
Exploring Limitations in Attention and Concentration in a Work Setting: The Effect on Disability Claims

Thursday, September 15, 2016

**Albany Marriott
Albany, NY**

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New York State Bar Association**

Lawyer Assistance Program 800.255.0569



Q. What is LAP?

- A.** The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

- A.** Services are **free** and include:
- Early identification of impairment
 - Intervention and motivation to seek help
 - Assessment, evaluation and development of an appropriate treatment plan
 - Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
 - Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
 - Information and consultation for those (family, firm, and judges) concerned about an attorney
 - Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

- A.** Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

- A.** LAP services are accessed voluntarily by calling 800.255.0569 or connecting to our website www.nysba.org/lap

Q. What can I expect when I contact LAP?

- A.** You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

- A.** The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?
2. Is it difficult for me to maintain a routine and stay on top of responsibilities?
3. Have I experienced memory problems or an inability to concentrate?
4. Am I having difficulty managing emotions such as anger and sadness?
5. Have I missed appointments or appearances or failed to return phone calls?
Am I keeping up with correspondence?
6. Have my sleeping and eating habits changed?
7. Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?
8. Does my family have a history of alcoholism, substance abuse or depression?
9. Do I drink or take drugs to deal with my problems?
10. In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?
11. Is gambling making me careless of my financial responsibilities?
12. Do I feel so stressed, burned out and depressed that I have thoughts of suicide?

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

New York State Bar Association

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

**You MUST turn in this form at the end of the
program for your MCLE credit.**

**Exploring Limitations in Attention and Concentration in a Work Setting: The Effect on
Disability Claims, Thursday, September 15, 2016 | New York State Bar Association's
Committee on Legal Aid, Albany Marriott, Albany, NY**

Name:

(Please print)

I certify that I was present for the entire presentation of this program

Signature:

Date:

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NEW YORK STATE BAR ASSOCIATION

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Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name:

Program Code:

Program Location:

Program Date:

1. What is your overall evaluation of this program? Please include any additional comments.

☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments_____

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
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Additional comments (CONTENT)

Additional comments (ABILITY)

3. Please rate the program materials and include any additional comments.

☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.

☐ Yes – Expanded ☐ Yes – Shortened ☐ No – Fine as is

Additional comments

5. Please rate the following aspects of the program: **REGISTRATION; ORGANIZATION; ADMINISTRATION; MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
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Additional comments

6. How did you learn about this program?

☐ Ad in legal publication ☐ NYSBA web site ☐ Brochure or Postcard
☐ Social Media (Facebook / Google) ☐ Email ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered



NEWYORK STATE BAR ASSOCIATION

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Exploring Limitations in Attention and Concentration in a Work Setting: The Effect on Disability Claims

PROGRAM DESCRIPTION

This session is offered to give an overview of the question of how a person's medical conditions can cause him/her to go off-task in a work situation, a very common issue in our disability cases. It is well known that employers will not keep an employee who goes off-task too often, or for too long. For that reason, this topic is important in a variety of contexts, including disability adjudication and determining how to assist people with disabilities in obtaining the best services, assistance and accommodations. An experienced legal services attorney will provide the substantive information on this topic. A psychologist or other medical professional will add a health care perspective on what medically determinable impairments could affect attention, concentration, persistence, or pace, and the testing that is available to document those limitations.

NEW YORK STATE BAR ASSOCIATION 2016 PARTNERSHIP CONFERENCE

DAP Workshop #1: EXPLORING LIMITATIONS IN ATTENTION AND CONCENTRATION IN A WORK SETTING: THE EFFECT ON DISABILITY CLAIMS

AGENDA

**September 15, 2016
10:00 a.m. – 11:15 a.m.**

1.5 Professional Practice

*Under New York's MCLE rule, this program has been approved for all attorneys,
including newly admitted.*

Presenter:

Kevin Liebkemann, Esq., Chief Counsel, Legal Services of New Jersey

INTRODUCTION

This session will cover some combinations of functional limitations which should, with good advocacy and preparation, result in a finding of disability at step five of the sequential evaluation in adult cases when the medical-vocational rules don't favorably apply. Some of the information might also prove helpful in proving inability to do past relevant work at step four. We will discuss the legal and factual bases for these theories of disability, as well as tips and resources on developing evidence to support them.

Idea: For each specific theory discuss how to create a record that makes it hard for the ALJ or decision writer to write an unfavorable ALJ decision without violating rules. What testimony? What explanations of statements and medical records? What other evidence like 3rd party statements?

Appendices: Appendix 1- How The Institute of Medicine Can Assist SSA In Exploring The Issue of Medical and Mental Health Conditions Causing People to be Off-Task or Absent In The Workplace by Kevin Liebkemann
Appendix 2 - Medical Assessment of Ability to Sustain Work-Related Activities (Mental) form

1. Time Off-Task

It is well known that employers will not keep an employee who goes off-task too often, or for too long. That raises some questions relevant to disability adjudication. What is the employer tolerance for off-task behavior? How do we prove that our client is off-task, and how much they are off-task? This section explores those questions and is intended to show you some ideas for recognizing and developing a “time off-task” theory of disability.

A. How long must a person be off-task before they cannot do any substantial gainful activity?

It depends on a number of things. I start with assumptions based on Social Security’s current rules, namely that we’re limiting the inquiry to ability to sustain performance of substantial gainful activity, e.g., work involving any full-time competitive job existing in significant numbers in the economy. Under current law that means no sheltered or accommodated work. Currently, with a very limited exception, Social Security rules do not take disability accommodations into account when adjudicating disability claims. I will use the term competitive employment to mean such non-sheltered, non-accommodated employment.

Representatives and Administrative Law Judges handling disability claims are aware that vocational experts often testify about employer tolerances for time off-task in Social Security Disability hearings. A quick search of recent Federal Court cases confirms that is so. The following link runs a Google Scholar search yielding over a thousand Federal Court Social Security Disability cases citing to vocational expert testimony and/or other evidence involving time off-task:

<http://tinyurl.com/offtaskcases>

The search terms were limited to only recent Federal Court cases in which the current Acting Commissioner Carolyn Colvin was named as defendant. My review of a sampling of those Federal Court cases documented a significant consensus of vocational expert testimony, with some outliers, that a person experiencing more than 10-15% of time off task would not be able to sustain substantial gainful employment in unskilled work.

Representative cases include:

Mills v. Colvin, 959 F. Supp. 2d 1079, 1084 - Dist. Court, ND Illinois 2013

“The VE further testified that the general tolerance for off-task time is around 10-12%, and an individual who needed a ten-minute break every hour would exceed that tolerance... The VE testified that needing two days off work per month would preclude an individual from working

any job.”

Lewis v. Colvin, 973 F. Supp. 2d 985, 992 - Dist. Court, ED Missouri 2013

“Mr. Breen [the vocational expert] responded that while the DOT does not discuss being off task, based on his fifteen years in placing people, Mr. Breen believed being off task about ten to twelve percent of the time to be the upper limit of what employers will typically tolerate.”

Some outlier vocational experts testify that the employer threshold tolerance for time off-task can be as high as 20%. The percentage can be less in some cases if the time off-task occurs at unpredictable times outside of normal work breaks, when an employer might need or expect an employee to be on-task. If an employee is repeatedly observed to be off-task outside of scheduled breaks, despite prior warnings and reprimands for such, and shows no signs that such off-task behavior during expected work times will cease, employers in competitive work situations will terminate the employee. In other words, that employee will not be able to sustain employment.

Representative cases with vocational expert testimony on this point include:

Harris v. Colvin, Docket No. 6:15-cv-06104 (MAT), WD New York 2016.

“When these limitations on concentration were included in the hypotheticals presented to the VE, the VE testified that an individual who is off task 10 percent of the work day would be unable to maintain competitive employment, *which requires the worker to be on task virtually all of the time outside of normal work breaks.*” [emphasis added]

Bourinot v. Colvin, 95 F. Supp. 3d 161, 172 - Dist. Court, D. Massachusetts 2015

The vocational expert testified that “...if they required more than two fifteen-minute breaks and a lunch break due to their inability to get back to work, the person would be unemployable.”

Sharp v. Colvin, Docket No. 1:13-cv-01888-DKL-WTL Dist. Court, SD Indiana 2015

Vocational expert testified that with a loss of 40 minutes of productivity per day “no jobs would be available.”

[Note that some of these cases are not officially designated for publication. Review your court’s policies on citing such cases before doing so.]

The expert testimony in the cases is reasonably consistent with SSA policy, which lists “The ability to maintain concentration and attention for extended periods (the approximately 2-hour segments between arrival and first break, lunch, second break, and departure),” as one of the “mental abilities needed for any job.” POMS DI 25020.010 B.2 Mental Limitations. A person going off-task frequently during those two hour segments is not demonstrating the required ability.

Some vocational experts have indicated that employer tolerances for time off-task can be somewhat relaxed for employees in some skilled, exempt positions. However, for unskilled and non-exempt positions most will admit that tolerances are generally strict. There is surely some variation amongst employers for tolerating their employee’s off-task behavior. The question is

really where the outer limits of that tolerance is. Many disability claims involve determinations at step five of SSA's sequential disability evaluation, in which the issue is whether a person can do any other substantial gainful work. The issue in most cases at that fifth step of the evaluation is whether a person can do other unskilled work. Other skilled work is often not germane at that stage because the claimants ordinarily do not have the acquired transferable skills necessary to do other work that they have not done before.

If a person goes off-task during a scheduled break it is not as much of a problem. However, when a person goes off-task outside of scheduled break times (which SSA recognizes as fifteen minute breaks in the morning and evening and up to an hour for lunch) then they are typically subject to reprimand or warning in the first instance. If they are again observed to be off-task outside of break time after such reprimand or warning, then additional progressive discipline typically follows. If after two or three such warnings, they are again observed to be off task then their employment is usually terminated. Such employees are unlikely to pass any introductory or trial period of employment and could not sustain competitive employment.

Employers typically expect that workers will be engaged in their assigned work duties during non-break times. Supervisor duties include ensuring that workers are doing the work they are supposed to be doing during scheduled work hours. Employers are not paying their employees to not work. If a person has a medical condition that causes them to intermittently go off task at times that cannot be fit into the employer's scheduled break time then they will be subject to the progressive discipline described above, eventually leading to job termination.

Such discipline is also typically used if an employee is observed to repeatedly make significant mistakes on the job or to fail to follow employer instructions despite repeated warnings and reprimands. Overall productivity loss can also instigate such discipline. In other words, an employee may appear to be on-task and nominally engaged in work activity, but their work product may be flawed or otherwise not acceptable due to impaired attention and concentration.

People who cannot help but intermittently go off-task or make such mistakes because of their medical condition might initially get hired, but they will not be able to sustain competitive substantial employment. People with such problems will sometimes have a record of a series of short periods of employment. Once employers recognize that the worker cannot be relied upon to be working productively between breaks, they lose their jobs.

Those of us representing disability claimants find that SSA's Administrative Law Judges often consider the time off-task analysis, but that it is extremely rare for SSA adjudicators and state contractors (DDS) to consider time off-task at the initial and reconsideration claim levels. Sometimes the same facts that would result in a loss at the initial and reconsideration levels document an approval before an ALJ where a vocational expert testifies to employer tolerances for time off task.

B. What can cause a person to go off-task?

People can go off-task on the job for a variety of reasons, such as:

- Impaired attention or concentration
- Being away from a fixed work station due to effects of medical impairments
- Effects of other severe medical impairments
- Need for medical treatment during normal working hours

A few medical impairments resulting in time off-task might cause limitations that do not fluctuate much. Examples might include people with intellectual disabilities from birth, or people with stable traumatic brain injuries. These cases involving static limitations are usually easier to document and prove.

More medical impairments cause limitations that can wax and wane, causing them to intermittently go off-task as severe symptoms become active. A small sample:

- loss of consciousness (e.g. seizures, daytime hypersomnolence, narcolepsy)
- post-traumatic stress disorder while experiencing a flashback
- panic or anxiety disorders while experiencing attacks
- psychotic disorders, while experiencing hallucinations
- chronic bouts of nausea or other severe gastrointestinal symptoms
- strong prescription medications that affect the ability to focus for a time
- chronic severe sleep deficits significantly impairing ability to focus
- medical conditions which can intermittently produce pain severe enough to cause loss of focus on work-related activity
- bouts of severe mania and racing thoughts
- episodes of severe depression
- diabetes who have poor control over their blood sugar levels, while experiencing severe hyper- or hypoglycemic episodes.
- vertigo while symptomatic
- other clearly distracting symptoms like severe muscle spasms

People experiencing such problems may be intermittently impaired in their ability to timely and accurately complete the tasks which the employer requires. These episodes can occur unpredictably and at inconvenient times. Such examples, if reasonably and properly documented, could support a disability claimant's assertion of being off-task for a time. SSA adjudicators are directed to make such assessments when performing the symptom analysis required by 20 C.F.R. 416.929 and 20 C.F.R. 404.1529. When an adjudicator determines that there is a medically determinable impairment that could cause a symptom, they then must assess the intensity, persistence, and degree to which the symptom limits capacity for work. Under that analysis adjudicators can make a finding that a person would be off-task.

