
Developing Medical Evidence for Limitations in The Ability To Attend and Focus on Tasks

Thursday, September 15, 2016

**Albany Marriott
Albany, NY**

CLE Course Materials and NotePad[®]

***Complete course materials distributed in electronic format online in
advance of the program.***

Sponsored by the

New York State Bar Association and The Committee on Legal Aid

This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

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.**

<p>Developing Medical Evidence for Limitations in The Ability To Attend and Focus on Tasks, Thursday, September 15, 2016 New York State Bar Association's Committee on Legal Aid, Albany Marriott, Albany, NY</p>

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

Live Program Evaluation (Attending In Person)

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			
	Excellent	Good	Fair	Poor	Excellent	Good	Fair	Poor
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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
Registration	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Organization	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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Meeting Site (if applicable)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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



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Developing Medical Evidence for Limitations in The Ability To Attend and Focus on Tasks

PROGRAM DESCRIPTION

On appeal, the claimant must demonstrate that s/he is unable to work, so vocational evidence is crucial to the claim. In a panel format, this session will present a discussion of sources of evidence to corroborate attention and concentration limitations, including psychological testing, medical questionnaires, and vocational evidence from agencies such as ACCESS-VR. Strategies will be suggested for creative alternatives, such as testimony and evidence from non-medical sources.

NEW YORK STATE BAR ASSOCIATION 2016 PARTNERSHIP CONFERENCE

DAP SESSION #2: DEVELOPING MEDICAL EVIDENCE FOR LIMITATIONS IN THE ABILITY TO ATTEND AND FOCUS ON TASK

**September 15, 2016
3:00 – 4:30 p.m.**

1.5 Transitional CLE Credits in Skills

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

Panelists:

Tanya Douglas, Esq., Director, Disability Advocacy Project, Manhattan Legal Services
Joseph Maslak, Esq., Staff Attorney, Legal Aid Society of Mid-New York, Inc.
Peter Racette, Esq., Deputy Director, Legal Aid Society of Northeastern New York, Inc.
Latanya White, Esq., Director of the Disability Advocacy Project at Brooklyn Legal Services

INTRODUCTION

On appeal, the claimant must demonstrate that s/he is unable to work, so vocational evidence is crucial to the claim. In a panel format, this session will present a discussion of sources of evidence to corroborate attention and concentration limitations, including psychological testing, medical questionnaires, and vocational evidence from agencies such as ACCESS-VR. Strategies will be suggested for creative alternatives, such as testimony and evidence from non-medical sources.

Appendices: Appendix 1- summary of a typical case involving limitations in attention and concentration
Appendix 2 - RFCs from ALJ decisions
Appendix 3 - Sample Medical Source Statements
Appendix 4 – Sample DSS Employability Assessments
Appendix 5 – Memo by Carol McManus on Standard for Employee Breaks
Appendix 6 - Sample Adaptive Functioning Questionnaire

I. Residual functional capacity (RFC)

A. RFC Overview

- a. What a claimant can still do - eight hours a day, five days per week - despite the limitations imposed by impairments and their symptoms
- b. 20 C.F.R. §§ 404.1545 & 416.945
 - i. (a) *General*—(1) *Residual functional capacity assessment*. Your impairment(s), and any related symptoms, such as pain, may cause physical and mental limitations that affect what you can do in a work setting. Your residual functional capacity is the most you can still do despite your limitations. We will assess your residual functional capacity based on all the relevant evidence in your case record. (See § 416.946.)
- c. SSR 96-9p – Determining Capability to Do Other Work – Implications of a Residual Functional Capacity For Less Than a Full Range of Sedentary Work
 1. http://www.socialsecurity.gov/OP_Home/rulings/di/01/SSR96-09-di-01.html

