

Employability, Placeability and Disability In Today's Economic Climate

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Constructual Definitions:

Employability: A person's ability to perform a particular occupation-It is determined by matching abilities and skills as they relate to occupational requirements.¹

Placeability: The likelihood that a client will actually secure and maintain work in a specific occupation. The dynamics of placeability include the availability of jobs in a certain geographic area; the evaluatee's age, gender, race; employer attitudes; and specific hiring requirements.²

Disability: Disability refers to impairment, activity limitation, or participation restriction resulting from the complex interaction between a health condition, personal factors and external factors represented by the circumstances in which the person lives (p. 106).³

Operational Definitions:

Constructual definitions are translated into operational definitions through legislation and case law development across various venues and jurisdictions.

Not all definitions are created equal. For example, workers compensation statutes vary with respect to how permanent-total disability is defined. Some examples include:

State Workers' Compensation

Florida (W/C):

An injured employee is presumed to be permanently and totally disabled unless the employer or carrier establishes that the employee is **physically capable of engaging in at least sedentary employment within a 50-mile radius of the employee's residence**. There is no mention of "employable" or "placeable"-these concepts have been argued through case law in Florida.⁴

¹ Parker, R., & Szymaski, E. (1998). *Rehabilitation Counseling: Basics and beyond* (3rd ed.). Austin, TX: Pro-Ed.

² Farnsworth, K., Field, J., Field, T. F., Griffin, S., Jayne, K. A., Johnson, C. B., et al. (2005). *QDR: The quick desk reference for forensic rehabilitation consultants*. Athens, GA: Elliott & Fitzpatrick.

³ Peterson, D. B. (2005). International Classification of Functioning, Disability and Health: An introduction for rehabilitation psychologists. *Rehabilitation Psychology, 50*(2), 105-112.

⁴ Florida Statutes 440.441.41 (1)(b)

In the case of *Ferrell Gas v. Childers*⁵, a 1st District Court of Appeals decision from 2008, the court held that it **is not sufficient to consider purely a physical exertion standard** such as the current definition of permanent total disability. This decision in essence expanded the definition of permanent disability from a purely physical exertion standard to a standard that **considers the full range of vocational factors such as age, level of education, work experience and transferable skills-in addition to a claimant's residual physical capacities**. Under this standard, it is possible that a claimant with a physical capacity of even light work may be found to be permanently disabled when considered within the context of the claimant's entire vocational profile. Consideration of the entire vocational profile would involve assessment of established physical and emotional limitations, vocational skills, work experience, education, age and other secondary factors that impact occupational access. Secondary factors may include such things as legal involvement; transportation barriers; immigration issues; language issues or pre-existing impairments that, but for the injury, did not previously present as a barrier to employment.

Minnesota (W/C):

Permanent total disability means only:

(1) the total and permanent **loss of the sight of both eyes, the loss of both arms at the shoulder, the loss of both legs so close to the hips that no effective artificial members can be used, complete and permanent paralysis, total and permanent loss of mental faculties;**
or

(2) **any other injury which totally and permanently incapacitates the employee from working at an occupation which brings the employee an income**, provided that the **employee must also meet the criteria of one of the following** items:

(i) the employee has at least a 17 percent permanent partial disability rating of the whole body;

(ii) the employee has a permanent partial disability rating of the whole body of at least 15 percent and the employee is at least 50 years old at the time of injury; or

(iii) the employee has a permanent partial disability rating of the whole body of at least 13 percent and the employee is at least 55 years old at the time of the injury, and has not completed grade 12 or obtained a GED certificate.

⁵ Fla. 1st DCA, April 7, 2008

For purposes of this clause, "totally and permanently incapacitated" means that the **employee's physical disability in combination with** any one of item (i), (ii), or (iii) causes the employee to be unable to **secure anything more than sporadic employment resulting in an insubstantial income**. Other factors not specified in item (i), (ii), or (iii), including the **employee's age, education, training and experience, may only be considered in determining whether an employee is totally and permanently incapacitated after the employee meets the threshold criteria of item (i), (ii), or (iii)**. The employee's age, level of physical disability, or education may not be considered to the extent the factor is inconsistent with the disability, age, and education factors specified in item (i), (ii), or (iii).⁶

Tennessee (W/C):

In making determinations, the court shall consider "**all pertinent factors including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.**"⁷

The court is provided guidance in making determinations of permanent total disability wherein at least (3) of the following facts concerning an employer are true:⁸

- (1) The employee **lacks a high school diploma or general equivalency diploma** or the employee **cannot read or write on a grade eight (8) level**;
- (2) The employee is **fifty-five (55) years of age or older**;
- (3) The employee has **no reasonably transferable job skills** from prior vocational background and training; and
- (4) The employee has **no reasonable employment opportunities available locally** considering the employee's permanent medical condition.