The effect of those intermittently severe, waxing and waning symptoms on a person's ability to maintain attention and concentration typically won't be captured in mental status examinations or psychometric test results if the examinations and tests took place while the symptoms were not very active. SSA has cautioned that ability to concentrate in a short-term mental status or psychological test by a clinician is not equivalent to the abilities needed "...to sustain attention

or pace under the stress of competitive employment for a normal workday or workweek...”
POMS DI 22511.05.D. Adjudicators should consider all the evidence in these situations and obtain a longitudinal history.

Treating physicians can often provide important input as well, with the following caveat. With a few exceptions involving those treating some mental impairments, treating health care providers are not in the business of documenting whether their patients sometimes experience loss of focus or time off-task for job-related tasks. A typical principal care provider, orthopedist, GI doctor, etc., is not likely to explicitly note "time off-task" or words to that effect, in medical treatment progress notes even if their patient's medical condition would cause that. The reason is because their patient's ability to remain on task is often not relevant to the diagnosis and treatment of their medical condition. This is particularly true with physical impairments which could intermittently impair the patient's focus in work situations and in activities of daily living. Treating sources will much more likely document reported symptoms and signs which could reasonably cause them to go off task, such as:

- Patient experiences 8/10 pain several times per week
- Patient reports severe anxiety attacks 3 times per week.
- Patient reports daily bouts of vertigo

The treating health care provider, if asked, may credibly opine that their patient would be off-task when experiencing such symptoms. Treating health care providers with a longitudinal history of treatment are often the professionals most likely to have observed the effects of intermittently severe symptoms in their patients. However, such information is not usually volunteered in progress notes because of its relatively tangential relevance for medical diagnosis and treatment purposes.

C. Tips

-Know your ALJ and vocational expert. Given the reported cases, you are likely to encounter vocational experts who could testify that the employer threshold for time off-task is as low as 10%, or as high as 20%. If your case is at the ALJ hearing level, do your homework. Remember the case search I mentioned that yields over a thousand case results on time off-task?

<http://tinyurl.com/offtaskcases> Run that search and add a restriction using your vocational expert's name. Are there any reported cases where that VE testified regarding employer time off-task thresholds? Any in which the ALJ in your upcoming hearing credited another VE's testimony on that issue? Forewarned is forearmed.

-Consider getting your own vocational expert report. If you are constantly butting heads with VEs who testify to unreasonably high estimates of employer tolerance for time off-task it would be useful to obtain your own VE report to use in such claims.

-Solicit treating source reports on how often the patient would be off-task due to their medical condition. It is important that it include detailed supporting explanations. I particularly recommend that such opinions be expressed in a percentage of time off-task. Given that we know that vocational opinions on employer tolerance for time off task ranges between 10% and

20%, it is not useful to use terms such as “occasionally” (usually denoting 6% to 33%). Furthermore, there is no agency definition of terms like “moderate” and “marked” to correspond to percentages of time off-task.

Such a line of questions might read:

What percentage of an 8 hour work day would your patient likely be off-task due to their medical conditions? _____%.

Identify the medical and clinical findings which support your assessment.

Please explain how those medical and clinical findings would cause your patient to go off-task?

-Look for supporting non-medical evidence. Disability claimants who exhibit off-task behavior in their normal daily activities might also do so in work situations. It sometimes provides compelling support. Problems consistent with a person who goes off-task can include:

- missing appointments
- problems consistently following medical treatment regimens
- reliance on support network, e.g. family remembers have to remind to take medication, check chores they have done, provide frequent reminders, etc.
- difficulty maintaining routines without assistance
- makes more mistakes than expected
- misses deadlines
- takes longer to get things done
- unable to keep jobs more than a short time

People who know your client can often provide such testimony. Statements from former employers and co-workers who are willing to talk about the circumstances of why your client lost their job(s) can be revealing.

-It helps to know about typical employer disciplinary processes and procedures. Become familiar with what can get a person fired. In this context, how often could a person get caught by a supervisor off-task outside of scheduled break times before they would likely be terminated? Ask your client what the policy was at his former place of employment, if they know. Sometimes union contracts or written employment policies spell such information out in detail. Drops in productivity, repeatedly making mistakes, and failing to complete required work tasks can trigger the employer disciplinary process and lead to job termination. Deficits in attention and concentration can cause people to make mistakes more often and fail to complete required work tasks.

-If you look at all of Social Security’s forms, including those they use to solicit medical opinions and give detailed explanations for their decisions, none of them rate percentage of time off-task. Consultative examiners virtually never address time off-task. That’s important for at least two reasons. First, if you obtain a well-supported treating physician opinion on time off-task then that opinion will not be contradicted by any agency source opinion. Second, if the agency

medical sources and adjudicators credited symptoms which could support a time off-task allegation, you can argue that such opinions are in your client's favor and support your theory of the case. Look especially at the Disability Determination Explanation, which will often state whether alleged symptoms are credited as to type, extent and functionally limiting effect. Consultative examination reports will sometimes credit reported symptoms.

2. Days Absent

Days absent is a close cousin to the concept of time off-task described above. Instead of just being off-task for a percentage of a day, sometimes people are absent for the entire day. Vocational experts at Social Security Disability hearings often testify regarding employer tolerances for days absent, and there are numerous Federal cases citing such vocational expert testimony. While there is some variation amongst vocational expert opinions on this point, the majority state that employers will not tolerate absenteeism averaging two or more days per month in competitive employment (some outlier vocational expert opinions place the employer days absent tolerance threshold lower at more than 1 day, while some place it higher at more than 2 days). Representative examples from Federal cases include:

Conner v. Shalala, 900 F.Supp. 994, 1003-4 (ND Ill. 1995) "In this case, Connor's attorney asked the VE to testify generally about the extent that an employer would tolerate an employee being absent from work. . . . The VE responded that in unskilled work the tolerance level would not exceed two absences per month on a consistent basis."

Dennis v. Astrue, 655 F.Supp.2d 746, 753 (W.D.Ky.2009) (VE testified that employers typically will tolerate no more than two absences per month on a consistent basis)

Milam v. Colvin, 794 F.3d 978, 982 (8th Cir. 2015) ("According to the VE, 'generally when you miss two days or 10 percent on a consistent basis employers would not tolerate it; however, on[e] day a month ... for a long-term employee—employers would tolerate that, your honor.'")

Spillers v. Colvin, 24 F. Supp. 3d 818, 823 (S.D. Iowa 2014) ("Finally, the vocational expert testified that if an individual were unable to attend work on a regular basis, missing work two days per month, then full time competitive work was precluded.")

Tips for days absent:

- Many of the same tips that apply for the time off-task analysis are useful for the days absent cases. Research can sometimes provide indicators of a vocational expert's past testimony on employer tolerances for days absent per month.

- There are several commercially available forms (treatises from Thomas Bush and Charles Hall) that provide good language for soliciting medical opinions from treating sources on days absent. They basically ask the treating source how often their patient would likely be absent from work due to their medical condition, on a monthly basis. As always, detailed explanations with supporting evidence should be documented whenever possible.

-As with time off-task, SSA agency forms, consultative reports, and initial and reconsideration decision explanations often fail to address the issue of days absent. Therefore, if you obtain such an opinion from a treating source, it will likely be unopposed.

-There is a bit more research available on absences policies that there are for time off-task.

The Bureau of Labor Statistics documents that absences in full-time employment in the United States average 2.9 days per year. <http://www.bls.gov/cps/cpsaat47.htm>. Notably, a person missing two days per month on average would be absent 24 days per year. A review of other available information from large employers demonstrates that they are restrictive on maximum number of absences allowed.

-This undated article indicates that Wal-Mart's policy is a maximum of three days absent over any six-month period, which averages to only ½ day per month.

<http://www.wthr.com/story/5624949/wal-marts-attendance-policy-criticized>

-This McDonalds corporate site indicates that employees are allowed 10 sick days and 2 personal days per year.

http://www.aboutmcdonalds.com/mcd/corporate_careers/benefits/highlights_of_what_we_offer/balance_work_and_life.html

-IBM indicates that it allows 15 days off after a year. http://m.ibm.com/http/www-03.ibm.com/employment/ca/en/newhire/regular_faq.html

-Check your state unemployment compensation cases. You can often find cases that hold that employers were justified in terminating employees for cause with far fewer absences than some VEs will credit. Some state unemployment compensation rules even codify such tolerances.

Examples:

Mason v. Load King Mfg. Co.,

<http://archive.law.fsu.edu/library/flsupct/sc93356/op-sc93356.pdf>

Florida Supreme Court approves firing of an employee under an employer disciplinary system that assigns one point to each instance of absence or tardiness, and allows job termination if 10 points are incurred in a 12 month period. In a four month period, claimant was absent four times, late four times and left early one time, and court found it “supports a finding of an established pattern of excessive absenteeism and tardiness” justifying his termination for cause.

In Wisconsin an employee can be terminated for cause if absent “on more than 2 occasions within the 120-day period before the date of the employee’s termination,” unless the employer has a policy stating otherwise in an employee manual (and of which the employee has acknowledged receipt with his or her signature) or the employee is excessively tardy in violation of the employer’s policy and (2) the employee did not provide his or her employer notice and one or more valid reasons for the absenteeism or tardiness. Wis. Stat. § 108.04(5)(e) (2013-2014)

3. Sedentary and significant loss of use of hands

SSA policy is that “[a]ny significant manipulative limitation of an individual's ability to handle and work with small objects with both hands will result in a significant erosion of the unskilled sedentary occupational base.” See also fn. 7 “Bilateral manual dexterity is needed when sitting...” Social Security Ruling 96-9p. If you have a client who has sedentary exertional limitations and whose ability to handle and work with small objects is limited, then you may have an argument that the rule in SSR 96-9p applies.

Such restrictions are caused by impairments such as arthritis in the hands, carpal tunnel syndrome, Parkinson's disease, cervical radiculopathy at some levels, peripheral and diabetic neuropathy, and obesity that might interfere with dexterous hand use. Some medications cause tremors and other problems with the hands. This theory is often employed in cases involving younger individuals who cannot benefit from any medical vocational guideline rules which direct a finding of disability for people limited to sedentary activity. With the sedentary limitation, exclusion of past work, and a significant limitation of hand use a younger claimant can prevail.

Unfortunately, SSR 96-9p fails to provide a clear definition of what “any significant” limitation is. Some cases have considered the application of the rule to particular fact patterns. One example is *Tenhove v. Colvin*, 927 F.Supp.2d 557 (E.D. Wisconsin 2013) in which the court remanded in part due to the ALJs failure to properly consider that a limitation to occasional handling, fingering limitation could erode sedentary occupational base as described in SSR 96-9p. Similarly, in *Hamilton v. Colvin*, 8 F. Supp. 3d 232 (ND NY 2013) the court remanded in part due to the ALJ not properly considering how carpal tunnel syndrome might have significantly effected hand use, eroding the sedentary occupational base as described in SSR 96-9p.

Advocates should be prepared to rebut adverse vocational expert testimony on this issue. Courts will sometimes permit VEs to offer testimony that some jobs might still exist despite an erosion of the occupational base. One example is *Welsh v. Colvin*, 765 F. 3d 926 (8th Cir. 2014), in which the court upheld the ALJs acceptance of VE testimony that a person could do a reduced but significant number of surveillance system monitor jobs if limited to sedentary and only occasional use of a non-dominant hand.

According to the Dictionary of Occupational Titles and Selected Characteristics of Occupations, the only unskilled (SVP 2 or less) sedentary job that lists no significant handling and fingering requirements is surveillance system monitor. However, that job has changed since the DOT last reviewed it in 1986. It is arguably no longer unskilled and typically requires workers to learn, understand and use computers and operating software (which could eliminate it from an unskilled work VE hypo). Use of computers may also increase hand use requirements and ability to use hands may be crucial during emergencies. Be ready to challenge and rebut VE testimony which might not have a proper basis in fact.

Simple hand strength testing in normal clinical examinations (like those performed in an agency consultative exam) usually only shows what a person can do over a short period of time. When soliciting a medical opinion regarding impaired hand use some degree of specificity is helpful. Here are examples of some questions I ask of treating sources in these cases.