B. Special considerations for mental RFC

- a. Basic mental demands of work, such as understanding, remembering and carrying out instructions; responding appropriately to supervision, co-workers, and work pressure in a work setting.
 - i. 20 C.F.R. §§ 404.1545(c) & 416.945(c)
 - ii. *See also* POMS DI 25020.010 – Mental Limitations
 - iii. <https://secure.ssa.gov/apps10/poms.nsf/lnx/0425020010>
- b. “*Substantial loss*” of ability to meet any of the basic mental demand of work severely limits the potential occupational base and would thus justify a finding of inability to perform other work
 - i. POMS § DI 25020.010, A, 3, B

c. SSR 85-15 – Capacity to Do Other Work – The Medical-Vocational Guidelines As a Framework for Evaluating Solely Nonexertional Impairments

- i. http://www.socialsecurity.gov/OP_Home/rulings/di/02/SSR85-15-di-02.html

d. SSR 85-16 – Residual Functional Capacity For Mental Impairments

i. Evidence to be considered in determining residual functional capacity:

1. Reports of the individual's activities of daily living and work activity, as well as testimony of third parties about the individual's performance and behavior; and
2. Reports from workshops, group homes, or similar assistive entities

ii. In analyzing the evidence, it is necessary to draw meaningful inferences and allow reasonable conclusions about the individual's strengths and weaknesses. Consideration should be given to factors such as:

1. Quality of daily activities, both in occupational and social spheres, as well as of the individual's actions with respect to a medical examination;
2. Ability to sustain activities, interests, and relate to others *over a period of time* (the frequency, appropriateness, and independence of the activities must also be considered);
3. Level of intellectual functioning; and
4. Ability to function in a work-like situation.

- iii. http://www.socialsecurity.gov/OP_Home/rulings/di/01/SSR85-16-di-01.html

C. Sample ALJ RFCs attached as *Appendix 2*

D. Reviewing/obtaining RFC assessments

a. NERD (SSA non-examining review physician/consultant) RFC in Exhibit File

- i. See 20 C.F.R. §§ 404.1546(a) & 416.946(a)

- ii. (a) *Responsibility for assessing residual functional capacity at the State agency.* When a State agency medical or psychological consultant and a State agency disability examiner make the disability determination as provided in § 416.1015(c)(1) of this part, a State agency medical or psychological consultant(s) is responsible for assessing your residual functional capacity. When a State agency disability examiner makes a disability determination alone as provided in § 416.1015(c)(3), the disability examiner is responsible for assessing your residual functional capacity.
 - iii. Check e-CAT for DDS RFC rationale
- b. MSS (Medical Source Statement) by SSA consultative examiner (CE)
 - i. See 20 C.F.R. §§ 404.1519(c)(6) & 416.919(c)(6) – Elements of a complete consultative examination
 - ii. “A statement about what you can still do despite your impairment(s), unless the claim is based on statutory blindness. If you are an adult, this statement should describe the opinion of the medical source about your ability, despite your impairment(s), to do work-related activities, such as sitting, standing, walking, lifting, carrying, handling objects, hearing, speaking, and traveling; and, in cases of mental impairment(s), the opinion of the medical source about your ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers and work pressures in a work setting... Although we will ordinarily request, as part of the consultative examination process, a medical source statement about what you can still do despite your impairment(s), the absence of such a statement in a consultative examination report will not make the report incomplete. See § 416.927”
- c. Findings by DHO (Disability Hearing Officer) in Continuing Disability Review (CDR) or Age Eighteen Review
 - i. See 20 C.F.R. §§ 404.1546(b) & 416.946(b)
 - ii. “*Responsibility for assessing residual functional capacity in the disability hearings process.* If your case involves a disability hearing under § 416.1414, a disability hearing officer is responsible for assessing your residual functional capacity. However, if the disability hearing officer's reconsidered determination is changed under § 416.1418, the Associate Commissioner for the Office of Disability Determinations or his or her delegate is responsible for assessing your residual functional capacity.”
- d. Assessments from treating sources

1. Sample Questionnaires/Medical Source Statements attached as
Appendix #3

E. Barriers to obtaining assessments

a. Blanket refusals by mental health centers/providers

i. Consider meeting with providers?