⁶ Minnesota Statutes 176.101-Subdivision 5

⁷ Tennessee Code, Title 50, Chapter 6, Part 2, Section 50-6-241

⁸ Tennessee Code, Title 50, Chapter 6, Part 2, Section 50-6-242

Washington (W/C):

"Permanent total disability" means **loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis** or other condition permanently incapacitating the worker **from performing any work at any gainful occupation.**⁹

If vocational and medical evaluations determine that your injury prevents you from ever becoming gainfully employed, you may be paid a monthly pension for life. However, this type of "non-statutory" pension may not be payable if you are able to return to work.¹⁰

*Federal Longshore & Harbor Workers Compensation Act*¹¹

The Longshore and Harbor Workers' Compensation Act (USLH) covers maritime workers; and workers on an adjoining pier, wharf, dry dock, terminal, building, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. In its most general sense, **the compensation component of the USLH act was designed to replace lost wages.** Within this conceptual framework, a worker who is unable to return to the job held at the time of injury, may still be able to return to work albeit in a less remunerative job. When an employee has established they are unable to return to the pre-injury job, the burden of employability shifts to the employer. The employer has a responsibility for establishing the existence of suitable alternative employment by demonstrating the existence of realistically available jobs within the employee's geographical area that are consistent with their age, level of education, work experience and physical abilities.

The employer's burden of demonstrating suitable alternative employment is most commonly satisfied through the use of private vocational rehabilitation counselors. Rehabilitation counselors involved in USLH claims ultimately complete labor market sampling to develop evidence to demonstrating the existence of suitable alternate employment. The purpose of such evidence was explained in the influential decision of **New Orleans (Gulfwide) Stevedores v. Turner**¹². **This decision resulted in a two prong test, that become known as the *Turner* test**, by which employers can satisfy the burden of demonstrating suitable alternative employment.

Under the first prong of the *Turner* test, the employer must demonstrate the types of jobs the employee is capable of performing or capable of being trained to perform.

⁹ Revised Code of Washington (RCW) 51.08.160

¹⁰ Washington State Department of Labor & Industries (2010), Workers' Guide to Industrial Insurance Benefits: Know your rights and responsibilities, publication F242-104-000

¹¹ Title 33, chapter 18 USC

¹² 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981)

The first prong of the *Turner* test can reasonably be satisfied by presenting specific jobs that are reasonably consistent with the employee's age, level of education, work experience and physical abilities. Under the second prong of the *Turner* test, the employer needs to demonstrate the jobs identified are realistically available in the community where the employee will compete for employment and for which he / she could realistically and likely secure. Under the second prong of the *Turner* test, secondary vocational factors that may present as barriers to re-employment must be considered. **Once the employer has presented evidence of suitable alternative employment consistent with the two prongs of the *Turner* test, the burden then shifts to the employee who has a complementary burden to show reasonable diligence in attempting to secure suitable alternative employment. In other words, the employee has a complementary burden of establishing their willingness to work.**

Social Security Disability

The Federal Code of Regulations defines disability in terms of both a medical and vocational elements.¹³ The medical element of disability is defined 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 12 months."¹⁴ The vocational element of the regulations read "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."¹⁵

To answer the question of whether a person meets the regulatory definition of disability, a five step sequential evaluation process is utilized that are followed in mechanical order. Each step is analyzed in order and a conclusion drawn before the process proceeds to the next higher step. A determination that a claimant is under a "disability", can only be made at step three or five.

Step 1: Is the person performing "substantial gainful activity"?

Substantial gainful activity is defined in the regulations as work activity that is both "substantial" and "gainful".¹⁶ Substantial work activity involves performing significant physical or mental activities.¹⁷ Work may be considered substantial even if it is performed on a part time basis; is physically or mentally less demanding;

¹³ Traver, D. (2006). *Social Security Disability Advocates Handbook*. Costa Mesa, CA: James Publishing.

¹⁴ Code of Federal Regulations, 20 CFR § 404.1505

¹⁵ U.S. Social Security Administration. (1985). *SSR 85-28: Titles II and XVI: Medical Impairments that are not Severe*. Washington, D.C.: Author.