Please estimate the ***total percentage of time*** during an eight-hour workday that your patient can use hands/fingers/arms for the following activities:

HANDS: Grasp, Turn Twist Objects <i>Right</i> _____ % <i>Left</i> _____ %	FINGERS: Fine Manipulations _____ % _____ %
--	--

Please estimate in **minutes** how long your patient can use hands/fingers/arms ***at one time without having to stop due to the medical condition*** for the following activities:

HANDS: Grasp, Turn Twist Objects <i>Right</i> _____ <i>Left</i> _____	FINGERS: Fine Manipulations _____ _____
--	--

Do your patient's medical conditions reduce the **pace** at which she can perform tasks with his/her hands, wrists and/or fingers?

_____ Yes _____ No

If yes, please estimate the extent of any such reduction compared to an average person without impairment:

-Grasp, turn or twist objects reduced _____% slower than average person
 -Use fingers for fine manipulation _____% slower than average person

Of course, it is important to connect such deficits to a medically determinable impairment and where possible to obtain the treating sources' explanation of the medical evidence supporting their opinions.

4. Substantial loss of use of a mental ability required for all work

Social Security policy is clear that a substantial loss of any of the "Mental Abilities Needed for Any Job" found in POMS DI 25020.010, should lead to a finding of disability. Those abilities include:

a. Understanding, carrying out, and remembering simple instructions

- The ability to remember locations and worklike procedures.
 - The ability to understand and remember very short and simple instructions.
 - The ability to carry out very short and simple instructions.
 - The ability to maintain concentration and attention for extended periods (the approximately 2-hour segments between arrival and first break, lunch, second break, and departure).
 - The ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances.
 - The ability to sustain an ordinary routine without special supervision.
 - The ability to work in coordination with or proximity to others without being (unduly) distracted by them.
 - The ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.
- b. Use of judgment
- The ability to make simple work-related decisions.
 - The ability to be aware of normal hazards and take appropriate precautions.
- c. Responding appropriately to supervision, coworkers, and usual work situations
- The ability to ask simple questions or request assistance.
 - The ability to accept instructions and respond appropriately to criticism from supervisors.
 - The ability to get along with coworkers or peers without (unduly) distracting them or exhibiting behavioral extremes.
- d. Dealing with changes in a routine worksetting — the ability to respond appropriately to changes in (a routine) work setting.

Also consider the **Mental Abilities Critical For Performing Unskilled Work** documented by the same rule. The claimant/beneficiary must show the ability to:

- a. remember work-like procedures (locations are not critical).
- b. understand and remember very short and simple instructions.
- c. carry out very short and simple instructions.
- d. maintain attention for extended periods of 2-hour segments (concentration is not critical).
- e. maintain regular attendance and be punctual within customary tolerances. (These tolerances are usually strict.) Maintaining a schedule is not critical.
- f. sustain an ordinary routine without special supervision.
- g. work in coordination with or proximity to others without being (unduly) distracted by them.
- h. make simple work-related decisions.
- i. complete a normal workday and workweek without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods. (These requirements are usually strict.)
- j. ask simple questions or request assistance.
- k. accept instructions and respond appropriately to criticism from supervisors.
- l. get along with coworkers or peers without (unduly) distracting them or exhibiting behavioral extremes.
- m. respond appropriately to changes in a (routine) work setting.

- n. be aware of normal hazards and take appropriate precautions.

<https://secure.ssa.gov/poms.nsf/lnx/0425020010>

The rule only gives a vague explanation of what is meant by “substantial loss” of one of those abilities. One explanation provided for it is “...he/she cannot perform the particular activity in regular, competitive employment but, at best, could do so only in a sheltered work setting where special considerations and attention are provided.” POMS DI 25020.010 A.3. Meeting that standard for even one of the above criteria could be a viable step five case theory. If you look down at section #7 below I provide some links to sources for identifying disability accommodations that are officially recognized by the government. If you obtain a persuasive opinion that such accommodations would be necessary for your client to perform any of the above-listed essential functions, you may have a legitimate argument that such requires a finding of disability. However, you will often need to educate adjudicators and Administrative Law Judges who may not be familiar with this theory.

5. SSR 96-9p List of Limitations Significantly Eroding Sedentary Occupational Base

Social Security Ruling 96-9p lists agency policy on a number of conditions which would erode the sedentary occupational base. Some of these will only rarely appear and will likely meet or equal a listing, but it is good for advocates to be aware of them.

“...an inability to lift or carry more than 1 or 2 pounds would erode the unskilled sedentary occupational base significantly.”

“...a limitation to standing and walking for a total of only a few minutes during the workday would erode the unskilled sedentary occupational base significantly.”

“If an individual is unable to sit for a total of 6 hours in an 8-hour work day, the unskilled sedentary occupational base will be eroded.” (but does not necessarily erode occupational base at higher levels if still able to stand/walk enough.

“An individual may need to alternate the required sitting of sedentary work by standing (and, possibly, walking) periodically. Where this need cannot be accommodated by scheduled breaks and a lunch period, the occupational base for a full range of unskilled sedentary work will be eroded.” (although may need to consult vocational resource).

“A complete inability to stoop would significantly erode the unskilled sedentary occupational base and a finding that the individual is disabled would usually apply.”

-*Tyson v. Apfel*, 107 F.Supp.2d 1267 (2000) A finding of complete inability to stoop, supported by doctor’s opinion, significantly eroded the sedentary occupational base and required finding of disability.

-But see *Mullens v. Barnhart*, 165 Fed. Appx. 611 (10th Cir. 2006), rule does not require a finding of disability in all cases, when a VE testifies to jobs.

-But see also *Luevano v. Barnhart*, Docket # CIV 05-0803 (USDC NM, July 12, 2006)(Magistrate Memo Opinion and Order) following *Mullens*.
-*Lauer v. Apfel*, 169 F.3d 489 (7th Cir. 1999) ALJ finding of complete inability to stoop does not necessarily direct a finding of disabled.

Tips: This can be a viable theory of disability, but the use of the term “usually” in the relevant SSR language may leave the door open for an ALJ to determine that a complete inability to stoop does not require a finding of disability. The DOT and SCO do list some sedentary unskilled jobs with no significant amount of stooping, but those might be unreasonable considering that there is always a time when things on the floor need to be picked up, at least rarely. Advocates should vigorously challenge any vocational evidence offered that their cases are “unusual” and that there are jobs the claimant could perform despite this limitation. For example, what if the worker dropped something and had to pick it up? A significant limitation in forward flexion of the lumbar spine often identifies a person limited in stooping.

“if an individual is limited in balancing even when standing or walking on level terrain, there may be a significant erosion of the unskilled sedentary occupational base.”

“If a visual limitation prevents an individual from seeing the small objects involved in most sedentary unskilled work, or if an individual is not able to avoid ordinary hazards in the workplace, such as boxes on the floor, doors ajar, or approaching people or vehicles, there will be a significant erosion of the sedentary occupational base. These cases may require the use of vocational resources.”

“A substantial loss of ability to meet any one of several basic work-related activities on a sustained basis (i.e., 8 hours a day, 5 days a week, or an equivalent work schedule), will substantially erode the unskilled sedentary occupational base and would justify a finding of disability. These mental activities are generally required by competitive, remunerative, unskilled work:

- Understanding, remembering, and carrying out simple instructions.
- Making judgments that are commensurate with the functions of unskilled work--i.e., simple work- related decisions.
- Responding appropriately to supervision, co- workers and usual work situations.
- Dealing with changes in a routine work setting.”

Using the definition of “substantial loss” found in the POMS section mentioned above in Section 4, proof of need for a sheltered or accommodated work situation to perform the above tasks adequately may support a finding of disability.

6. Two Special Medical-Vocational Profiles in SSR 82-63

-Worn out worker rule “the person must have a marginal education and long work experience (i.e., 35 years or more) limited to the performance of arduous unskilled physical labor which can no longer be performed because of a severe impairment(s).” Marginal education is usually 6th

grade or less

-No Past Work Rule

“[W]here an individual of advanced age with no relevant work experience has a limited education or less, a finding of an inability to make a vocational adjustment to substantial work will be made, provided his or her impairment(s) is severe, i.e., significantly limits his or her physical or mental capacity to perform basic work-related functions. In the cases involving individuals of advanced age, the only medical issue is the existence of a severe medically determinable impairment. The only vocational issues are advanced age, limited education or less, and absence of relevant work experience. With affirmative findings of fact, the conclusion would generally follow that the claimant or beneficiary is under a disability.”

Advanced age = 55 or older

Limited education = less than high school education

But see *Fogg v. Colvin*, Docket No. 15-5023, (10th Cir. 11/27/15) SSR 82-63 only creates a presumption of disability that can be overcome, as applied to the no past work rule scenario. See also *Kendall v. Astrue*, 906 F.Supp.2d 433 (Md. 2012)

7. Need Disability Accommodation

If you can show that your client would not be able to work without disability accommodations then your client should prevail. The exception is for cases in which your client's past relevant work was accommodated and he/she could still do it with the same accommodations. These questions usually come up in the context of vocational expert testimony. Sometimes, VEs give testimony that silently includes the fact that disability accommodations would be needed. Skilled cross-examination can sometimes tease that out.

What are disability accommodations? There are numerous government sources which list examples of such disability accommodations, including but not limited to:

Job Accommodation Network

<http://askjan.org/>

Social Security Policies

<https://secure.ssa.gov/poms.nsf/lnx/0200211001>

https://www.ssa.gov/OP_Home/hallex/I-02/I-2-0-8.html

https://www.ssa.gov/accessibility/504_overview.html (see links on this site)

Equal Employment Opportunity Commission

<http://www.eeoc.gov/policy/docs/accommodation.html#types>

<https://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1630.xml>

Conclusion

Knowing alternative theories of disability can help advocates recognize good cases that they might otherwise missed. It can also help win cases that otherwise could be lost.

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Note: Some of the above materials were recently included in my presentation at SSA's National Disability Forum

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Exploring Limitations in Attention and Concentration in a Work Setting: The Effect on Disability Claims

Biographies

Speaker Biographies

Kevin Liebkemann

Kevin Liebkemann is a 1991 Tulane Law School graduate who has represented adult and child Social Security Disability claimants for over 20 years. Following 10 years in private practice Kevin has worked at not-for-profit groups providing free representation to people with disabilities. He is currently Chief Counsel for Disability Rights at Legal Services of New Jersey. He handles Social Security cases from the ALJ level through U.S. District Court and supervises attorneys handling hearings and appeals. Kevin is also in charge of the Veterans Legal Assistance Project and the Disability Rights Initiative at Legal Services of New Jersey. Kevin regularly publishes articles on disability topics and conducts continuing legal education trainings on disability-related topics, and participates in groups advocating for beneficial changes in local and national disability policies.

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**How The Institute of Medicine Can Assist SSA In Exploring The Issue of Medical and
Mental Health Conditions Causing People to be Off-Task or Absent In The Workplace
by Kevin Liebkemann, June 9, 2016**

SSA and advocates are interested in the IOM's input regarding medical and mental health conditions that might reasonably cause a person to be off-task or be absent in a work situation, with a particular focus on unskilled and simple work (e.g. work that could be learned in one month or less, typically involving tasks with no more than three-step processes). This would include symptoms, signs, and treatment that may intermittently impact work.

Employers have limited tolerances for employees regarding absenteeism and off-task behavior. The question of what those tolerances are is a part of the disability evaluation but that is a question for vocational experts and thus we don't pose it to the IOM. However, SSA and advocates can greatly benefit from the IOM's input on other questions. **The first of those is what medical and mental health conditions, symptoms, treatments, etc. could reasonably cause a person to go off-task or be absent, particularly regarding unskilled and simple work.** Which medical conditions are most likely to produce such time off-task or absences, even if intermittently? Which prescription medications? Which therapeutic treatments have effects that might reasonably cause such time off-task or absences?

Advocates note that their clients report certain medical conditions, symptoms and treatments that have caused them to experience symptoms that would take them off-task or be absent in a work situation. Advocates provide a list below of some of the conditions and treatments that their clients commonly report as having those effects. They are split into several categories noted in the attached chart.

Some of the examples and categories are fairly clear in requiring intermittent time off-task or absence. Medical treatment during work hours takes a person off-task. Having to leave a work station due to a medical condition can take a person off-task. Some symptoms necessarily take a person off-task (e.g. a seizure). However, there are many other situations where the issue is less clear and may depend on the severity of the condition or symptom. The IOM's guidance on which conditions might intermittently take a person off-task will be useful.

In considering these issues it is important to consider some common challenging circumstances. We ideally hope that all people can access effective health care for their conditions and strive for that result. Some of the listed examples might produce less limitation for people who have meaningful access to effective medical treatment. Unfortunately, many face barriers preventing or delaying receipt of such effective treatment. When that happens through no fault of the disability claimant, SSA adjudicators are not supposed to penalize the claimant in the symptom analysis. As we analyze what medical impairments might reasonably cause time off-task or days absent, we should thus consider the effects of limited (or in some cases no) access to effective medical treatment. Examples of claimants who more commonly experience such difficulty include:

- Impoverished claimants
- Claimants with no insurance
- Claimants who have insurance but their access to needed specialist care is limited and/or delayed
- Claimants with mental limitations that interfere with their ability to procure or comply with effective treatment recommendations
- Claimants with an inadequate support network

In some situations treatments are effective for most patients but a smaller percentage do not respond well. It stands to reason that the patients who do not respond well are the ones more likely to file disability claims. As a result, when providing input, please consider whether these medical conditions could produce time off-task or absences for people with limited access to treatment and who may not respond ideally even if they follow recommended treatment.