b. Requirement for acceptable medical sources

i. *Diagnoses* must be made by “acceptable” medical source

ii. 20 C.F.R. §§ 404.1513(a) & 416.913(a)

1. *Sources who can provide evidence to establish an impairment.*

We need evidence from acceptable medical sources to establish whether you have a medically determinable impairment(s). See 20 C.F.R. §§ 404.1508 & 416.908. Acceptable medical sources are—

- a. Licensed physicians (medical or osteopathic doctors);
- b. Licensed or certified psychologists. Included are school psychologists, or other licensed or certified individuals with other titles who perform the same function as a school psychologist in a school setting, for purposes of establishing mental retardation, learning disabilities, and borderline intellectual functioning only;
- c. Licensed optometrists, for purposes of establishing visual disorders only (except, in the U.S. Virgin Islands, licensed optometrists, for the measurement of visual acuity and visual fields only). (See paragraph (f) of this section for the evidence needed for statutory blindness);
- d. Licensed podiatrists, for purposes of establishing impairments of the foot, or foot and ankle only, depending on whether the State in which the podiatrist practices permits the practice of podiatry on the foot only, or the foot and ankle; and
- e. Qualified speech-language pathologists, for purposes of establishing speech or language impairments only. For this source, “qualified” means that the speech-language pathologist must be licensed by the State professional licensing agency, or be fully certified by the State education agency in the State in which he or she practices, or hold a Certificate of Clinical Competence

from the American-Speech-Language-Hearing Association.

c. Controlling weight only given to opinions of acceptable medical sources

- i. 20 C.F.R. §§ 1527(d) & 416.927(d)
- ii. SSR 96-2p
- iii. POMS DI 24515.002 to DI 24515.005

F. Creative solutions/alternatives

a. *Assessments* from non-acceptable medical and non-medical sources should be given weight

- i. 20 CFR §§ 404.1513(d) & 416.913(d)

1. *Other sources.* In addition to evidence from the acceptable medical sources listed in paragraph (a) of this section, we may also use evidence from other sources to show the severity of your impairment(s) and how it affects your ability to work or, if you are a child, how you typically function compared to children your age who do not have impairments. Other sources include, but are not limited to—

- a. Medical sources not listed in paragraph (a) of this section (for example, nurse-practitioners, physicians' assistants, naturopaths, chiropractors, audiologists, and therapists);
- b. Educational personnel (for example, school teachers, counselors, early intervention team members, developmental center workers, and daycare center workers);
- c. Public and private social welfare agency personnel; and
- d. Other non-medical sources (for example, spouses, parents and other caregivers, siblings, other relatives, friends, neighbors, and clergy).

- ii. See also SSR 06-3p – Considering Opinions and Other Evidence From Sources Who Are Not “Acceptable Medical Sources” in Disability Claims; Considering Decisions on Disability by Other Governmental and Nongovernmental Agencies

- 1. http://www.socialsecurity.gov/OP_Home/rulings/di/01/SSR2006-03-di-01.html

- iii. *See, e.g., Kohler v. Astrue*, 546 F.3d 260 (2d Cir. 2008) holding nurse practitioner’s opinion entitled to some weight
- b. Department of Social Service (DSS) Employability Assessments
 - i. Sample DSS forms attached as Appendix 4
 - ii. Tips for obtaining from DSS?
 - iii. More support from DSS Employability Units
- c. Testimony – see *infra*
- d. Affidavits, transcriptions of phone interviews?
 - i. Instructions for physicians?
 - ii. <http://www.nhchc.org/wp-content/uploads/2012/02/DocumentingDisability2007.pdf>
 - iii. <http://www.lsnjlaw.org/Disability/Documenting-Disability/Pages/default.aspx>
- e. Lay witnesses
- f. Former employers, co-workers
- g. VESID/ACCES-VR records
 - i. Functional assessments
 - ii. Psychological testing
 - iii. Job coach, supported employment reports
- h. School Records
 - i. *See, e.g., SSR 11-2p*, emphasizing to the extent to which evidence from school programs, both secondary and post-secondary, may assist in evaluating the severity and impact of a young adult’s impairments
 - ii. Non-exhaustive list of examples of school-related difficulties that might indicate difficulty with work activities
 - 1. Difficulty in understanding, remembering, and carrying out simple instructions and work procedures during a school-sponsored work experience;
 - 2. Difficulty communicating spontaneously and appropriately in the classroom;
 - 3. Difficulty with maintaining attention for extended periods in a classroom;
 - 4. Difficulty relating to authority figures and responding appropriately to correction or criticism during school or a work-study experience;