¹⁶ Code of Federal Regulations, 20 CFR § 404.1572

¹⁷ Code of Federal Regulations, 20 CFR § 404.1572

results is lesser pay or requires a lesser degree of responsibility than work previously performed.¹⁸ Gainful work activity is activity that is performed for pay or profit or activity that represents the kind of work usually done for pay or profit, whether or not a profit is actually realized.¹⁹ If a determination is made that a person is performing substantial gainful activity, then the person will be found “not disabled”. If the person is not engaged in substantial gainful activity, the sequential evaluation proceeds to step two.

Step 2: Does the person must have a severe medically determinable physical or mental impairment²⁰ that meets at least one of three durational criteria which include:²¹

- it is expected to result in death;
- has lasted for a period of twelve continuous months;
- or it is expected to last for a period of at least 12 continuous months.

Step 3: Does the person have an impairment that meets or equals medical listing as specified in the regulations?²²

A conclusion at step three requires medical input. This is the first step in the five step sequential evaluation where a claimant could be found disabled in which case, the sequential evaluation would stop. In the case where a medical conclusion is drawn that a claimant does not meet or equal a medical listing, the sequential evaluation proceeds to step four. A step three determination is necessary in every case, however, unless medical input is provided; the vocational consultant must defer any opinions at this step to avoid the risk of potential ethical or legal conflict with practicing outside of one’s scope of professional practice.²³

Step 4: Can the person engage in past relevant work?

At the fourth step, consideration of disability moves to an evaluation of the claimant’s impairments and how the impairments impact his or her ability to engage in activities and participation within the context of their past relevant work. Prior to this step, a medical determination must be made regarding the full scope of the claimant’s physical and mental impairments which, in composite, comprise the claimant’s residual functional capacity profile.²⁴ Once an analysis is made of the claimant’s function by function residual functional capacity, their work history over

¹⁸ Code of Federal Regulations, 20 CFR § 404.1572

¹⁹ Code of Federal Regulations, 20 CFR § 404.1572

²⁰ Code of Federal Regulations, 20 CFR § 404.1520

²¹ Code of Federal Regulations, 20 CFR § 404.1509

²² Code of Federal Regulations, 20 CFR § 404, Appendix 1 of subpart P

²³ Commission on Rehabilitation Counselor Certification. (2009). *Certified Rehabilitation Counselor Scope of Practice*, from http://www.crccertification.com/pages/crc_ccrc_scope_of_practice/43.php.

²⁴ U.S. Social Security Administration. (1996b). *SSR 96-8p: Policy Interpretation Ruling Titles II and XVI: Assessing Residual Functional Capacity in Initial Claims*. Washington, D.C.: Author.

the previous 15 years is classified. The position of the Social Security Administration is that a gradual change is likely to occur over a period of years so that after a certain amount of time, it is no longer realistic to assume that skills learned in the remote past, continue to apply to the present labor market.²⁵ A claimant's work history is classified by skill level and physical demand and compared to the residual functional capacity profile. A decision is then made whether the claimant retains the capacity to return to his or her past relevant work. three prong test has been developed for making this assessment.²⁶

1. Does the claimant retain the capacity to perform a past relevant job based on a broad generic, occupational classification such as a "delivery job".
2. Does the claimant retain the capacity to perform the particular job as he or she actually performed it.
3. Does the claimant retain the capacity to perform the functional demands and job duties of the job as ordinarily required by employers in the national economy. This determination is made utilizing the Dictionary of Occupational Titles²⁷

If a claimant is determined to be capable of returning to their past relevant work at step four, then the sequential evaluation process stops and the claimant is found to be "not disabled". However, if the claimant is unable to return to his or her past relevant work, the sequential evaluation proceeds to the fifth and final step in the evaluation process.

Step 5: Can the person perform other work that exists in the national economy?

Assessment at step five focuses on the claimant's residual functional capacity as established in step four, in concert with the claimants age, level of education, and skills acquired from their past relevant work over the preceding fifteen years.²⁸ At step five, the Social Security Administration provides direct adjudicative guidance in the form of the Medical-Vocational Guidelines.²⁹ Where the particular findings of a claimant's vocational factors and functional capacity perfectly coincide with a medical-vocational rule, then the rule would direct a finding of "disabled" or "not disabled" accordingly. However, if the factors of a particular case do not precisely coincide with a particular rule, then the medical-vocational guidelines are to be applied as a framework for adjudicative decision making.³⁰ The medical-vocational

²⁵ Code of Federal Regulations, 20 CFR § 404.1565

²⁶ U.S. Social Security Administration. (1982). *SSR 82-61: Titles II and XVI: Past Relevant Work-The Particular job or the Occupation as Generally Performed*. Washington, D.C.: Author.

²⁷ U.S. Department of Labor (1991a). *The Dictionary of Occupational Titles*. Washington, D.C.: Author.

