation program, see the Annual U.S. Chamber of Commerce’s publication *Analysis of Workers’ Compensation Laws*). While the notion of workers’ compensation dated back into the early 1800s (Weed & Field, 2012, p. 49; Barros-Bailey, 2014, pp.15–20), this was a very exciting time in our history because the compensation programs (especially state compensation) were driving the cases for rehabilitation planning. IntraCorp and Crawford Rehabilitation (both large insurance companies) were employing “in house” staff in response to the need for case planning. Soon thereafter, private professionals clearly saw the opportunities for this type of work and responded with a vengeance. Small companies were created over-night, all across the country. Business owners accepted the challenge as to who would have the “biggest company” as attested to by the number of counselors that be would added to their staff. A company would become “regional” with several satellite offices as the referrals came flooding in with an ever-increasing demand for rehabilitation services. While the compensations programs’ goal was to “rehabilitate and then return-to-work” injured workers, attorneys saw the need to represent a person with a work-place injury to insure that the worker received all the benefits that a person was due (of course, attorneys would take their usual percentage of a settlement). Administrative hearings were

always a possibility in any case which might have required the rehabilitation consultant to be present to explain the rehabilitation plan.

At the same time, the *National Association of Rehabilitation Professionals in the Private Sector (NARPPS)* was founded in 1981 by Rick LaFon and Bill Roberts of California, and shortly thereafter Ken Anchor of Tennessee formed (in 1982) the *American Board of Vocational Experts (ABVE)*. Memberships in both associations soared during the late 1980s, and both initiated a professional journal along with frequent conferences around the country.

And then came the crash. First, the states of Colorado and Washington as the governors and state legislatures were becoming drastically concerned about the growing debt from their respective compensations programs. The rehabilitation sector, in part, was receiving the blame for this debt as it was attributed to the high cost of rehabilitation services – in some instances the debt was exceeding \$100 million or more. Something had to be done to stem of debt tide and as a result, the “mandatory” requirement was tagged as the culprit. Other states followed the lead as legislatures across the country began to seriously cut back on the provision of rehabilitation services. By the mid-1990s the landscape looked much different that the previous decade (see Figures 1&2). The need for rehabilitation consultants declined as less demand for their services became clearly apparent in compensation cases. To be sure, VEs continued to be active with the SSA/SSDI program, and with compensations cases (although to a much lesser degree). These developments set the stage for the private sector rehabilitation movement to re-define itself as a means of survival. In some cases, the large and/or regional rehabilitation companies either ceased to exist or are now

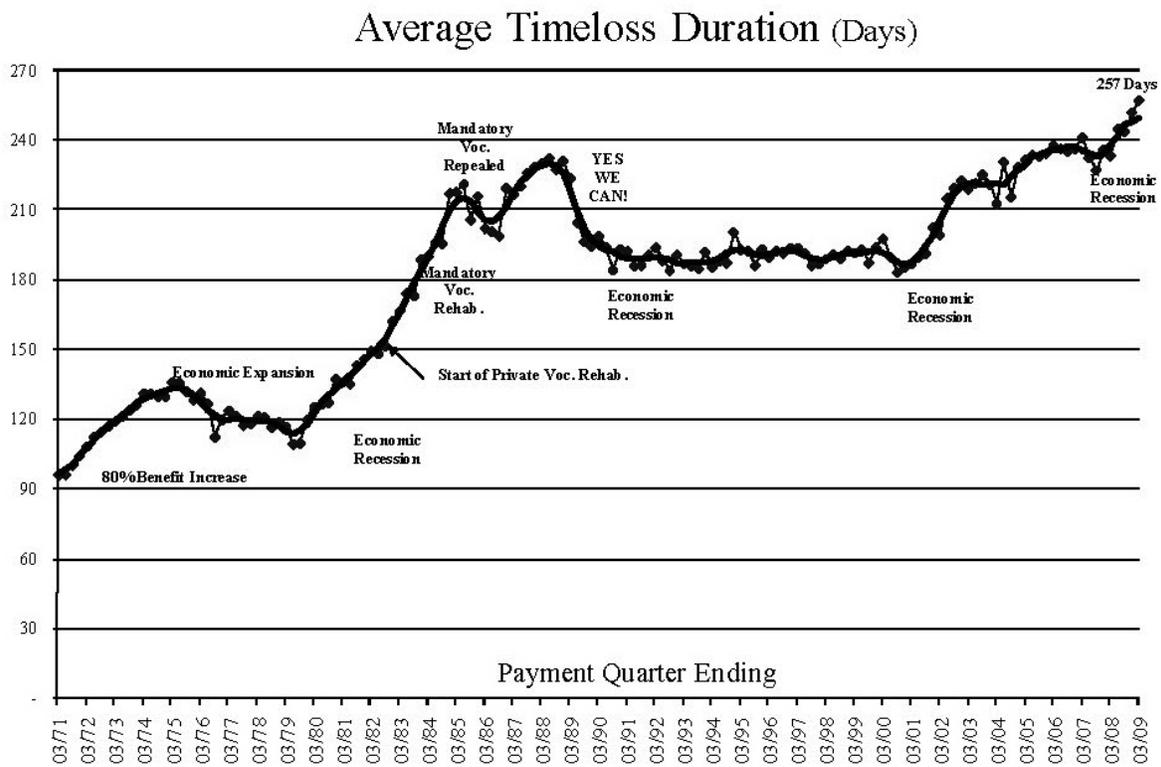


Figure 1. Average Timeloss Duration. Source: Washington Workers' Compensation Board (2009).

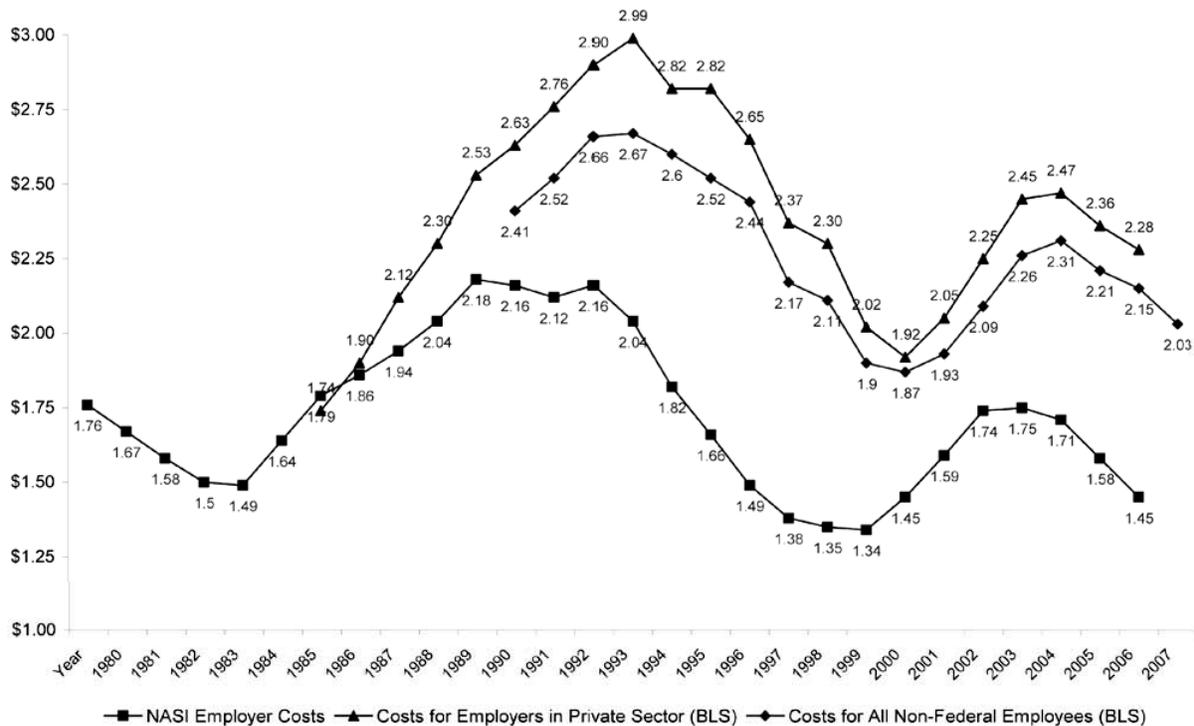


Figure 2. Workers' Compensation Costs per \$100 of Payroll, 1980-2008, NASI and BLS Data; Source: Utterback & Schnorr (2010).

so changed that they are hardly recognizable (i.e., where has Crawford gone?). Many of the smaller companies are completely gone or now have been down-sized to a “Mom and Pop” shop with a secretary on the side. Many VEs looked toward the legal arena as an alternative income source, but the growth in this area has been slow, although steady. Testifying in legal cases is the new vogue - even with the occasional ambiguity, confusion, and uncertainties of how cases should be developed in order to avoid trouble with the courts or the non-hiring attorney. Social Security VE work has steadily grown as more and more people seek disability benefits. Compensation cases, while decreased from the 70s and 80s, is steady work for some in most states. Personal injury and legal cases, comprised of many of the components described in the “Methodology Phase,” is the new vista for the vocational expert.