If there are any other medical conditions, symptoms, or treatments which could reasonably cause a person to be off-task or absent then we appreciate your input and advice concerning them. It's also important to note that many disability claimants have multiple medical impairments. Even conditions that might only moderately impact time off-task or absences might, in combination with other such conditions, prevent a person from sustaining full-time competitive work. One of the advantages to evaluating claims on a basis of how often medical impairments produce time off-task or absence is that it facilitates consideration of the cumulative effect of multiple medical impairments on a person's ability to sustain work.

The second big issue is **whether SSA might be able to resolve more claims expeditiously by using its “Listings,” particularly in whether a disability claimant might functionally equal Listings requirements.** A person can functionally equal a listing’s requirements if medically determinable impairments functionally limit them as much as someone who at least minimally met the requirements of any listing. That can be true even though some of the other listing requirements (e.g. medical test results, symptoms, or signs) are not present. Under SSA rules, one medical condition (or a combination of them) can functionally equal the requirements another medical listing even if they are not even in the same category of medical conditions. The important thing is that the functional limitations produced by those conditions are reasonably equivalent.

Several of the Listings have primary functional impairments that can be fairly expressed as days absent or time off-task. Examples:

- Listing 3.03 B Asthma, requires proof of asthma attacks requiring physician intervention at least once every two months or 6 times per year. The primary functional deficit, vis-à-vis the employer would be days absent (the additional environmental limitations associated with asthma are only very rarely dispositive in any disability claim).
- Listings 6.09 (complications of chronic kidney disease) and 7.05 (hemolytic anemias) require 3 hospitalizations in a 12-month period which have to be at least 48 hours long (including ER time) and at least 30 days apart. From a functional standpoint, such hospitalizations would involve work absences, potentially in the amount of 6 days or more a year.
- Listing 11.02 (convulsive epilepsy) requires proof of convulsive seizure occurring more frequently than once per month. The primary functional deficit, vis-à-vis an employer, would be the person would be absent two or more days per month.
- Listing 11.03 (non-convulsive epilepsy, petit mal, psychomotor, or focal) requires a finding of seizures more than once per week with alteration of awareness or loss of consciousness and transient postictal manifestations of unconventional behavior or significant interference with activity during the day. From an employer’s point of view, a person off-task a significant number of times in a typical work week would be functionally limited to a similar degree.
- Listings 14.07 and 14.08 (immune deficiency disorders) discuss hospitalization or IV treatment 3 times in a 12-month period.

One question for the IOM to consider is whether a person who would be absent a certain number of days per month, or chronically off-task more than a certain percentage of the time, might be at least as functionally limited for work purposes as someone who minimally met the requirements of one of the listings mentioned above.

Additional Background:

Social Security has a 5 step sequential process for determining disability. At step 3 a person meeting or equaling the requirements of one of Social Security's "Listings" is found disabled. The adult listings are found here:

<https://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm>. Otherwise the analysis proceeds to step 4 where SSA considers whether the disability claimant can do past relevant work, which is usually substantial work done within an approximately 15 year time frame prior to the decision. If they could do past relevant work, the claim is denied. If they could not do past relevant work, then SSA considers at step 5 whether the claimant can sustain any other competitive full-time (8 hours a day, 5 days per week), non-accommodated types of jobs that exist in significant numbers. In other words, if the disability claimant's maximum capacity is for part-time or accommodated work, then they can still be found disabled at step 5 of the disability evaluation. At step 5 the claim is denied only on proof that a claimant could sustain a full-time competitive job.

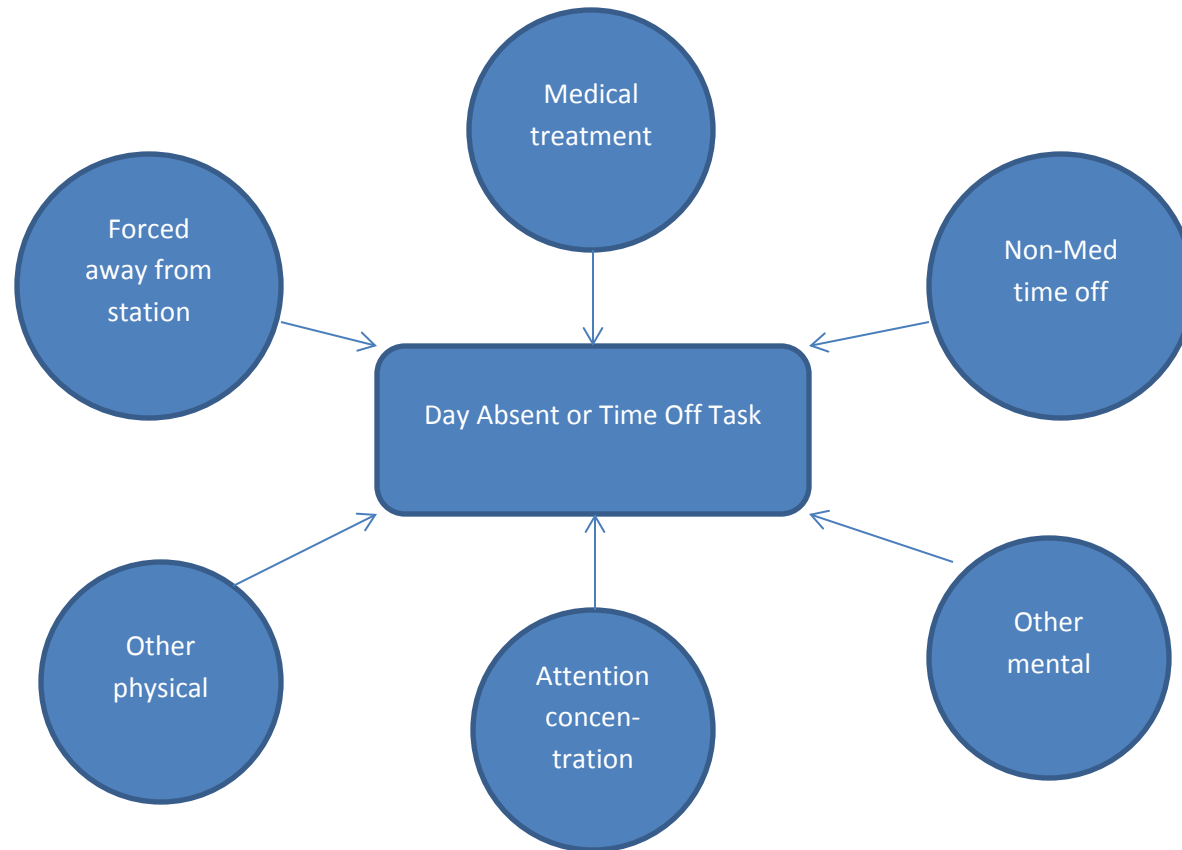
Many vocational experts have testified in Social Security Disability hearings that employers in unskilled work would not tolerate employees being absent 2 or more days average per month on an ongoing basis (there is some variation, with a minority of experts setting the bar at more than 1 day, and others at 3 or more days per month). Many vocational experts have testified that employers in unskilled work generally do not tolerate employees being off-task more than 10% of a work day on average (some variation with a minority of experts setting the bar as high as 20% off task).

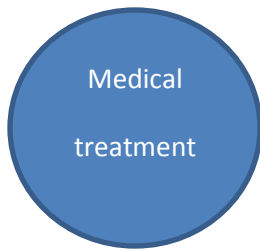
If SSA could set a reasonable bar for time off-task and days absent that would be as functionally limiting as someone who at least minimally met the requirements of a listing (or which from a vocational standpoint would exclude all other work at step 5), it would make the disability analysis more efficient. It would also allow better consideration of how a combination of medical impairments could produce functional limitations equivalent to that of a listing (e.g. considering total percentages of time off task and/or days absent produced by multiple impairments).

The Importance of This Work:

Better evaluation of time off-task and days absent at early stages of adjudication could cut the time it takes for SSA to make a final disability decision by two years or more in many claims. Currently there is not sufficient policy guidance for adjudicators at the initial and reconsideration claim levels to evaluate these factors well, so they are only seriously considered at the ALJ Hearing level. Earlier consideration could save SSA substantial resources and reduce the harm that long wait times cause to some claimants. It could also improve decisional accuracy by facilitating better consideration of many claims involving multiple medical impairments. The IOM can assist development of such policy by providing input about medical conditions that could reasonably cause people to go off-task or be absent in competitive work situations.

Categorizing Ways A Person Can Go Off Task At Work





Common Ways Medical Treatment Causes Time Off-Task or Days Absent

Almost any medically determinable impairment can result in the need for time off for treatment. If the treatment is medically necessary the time off task or days absent for the treatment should be considered in the disability adjudication analysis.

Time off Task

- Scheduled outpatient appointments
- Walk-in outpatient treatment (acute problems but ER not required).
- Self-administered treatment or care in the workplace (person with asthma uses nebulizer machine, or person with diabetes checks blood sugar and administers insulin). While administering their medical treatments the person is off-task.
- Need to frequently get medical testing for condition (blood work, urinalysis etc.)
- Treatment at an emergency room or hospital
- Mental illness causing need for participation in an intensive outpatient or partial hospitalization treatment program, typically 3 to 5 days per week and several hours per day.



Common ways medical impairments cause time off-task by forcing a person away from their work station include the following.

1. An orthopedic or neurological condition causes the need for a sit/stand/walk option to alleviate severe symptoms. While the person is away from their work station they are off-task. Examples:

-A person diagnosed with severe knee arthritis credibly complains their knees become stiff and painful, and lock up if they sit or stand still for more than thirty minutes at a time. They must stretch and walk about for 10 minutes for every 30 minutes of sitting or standing to alleviate the pain and stiffness. While actively stretching and walking they are likely away from their work station and off-task. See Social Security Ruling on sit/stand/walk options (SSR 96-9p).

2. A medical condition requires a person to intermittently be in a postural position in which they cannot perform work activities.

-A person with a herniated lumbar disc and radiculopathy credibly complains that after an hour of sitting or standing their back becomes very stiff and the pain shooting down their legs becomes unbearable. It is only relieved by taking strong pain medication that makes them feel dizzy and lying down with a heating pad on their back for twenty minutes. While they are lying down they are away from their work station and off-task.

-A person who experiences chronic lower extremity edema (e.g. from chronic venous insufficiency, heart, liver, kidney disease, medication effects, or other causes) is advised by their doctor to elevate their feet above heart level until the swelling is alleviated, which usually takes about 15-20 minutes. Even with medication the swelling can occur several times per day. While the person is reclining with feet elevated above heart level, they are away from their work station and off-task.

3. Gastrointestinal symptoms taking worker away from work station. Examples:

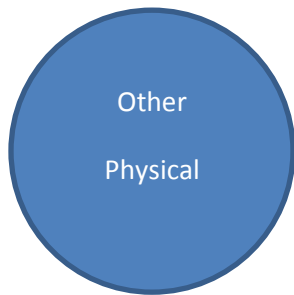
-Symptoms of chronic urinary frequency and/or urgency (for medical causes see <http://www.mayoclinic.org/symptoms/frequent-urination/basics/causes/SYM-20050712>)

While the person is away from the work station attending to their symptoms they are off-task.

-Urinary incontinence causing the need to go to the bathroom and clean up. Some adjudicators incorrectly assume that use of adult diapers makes this irrelevant. However, such diapers are advised to be changed soon after they are soiled, and the affected skin area cleaned. While doing so, the person is off-task. There are multiple medical causes for urinary incontinence <http://www.mayoclinic.org/diseases-conditions/urinary-incontinence/basics/causes/con-20037883>.

-Chronic fecal incontinence such as diarrhea causing the need to go to the bathroom, wash, and/or change clothes. Multiple medical conditions and some medications cause the symptoms, see <http://www.mayoclinic.org/diseases-conditions/diarrhea/basics/causes/CON-20014025>. We commonly see it associated with Crohn's disease and irritable bowel syndrome. While experiencing and recovering from the incontinence, the person is off-task.

-Chronic nausea and vomiting, caused by many medical conditions and some medical treatments. <http://www.mayoclinic.org/symptoms/nausea/basics/causes/sym-20050736>. People experiencing these symptoms must typically leave their work station and are off-task while recovering.