²⁸ Code of Federal Regulations, 20 CFR § 404.1520

²⁹ Code of Federal Regulations, 20 CFR 404, Appendix 2 to Subpart P

³⁰ U.S. Social Security Administration. (1983a). *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*. Washington, D.C.: Author.

guidelines consider only exertional impairments which are defined as sitting, standing, walking, lifting, and carrying.³¹ . Therefore, if an impairment is not exertional in nature, then by definition, it must be non-exertional.

If the particular factors in a claim do not precisely align with a specific medical-vocational rule, then the step five evaluation proceeds to applying the known vocational factors to answer the question as to whether, the claimant can perform other work that exists in the national economy in significant numbers. Ultimately, if a determination is made that the claimant is unable to perform other work that exists in the national economy in significant numbers, the claimant will be found “disabled”. If the claimant is found to be able to perform other work, the evaluation will terminate in a finding of “not-disabled”. In either case, the sequential evaluation process will terminate at step five.

Case Example of Conflict Between Systems:

For example, consider the case of a 30-year-old attorney with 5 years of experience. Our hypothetical claimant was involved in a work related motor vehicle accident and as a result, underwent a right, below the knee amputation. Following the accident, he experienced significant problems being fitted for a prosthesis and as a result could only walk up to a half block. Even then, it would take him close to 30 minutes to walk this distance. He is able to walk shorter distances, such as walking around his house or to go to his neighbor’s house immediately next door. He relies on a scooter to go longer distances such as grocery shopping. He lives in very small town some 35 miles from a larger metropolitan area.

Is the person described above disabled? Well it depends upon the setting in which the disability is being considered. The Social Security Administration (SSA) utilizes a five-step sequential evaluation process for determining if an applicant is disabled. At step 1, the SSA determines if the claimant is engaged in substantial gainful activity (SGA). In this case, the claimant is not working and therefore, the process proceeds to step 2. In step 2, the severity of the impairment is evaluated. It’s clear in this case, that the claimant has a severe impairment. In step 3, the claim is evaluated within the context of the “listings”. The claimant in this example is found to be disabled at step 3 of the evaluation process. According to the listings, an amputation of one or more extremities, combined with the inability to utilize a prosthesis to effectively ambulate constitutes a medical disability.³² Since the claimant is determined to be disabled under a medical listing, there is no need to proceed to steps 4 or 5 which would evaluate the claimant’s ability to do past or other work. In the example, disability is determined based on medical issues alone.

³¹ U.S. Social Security Administration. (1983a). *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*. Washington, D.C.: Author.

³² CFR, pt 404, Subpart P, App. 1, section 1.05B

Conversely, assume the same claimant described above, but within the context of a worker's compensation claim. For simplicity sake, the case will be evaluated within the context of the Florida workers compensation system. Within this system, a claimant with the injury described above is considered permanently and totally disabled unless the employer / carrier establishes the employee is physically capable of engaging in at least sedentary employment within a 50-mile radius of the employee's residence. Assuming this claimant has very high level transferable skills (based upon his legal training and experience), there is a very high probability the employer / carrier will, through a vocational expert demonstrate the availability of sedentary work within 50 miles of his residence. The vocational expert need only identify sedentary employment of a general nature to satisfy the burden of employability. Under the Florida workers compensation statute, this claimant would likely not be found to be disabled as the burden of evidence to be demonstrated is of a practical vocational matter versus being limited to medical issues only. It is important to note here that significant variability exists between the states with respect to how workers compensation is administered and the issue of disability is evaluated.

Lastly, assuming the same claimant within the context of a long-term disability claim-even a different conclusion might be reached. While the policy language may vary considerably from policy to policy, each will define how the insurer will evaluate the issue of ongoing "disability". Some basic clauses may address the level of earnings necessary to find a claimant employable. Other clauses may place a restriction on the geographic area-such as a 25-30 mile radius of the claimant's home. Other policies may restrict evidence of employment to the same or a closely related occupation versus general or low skilled employment. In this example case, the claimant may or may not be found disabled depending upon the terms of the policy. Should the policy require demonstration of employment within a 25-30 mile radius and consider only the same or closely related occupation as suitable, the claimant would likely be found disabled. If the policy provided for a broader labor market in terms of distance and transferable skills, the claimant would likely not be found to be disabled. These policies are highly variable and depend upon the specific terms and conditions as stated by the insurer.

As can be seen from the three examples above, the setting in which disability is evaluated has a significant impact upon whether benefits are awarded. While some settings are more practical than others, none are perfectly predictable.