5. Difficulty using motor skills to move from one classroom to another.
- ii. Types of school evidence that may be considered : Special education records including Individualized Education Program (IEP) plans, Section 504 plans, and IEP transition plans
- i. Evidence from prior claim files
 - i. See HALLEX I-2-1-13.B.2, emphasizing the significance of evidence that may be in a prior claim file. http://ssa.gov/OP_Home/hallex/I-02/I-2-1-13.html
 - ii. Hearing Office staff must consult with an Administrative Law Judge (ALJ) about obtaining a prior claim(s) file when it may be necessary for a full adjudication of the issues before the ALJ. An ALJ will generally find that evidence in a prior claim(s) file is necessary for a full adjudication of the issues when the ALJ determines: there is a need to establish a longitudinal medical, educational, or vocational history; or the impairment is of a nature that evidence from a prior folder could make a difference in establishing whether disability is present in the current claim.
 - iii. But HALLEX I-2-6-58 continues to allow adjudicator to determine relevancy before admitting evidence from prior file into the current Exhibit File. http://ssa.gov/OP_Home/hallex/I-02/I-2-6-58.html

II. Vocational Experts (VEs)

- A. SSA relies on Medical-Vocational Guidelines (the “grid”) at Pt. 404, Subpt. P, App.2 of 20 C.F.R. to satisfy its burden at Step five to demonstrate that a significant number of jobs exist in the economy that the claimant could perform in light of his/her vocational profile.
 - a. 20 C.F.R. §§ 404.1569a & 417.869a
- B. Application of grid rules will NEVER result in a favorable decision in a young adult claim
- C. When do/should the grid rules not apply?
 - a. Claimant has solely nonexertional limitations
 - i. “In the evaluation of disability where the individual has solely a nonexertional type of impairment, determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in this appendix 2. The rules do not direct factual conclusions of disabled or not disabled for individuals with

- solely nonexertional types of impairments.” 20 C.F.R. Pt. 404, Subpt. P, App.2 §200.00(e)(1)
 - ii. Nonexertional limitations include those related to mental impairments, postural, visual environmental, pain, etc. 20 C.F.R. §§ 404.1569a(c) & 416.969a(c)
 - iii. *See also* SSRs 83-10, 85-15, 96-4p, 96-9p
- b. Claimant with combination of exertional and nonexertional limitations
 - i. 20 C.F.R. §§ 404.1569a(d) & 416.969a(d)
 - ii. Grid rules may be used as a framework to support a finding of disability. 20 C.F.R. Pt. 404, Subpt. P, App.2 §200.00(e)(2)
 - iii. *See also* SSR 83-14
 - c. Claimant with RFC for less than full range of sedentary work
 - i. *See* SSR 96-9p
 - d. Claimant with RFC between ranges of work
 - i. *See* SSR 83-12
- D. Application of grid versus necessity for expert testimony must be determined on case-by-case basis. *Bapp v. Bowen*, 802 F.2d 601 (2d Cir. 1986)
- a. If claimant’s work capacity is significantly diminished beyond that caused by exertional limitations, application of grid is inappropriate
 - b. “Significantly diminish” means additional loss of work capacity beyond a negligible one that so narrows the possible range of work as to deprive claimant of a meaningful employment opportunity. *Id.* at 605-606
 - c. *See also* SSRs 83-12, 96-9p re significant erosion of occupational base
- E. What kinds of limitations are significant enough to warrant VE testimony?
- a. *Schultz v. Astrue*, 2012 WL 243748 (W.D.N.Y.) - ALJ may have improperly minimized the nature and extent of Plaintiff’s non-exertional impairments where a treating psychiatrist limited his ability to tolerate work pressures and complete a normal workday on a sustained basis)
 - b. *Ketch v. Colvin*, 2014 WL 411875 (W.D.N.Y.) - inability to interact with co-workers on more than an occasional basis is significantly limiting with regard to the basic mental demands of unskilled work, requiring testimony from a vocational expert