### The Methodology Phase (1980 - 2000)

Leading into the “Methodology Phase” were two very distinct factors: the rapid decline in “mandated” rehabilitation cases, and the onset of the “*Daubert* Decade.” While methods, techniques, approaches, and protocols have been developed since the 1950s and 1960s, the *Daubert* and *Kumho* rulings brought considerably more attention to the methods and techniques utilized by vocational experts (Field et al., 2006).

As a group of practitioners, private sector rehabilitation professionals have been remarkably production in developing tools, techniques and methods for practicing their craft. Except for much of the vocational evaluation and assessment systems, most of the published materials have come from the private sector. While it is virtually impossible to list and summarize all that has been

accomplished, the following major topics illustrate what has been achieved. Other citations listed throughout are intended to provide basic information on the selected topics with apologies to those authors who have not been identified. For more complete and general discussion of these topics, see (Robinson, 2014; Weed & Field, 2012; Strauser, 2014).

**Transferable Skills:** Sidney Fine (1957a, 1957b), probably more than any other researcher, is responsible for articulating a model and format for transferability of work skills (TWS). Taking cues from the *Federal Register* related to the SSA Disability Program, Fine describes the essential factors in the TWS process and how a matching program can be accomplished through the use of *Dictionary of Occupational Titles* and labor market information. Fine defined TWS as “the movement of workers with certain knowledge and abilities from one job to another (1957a, p. 803). All subsequent research has been to further develop the TWS notion and refine the process over time with sophisticated computer programs. However, the rationale is essentially the same as proposed by Fine’s research. Over the years there have been many excellent papers published that present the basics of transferability (Field, 2002; Dunn & Growick, 2000; Grimley, Williams, Hahn, & Dennis, 2000; McCroskey, 2003), and other papers which have provided much more detailed analysis (McCroskey et al., 2000; Truthan & Karman, 2003; Dunn & Kontosh, 2002; Field & Dunn, 2014). For additional readings on this topic, see the special issue of the *Journal of Forensic Vocational Analysis* edited by Weed (2002).

**Job Matching Programs:** As a precursor to many micro-computer software programs of the 1980s and thereafter, a model for “man-job matching” was proposed as far back as 1965 (Leiman), and later by Holt and Huber (1969). A method comparing hard variables (skills and knowledge) to soft variables (motivational factors in applying skills and knowledge) was used in predicting performance on the job. Shortly thereafter in 1971 (Hannings et al., 1972), Cleff developed the *Cleff Job Man Matching System* as a technique involving the use of a computer to identify and match the characteristics of a person to similar characteristics of jobs. Sixteen dimensions, similar for both describing the person and the job, were the basis for the matching process. The program was developed in conjunction with the *NJ Rehabilitation Commission* and the *NJ Employment Service*. Two hundred and fifty jobs were profiled and were available for analysis of SSA/SSDI claimants yielding a printout of jobs that matched. While not necessary to describe all of the programs that were developed through the last few decades, some of the more prominent software programs, similar to Cleff’s rationale, have included: *Job Search*, *Labor Market Access*, *Abilities Information Systems*, *McDOT/Datamaster*, *Life Step*, *OASYS*, *SkillTRAN*, *Sage*, and several more. As useful and helpful as these job matching programs can be for the vocational expert, a survey study of vocational experts completed by Kontosh and Wheaton (2003, pp. 43–44) showed that of 13,164 cases worked on by 75 members of the Forensic Section of IARP, 8,484 of the cases included a transferable skills analysis. The vocational experts used a computer program (*LifeStep* 17.3%, *OASYS* 6.1%, *Labor Market Access* 4%, *Job Quest* 4%, and collectively several “other” programs 12.6%) for the TSA in 44% of the TSA cases, while 56% did not use a TSA software program as TSAs were completed manually with a *VDARE* or a *RAPEL* method

**Worklife Expectancy/Tables:** How long is a person expected to work? Assuming that a person will live until the retirement age (whatever that is), it still begs the question on how long a person will work. Compounding the issue is when a person is disabled as a result of an injury or disease since it is very possible that a person with a disability may well stop work long before retirement. How does one approach this issue, and what resources or information are available to assist in the decision. Field and Jayne (2008, pp. 75–86) provide an overview of this issue with a review of published methods for estimating worklife with a discussion of Brookshire’s (1983) “life-participation-employment (LPC)” method, Ciecka and Skoog’s (2007) work on the *Markov*

Tables, to Gamboa's *New Worklife Expectancy Tables* (2006), the original *BLS Worklife Tables*, along with the various data sources used for each method. Another valuable source from a more "economic" viewpoint presents information on both life and worklife is the resource edited by Richards and Donaldson (2010) in which they discuss several different approaches to estimating worklife in addition to providing scores of data in table format to better explain various economic constructs.

**Estimating Earning Capacity:** Another major issue for the vocational expert is earning capacity and how one can achieve a reasonable estimate of present and future earnings. For a review of the prevailing approaches, Field (2012) provides a summary of these and other approaches to the earnings capacity issue. Traditionally, forensic economists have provided estimates on future earnings based on the work of the vocational expert. The vocational expert, on the other hand, has had no difficulty in providing an estimate of pre-to-post injury functioning and then estimating post-injury earning capacity. In recent years, Dillman (1987) has emphasized the necessary interface between the two disciplines which has resulted in some vocational experts actually providing both present and future earnings which is prominently advocated by Gamboa and his associates (Gamboa et al., 2009). In recent years, Shahnasarian (2004) has developed an approach to estimating earning capacity which centers on a "worksheet" format that is used to summarize information derived from the client interview and case records. This approach places more emphasis on evaluating and understanding information involving the client directly.

**Life Care Planning:** The cost of being disabled for the remainder of one's life is the essence of life care planning. Deutsch and Sawyer (1986) developed an organized approach to help identify important factors and their related costs for a person with a long-term injury, sometimes a catastrophic injury. The method was further refined by Deutsch through training and conferences of professionals in this area of practice. Many noteworthy contributions by other practitioners (Weed, 2007; Weed & Berens, 2010; Weed & Johnson, 2007) helped to advance this area of expertise. McCollom (2002) is generally credited with founding the *Academy of Life Care Planning* as well as serving as the first editor of the *Journal of Life Care Planning*. Today, a life care plan is a standard area for attention by the VE when developing a personal injury case.

## **The Daubert Decade (1993 - 2005)**

In 1993, the U.S. Supreme Court released a decision involving the admissibility of expert opinion (*Daubert v. Dow Merrill Pharmaceutical*, 1993). This case identified four criteria by which scientific testimony would be evaluated:

1. Can the theory or technique be tested (scientific method)?
2. Has the theory or technique been subjected to peer review and publication?
3. What is the known error rate of the tested theory or technique?
4. Is the theory or technique accepted by the relevant scientific community?

The *Daubert* ruling caused a great deal of concern among members of the rehabilitation profession since it was unclear how VEs should respond to the identified criteria for testimony. Stein (2002, p. 9), for example, was very adamant about what the ruling meant: "While debate among VEs has had wide variance between the scientific and non-scientific methods, The U.S. Supreme Court's decision was not ambiguous: The scientific method is the standard for vocational evaluation and vocational expert testimony". Likewise, McCroskey, Feldbaum, Dennis, and Hahn (2003, p. 57) concluded : "In the forensic area, expert testimony has been challenged under *Daubert* and must

now have a reliable basis founded upon the scientific method. Research on the reliability and validity of our tools and methodologies is necessary to establish a reliable basis for testimony.” In my view, these observations are either an over-reaction or a misreading the intent of the ruling. Subsequently, the *Joiner* ruling (*General Electric v. Joiner*, 1997) emphasized that the gatekeeper had discretion in allowing or not allowing opinion in a case involving the social sciences. The issue was further clarified in *Kumho Tire* (*Kumho Tire Company v. Carmichael*, 1999) when it was shown that an alternative criteria was appropriately used in the evaluation of an (allegedly) defective tire. The *Kumho* ruling indicated that the gatekeeper had significant *leeway* and *may* (these two words were italicized in the ruling for purpose of emphasis) consider other criteria in assessing the admissibility of testimony. The *Daubert* ruling did indicate that any methodology used had to meet the tests of reliability and relevance. *Federal Rule of Evidence 702* identified three types of knowledge that could be presented (scientific, technical, and specialized) which suggests that the central concern is that the methodology employed by an expert is within one of the three knowledge domains. But in either case, the methodology testing the knowledge area in question must meet the *Daubert* test of reliability and relevance – and both must relate to the facts of the case. In *Kumho*, Carlson, the tire expert, used his own four point criteria for evaluating car tires; the *Kumho* ruling clearly established that the gatekeeper could and did allow a different criteria for evaluating Carlson’s methodology as he applied the criteria to the facts of the case – in both a reliable and relevant manner.