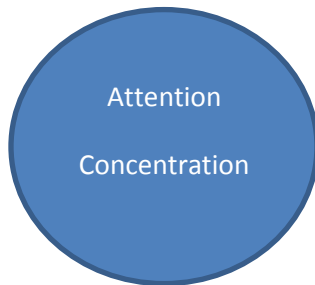


1. Cluster headaches which are not fully alleviated by treatment can intermittently cause time off-task or days absent. Our clients report that severe pain can make it impossible for them to tolerate even simple work activity while symptoms are active.
2. Seizures can cause intermittent time off task and/or days absent. During the time of a seizure a person is not reasonably capable of work activity. Some seizures produce an altered state of consciousness called a post-ictal state, which can reasonably preclude work activity and result in additional time off task.
3. Narcolepsy and hypersomnia can result in time off-task. Uncontrollably falling asleep causes a person to be off-task during periods of unconsciousness.
4. Intermittently severe to extreme pain can cause time off task or days absent. Numerous medical conditions can produce intermittently severe pain which can greatly limit a person's tolerance for physical activities and substantially distract them to the point of not being able to reliably perform work activity. SSA has an analysis that adjudicators employ for determining the effects of pain on functional capacity (20 C.F.R. 416.929 and 404.1529). Examples of conditions we see that can produce such intermittently severe pain.

- Severe radiculopathy or neuropathy
- Severe arthritis
- Pancreas attacks
- Cancer patients (pain and treatment)

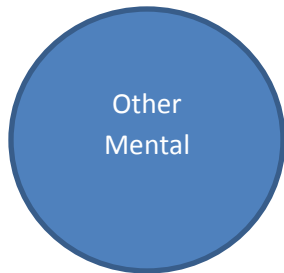
5. Vertigo. The degree of distraction and impairment produced by vertigo reasonably precludes work while the symptom is active.

6. Some powerful medications and treatment regimens can produce severe side effects causing a people to go off-task for a time, even when used as prescribed. Some examples include cancer chemotherapy drugs, strong narcotic pain medications, and interferon.



Some conditions may chronically affect a person's ability to maintain attention and concentration on task. Some of those are covered here. Other conditions which more intermittently impact attention and concentration are covered under "other mental."

1. Impairment of attention and concentration is a recognized symptom for many mental conditions such as organic mental disorders, schizophrenia, affective disorder, intellectual disability, anxiety disorders, and others.
2. Some of our patients with long histories of uncontrolled seizure activity report chronic difficulties with memory and with maintaining attention and concentration on task even when not experiencing seizures.
3. Chronic sleep deficit can significantly impair attention and concentration.

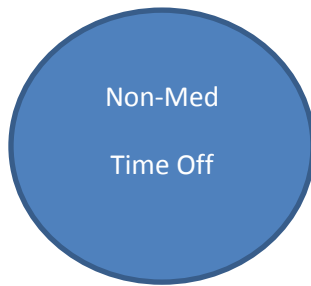


Some symptoms of mental conditions can reasonably cause a person to intermittently go off-task in a work setting.

1. Obsessive compulsive behavior. People with obsessive compulsive disorder sometimes feel compelled to perform rituals which may not be reasonably related to their work tasks. While engaged in such rituals they are off-task.
2. Racing thoughts are a known symptom of people experiencing mania, anxiety, and ADHD. If severe enough, racing thoughts can make it almost impossible to stay focused on a given task, leading to time off task.
3. Panic attacks are sudden episodes of intense fear triggering severe physical reactions such as chest pain, rapid heart rate, trembling, shaking, shortness of breath, and more. A person with such symptoms could reasonably be expected to be off-task.
4. Our clients with severe anxiety and agoraphobia report that they are sometimes incapable of leaving their homes regardless of whether they have places they are scheduled to go. For some, even thinking of leaving the home on such days can induce panic attacks. On such days, they would not be able to report to work and would be absent.
5. A person with post-traumatic stress disorder experiencing a flashback is often unaware of what is going on around them. During such times they are off-task.
6. In some cases people experiencing psychosis can be distracted to the point of being off-task.
7. Some of our clients experiencing severe cases of depression report that there are days their depressive symptoms are so severe they must stay in bed or cannot venture out of their home.

8. Impaired recent or short term memory. A precursor to being on task is remembering the task you are supposed to be doing. In virtually all jobs, supervisors tell workers tasks to do. A mental illness causing person to forget a significant number of tasks they were told to do (e.g. short term verbal memory) will result in time off-task.

9. Some of the more powerful drugs for treatment of mental illness, particularly in high doses, can result in time off task in some claimants. Examples: Lithium, Geodone.



Non-medically related time off falls outside of the five step sequential evaluation analysis for disability. However, it is important to recognize that all persons, including those with disabilities, do from time to time require time off of work to rest, recover, and deal with other matters. This does not change when a person with a disability has medical conditions that require additional time off task or days absent. Thus, in considering whether a person falls outside of acceptable employer tolerances for time off task and days absent, it would be unreasonable to assume that the person with the disability would never require time off for rest or recovery during breaks unless it was related to the disability.

Physician: field:ContactFullName

Date of last exam: _____

Patient: field:ClientFullName

SS#: field:SSN

Medical Assessment of Ability to Sustain Work-Related Activities (Mental)

To determine this individual's ability to **sustain satisfactory function in work-related activities** on a **8-hour day, 40 hour week basis** in a **regular competitive work setting**, please give an assessment, based on your examination and review of treatment records, of how the individual's mental/emotional capabilities are affected **by the impairment(s)**. Consider the medical history, the chronicity of findings (or lack thereof), and the expected duration of any work-related limitations, but not the individual's age, sex, work experience, or the effects of **drug abuse** or **alcoholism**.

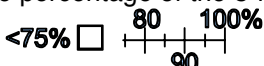
For each activity shown below:

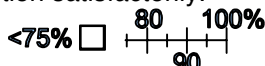
1. Mark the following scale with an "X" to reflect the **percentage of an 8-hour work day** the individual can be expected to sustain a **satisfactory** level of functioning.

2. Identify the particular medical or clinical findings (i.e., mental status examination, behavior, intelligence test results, symptoms) which support your assessment of any limitations. It is important that you relate specific medical findings to any noted limitation in capacity. The usefulness of this assessment depends on the extent to which you do this.

I. Making Occupational Adjustments

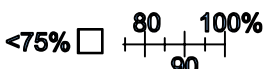
A. Mark the scale to show the percentage of the 8-hour work day the individual can function satisfactorily.

i. Follow work rules 

v. Interact with supervisor(s) 

ii. Relate to co-workers 

vi. Deal with ordinary work stresses 

iii. Deal with the public 

vii. Function independently 

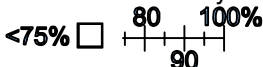
iv. Use judgment 

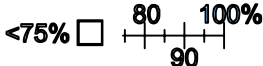
viii. Maintain attention/concentration 

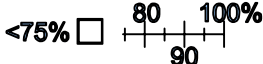
B. Describe any limitations and include the medical/clinical findings that support this assessment. If some of these actions cannot be sustained for an 8 hour work shift, explain why.

II. Making Performance Adjustments

A. Mark the scale to show the percentage of the 8-hour work day the individual can function satisfactorily.

i. Understand, remember and carry out **complex** job instructions 

ii. Understand, remember and carry out **detailed**, but not complex, job instructions 

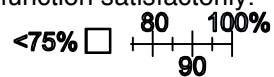
iii. Understand, remember and carry out **simple** job instructions 

B. Describe any limitations and include the medical/clinical findings that support this assessment; e.g., intellectual ability, thought organization, memory, comprehension, etc.

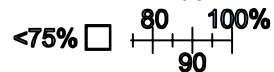
III. Making Personal-Social Adjustments

A. Mark the scale to show the percentage of the 8-hour work day the individual can function satisfactorily.

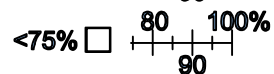
i. Maintain personal appearance



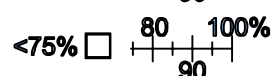
ii. Behave in an emotionally stable manner



iii. Relate predictably in social situations



iv. Demonstrate reliability



B. Describe any limitations and include the medical/clinical findings that support this assessment.

IV. Other Work-Related Activities

State any other work-related activities which are affected by the impairment, and indicate how the activities are affected. What are the medical/clinical findings that support this assessment?

V. Capability to Manage Benefits

Can the individual manage benefits in his or her own best interest?

Yes No

☐ ☐

If not, please explain why not.

VI. Onset of Above Limitations

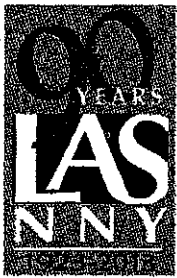
Based upon your evaluation, treatment, and/or review of records, please state the earliest date from which the limitations assessed on this form have existed at the assessed severity.

Signature

Date

APPENDIX 1

Case Summary



**Legal Aid
Society**
of Northeastern
New York, Inc.

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(800) 722-7380 • (518) 563-4022 • Fax: (518) 563-4058

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Deputy Director

March 21, 2013

Appeals Council
Office of Disability Adjudication and Review, SSA
5107 Leesburg Pike
Falls Church, Va 22041-32551

Re: [REDACTED]

Dear Appeals Council:

This letter- brief is submitted in support of [REDACTED]'s Request for Review of the January 25, 2013 unfavorable hearing decision denying Ms. [REDACTED] March 12, 2010 claim for SSI benefits. The unfavorable decision should be reversed because the ALJ failed to consider several severe impairments; because the ALJ's residual functional capacity assessment is not supported by substantial evidence and is erroneous as a matter of law; and because the determination that Ms. [REDACTED] is capable of work existing in the national economy is not supported by substantial evidence and is erroneous as a matter of law. The Appeals Council should reverse the hearing decision and, given the evidence of disability, issue a decision finding that Ms. [REDACTED] is disabled.

INTRODUCTION

Ms. [REDACTED] is currently 44 years old. She has a high school diploma, but was in special education throughout her schooling and earned only an Individualized Education Program (IEP) diploma, not a general education diploma. She has past relevant work as an assembly line worker. The Administrative Law Judge initially denied Ms. [REDACTED] SSI claim in a July 20, 2011 unfavorable decision. Exh. 3A. That determination was vacated by the Appeals Council and the case remanded for further consideration of Ms. [REDACTED]'s residual functional capacity and the extent to which her non-exertional limitations erode the occupational base for light work. Exh. 4A.

The January 25, 2012 unfavorable decision found that Ms. [REDACTED] has not performed substantial gainful activity since the filing of the SSI claim; has the severe impairments of morbid obesity, bilateral knee pain, insomnia, depression, anxiety, bipolar disorder, and borderline intellectual function; that the severity of Ms. [REDACTED] impairments did not meet or equal a Listing; that Ms. [REDACTED] had the residual functional capacity to do light work limited to rote, unskilled work involving simple work-related decisions, frequent but not constant interaction with others, and only minor changes in the work setting; that she was unable to perform any past relevant work; and that she was capable of performing other work in the national economy.



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SEVERITY OF NEUROLOGICAL CONDITIONS

The Administrative Law Judge's failure to find that Ms. [REDACTED] Expressive Language Disorder, Attention Deficit/Hyperactivity Disorder, and Developmental Coordination Disorder are severe is erroneous as a matter of law and unsupported by substantial evidence. These conditions were each diagnosed in a January 17, 2005 Neuropsychological Evaluation. Exh 2F at pages 15-21. As in 2011 vacated hearing decision, the January 25, 2013 unfavorable decision failed to even mention this evaluation or discuss the conditions found in the evaluation.

The Neuropsychological Evaluation was performed because the Clinton County Department of Social Services had placed Ms. [REDACTED] children in foster care as Ms. [REDACTED] was not providing adequate care and supervision to the children. Exh. 21F at page 2; Exh. 2F at page 15. Ms. [REDACTED] was first given a psychological evaluation at Sunmount Developmental Disabilities Service Office, where it was determined that although Ms. [REDACTED] had been classified as mentally retarded throughout her schooling, she actually had a low average full scale IQ. Exh. 4F at page 4. The Sunmount report noted, however, that Ms. [REDACTED] adaptive functioning scores were in the range of mild mental retardation, that she had clear and significant difficulty processing verbal language, and that she had sustained a possible head injury in a motor vehicle accident. Exh. 21 F at 3-4. The Sunmount evaluation concluded that a neuropsychological assessment should be done to assess whether there was a neurological impairment as a basis for disability. *Id.* at page 4.

The neuropsychological evaluation concluded that Ms. [REDACTED] was deficit in three areas of visuospatial processing and problem-solving—sustained attention, expressive language and sensorimotor skills. Exh. 2F at page 20. The report stated that Ms. [REDACTED] attention was adequate in brief segments of time, but she had difficulty maintaining attention. *Id.* The report also found that Ms. [REDACTED] sensorimotor functions were significantly deficient, with severely impaired tactile discrimination bilaterally, slow learning of manual motor sequences, and very slow graphomotor speed. *Id.* at page 19. The report also found that Ms. [REDACTED] was limited in verbal reasoning, had trouble holding verbal concepts in mind and working them through due to weak auditory working memory and weakly developed verbal conceptualization and reasoning. *Id.* at page 20.

The hearing decision failed to even consider the Neuropsychological Evaluation—the evaluation simply is not mentioned in the hearing decision, despite a similar failing in the 2011 hearing decision having been noted in the prior Request for Review. *See* Exh. 10B at page 5. This is a significant failing, as Ms. [REDACTED] limited attention, deficit motor function, and expressive language deficits all have significant impact on her work-related function. As will be shown *infra*, the vocational expert testified at the remand hearing that Ms. [REDACTED] would not be capable of performing work in the national economy if she is off task even 20% of the time. As will also be shown *infra*, two of the three occupations the vocational expert identified in response to the Administrative Law Judge's hypothetical require frequent reaching and handling, tasks Ms. [REDACTED] cannot perform given her slow learning of manual motor sequences and very slow motor speed. Ms. [REDACTED] neurological conditions are severe because they have significant impact on her residual functional capacity, yet the conditions and the evaluation are not even mentioned or considered in the hearing decision.

RESIDUAL FUNCTIONAL CAPACITY

The residual functional capacity determination is also not supported by substantial evidence and is erroneous as a matter of law. In addition to failing to consider the effects of Ms. [REDACTED] neurological conditions on her residual functional capacity, the fundamental problem with the residual functional determination is that it finds Ms. [REDACTED] can sustain function for the equivalent of a full-time job despite numerous indications to the contrary in the record. This is accomplished by a selective reading of the opinion evidence, taking the opinion evidence out of context, and an outright astounding weighing of two crucial pieces of opinion evidence.

Turning first to the astounding, the hearing decision gives great weight to an opinion by a non-examining physician which is remarkable in its superficiality while giving no weight to a well-reasoned and supported opinion by a consultative examiner. The hearing decision violates 20 C.F.R. 416.927(c)(3) by doing so.

The hearing decision gives great weight to an opinion by Dr. Aaron Satloff (Exh. 36) that Ms. [REDACTED] has the ability to understand simple instructions, maintain attention and concentration, relate adequately with others, and adapt to changes. Hearing Decision at page 16-17. The weight accorded Dr. Satloff's opinion is simply inexplicable. Dr. Satloff is a non-examining physician. Furthermore, when asked to cite the particular medical signs, laboratory findings, or other factors supporting his opinion on degree of limitation, Dr. Satloff merely states: "19F". Exh. 36 at page 3 and page 5. No particular signs, findings or factors are identified at all. Even more astounding is Exhibit 19F itself—a form completed by another non-examining physician. Despite the wealth of evaluations and opinions contained in a voluminous record addressing Ms. [REDACTED] multiple mental and neurological impairments, Dr. Satloff manages to cite the opinion of the other non-examining physician as the sole and only support for his conclusions. Dr. Satloff's opinion is remarkable only for its superficiality and its distinct lack of support, yet it is given great weight in the hearing decision. Under 416.927(c)(3), the more citation to signs, symptoms and findings, the more weight is given to an opinion. Dr. Satloff provides no citation to signs, symptoms or findings, yet his opinion is given great weight. Under 416.927(c)(3), the better an explanation is given for an opinion, the more weight is given to that opinion. Dr. Satloff gives no explanation for his opinion save a terse reference to another non-examining physician, yet his opinion is given great weight. Under 416.927(c)(3), the weight given to a non-examining physician depends on the degree to which supporting evidence is provided. Dr. Satloff provides no supporting evidence, yet his opinion is given great weight. The weight given Dr. Satloff's opinion is simply inexplicable.

As remarkable as the great weight given to Dr. Satloff's superficial opinion is the "very little weight" given to the opinion by Dr. Richard Liotta (Exh. 37F and Exh. 38F). Hearing Decision at page 18. The hearing decision found that Dr. Liotta "relied quite heavily on the subjective report of symptoms and limitations provided by the claimant, and seemed to uncritically accept as true, most, if not all, of what the claimant reported." *Id.* This is a spurious and unsupported conclusion.

Dr. Liotta begins his narrative report with a thorough review of the mental and neurological evaluations in the record, including that of Dr. Satloff. Exh. 37F at pages 1-4. Dr.

Liotta's report specifically cites the findings in these evaluations in commenting "her history and the information reviewed suggest the likelihood of more functional deficits than Dr. Satloff concluded she had..." *Id.* at page 4. Moreover, Dr. Liotta did more than simply report what Ms. [REDACTED] told him during the evaluation. Dr. Liotta conducted a mental status examination, which included his observations of Ms. [REDACTED] dress, hygiene, speech, associations and mood. *Id.* at page 6. Dr. Liotta administered tests based on similarities and proverbs ("abstracting ability very low"); serial 3s ("able to do serial 3s though extremely slowly"); and two trials of word recall ("able to recall 3/5 words immediately and 3/5 on a second trial"). *Id.* Dr. Liotta administered the Repeatable Battery for the Assessment of Neuropsychological Status (RBANS), an individually administered test for cognitive decline, to get more information regarding Ms. [REDACTED] cognitive functioning. *Id.* The RBANS showed that Ms. [REDACTED] was more than two standard deviations below the mean on immediate memory, language, attention, and delayed memory. *Id.* She was nearly three deviations below the mean on attention. *Id.*

Dr. Liotta did not simply uncritically accept what Ms. [REDACTED] told him—he conducted a thorough review and evaluation including objective tests to reach his conclusion. Based on the mental status examination and the RBANS, Dr. Liotta concluded that consistency is likely to be a significant problem for Ms. [REDACTED] due to the demonstrated significant deficits in memory, attention and concentration. *Id.* at page 8. Asked to assess Ms. [REDACTED] ability to do mental work-related activities, Dr. Liotta stated she had moderate limitations on the ability to understand, remember, and carry out simple instructions and make judgments on simple work-related decisions and marked limitation on the ability to understand, remember and carry out complex instructions and the ability to make judgments on complex work-related decisions. Exh. 38F at page 1. Dr. Liotta cited the significant difficulty with attention, concentration, and memory in his narrative report and noted the sustained ability to perform all these tasks is particularly problematic. *Id.* Dr. Liotta also found that Ms. [REDACTED] had marked limitation in the ability to respond to usual work settings and changes in the work setting, citing low stress tolerance and noted again that the ability to consistently perform work-related activities is significantly limited. *Id.* at page 2.

Pursuant to the standards of 416.927(c)(3), Dr. Liotta's opinion should be accorded great weight: his evaluation cited specific medical signs, findings and test results for his conclusion. He has provided a thorough explanation and support for his conclusions, including a detailed review of the mental health records, objective testing, and a mental status examination.

Turning next to the opinions taken out of context, the Hearing Decision accords "great weight" to statements made in discharge summaries from in-patient psychiatric treatment Ms. [REDACTED] received in 2006 and 2011 (Exh. 4F; Exh. 30F). Hearing Decision at page 11 and page 15.

On June 18, 2006 Ms. [REDACTED] was admitted to the CVPH Medical Center's Mental Health Unit. Exh. 4F. She was admitted "on a 939 from the ECC." Exh. 4F at page 5. New York Mental Hygiene Law 939 is the section of state law under which an individual can be involuntarily admitted to psychiatric in-patient treatment. The statute provides that an individual may be involuntarily admitted only if a staff physician determines that the person is likely to be a danger to themselves or others if not involuntarily admitted for treatment. When discharged from the CVPH Mental Health Center 10 days later, on June 27, 2006, the discharge physician

noted that her mental status was good. However, this discharge summary is conducted to determine if the patient presents a danger to themselves or others, not whether the person is capable of basic mental work activities or sustaining competitive work. Similarly, Ms. [REDACTED] was again involuntarily admitted to the CVPH Mental Health Unit from November 28, 2011 until December 2, 2011. (Exh. 30F). Similarly, the discharge physician found that Ms. [REDACTED] mental status was good. *Id.* page 2. The Hearing Decision treats these discharge summaries as though they offered opinions regarding Ms. [REDACTED] basic mental work activities and her ability to sustain competitive work. The discharge summaries indicate that Ms. [REDACTED] was no longer considered an imminent threat to commit suicide. The discharge summaries certainly do not support the conclusion that she is capable of competitive work activities, nor do they purport to do so.

In short, the residual functional capacity determination is not supported by substantial evidence. While Ms. [REDACTED] is capable of maintaining her attention and concentration for short periods, she is not capable of sustaining attention and concentration for the sustained period contemplated in SSR 96-8p—8 hours per day, five days per week or the equivalent. She is not capable of performing simple work activity on an ongoing basis.

WORK WHICH EXISTS IN THE NATIONAL ECONOMY

In response to a hypothetical question by the Administrative Law Judge asking if there was work in the national economy for an individual capable of light work limited to rote, unskilled work involving simple work-related decisions, frequent but not constant interaction with others, and only minor changes in the work setting, the vocational expert identified three occupations: Investigator, Dealer Accounts (DOT Code 241.367-038); Table Worker (DOT Code 734.687-014) and Assembler, Electrical Accessories (DOT Code 729.687-010). The vocational expert further testified that a person with the limitations in the hypothetical would not be capable of performing any work in the national economy, including the three identified occupations, if they were to have more than one unscheduled absence from work per month or if the individual was off task 20% or more of the work time.

The residual functional capacity erroneously established by the Administrative Law Judge fails to account for Ms. [REDACTED] inability to remain on task for more than 80% of the work day and her inability to consistently perform even simple work activities. As noted by Dr. Liotta and the Neuropsychological Evaluation, Ms. [REDACTED] will not be able to maintain her attention for 80% of an 8 hour workday. She will not be able to avoid unscheduled absences due to her anxiety and depression. Indeed, either one of her involuntary psychiatric admissions would have resulted in the loss of any of the occupations identified by the vocational expert.

Additionally, she is not able to perform any of the three occupations identified by the vocational expert. The Dictionary of Occupational Titles (DOT) and Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles (SCO) descriptions of the three occupations are attached hereto. The Investigator, Dealer Accounts position is simply beyond the simple work limitations expressed in the Administrative Law Judge's residual functional capacity evaluation and hypothetical. The occupation may be unskilled, but it requires Reasoning Development commensurate with solving practical problems and dealing with a variety of concrete variables in situations where only limited standardization exists and

interpreting a variety of instructions in written, oral, diagrammatic, or schedule form; requires Mathematical Development commensurate with computing discount, interest, profit and loss, commissions, markup and selling price, ratio, proportion and percentage; and requires Language Development commensurate with a wide variety of reading, writing and public speaking abilities. DOT at page 212, 1010-11 (Reasoning Development at Level 4, Mathematical Development at Level 3 and Language Development at Level 4). Ms. [REDACTED] is not capable of these levels of function given her Borderline Intellectual Function and Expressive Language Disorder. The Table Worker and Assembler positions both require Frequent Reaching and Handling. SCO at page 284. Ms. Gokey is not capable of this given her Developmental Coordination Disorder.

CONCLUSION

The unfavorable hearing decision is not supported by substantial evidence and is erroneous as a matter of law. Given the testimony of the vocational expert regarding jobs available in the national economy for a person with Ms. [REDACTED] limitations, the hearing decision should be vacated and benefits awarded. If this case is remanded for any reason, it should be assigned to a different Administrative Law Judge. The weighting of the evidence in the hearing decision, as well as the failure to consider the Neuropsychological Evaluation in two different hearing decisions, shows that the Administrative Law Judge authoring the January 25, 2013 hearing decision is biased against Ms. [REDACTED] claim.

Sincerely,


Peter Racette
Deputy Director

APPENDIX 2

Sample ALJ RFC's

APPENDIX 2 – SAMPLE ALJ RFCs

RFC DETERMINATION FROM FULLY FAVORABLE DETERMINATION, WHERE VE TESTIFIED:

The claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 416.967(a) except he could sit-less than one hour, stand-less than one hour, walk-less than 1 hour, carry less than 10 pounds. He would be off-task more than 10% of the time due to non-exertional impairments

RFC DETERMINATION FROM UNFAVORABLE ALJ DECISION, WHERE VE TESTIFIED:

After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform a full range of work at all exertional levels but with the following non-exertional limitations: able to perform simple, routine and repetitive tasks; having a low stress job requiring only occasional decision-making and occasional changes in the work setting; no interaction with the public; and only occasional interaction with co-workers and supervisors.