In the field of vocational expertise and rehabilitation consulting, the *Daubert* criteria generally do not apply; if that was the case, most vocational testimony would be disallowed for the lack of affirmation by the scientific method. Vocational testimony usually relies on the facts of the case (past work, personality factors, medical information, vocational assessment and functional capacities – to name a few), consisting of a proper foundation for developing opinion. The opinion is a clinical judgment process of a single person (N of 1) (Choppa, Johnson, & Neulicht, 2014; Field, Choppa, & Weed, 2009) that relies on many objective and subjective factors (foundation information, assessment and evaluation, and methodologies of estimating employment potential, transferable skills analysis, and future earnings, developing a life care plan, etc.) that collectively form the basis of an opinion. The methods employed (Field, Johnson, Schmidt, & Van de Bittner, 2006) must meet the test of reliability (at a minimum peer reviewed and generally accepted) and relate to the facts of the case. For a more complete discussion of the major rulings (i.e., *Daubert*, *Joiner*, and *Kumho*) and their interaction with the federal rules of evidence, see Dunn & Field, (2014).

**The *Daubert* Challenge:** In terms of a vocational expert or rehabilitation consultant being challenged, usually a “*in limine motion to exclude*” an expert’s testimony, either in whole or part, is a legal maneuver usually referred to as “a *Daubert* challenge.” The phrase implies that the expert will be challenged on methodology with reference to the *Daubert* four-point criteria. This is generally not the case. In my view, the challenge really should be referred to a “the FRE 702 challenge.” At issue in a challenge is the expert’s qualifications to offer opinion or the reliability of the expert’s methodology in arriving at an opinion.

A typical challenge (in the rehabilitation field) is one similar to the motion as is found in *Ankar & Ankar v. Brown & TNR Trucking* (2014). The case involved a motion to limit the testimony of two experts - a vocational expert and an economist. The challenge included the following elements:

1. “The court fulfills a gatekeeper function to exclude irrelevant or unreliable expert testimony” – citing the *Daubert* ruling only this one time.

2. Noting that the reliability/relevance “function begins with Rule 702”, the complete text of FRE 702 is include in the court’s decision, and is referenced five times in the narrative.
3. Further, observing that the “court should make certain that an expert, whether basing testimony upon professional studies or personal experiences, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field (citing *Kumho*).
4. Citing *Kumho* a second time, “the district court retains ‘broad latitude’ both deciding how to determine whether an exert’s testimony is reliable, and ultimately, whether the testimony is, in fact, reliable.”
5. Finally, the court writes “The party offering the expert must prove by a preponderance of the evidence that the proffered testimony satisfies the Rule 702 test.”

This case, resulting in a *motion to exclude* the two experts, is typical of most cases where experts are challenged. In my review of scores of cases similar to *Ancar*, FRE 702 is virtually cited in all cases as the basis for the *motion to exclude*. In fact, it is very common for the court to cite verbatim the FRE 702 rule within the text of the decision – as it was in this case.

**Qualifications:** In *Hanford Nuclear Reservation Litigation* (2004), the expert’s credentials were at issue and challenged as it appeared that he was merely an “information coordinator and scrivener, not a medical or occupational rehabilitation expert.” The expert responded by reviewing and listing important points regarding his credentials including education and training, work experience within the rehabilitation field, association memberships, activities with the profession – generally how he acquired the necessary specialized knowledge needed for developing opinion. The motion was denied.

**Methodology:** In the case of a “motion to exclude” because of methodology, the vocational expert in *Minton & Minton v. Savage & Savage* (2004) was challenged on the grounds that the damage model the expert used was not “scientifically reliable.” It was shown that the expert evaluated the plaintiff’s earning capacity, future medical cost, all relevant medical records,, including functional restrictions, used labor market data generated by the federal government, and was able to demonstrate that he was familiar with peer reviewed and published literature on topics of earnings capacity and damages – methods which were generally accepted within his professional community. The motion was denied.

**Frequency of Motions to Exclude:** To date, there are no collective data available on the number of challenges and exclusions of vocational experts. However, PriceWaterhouseCoopers provides a yearly study of trends and outcomes of *Daubert Challenges to Financial Experts* (2011). The study was based on 5,360 cases within federal jurisdictions that referenced either *Kumho* only (466), or both *Daubert* and *Kumho* together (4,894). While most of the data relate to financial experts, the two tables of data relate to “witnesses of all types.” Again, it is impossible to extract what number of challenges and exclusions pertain to just vocational experts, the charts provide some idea of what is the nature of challenges in federal courts. *Daubert* challenges over the ten year period have shown an increase (see Figure 3). However, challenges on a percentage basis for exclusions or partial exclusions have remained relatively constant at about 43% (Figure 4). When it comes to the reasons for exclusion, reliability is by far the most frequent reason with relevance and qualifications less frequent (Figure 5).

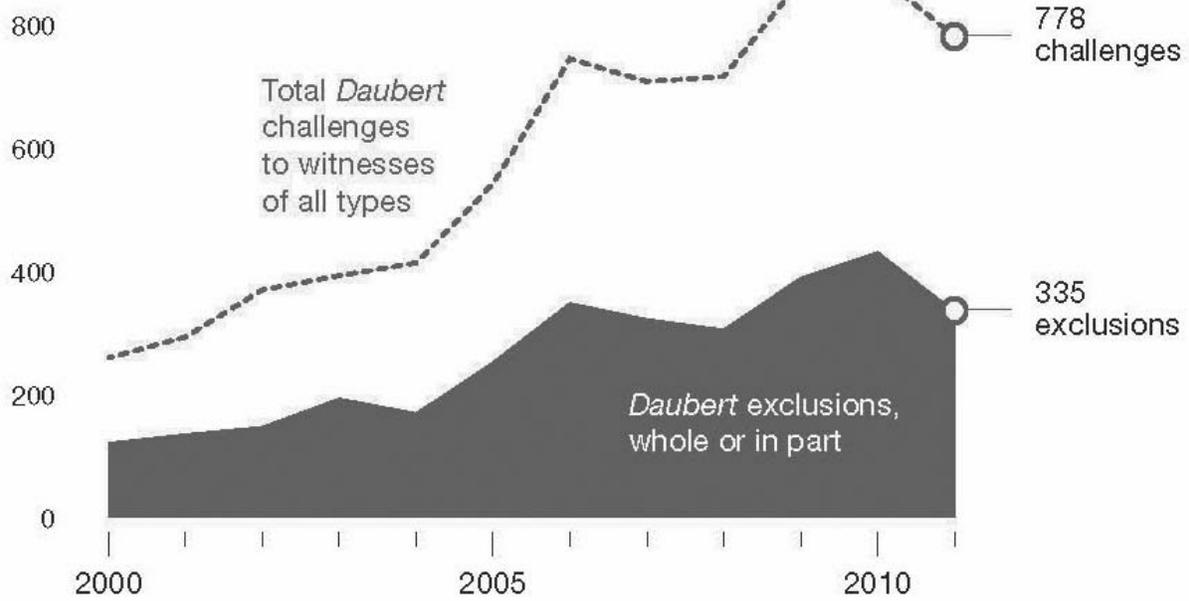


Figure 3. *Daubert* challenges and exclusions to expert witnesses of all types, 2000-2011. Source: PriceWaterhouseCoopers (2011, p. 6).

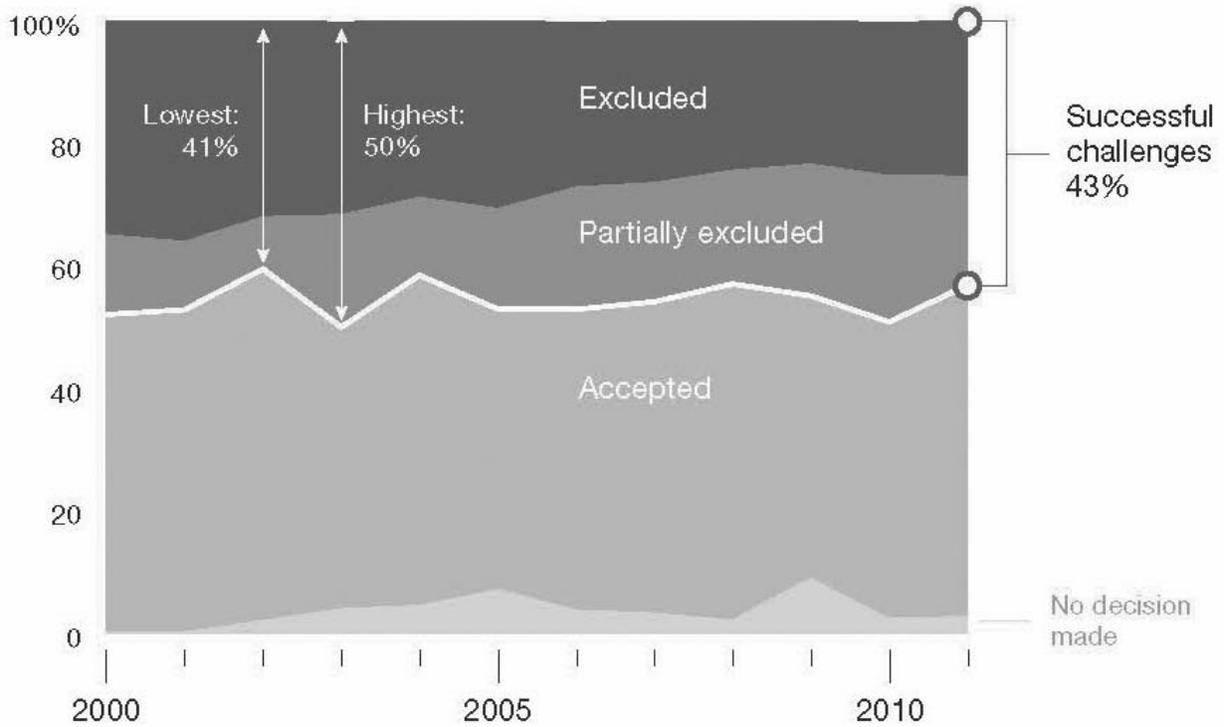


Figure 4. Outcome of *Daubert* challenges to expert witnesses of all types, 2000-2011. Source: PriceWaterhouseCoopers (2011, p. 6).