RFC DETERMINATIONS FROM UNFAVORABLE ALJ DECISIONS, WHERE NO VEs WERE CALLED:

After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 416.967(a) except the claimant requires unskilled work, occasional use of stairs and ramps, squatting and bending. The claimant can frequently reach overhead. The claimant should avoid concentrated exposure to respiratory irritants such as dust odors, fumes and gases. The claimant retains the ability to understand, carry out and remember simple instructions; to respond appropriately to supervision, co-workers and usual work situations and deal with changes in the routine work setting.

The claimant has the residual functional capacity to perform a full range of work at all exertional levels. Additionally, the claimant retains the ability to understand and follow simple instructions and directions, perform simple tasks with supervision and independently, maintain attention and concentration for simple tasks, regularly attend to a routine and maintain a schedule, relate to and interact with others to the extent necessary to carry out simple tasks, and handle work-related stress in that she is able to make decisions directly related to the performance of simple tasks in a stable, unchanging work environment.

APPENDIX 3

SAMPLE MEDICAL SOURCE STATEMENTS

Physician: field:ContactFullName

Date of last exam: _____

Patient: field:ClientFullName

SS#: field:SSN

Medical Assessment of Ability to Sustain Work-Related Activities (Mental)

To determine this individual's ability to **sustain satisfactory function in work-related activities** on a **8-hour day, 40 hour week basis** in a **regular competitive work setting**, please give an assessment, based on your examination and review of treatment records, of how the individual's mental/emotional capabilities are affected **by the impairment(s)**. Consider the medical history, the chronicity of findings (or lack thereof), and the expected duration of any work-related limitations, but not the individual's age, sex, work experience, or the effects of **drug abuse** or **alcoholism**.

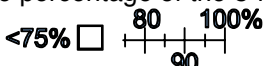
For each activity shown below:

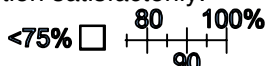
1. Mark the following scale with an "X" to reflect the **percentage of an 8-hour work day** the individual can be expected to sustain a **satisfactory** level of functioning.

2. Identify the particular medical or clinical findings (i.e., mental status examination, behavior, intelligence test results, symptoms) which support your assessment of any limitations. It is important that you relate specific medical findings to any noted limitation in capacity. The usefulness of this assessment depends on the extent to which you do this.

I. Making Occupational Adjustments

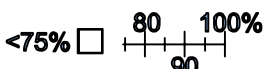
A. Mark the scale to show the percentage of the 8-hour work day the individual can function satisfactorily.

i. Follow work rules 

v. Interact with supervisor(s) 

ii. Relate to co-workers 

vi. Deal with ordinary work stresses 

iii. Deal with the public 

vii. Function independently 

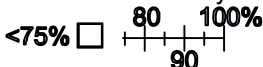
iv. Use judgment 

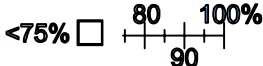
viii. Maintain attention/concentration 

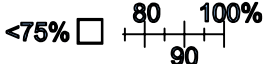
B. Describe any limitations and include the medical/clinical findings that support this assessment. If some of these actions cannot be sustained for an 8 hour work shift, explain why.

II. Making Performance Adjustments

A. Mark the scale to show the percentage of the 8-hour work day the individual can function satisfactorily.

i. Understand, remember and carry out **complex** job instructions 

ii. Understand, remember and carry out **detailed**, but not complex, job instructions 

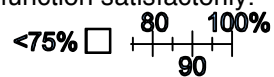
iii. Understand, remember and carry out **simple** job instructions 

B. Describe any limitations and include the medical/clinical findings that support this assessment; e.g., intellectual ability, thought organization, memory, comprehension, etc.

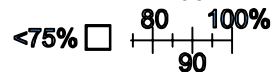
III. Making Personal-Social Adjustments

A. Mark the scale to show the percentage of the 8-hour work day the individual can function satisfactorily.

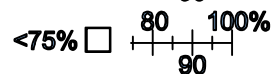
i. Maintain personal appearance



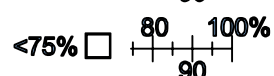
ii. Behave in an emotionally stable manner



iii. Relate predictably in social situations



iv. Demonstrate reliability



B. Describe any limitations and include the medical/clinical findings that support this assessment.

IV. Other Work-Related Activities

State any other work-related activities which are affected by the impairment, and indicate how the activities are affected. What are the medical/clinical findings that support this assessment?

V. Capability to Manage Benefits

Can the individual manage benefits in his or her own best interest?

Yes No

☐☐

If not, please explain why not.

VI. Onset of Above Limitations

Based upon your evaluation, treatment, and/or review of records, please state the earliest date from which the limitations assessed on this form have existed at the assessed severity.

Signature

Date

MENTAL IMPAIRMENT QUESTIONNAIRE

NAME: _____

SSN: _____

Please answer the following questions concerning your patient's impairments. *Attach relevant treatment notes and test results* as appropriate.

1. Frequency and length of contact: _____

2. DSM-IV Multiaxial Evaluation:

Axis I: _____

Axis IV: _____

Axis II: _____

Axis III: _____

3. Treatment:

4. Medications with notation of any side effects:

5. Prognosis:

6. Findings on mental status examination:

7. Signs and Symptoms

8. Does this individual have a medically/psychologically determinable impairment that produces symptoms that he/she describes to you?

YES ☐ NO ☐

9. The above-described conditions have existed to this degree of severity since at least

10. Can the individual manage benefits in his or her own best interest?

YES ☐ NO ☐

11. Degree to which mental conditions affect patient's ability to do work-related activities on a day-to-day basis in a competitive (8 hours per day – 5 days per week) work setting:

NONE/SLIGHT: not significantly impaired

MODERATE: able to perform at 80-85% of normal expected productivity

MODERATELY SEVERE: able to perform at 60-80% of normal expected productivity

SEVERE: totally precluded

Mental Abilities		None/Slight	Moderate	Moderately Severe	Severe
A	remember locations and work like procedures				
B	understand, remember or carry out one-step instructions				
C	make simple work-related decisions				
D	ask simple questions or request assistance				
E	understand, remember, or carry out multi-step instructions				
F	maintain concentration and attention for extended periods.				
G	perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances				
H	sustain an ordinary routine without special supervision				
I	take public transportation				
J	work in coordination with or proximity to others without being unduly distracted by them				
K	complete a normal workday/week without interruptions from psychologically based symptoms				
L	perform at a consistent pace				
M	be aware of normal hazards and take appropriate precautions				
N	accept instructions and respond appropriately to criticism from supervisors				
O	get along with coworkers or peers without unduly distracting them or exhibiting behavioral extremes				
P	maintain socially appropriate behavior				
Q	meet basic standards of neatness and cleanliness				
R	respond appropriately to changes in a routine work setting				

12. Is this individual currently using drugs and/or alcohol?
YES ☐ NO ☐

13. Would the restrictions persist if the individual stopped using?
YES ☐ NO ☐

If yes, please explain:

14. Does your patient have a low IQ or reduced intellectual functioning?
YES ☐ NO ☐

*Please explain (with reference to specific test results):

15. Does the psychiatric condition exacerbate your patient's experience of pain or any other physical symptom?
YES ☐ NO ☐

*If yes, please explain: _____

16. Do your patient's mental impairments ever cause intermittent symptoms or exacerbations severe enough that they would cause him/her to need to take unscheduled work breaks during a shift if he/she was at a full-time job?
YES ☐ NO ☐

*If yes, please explain: _____

17. Do your patient's mental impairments ever cause intermittent symptoms or exacerbations severe enough that would cause him/her to take unscheduled days off work if they were at a full time job?
YES ☐ NO ☐

If yes, then how many days per month would the patient be absent from work on average?

____ 1 day ____ 2 days ____ 3 days ____ More than 3 days

Date

Signature

Title

Printed/Typed Name

M.D. Signature

Printed/Typed Name

Mental Impairment Questionnaire

Name of Patient: _____

SSN: _____

Please answer the following questions concerning your patient's impairments. This information will be used in addition to the relevant medical records and opinions from other health care providers to adjudicate your patient's Social Security disability claim.

1. Frequency and length of contact: _____

2. DSM-IV Multiaxial Evaluation:

Axis I: _____

Axis II: _____

Axis III: _____

Axis IV: _____

Axis V (Current GAF): _____

(Highest GAF Past year): _____

Comments:

3. Identify your patient's signs and symptoms associated with the diagnosis:

- | | | |
|--|---|---|
| <input type="checkbox"/> Poor memory | <input type="checkbox"/> Perceptual disturbances | <input type="checkbox"/> Appetite disturbance with weight change |
| <input type="checkbox"/> Sleep disturbance | <input type="checkbox"/> Time or place disorientation | <input type="checkbox"/> Psychomotor agitation or retardation |
| <input type="checkbox"/> Personality change | <input type="checkbox"/> Difficulty thinking or concentrating | <input type="checkbox"/> Catatonia or grossly disorganized behavior |
| <input type="checkbox"/> Emotional lability | <input type="checkbox"/> Social withdrawal or isolation | <input type="checkbox"/> Loss of intellectual ability of 15 IQ points or more |
| <input type="checkbox"/> Decreased energy | <input type="checkbox"/> Blunt, flat, or inappropriate affect | <input type="checkbox"/> Pathological dependence or passivity |
| <input type="checkbox"/> Manic syndrome | <input type="checkbox"/> Delusions or hallucinations | <input type="checkbox"/> Illogical thinking or loosening of associations |
| <input type="checkbox"/> Mood disturbance | <input type="checkbox"/> Obsession or compulsions | <input type="checkbox"/> Intrusive recollections of a traumatic experience |
| <input type="checkbox"/> Recurrent panic attacks | <input type="checkbox"/> Feelings of guilt/worthlessness | <input type="checkbox"/> Somatization unexplained by organic disturbance |
| <input type="checkbox"/> Hostility and irritability | <input type="checkbox"/> Generalized persistent anxiety | <input type="checkbox"/> Anhedonia or pervasive loss of interests |
| <input type="checkbox"/> Substance dependence | <input type="checkbox"/> Suicidal ideation or attempts | <input type="checkbox"/> Paranoia or inappropriate suspiciousness |
| <input type="checkbox"/> Persistent irrational fears | <input type="checkbox"/> Oddities of thought, perception, speech, or behavior | |

Other symptoms and remarks: _____

4. Describe the *clinical findings*, including results of mental status examination, which demonstrate the severity of your patient's mental impairment and symptoms: _____

5. Describe the treatment and response including any side effect of medication that may have

implications for working, e.g., drowsiness, dizziness, nausea, etc: _____

6. Prognosis: _____

7. Has your patient's impairment lasted or can it be expected to last at least twelve months? ☐ Yes ☐ No

8. Does your patient have a low I.Q. or reduced intellectual functioning? ☐ Yes ☐ No

Please explain (with reference to specific test results): _____

9. On average, how often do you anticipate that your patient's impairments or treatment would cause your patient to be absent from work?

☐ Never

☐ Less than once a month

☐ About once a month

☐ About twice a month

☐ About three times a month

☐ More than three times a month

10

For each activity shown below, the following definitions apply.	No impact	Mental impairments does not preclude performance of any aspect of the job mentally
	5% impact	Mental impairment precludes work performance for approximately 5% of an 8 hour day (5% = 24 minutes)
	10% impact	Mental impairment precludes work performance for approximately 10% of an 8 hour day (10% = 48 minutes)
	15% or more impact	Mental impairment precludes work performance for 15% or more of an 8 hour day (15% = 72 minutes)

A. Mental Abilities Needed to Do Unskilled Work

	No impact	5% impact	10% impact	15% or more impact
1. Remember work-like procedures.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Understand, remember, and carry out very short and simple instructions.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Maintain sufficient attention and concentration to appropriately complete tasks in a timely manner.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Complete tasks without extra supervision or assistance.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Perform at a consistent pace without an unreasonable number and length of rest periods.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

6. Meet minimum quality and accuracy standards.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Complete a normal workday without interruptions from psychologically based symptoms.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Work in coordination with or proximity to others without being unduly distracted.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Make simple work related decisions.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. Accept instructions and respond appropriately to criticism from supervisors.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. Get along with others without unduly distracting them or exhibiting behavioral extremes.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. Respond appropriately to changes in a routine work setting.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13. Deal with normal work stress.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14. Be aware of normal hazards and take appropriate precautions.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	No impact	5% impact	10% impact	15% or more impact

B. Mental Abilities Needed to Do Semi-Skilled and Skilled Work

1. Understand, remember, and carry out detailed instructions.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Maintain attention and concentration for extended periods and complete tasks independently, effectively, and in a timely manner.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Set realistic goals or make plans independently of others.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Deal with stress of semiskilled and skilled work.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

C. Mental Abilities Needed to Do Particular Types of Jobs or Changes in Work

	No impact	5% impact	10% impact	15% or more impact
1. Interact appropriately with the general public.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Perform a few routine tasks over and over with little opportunity for diversion or interruption.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Perform tasks only under specific instructions, allowing little or no room for independent action or judgment in working out problems.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Deal with people in work situations beyond receiving work instructions.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Adjust to the demands of a new job or a different work setting from past work experience.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comments: _____