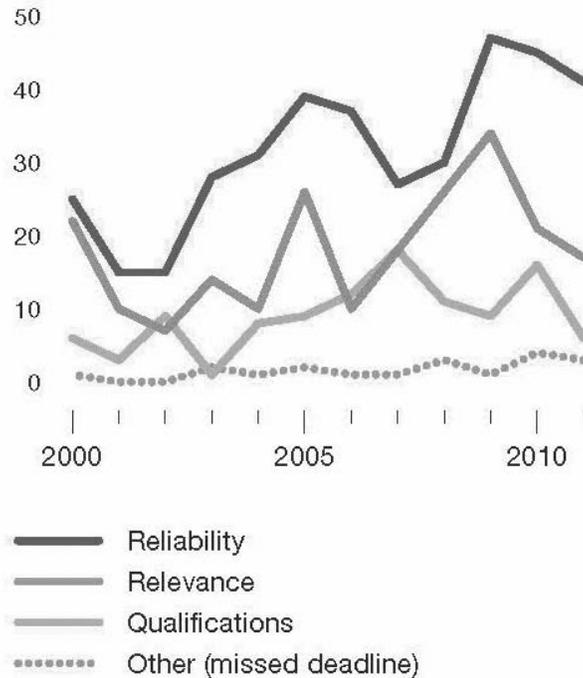


Figure 5. Exclusion reasons history. Source: PriceWaterhouseCoopers (2011, p. 13)

## The Forensic Maturation Years (1995 - present)

In my opinion, it seems that the profession of forensic rehabilitation consulting and vocational expert work has arrived. Taking into account the stability of the Vocational Expert program in SSA, and the settling in of the compensation area, we are no longer struggling to know who we are. The growth and expansion of the rehabilitation laws and regulations, the productive era of vocational evaluation and assessment, along with the growth and maturing of the rehabilitation associations have likewise added stability and direction. Through ABVE and IARP, various standards have been developed and given definition in areas of ethics, practice, and activities. The *Daubert* trilogy, and subsequent case law, have, following a few years of confusion and ambiguity, clarified the expert's role in state and federal courts.

**Functions of the VE:** In terms of roles and functions of the rehabilitation consultant, much has been written for and published in the professional journals over the years. Bringing much of that work to the forefront is an excellent article by Robinson and Pomeranz (2011) and the discussion of the VRAM Model (see Figure 6). The Model is an effort to identify and operationalized 29 core domains related to vocational earning capacity. In fact, a review of the domain activities and the accompanying flow chart reveals that this study is rather comprehensive taking into account a large majority of a consultant's activities. Weed, over the years, studied the role and functions of the life care planner through a bi-annual conference of LCP professionals. Relying on group activities by attendees over several years, the results were summarized in the *Journal of Life Care Planning* (Vol. 10, No. 3, 2011). Another important study completed by Pomeranz, Yu, and Reid (2010) developed research on the role and functions of life care planners, and yielded a significant amount of data and information on what LCPers do on a daily basis.

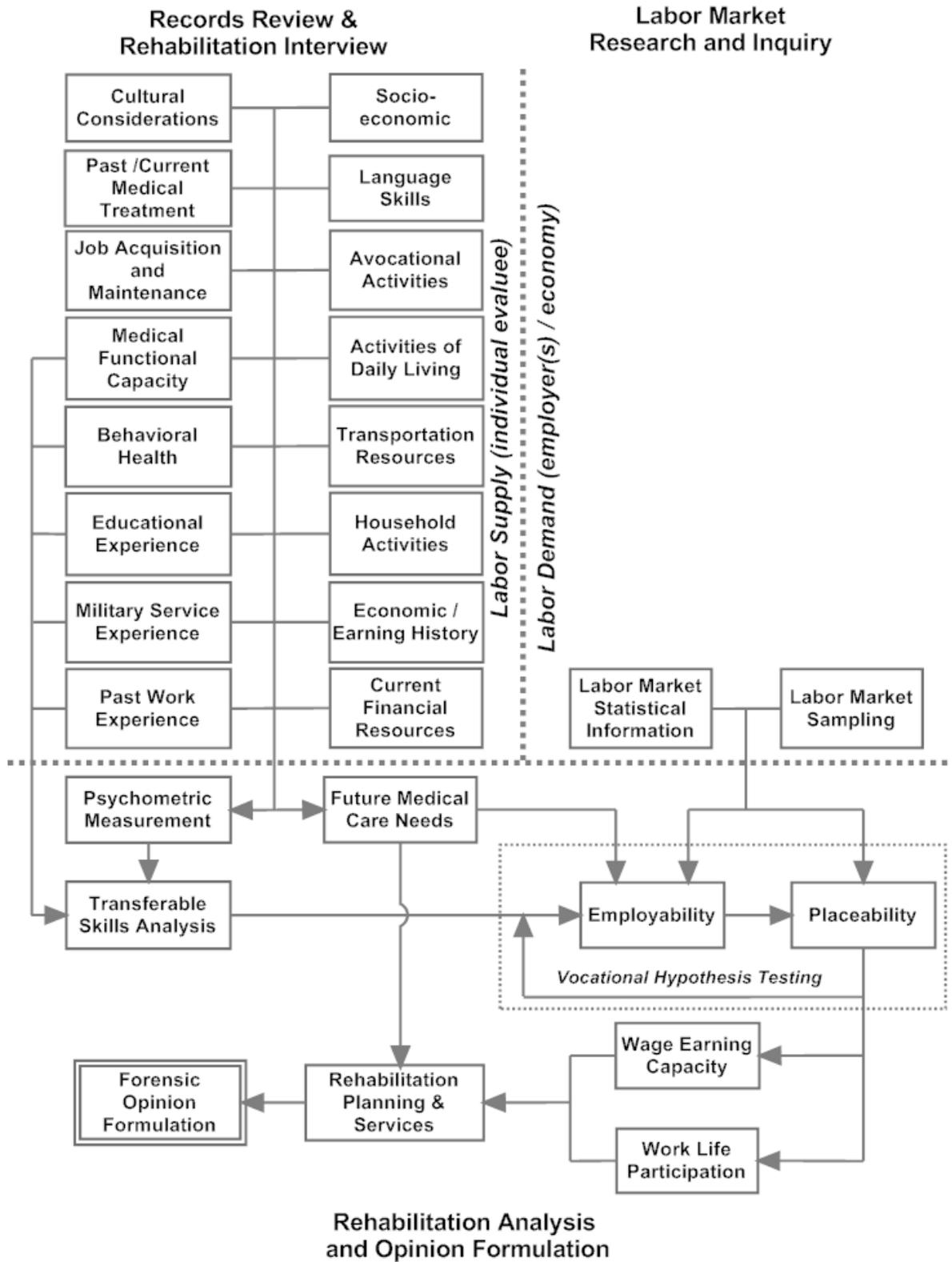


Figure 6. Vocational and Rehabilitation Assessment Model (VRAM). Source: Robinson (2011, p. 100)

**VE Characteristics:** In a study of rehabilitation counselors performing as vocational experts, Younger (2005), counselors responded to a survey in which they were asked to identify the five most important traits of an effective expert. The survey sample consisted of 346 experts who were considered to be “effective” as vocational experts. Chart 5 summarizes the results.

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**Chart 5: Most Important Traits of Effective Rehabilitation Expert**

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Characteristics	First Choice %
Credibility	38.4
Objectivity	15.3
Honesty	11.8
Integrity	11.1
Preparation before Trial	8.5
Analytical Ability	5.5
Prior Experience	5.2
Consistency in Testimony	5.1
Ability to Persuade Others	3.3
Education	2.9
Teaching Ability	2.6
Investigative Ability	2.0
Public Speaking Ability	2.0
Writing Ability	1.0
Physical Attractiveness	1.0

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Source: Younger (2005, p. 104)

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All of these factors and developments over the last sixty years have brought us to where we are today – a significant, important and mature(ing) profession that makes many positive contributions the field of forensic rehabilitation consulting, and particularly, to that of the work of the vocational expert. In retrospect, the history of our profession and that of the vocational expert has been a glorious journey, sometimes beset with obstacles, but glorious nevertheless. Now we only have to decide, individually, whether we are a “fox” or a “hedgehog.”