11. To what extent if any, are the above symptoms and limitations related to ongoing drug/alcohol abuse?
Please explain. _____

Date

Signature

Printed name

Address

APPENDIX 4

SAMPLE DSS EMPLOYABILITY ASSESSMENT

2/09

(3) MEDICAL HISTORY - Please list all past medical conditions:

(4) CURRENT MEDICATIONS:

Date 1 st Prescribed	Medication	Dosage	Frequency

LIST THE SIDE EFFECTS CLIENT EXPERIENCES WITH MEDICATION, IF ANY:

(5) CURRENT TREATMENT PROGRAM(S) (INCLUDING ALCOHOL/CHEMICAL DEPENDENCY)/OTHER KNOWN BEHAVIORAL HEALTH:

Program Name: Telephone #:

Address:

Treatment Program Contact: Title:

Date of First Treatment: Treatment Type:

Treatment Schedule: Days: Time: Date of Last Examination:

Has individual's condition improved as a result of this treatment? Yes ☐ No ☒

If no, please explain:

(6) CURRENT LEGAL APPOINTMENTS, OBLIGATIONS (e.g. drug court/probation, etc.):

(7) EPISODES ATTRIBUTED TO PSYCHIATRIC AND/OR SUBSTANCE ABUSE CONDITIONS:

Check column that applies	Never	On Occasion	Frequent
Medical hospitalizations or emergency room visits	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Acute psychiatric hospitalization	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Hospitalization for alcohol/drug abuse	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Interacts appropriately with others	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Prior attempts at alcohol/drug abstinences	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Passing out or black-out episodes	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Repetitive violent actions towards self or others	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Loss of job or failure to complete education or training program	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Behavior interferes with activities of daily living	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Suicide attempt	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Decompensation (episodes of psychosis)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

(8) MENTAL STATUS EXAMINATION: (most recent date)

☒ Mental status examination was indicated and results are:

(9) **DIAGNOSTIC IMPRESSION:** Must be completed by Psychiatrist or Psychologist

List all psychiatric diagnoses. Include psychiatric and alcohol/drug addiction diagnosis using DSM IV classification

AXIS I: _____

AXIS II: _____

AXIS III: _____

AXIS IV: _____

AXIS V: _____

(10) **EMPLOYABILITY DETERMINATION:**

A. <u>FUNCTIONAL LIMITATIONS/CLINICAL OBSERVATIONS:</u>	Normal Functioning No evidence of limitation	Moderately Limited Unable to function 10-25% of the time	Very Limited Unable to function 25% or more of the time	Insufficient Data
Demonstrates the capacity to follow, understand and remember simple instructions and directions	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Demonstrates the capacity to perform simple and complex tasks independently	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Demonstrates the capacity to maintain attention and concentration for role tasks	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Demonstrates the capacity to regularly attend to a routine and maintain a schedule	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Demonstrates the capacity to maintain basic standards of hygiene and grooming	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Demonstrates the capacity to perform low stress and simple tasks	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

DOES PATIENT DEMONSTRATE THE CAPACITY TO USE PUBLIC TRANSPORTATION: ☒ YES ☐ NOB. EMPLOYABILITY:

Indicate which of the following four statements best describe the individual's condition and elaborate, if indicated. Please note that the responsibility for determining employability related to substance abuse is determined solely by the district's Certified Alcohol and Substance Abuse Counselor (CASAC)

COMPLETE ONE SECTION ONLY (Continued on next page)	1. <input type="checkbox"/> Individual demonstrates ability to participate in activities (e.g. work, education, and training) for up to 40 hours per week, does not have any limitations, and does not require any treatment/rehabilitation or assessment by the district's CASAC.
	2. <input type="checkbox"/> Individual demonstrates ability to participate in activities (e.g. work, education, and training) <input type="checkbox"/> for up to 40 hours <u>with reasonable accommodations listed on next page- Section C</u> <input type="checkbox"/> OR _____ hours per week <u>with reasonable accommodations listed on next page - in Section C</u> Expected Duration: _____ weeks/months/years(s) Specify treatment, diagnosis and/or referral recommendations, including referral to the district's CASAC for substance abuse assessment: Reason: <u>If less than 40 hours, list the reason(s) individual is unable to participate in full-time activities:</u>
	3. <input checked="" type="checkbox"/> Individual is unable to participate in any activities except treatment or rehabilitation (include treatment/rehabilitation) Expected Duration: _____

Specify treatment, diagnosis and/or referral recommendations, including referral to the district's CASAC for substance abuse assessment:

Reason: If less than 40 hours, list the reason(s) individual is unable to participate in full-time activities:

4. ☐ Individual appears permanently disabled, condition is not expected to improve, and is unable to participate in any activities. SSReferral is based on:

Is referral to the district's CASAC for substance abuse assessment is recommended: Yes ☒ No ☐

C. **REASONABLE ACCOMMODATIONS:** Must be completed if any box from # 2 on previous page is checked

Describe any necessary reasonable accommodations which are recommended based on identified disabilities:

Describe any working conditions, environments or work activities which are contraindicated:

MEDICAL PROFESSIONAL'S INFORMATION: Form must be completed & signed by a Licensed Behavioral Health Professional.

Name: _____

Address: _____

Board eligible or certified specialty: _____

Signature of Behavioral Health Professional: _____

Date form completed: _____

Phone: _____

APPENDIX 5

McMANUS MEMO ON EMPLOYEE BREAKS

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MEMO

Meal & Rest Breaks in New York State

A note from Friday's presentation on V.E's in SSA-ODAR

About meal & rest breaks. We usually recite the customary ½ hr. unpaid lunch break and 2 short, 20 minute breaks/shift. Here is the scoop on the law in this matter. It's a little more complex than it appears on the surface:

Question to the US Dept of Labor – "What comprises lawful breaks for workers and must be furnished by employers?"

Actually, Federal Labor Law does not require meal or rest breaks. This is left to the states.

New York State Dept of Labor requires the following:

Labor Law Section 162 sets forth the required meal periods for employees in New York State. Factory Workers are entitled to a 60-minute lunch break between 11:00 a.m. and 2:00 p.m. and a 60-minute meal break at the time midway between the beginning and end of the shift for all shifts of more than six hours starting between 1:00 p.m. and 6:00 a.m. and lasting more than six hours.

Non-Factory Workers are entitled to a 30-minute lunch break between 11:00 a.m. and 2:00 p.m. for shifts six hours or longer that extend over that period and a 45-minute meal break at the time midway between the beginning and end of the shift for all shifts of more than six hours starting between 1:00 p.m. and 6:00 a.m. All Workers are entitled to an additional 20-minute meal break between 5:00 p.m. and 7:00 p.m. for workdays that extend from before 11:00 a.m. to after 7:00 p.m. Section 162 also allows the Commissioner to permit shorter meal periods upon application by the employer and if the Commissioner believes such modifications are warranted by special circumstances.

Who is covered by Section 162 of the Labor Law? All private and public sector employers and their employees who work in New York State are covered by the law. However, the law contains different requirements for factory workers and non-factory workers.

Who is a factory worker? Section 162 has different meal period requirements for persons "employed in or in connection with a factory." A factory includes a mill, workshop, or other manufacturing establishment and includes all buildings, sheds, structures or other places used for or in connection with these establishments. A factory does not include dry dock plants engaged in making repairs to ships, power houses, generating plants and other structures owned or operated by a public

service corporation. Any employee who works in or whose primary duties involve the maintenance and/or operation of a factory is a factory worker for the purposes of Section 162 of the Labor Law.

Where only one employee is on duty, is that employee required to be provided with an uninterrupted meal period? In some instances where only one person is on duty or is the only one in a specific occupation, it is customary for the employee to eat on the job without being relieved. The Department of Labor will accept these special situations (The "One-Employee Shift" exception) as compliance with Section 162, where the employee voluntarily consents to the arrangements. However, an uninterrupted meal period must be afforded to every employee who requests this from an employer prior to consenting to the arrangement. To demonstrate that voluntary consent to such one-employee shifts has been given, an employer must explain to the employee that:

- The nature of the industry in which the employer operates necessitates one-employee shifts
- The employee's meal periods may be interrupted The employer must then obtain an acknowledgement, preferably in writing, by the employee, either:
 - When the employee is hired
 - Before the time the employee would be expected to give up his/her uninterrupted meal periods.

An employer cannot use mere acceptance of a job or continued employment without objection as an acknowledgement. If an employee works through a meal period due to one-employee shift requirements, the employee must be paid for such meal period. Once an affirmative acknowledgement is given by an employee, it cannot be revoked without a change in circumstances.

Are employees required to be paid for meal period time? **Meal periods that meet statutory requirements are not required to be counted as "hours worked" and employees are not required to be paid for such time.** (See answer above for situations in which employees work through meal periods.)

Are 'brown bag lunches' permissible in New York State? "Brown bag lunches" are where employees eat their lunch while listening to a speaker or some sort of presentation. The topics of such lunches may be work-related or not related to work (e.g. related to health and wellness issues, personal finances, retirement).

Employees must be allowed an uninterrupted meal period and must be free to leave their work area(s) and engage in other pursuits. If employees are required by their employers to attend such working or brown bag lunches (typically on topics related to work), they do not count as a meal period and must also be counted as time

worked. Employees who voluntarily choose to attend such lunches on topics, are receiving a meal period under the law.

May employees consent to not taking a meal period? The New York State Court of Appeals, New York's highest court, held that, in a situation where there was a collective bargaining agreement that provided for a waiver of statutory meal periods in exchange for additional breaks and meal periods scheduled at other times, employees may waive their rights under the Labor Law. Such waivers must include the following:

- ♣ The operational needs of the industry make strict compliance with the meal period provisions impractical
 - ♣ The waiver was obtained openly and knowingly, absent of duress or coercion, through good faith negotiations
 - ♣ The employees received a desired benefit through the negotiations in return for such a waiver
- The Court of Appeals decision, *ABC Broadcasting v. Roberts*, can be found at 61 N.Y.2d 244 (1984). Does the Commissioner permit shorter time periods?

The Department will permit a shorter meal period of not less than 30 minutes as a matter of course, without application by the employer, so long as there is no indication of hardship to employees. A meal period of not less than 20 minutes will be permitted only in special or unusual cases after investigation and issuance of a special permit. How does an employer apply for a shorter time period? An application may be found on the Department's web site at the following link: <http://www.labor.ny.gov/formsdocs/wp/ls284.pdf>.

May an employer require employees to remain at work during meal breaks? There is nothing in the Labor Law that requires that an employee be permitted to leave the work premises for the meal period, so long as the employee is completely freed from duties during the meal period. Employees must be completely relieved from duty for the purposes of providing meal periods and an employee is not relieved if he or she is required to perform any duties, whether active or in-active, during that period. While employees may remain at their desk or in their work area during a meal break, they must be effectively relieved of their duties during that period. **In general, employees who are required to remain at their desk or workstation during meal periods are not considered to be completely relieved of their duties. It is important to note, however, the one-employee shift exception discussed above allows for a general exception to this rule.**

May employers round starting and stopping time for counting meal period requirements? Yes. Rounding of time is a practice where employers will round the beginning and/or end of a shift or meal period to an interval. For example, rounding occurs when an employee arrives at work at 8:02 and the time records note that the

employee arrives at 8:00. The Department follows the principles set forth in federal regulations (29 CFR §785.48(b)) with regard to the rounding of time. That regulation recognizes that rounding is commonly accepted in industry at intervals ranging from 5 to 15 minutes and permits such rounding. Extending this rounding regulation to the meal period requirements is proper, so long as rounding of starting and stopping time for the counting of meal period requirements does not, over a period of time, result in a failure provide employees with the required meal periods. In short, rounding of time is permissible as long as it does not result in employees losing time.

Must employees be paid for breaks and rest periods? While the Labor Law does not require that employers provide rest periods of short duration, if they are provided to or taken by employees, they must be counted as working time. The Department follows Federal Regulation 29 CFR §785.18 which provides that rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.

Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that:

- ♣ The authorized break may only last for a specific length of time
- ♣ Any extension of the break is contrary to the employer's rules
- ♣ Any extension of the break will be punished. Can employees have the option of either having meal break or leaving work earlier at the end of a shift? As discussed above, employees may waive their rights to a meal period under Section 162 only if the requirements of the waiver set forth by New York courts are met. Furthermore, the option of leaving early does not constitute a sufficient employee benefit upon which to satisfy the third of those requirements, as it merely substitutes time off during a workday for time off at the end of a workday. This does not mean that an employer and employee cannot agree that the employee may work through a meal period in exchange for being able to leave work early on an occasional basis due to employee needs. However, the employer and employee cannot agree to such a situation on a long-term, regular basis.