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# Appendix A

## Criteria for Section of Vocational Experts in SSA (@1965)

### A. Recent experience in:

1. Rehabilitation counseling and/or placement, particularly with clients having prior work experience.
2. The use of occupational information materials developed for vocational counseling, including information about the requirements of jobs such as duties, skills, physical demands, working conditions and occupationally significant characteristics, A working knowledge of the *Dictionary of Occupational Titles* (3rd ed., 1965), and its two supplements is important.
3. The utilization of the concept of transferability of skills in terms of worker traits and functions.

### B. Ability to observe and evaluate personal characteristics, education and vocation background.

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

Source: Hannings et al. (1972, p. 138).



## Appendix B

### Cumulative Listing of Current Court Case Decisions Published As Acquiescence Rulings (1986-2005)

*Adams v. Weinberger* (contributions to support re: posthumous illegitimate child — title II of the Social Security Act), AR 86-21(2)

*Akers v. Secretary of Health and Human Services* (attorney's fees based in part on continued benefits paid to Social Security claimants — title II of the Social Security Act), AR 93-3(6) **(Rescinded 4/14/2000)**

*Albright v. Commissioner of the Social Security Administration*, ((Interpreting *Lively v. Secretary of Health and Human Services*)—Effect of Prior Disability Findings on Adjudication of a Subsequent Disability Claim—Titles II and XVI of the Social Security Act), AR 00-1(4)

*Aubrey v. Richardson* (interpretation of the Secretary's regulation regarding presumption of death — title II of the Social Security Act), AR 86-6(3) **(Rescinded 7/14/1995)**

*Autrey v. Harris* (interpretation of the Secretary's regulation regarding presumption of death — title II of the Social Security Act), AR 86-7(5), AR 86-11(11) **(Rescinded 7/14/1995)**

*Blakes v. Barnhart* (cases involving sections 12.05 and 112.05 of the Listing of Impairments that are remanded by a court for further proceedings under titles II and XVI of the Social Security Act), AR 03-1(7)

*Bloodsworth v. Heckler* (judicial review of Appeals Council dismissal of a request for review of an ALJ decision — titles II and XVI of the Social Security Act), AR 92-4(11) **(Rescinded 10/26/1999 by AR 99-4(11))**

*Bloodsworth v. Heckler* (judicial review of Appeals Council dismissal of a request for review of an Administrative Law Judge decision — titles II and XVI of the Social Security Act), AR 99-4(11)

*Boylard v. Califano* (the "contribution to support" requirement of section 216(h)(3)(C)(ii) of the Social Security Act), AR 86-15(6)

*Branham v. Heckler* (what constitutes a significant work-related limitation of function — titles II and XVI of the Social Security Act), AR 93-1(4) **(Rescinded 9/20/2000)**

*Brewster on Behalf of Keller v. Sullivan* (interpretation of the Secretary's regulation regarding presumption of death — title II of the Social Security Act), AR 93-6(8) **(Rescinded 7/14/1995)**

*Brodner, Condon and v. Bowen* (attorney's fees based in part on continued benefits paid to Social Security Claimants — title II of the Social Security Act), AR 93-4(2) **(Rescinded 4/14/2000)**

*Butterworth v. Bowen* (conditions under which the Appeals Council has the right to reopen and revise prior decisions — titles II and XVI of the Social Security Act), AR 87-2(11) **(Rescinded 8/6/1998)**

*Capitano v. Secretary of HHS* (entitlement of a deemed widow when a legal widow is entitled on the same earnings record — title II of the Social Security Act), AR 86-2R(2)

*Chavez v. Bowen*, (effect of a prior final decision that a claimant is not disabled, and of findings contained therein, on adjudication of a subsequent disability claim arising under the same title of the Social Security Act — Titles II and XVI of the Social Security Act), AR 97-4(9)

*Childress v. Secretary of Health and Human Services* (the "contribution to support" requirement of section 216(h)(3)(C)(ii) of the Social Security Act), AR 86-15(6)

*Condon and Brodner v. Bowen* (attorney's fees based in part on continued benefits paid to Social Security claimants — title II of the Social Security Act), AR 93-4(2) **(Rescinded 4/14/2000)**

*Conley v. Bowen* (determination of whether an individual with a disabling impairment has engaged in substantial gainful activity following a reentitlement period — title II of the Social Security Act), AR 93-2(2) **(Rescinded 8/10/2000)**

*Culbertson v. Secretary of Health and Human Services* (waiver of administrative finality in proceedings involving unrepresented claimants who lack the mental competence to request administrative review — titles II and XVI of the Social Security Act), AR 90-4(4)

*Curry v. Apfel* (burden of proving residual functional capacity at step five of the sequential evaluation process for determining disability — titles II and XVI of the Social Security Act), AR 00-4(2) **(Rescinded 9/25/2003)**

*Damon v. Secretary of Health, Education and Welfare* (child benefits: support of child adopted after worker's entitlement to benefits — title II of the Social Security Act), AR 86-16(2)

*Daniels on Behalf of Daniels v. Sullivan* (application of a State's intestacy law requirement that paternity be established during the lifetime of the father — title II of the Social Security Act), AR 97-3(11)

*Dennard v. Secretary of Health and Human Services*, (effect of a prior finding of the demands of past work on adjudication of a subsequent disability claim arising under the same title of the Social Security Act — titles II and XVI of the Social Security Act) AR 98-3(6)

*DeSonier v. Sullivan* (method of application of State Intestate Succession Law in determining entitlement to child's benefits — title II of the Social Security Act), AR 96-1(6)

*Difford v. Secretary of Health and Human Services* (scope of review on appeal in a medical cessation of disability case — title II of the Social Security Act), AR 92-2(6) **(Rescinded 2/21/2013)**

*Dion v. Secretary of Health and Human Services* (applicability of the windfall offset provision), AR 88-4(1)

*Doran v. Schweiker* (contributions to support re: posthumous illegitimate child — title II of the Social Security Act), AR 86-23(9)

*Drummond v. Commissioner of Social Security* (effect of prior findings on adjudication of a subsequent disability claim arising under the same title of the Social Security Act), AR 98-4(6)

*Edwards v. Califano* (interpretation of the Secretary's regulation regarding presumption of death — title II of the Social Security Act), AR 86-10(10) **(Rescinded 7/14/1995)**

*Fagner v. Heckler* (applicability of section 1127 of the Social Security Act), AR 86-25(9)

*Florez on Behalf of Wallace v. Callahan* (supplemental security income — deeming of income from a stepparent to a child when the natural parent is not living in the same household — title XVI of the Social Security Act), AR 99-1(2) **(Rescinded 6/16/2008)**

*Flowers v. U.S. Department of Health and Human Services* (what constitutes a significant work-related limitation of function — titles II and XVI of the Social Security Act), AR 93-1(4) **(Rescinded 9/20/2000)**

*Fowlkes v. Adamec* (determining whether an individual is a fugitive felon under the Social Security Act), AR 06-1(2)

*Gamble v. Chater* (amputation of a lower extremity — when the inability to afford the cost of a prosthesis meets the requirements of Section 1.10C of the Listing of Impairments — titles II and XVI of the Social Security Act), AR 97-2(9) **(Rescinded 2/19/2002)**

*Gillett-Netting v. Barnhart* (applicability of State law and the Social Security Act in determining whether a child conceived by artificial means after an insured person's death is eligible for child's insurance benefits — Title II of the Social Security Act), AR 05-1(9) **Rescinded 11/13/2012**

*Gonzalez v. Sullivan* (effect of initial determination notice language on the application of administrative finality — titles II and XVI of the Social Security Act), AR 92-7(9)

*Grigg v. Finch* (correction of an individual's earnings record to reflect self-employment income for years in which the individual did not timely file an income tax return), AR 86-20(6)

*Haddock v. Apfel* (use of vocational expert testimony and the Dictionary of Occupational Titles under 20 CFR 404.1456, 416.966 — titles II and XVI of the Social Security Act) AR 00-3(1) **(Rescinded 12/4/2000)**

*Hickman v. Apfel* (evidentiary requirements for determining medical equivalence to a listed impairment—titles II and XVI of the Social Security Act), AR 00-2(7) **(Rescinded 03/30/2006)**

*Hickman v. Bowen*, (evaluation of loans of in-kind support and maintenance for Supplemental Security Income (SSI) benefit calculation purposes AR 88-07(5) **(Rescinded)**

*Hodge v. Shalala* (worker's compensation — proration of a lump-sum award for permanent disability over the remainder of an individual's working life — Oregon — title II of the Social Security Act), AR 95-2(9)

*Howard on behalf of Wolff v. Barnhart* (applicability of the statutory requirement for pediatrician review in childhood disability cases to the Hearings and Appeals levels of the administrative review process — Title XVI of the Social Security Act), AR 04-1(9)

*Hutcheson v. Califano* (determination of stepchild and resulting entitlement to auxiliary benefits — title II of the Social Security Act), AR 86-12(9)

*Iamarino v. Heckler* (positive presumption of substantial gainful activity for sheltered work), AR 87-4(8) **(Rescinded 8/10/2000)**

*Johnson v. Califano* (interpretation of the Secretary's regulation regarding presumption of death — title II of the Social Security Act), AR 86-8(6) **(Rescinded 7/14/1995)**

*Jones v. Secretary of Health, Education and Welfare* (child's benefits — contributions for support — title II of the Social Security Act), AR 86-14(4)

*Kerns v. Apfel* (definition of highly marketable skills for individuals close to retirement age — titles II and XVI of the Social Security Act), AR 99-2(8) **(Rescinded 5/8/2000)**

*Leschniok v. Heckler* (necessity of a determination under sections 225(b) and/or 1631(a)(6) of the Social Security Act for a disability benefits recipient engaged in an approved vocational rehabilitation program prior to cessation of his/her benefits based on medical recovery), AR 86-5(9)

*Levings v. Califano* (definition of an inmate of a public institution — title XVI of the Social Security Act), AR 88-6(8)

*Lidy v. Sullivan* (right to subpoena an examining physician for cross-examination purposes — titles II and XVI of the Social Security Act), AR 91-1(5)

*Lively v. Secretary of Health and Human Services* (effect of prior disability findings on adjudication of a subsequent disability claim arising under the same title of the Social Security Act — titles II and XVI of the Social Security Act), AR 94-2(4) **(Rescinded 1/12/2000 by AR 00-1(4))**

*Martinez v. Heckler* (disability program — individuals who are illiterate and unable to communicate in English — titles II and XVI of the Social Security Act), AR 86-3(5)

*Mazza v. Secretary of Health and Human Services* (order of effectuation in concurrent application cases) — titles II and XVI of the Social Security Act), AR 92-1(3)

*McDonald v. Bowen* (entitlement to benefits where a person returns to work less than 12 months after onset of disability), AR 88-3(7) **(Rescinded 6/10/2002)**

*McNeal v. Schweiker* (child's benefits — contributions for support — title II of the Social Security Act), AR 86-13(3)

*McQueen v. Apfel* (definition of highly marketable skills for individuals close to retirement age — titles II and XVI of the Social Security Act), AR 99-3(5) **(Rescinded 5/8/2000)**

*Meza, Secretary of Health, Education and Welfare v.* (interpretation of the Secretary's regulation regarding presumption of death — title II of the Social Security Act), AR 86-9(9) **(Rescinded 7/14/1995)**

*Newton v. Chater* (entitlement to trial work period before approval of an award for benefits and before twelve months have elapsed since onset of disability — titles II and XVI of the Social Security Act), AR 98-1(8) **(Rescinded 6/10/2002)**

*Owens v. Schweiker* (child's benefits — title II of the Social Security Act), AR 86-17(9) **(Rescinded 11/27/1998)**

*Parisi by Cooney v. Chater* (reduction of benefits under the family maximum in cases involving dual entitlement — title II of the Social Security Act), AR 97-01(1) **(Rescinded 10/27/1999)**

*Parker v. Schweiker* (the "contribution to support" requirement of section 216(h)(3)(C)(ii) of the Social Security Act), AR 86-15(6)

*Parsons v. Health and Human Services* (contributions to support re: posthumous illegitimate child — title II of the Social Security Act), AR 86-22(4)

*Paskel v. Heckler* (necessity of a determination under sections 225(b) and/or 1631(a)(6) of the Social Security Act for a disability benefits recipient engaged in an approved vocational rehabilitation program prior to cessation of his/her benefits based on medical recovery), AR 86-4(3)

*Patterson v. Bowen* (use of the age factor in the Medical-Vocational Guidelines in making disability determinations), AR 88-1(11) **(Rescinded 5/8/2000)**

*Petersen v. Astrue* (whether a National Guard technician who worked in noncovered employment is exempt from the Windfall Elimination Provision (WEP)), AR 12-1(8)

*Preslar v. Secretary of Health and Human Services* (definition of highly marketable skills for individuals close to retirement age — titles II and XVI of the Social Security Act), AR95-1(6) **(Rescinded 5/8/2000)**

*Quinlivan v. Sullivan* (meaning of the term "against equity and good conscience" in the rules for waiver of recovery of an overpayment — titles II and XVI of the Social Security Act; title IV of the Federal Mine Safety and Health Act of 1977), AR 92-5(9)

*Rosenberg v. Richardson* (entitlement of a deemed widow when a legal widow is entitled on the same earnings record — title II of the Social Security Act), AR 86-2R(2)

*Ruppert v. Bowen* (evaluation of a rental subsidy as in-kind income for supplemental security income benefit calculation purposes), AR 90-2(2)

*Salamalekis v. Apfel* (entitlement to trial work period before approval of an award of benefits and before 12 months have elapsed since the alleged onset of disability — titles II and XVI of the Social Security Act), AR 00-5(6) **(Rescinded 6/10/2002)**

*Shelnutt v. Heckler* (interpretation of the Secretary's regulation regarding presumption of death — title II of the Social Security Act), AR 86-6(3) **(Rescinded 7/14/1995)**

*Shoemaker v. Bowen* (attorney's fees based in part on continued benefits paid to Social Security claimants — title II of the Social Security Act), AR 93-5(11) **(Rescinded 4/14/2000)**

*Sird v. Chater* (mental retardation — what constitutes an additional and significant work-related limitation of function — titles II and XVI of the Social Security Act), AR 98-2(8) **(Rescinded 9/20/2000)**

*Smith v. Bowen* (use of vocational expert or other vocational specialist in determining whether a claimant can perform past relevant work — titles II and XVI of the Social Security Act), AR 90-3(4) **(Rescinded 9/25/2003)**

*State of Minnesota v. Apfel* (coverage for Employees Under a Federal-State Section 218 Agreement or Modification and Application of the Student Services Exclusion From Coverage to Services Performed by medical residents — title II of the Social Security Act), AR 98-5(8)

*Sykes v. Apfel* (using the grid rules as a framework for decisionmaking when an individual's occupational base is eroded by a nonexertional limitation — titles II and XVI of the Social Security Act), AR 01-1(3)

*Wages v. Schweiker* (interpretation of the Secretary's regulation regarding presumption of death — title II of the Social Security Act), AR 86-7(5) **(Rescinded 7/14/1995)**

*Walker v. Secretary of Health and Human Services* (entitlement to trial work period before approval of award for benefits and before 12 months have elapsed since onset of disability — titles II and XVI of the Social Security Act), AR 92-6(10) **(Rescinded 6/10/2002)**

*Webb v. Richardson* (attorneys' fees — single fee, not to exceed 25 percent of past-due benefits, set by tribunal which ultimately upholds the claim — title II of the Social Security Act), AR 87-1(6) **(Rescinded 3/3/1995)**

*Wilcox, Gardner v.* (interpretation of the Secretary's regulation regarding presumption of death — title II of the Social Security Act), AR 86-9(9) **(Rescinded 7/14/1995)**

*Wolfe v. Sullivan* (contributions to support — posthumous illegitimate child — title II of the Social Security Act), AR 94-1(10)

*Woodson v. Schweiker* (interpretation of the deemed marriage provision — title II of the Social Security Act), AR 86-18R(5), AR 86-19R(11)

*Young v. Bowen* (waiver of administrative finality in proceedings involving unrepresented claimants who lack the mental competence to request administrative review — titles II and XVI of the Social Security Act), AR 90-4(4)

# Appendix C

## POLICY INTERPRETATION RULING

### SSR 00-4p: TITLES II AND XVI: USE OF VOCATIONAL EXPERT AND VOCATIONAL SPECIALIST EVIDENCE, AND OTHER RELIABLE OCCUPATIONAL INFORMATION IN DISABILITY DECISIONS

#### PURPOSE:

This Ruling clarifies our standards for the use of vocational experts (VEs) who provide evidence at hearings before administrative law judges (ALJs), vocational specialists (VSs) who provide evidence to disability determination services (DDS) adjudicators, and other reliable sources of occupational information in the evaluation of disability claims. In particular, this ruling emphasizes that before relying on VE or VS evidence to support a disability determination or decision, our adjudicators must:

- Identify and obtain a reasonable explanation for any conflicts between occupational evidence provided by VEs or VSs and information in the *Dictionary of Occupational Titles* (DOT), including its companion publication, the Selected Characteristics of Occupations Defined in the *Revised Dictionary of Occupational Titles* (SCO), published by the Department of Labor, and
- Explain in the determination or decision how any conflict that has been identified was resolved.

#### CITATIONS (AUTHORITY):

Sections 216(i), 223(d)(2)(A), and 1614(a)(3)(B) of the Social Security Act, as amended; 20 CFR Part 404, sections 404.1566-404.1569, 20 CFR Part 404, subpart P, appendix 2, § 200.00(b), and 20 CFR Part 416, sections 416.966-416.969.

#### PERTINENT HISTORY:

To determine whether an individual applying for disability benefits (except for a child applying for Supplement Security Income) is disabled, we follow a 5-step sequential evaluation process as follows:

1. Is the individual engaging in substantial gainful activity? If the individual is working and the work is substantial gainful activity, we find that he or she is not disabled.
2. Does the individual have an impairment or combination of impairments that is severe? If the individual does not have an impairment or combination of impairments that is severe, we will find that he or she is not disabled. If the individual has an impairment or combination of impairments that is severe, we proceed to step 3 of the sequence.

3. Does the individual's impairment(s) meet or equal the severity of an impairment listed in appendix 1 of subpart P of part 404 of our regulations? If so, we find that he or she is disabled. If not, we proceed to step 4 of the sequence.
4. Does the individual's impairment(s) prevent him or her from doing his or her past relevant work (PRW), considering his or her residual functional capacity (RFC)? If not, we find that he or she is not disabled. If so, we proceed to step 5 of the sequence.
5. Does the individual's impairment(s) prevent him or her from performing other work that exists in the national economy, considering his or her RFC together with the "vocational factors" of age, education, and work experience? If so, we find that the individual is disabled. If not, we find that he or she is not disabled.

The regulations at 20 CFR 404.1566(d) and 416.966(d) provide that we will take administrative notice of "reliable job information" available from various publications, including the DOT. In addition, as provided in 20 CFR 404.1566(e) and 416.966(e), we use VEs and VSs as sources of occupational evidence in certain cases. Questions have arisen about how we ensure that conflicts between occupational evidence provided by a VE or a VS and information in the DOT (including its companion publication, the SCO) are resolved. Therefore, we are issuing this ruling to clarify our standards for identifying and resolving such conflicts.

## **POLICY INTERPRETATION:**

### **Using Occupational Information at Steps 4 and 5**

In making disability determinations, we rely primarily on the DOT (including its companion publication, the SCO) for information about the requirements of work in the national economy. We use these publications at steps 4 and 5 of the sequential evaluation process. We may also use VEs and VSs at these steps to resolve complex vocational issues.[1] We most often use VEs to provide evidence at a hearing before an ALJ. At the initial and reconsideration steps of the administrative review process, adjudicators in the DDSs may rely on VSs for additional guidance. See, for example, SSRs 82-41, 83-12, 83-14, and 85-15.

### **Resolving Conflicts in Occupational Information**

Occupational evidence provided by a VE or VS generally should be consistent with the occupational information supplied by the DOT. When there is an apparent unresolved conflict between VE or VS evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to support a determination or decision about whether the claimant is disabled. At the hearings level, as part of the adjudicator's duty to fully develop the record, the adjudicator will inquire, on the record, as to whether or not there is such consistency.

Neither the DOT nor the VE or VS evidence automatically "trumps" when there is a conflict. The adjudicator must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on the VE or VS testimony rather than on the DOT information.

### **Reasonable Explanations for Conflicts (or Apparent Conflicts) in Occupational Information**

Reasonable explanations for such conflicts, which may provide a basis for relying on the evidence from the VE or VS, rather than the DOT information, include, but are not limited to the following:

- Evidence from VEs or VSs can include information not listed in the DOT. The DOT contains information about most, but not all, occupations. The DOT's occupational definitions are the result of comprehensive studies of how similar jobs are performed in different workplaces. The term "occupation," as used in the DOT, refers to the collective description of those jobs. Each occupation represents numerous jobs. Information about a particular job's requirements or about occupations not listed in the DOT may be available in other reliable publications, information obtained directly from employers, or from a VE's or VS's experience in job placement or career counseling.
- The DOT lists maximum requirements of occupations as generally performed, not the range of requirements of a particular job as it is performed in specific settings. A VE, VS, or other reliable source of occupational information may be able to provide more specific information about jobs or occupations than the DOT.

### **Evidence That Conflicts With SSA Policy**

SSA adjudicators may not rely on evidence provided by a VE, VS, or other reliable source of occupational information if that evidence is based on underlying assumptions or definitions that are inconsistent with our regulatory policies or definitions. For example:

- Exertional Level

We classify jobs as sedentary, light, medium, heavy and very heavy (20 CFR 404.1567 and 416.967). These terms have the same meaning as they have in the exertional classifications noted in the DOT.

Although there may be a reason for classifying the exertional demands of an occupation (as generally performed) differently than the DOT (e.g., based on other reliable occupational information), the regulatory definitions of exertional levels are controlling. For example, if all available evidence (including VE testimony) establishes that the exertional demands of an occupation meet the regulatory definition of "medium" work (20 CFR 404.1567 and 416.967), the adjudicator may not rely on VE testimony that the occupation is "light" work.

- Skill Level

A skill is knowledge of a work activity that requires the exercise of significant judgment that goes beyond the carrying out of simple job duties and is acquired through performance of an occupation that is above the unskilled level (requires more than 30 days to learn). (See SSR 82-41.) Skills are acquired in PRW and may also be learned in recent education that provides for direct entry into skilled work.

The DOT lists a specific vocational preparation (SVP) time for each described occupation. Using the skill level definitions in 20 CFR 404.1568 and 416.968, unskilled work corresponds to an SVP of 1-2; semi-skilled work corresponds to an SVP of 3-4; and skilled work corresponds to an SVP of 5-9 in the DOT.

Although there may be a reason for classifying an occupation's skill level differently than in the DOT, the regulatory definitions of skill levels are controlling. For example, VE or VS evidence may not be relied upon to establish that unskilled work involves complex duties that take many months to learn, because that is inconsistent with the regulatory definition of unskilled work. See 20 CFR 404.1568 and 416.968.

- Transferability of Skills

Evidence from a VE, VS, or other reliable source of occupational information cannot be inconsistent with SSA policy on transferability of skills. For example, an individual does not gain skills that could potentially transfer to other work by performing unskilled work. Likewise, an individual cannot transfer skills to unskilled work or to work involving a greater level of skill than the work from which the individual acquired those skills. See SSR 82-41.

### **The Responsibility To Ask About Conflicts**

When a VE or VS provides evidence about the requirements of a job or occupation, the adjudicator has an affirmative responsibility to ask about any possible conflict between that VE or VS evidence and information provided in the DOT. In these situations, the adjudicator will:

- Ask the VE or VS if the evidence he or she has provided conflicts with information provided in the DOT; and
- If the VE's or VS's evidence appears to conflict with the DOT, the adjudicator will obtain a reasonable explanation for the apparent conflict.

### **Explaining the Resolution**

When vocational evidence provided by a VE or VS is not consistent with information in the DOT, the adjudicator must resolve this conflict before relying on the VE or VS evidence to support a determination or decision that the individual is or is not disabled. The adjudicator will explain in the determination or decision how he or she resolved the conflict. The adjudicator must explain the resolution of the conflict irrespective of how the conflict was identified.

### **EFFECTIVE DATE:**

This Ruling is effective on the date of its publication in the Federal Register. The clarified standard stated in this ruling with respect to inquiring about possible conflicts applies on the effective date of the ruling to all claims for disability benefits in which a hearing before an ALJ has not yet been held, or that is pending a hearing before an ALJ on remand. The clarified standard on resolving identified conflicts applies to all claims for disability or blindness benefits on the effective date of the ruling.

### **CROSS-REFERENCES:**

SSR 82-41, "Titles II and XVI: Work Skills and Their Transferability as Intended by the Expanded Vocational Factors Regulations Effective February 26, 1979," SSR 82-61, "Titles II and XVI: Past Relevant Work--The Particular Job or the Occupation as Generally Performed," SSR 82-62, "Titles II and XVI: A Disability Claimant's Capacity to Do Past Relevant Work, In General," SSR 83-10, "Titles II and XVI: Determining Capability to Do Other Work--The Medical-Vocational Rules of Appendix 2," SSR 83-12, "Titles II and XVI: Capability to Do Other Work--The Medical-Vocational Rules as a Framework for Evaluating Exertional Limitations Within a Range of Work or Between Ranges of Work," SSR 83-14, "Titles II and XVI: Capability to do Other Work--The Medical-Vocational Rules as a Framework for Evaluating a Combination of Exertional and Nonexertional Impairments," and SSR 85-15, "Titles II and XVI: Capability to Do Other Work--The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments";

AR 90-3(4), 837 F.2d 635 (4th Cir. 1987)-Use of Vocational Experts or Other Vocational Specialist in Determining Whether a Claimant Can Perform Past Relevant Work-Titles II and XVI of the Social Security Act;

Program Operations Manual System, Part 04, sections DI 25001.001, DI 25005.001, DI 25020.001-DI 25020.015, and DI 25025.001- DI 25025.005.

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[1] In accordance with Acquiescence Ruling 90-3(4), we do not use VEs at step 4 of the sequential evaluation process in the Fourth Circuit.



# Appendix D

## Sample Case

8 of 12 DOCUMENTS

**CLORETTE ANCAR and LEONARD JOSEPH ANCAR, JR., PLAINTIFFS v. LEROY BROWN, JR. and TNE TRUCKING, INC, DEFENDANTS**

**CIVIL ACTION NO. 3:11-cv-595-DPJ-FKB**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, NORTHERN DIVISION**

**2014 U.S. Dist. LEXIS 20358**

**February 19, 2014, Decided**

**February 19, 2014, Filed**

**CORE TERMS:** recommendation, reliable, home-exercise, physical therapy, weight-loss, medication, future medical treatment, injection, expert testimony, admissibility, inadmissible, life-care, recommends, reduction, general rule, expert's opinion, permitted to testify, jury's consideration, questions relating, cross-examination, unreliable, gatekeeper, admissible, assigned, vigorous, epidural, therapy, steroid, future medical, current condition

**COUNSEL:** [\*1] For Clorette Ancar, Leonard Joseph Ancar, Jr., Plaintiffs: Christie Evans Ogden, Daryl Matthew Newman, Quentin Andrew Daniels, DON H. EVANS, PLLC, Jackson, MS; Donnie Herbert Evans, DON H. EVANS, ATTORNEY, Jackson, MS.

For Leroy Brown, Jr., TNE Trucking, Inc., Defendants: Benny McCalip May, David C. Dunbar, DUNBARMONROE, P.A., Ridgeland, MS.

**JUDGES:** Daniel P. Jordan III, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** Daniel P. Jordan III

## OPINION

### ORDER

This negligence action is before the Court on Defendants' Motion to Limit the Testimony of Certain Experts [104]. The Court, having considered the memoranda and submissions of the parties, finds that Defendants' motion should be granted in part and denied in part.

### I. Facts and Procedural History

This case arises from a February 14, 2011 traffic accident on Interstate Highway 20. Defendant Leroy Brown was driving a tractor-trailer eastbound and veered off the road after apparently falling asleep. Plaintiffs Clorette and Leonard Joseph Ancar were traveling westbound and purportedly reacted when they saw Brown. Though the two vehicles never collided, the Ancars swerved and struck the barrier in the median.

Plaintiffs allege that they both suffered injuries from the accident. Their [\*2] amended complaint alleges negligence, gross negligence, and recklessness against Defendant Brown and vicariously against his employer Defendant TNE Trucking, Inc. In support of their claims, the Ancars designated **economist** Gerald Lee and life-care planner Nathaniel Fentress as experts. Defendants filed the instant motion to limit the testimony of both experts, arguing that their opinions are unreliable.

### II. Standard

The district court fulfills a gatekeeper function to exclude irrelevant or unreliable expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 & n.7 (1993). This function begins with Rule 702 of the Federal Rules of Evidence, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. [\*3] Under Rule 702, the court should “make certain that an expert, whether basing testimony upon professional studies or personal experiences, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

Whether a proposed expert should be permitted to testify under Rule 702 “is case, and fact, specific.” *Hodges v. Mack Trucks Inc.*, 474 F.3d 188, 194 (5th Cir. 2006) (citation omitted). Thus, the district court retains “‘broad latitude’ both in deciding how to determine whether an expert’s testimony is reliable, and ultimately, whether the testimony is, in fact, reliable.” *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)). “The party offering the expert must prove by a preponderance of the evidence that the proffered testimony satisfies the rule 702 test.” *Mathis v. Exxon Corp.*, 302 F.3d 448, 459—60 (5th Cir. 2002).

The gatekeeper function of the district court does not, however, replace trial on the merits. In performing this function, “the district court should approach its task ‘with proper deference to the jury’s role as the arbiter of [\*4] disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert’s opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury’s consideration.’” *United States v. 14.38*

*Acres of Land, More or Less Situated in Leflore Cnty.*, 80 F.3d 1074, 1077 (5th Cir. 1996) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)).

### III. Analysis

#### A. Nathaniel Fentress

Fentress is a vocational rehabilitation specialist who submitted a **life-care plan** for Clorette Ancar. In that plan, Fentress recommends lifelong medication and physical therapy, a home-exercise program, a weight-loss program, and annual epidural-steroid injections. Defendants argue that these recommendations lack a reliable foundation and are therefore inadmissible.

#### 1. Medication

Defendants first take issue with Fentress's opinion regarding future medication. Fentress's **life-care plan** recommends Aleve, Advil or Tylenol four times a day; Celexa once a day; and Xanax once a day for the rest of her life. That opinion finds some support in the record. With respect to the Celexa and Xanax, Dr. Howard Katz performed an IME and concluded [\*5] that prescriptions for Celexa and Xanax "are reasonable." Defs.' Mot. [104] Ex. F, IME Report. As for the other medications in the report, Dr. Katz listed "Tylenol, Advil or Aleve" in the "Anticipated Future Medical Needs" section of his report. *Id.*

Defendants argue that Fentress and Plaintiffs misconstrue Dr. Katz's opinion because Dr. Katz does not relate Mrs. Ancar's current condition to the accident. But that is a disputed fact. The treating physician, Dr. Alexis Waguespack, attributes Plaintiff's current condition to the accident as does Dr. Michael C. Molleston, who describes Dr. Katz's causation opinions as "inaccurate and unreasonable." Pls.' Resp. [106] Ex. H, Letter. It is a matter of weight whether Dr. Katz's opinions regarding future needs are causally related to the accident. Finally, additional support is found in Dr. Alexis Waguespack's March 2013 letter stating that Mrs. Ancar's "injuries . . . are permanent in nature and will more likely than not require future medical treatment for the rest of her life . . . includ[ing] medications." *Id.*, Ex. E, Letter.

Defendants' arguments are not without appeal, but they go to Fentress's interpretation of this evidence. *See Daubert*, 509 U.S. at 596 [\*6] (noting that "[v]igorous cross-examination" and other traditional safeguards are "appropriate means of attacking shaky but admissible evidence"). "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *14.38 Acres of Land*, 80 F.3d at 1077 (emphasis added) (internal quotations and citations omitted). This portion of the motion is denied.

#### 2. Physical Therapy

Defendants next argue that Fentress's recommendation of lifetime physical therapy does not have a reliable basis. Plaintiffs point to Dr. Waguespack's March 2013 letter, which states that the injuries "will more likely than not require future medical treatment for the rest of her life . . . includ[ing] therapy." Pls.' Resp. [106] Ex. E, Letter. Defendants respond that Dr. Waguespack's deposition testimony two months earlier in January 2013 indicates otherwise. Then, Dr. Waguespack testified that Mrs. Ancar had "ongoing physical therapy without any longterm improvement" and that she "probably discontinued the physical therapy." Defs.' Mot. [104] Ex. E, Waguespack Dep. at 23. Any [\*7] inconsistency in Dr. Waguespack's recommendations goes to the weight of the evidence and not its admissibility. *See Lyondell Chem. Co. v. Albemarle Corp.*, No. 1:01-CV-890, 2007 U.S. Dist. LEXIS 101639, 2007 WL 5517247, at \*3 (E.D. Tex. June 8, 2007) (denying motion to exclude allegedly inconsistent expert testimony because counsel would have opportunity for cross-examination). Fentress's recommendation as to physical therapy is admissible.

### 3. Weight-Loss and Home-Exercise Programs

Fentress also recommends both weight-loss and home-exercise programs. Defendants argue that this recommendation lacks a reliable basis and that any need for weight loss is not causally related to the accident at issue. Plaintiffs fail to respond to Defendants' arguments regarding these recommendations. The only mention of a home-exercise program is a statement by Dr. Katz that Mrs. Ancar needed it for her original back injury. He also stated that she would benefit from weight reduction. But there is no opinion from any of the doctors as to a future medical need for these programs. There is no reliable basis in the record for an opinion that Mrs. Ancar will need weight-loss and home-exercise programs as a result of the accident. Testimony [\*8] as to these recommendations is inadmissible.

### 4. Epidural Steroid Injections

Defendants' last objection is to Fentress's recommendation that Mrs. Ancar receive one epidural steroid injection per year for the rest of her life. Plaintiffs again point to Dr. Waguespack's March 2013 letter in which she states that "[Mrs.] Ancar . . . will more likely than not require future medical treatment for the rest of her life . . . includ[ing] . . . injections . . ." Pls.' Resp. [106] Ex. E, Letter. This is sufficient to admit the opinion which will be subject to vigorous cross examination. *See 14.38 Acres of Land, More or Less Situated in Leflore County*, 80 F.3d at 1077.

### B. Gerald Lee

Dr. Gerald Lee is an **economist**. Plaintiffs designated to testify as to Mrs. Ancar's future medical costs and lost wages. While Defendants accept Dr. Lee's qualifications, they moved to strike both opinions.

Starting with the future-lost-wages opinion, Dr. Lee provided two projections, one based on a 32% reduction and the other using a 100% reduction in Mrs. Ancar's future employment. Both estimates were provided by Plaintiffs' counsel, a basis Defendants deems insufficient. During the pretrial conference, Plaintiffs stated [\*9] that Mrs. Ancar is fully employed and that Dr. Lee will not be required with respect to future-lost wages. This portion of the motion is therefore granted.

Defendants also object to Dr. Lee's opinion on the present-value calculations of the treatments recommended by Fentress for the same reasons they objected to Fentress's opinions. Dr. Lee will be permitted to testify to the same extent as Fentress. His opinion as to the values of the home-exercise and weight-loss programs are inadmissible because they lack a reliable basis and are not relevant.

### IV. Conclusion

The Court has considered all the arguments. Those not specifically mentioned would not change the result. For the foregoing reasons, Defendants' motion is granted in part and denied in part.

**SO ORDERED AND ADJUDGED** this the 19th day of February, 2014.

/s/ Daniel P. Jordan III

UNITED STATES DISTRICT JUDGE