- c. *Searles v. Astrue*, 2010 WL 2998676 (W.D.N.Y.) - ALJ erred in relying on guidelines in light of claimant's problem with equilibrium, cognitive limitations, and fatigue
- d. *West v. Astrue*, 2008 WL 2561991 (W.D.N.Y.) – ALJ erred in failing to consider claimant's anxiety, fatigue, shortness of breath, and drowsiness caused by medications as significant non-exertional limitations
- e. *Franklin v. Apfel*, 8 F.Supp. 2d 227 (W.D.N.Y. 1998) – ALJ erred in finding that claimant with no useful ability to deal with work stresses or maintain concentration and attention could perform the full range of work
- f. *See also supra* - SSRs 85-15, 85-16 – stress is highly individualized
 - i. *But see Zabala v. Astrue*, 595 F.3d 402, 411 (2d Cir. 2010) – ALJ's finding that claimant's mental condition did not limit her ability to perform unskilled work, including carrying out simple instructions, dealing with work changes, and responding to supervision upheld
- g. *Antonetti v. Astrue*, 399 F.Supp.2d 199 (W.D.N.Y. 2005) – cognitive limitations (low IQ) non-exertional, and fact that claimant was considered to have moderate to marked limitations in 14 out of 20 categories on the MRFC *could* be significant enough to preclude use of grid
 - i. *But see Calabrese v. Astrue*, 592 F.Supp.2d 379 (W.D.N.Y. 2009), *aff'd* 2009 WL 5031356 (2d Cir 2009) - finding that ALJ's failure to include IQ scores in hypothetical question (HQ) was not error when HQ included the functional limits related to cognitive impairments
 - ii. *And see Kaminski v. Astrue*, 2012 WL 887468 (N.D.N.Y.) – IQ scores in 60s not significant per SSR 85-15, where claimant could understand and carry simple instructions under somewhat closer supervision
- h. Vocational testimony generally necessary if claimant needs to alternate sitting/standing, or has loss of use of upper extremity - SSR 83-12, SSR 96-9p
- i. Postural limits, such as balancing, *may* require vocational consultation, and would be particularly useful for claimants with only occasional ability to stoop – SSR 96-9p; *see also* SSRs 85-15, 83-14
- j. Significant limitation of bi-lateral manual dexterity would result in significant erosion of sedentary base (but not the inability to feel size, shape, temperature) – SSRs 96-9p, 85-15, 83-14
- k. Visual limits such as inability to see small objects or avoid ordinary workplace hazards could be significant erosion of sedentary base – SSR 96-

9p; loss of visual field will indicate significant erosion for light work – SSR 83-14

F. What kinds of limitations are not considered significant?

- a. Environmental limitations will rarely erode base – SSRs 96-9p, 85-15
- b. Limitations in communication will rarely erode base, but there are situations where vocational consultation may be necessary – SSRs 96-9p, 85-15
- c. Ability to push, pull, or climb ladders ordinarily will not significantly erode base – SSRs 96-9p, 85-15, 83-14
- d. *See also Buschle v. Astrue*, 2012 WL 463443 (N.D.N.Y.) – where seizure disorder that only affected ability to climb ladders did not preclude application of grid

G. Remember that mere existence of non-exertional limitations will not mandate vocational testimony

- a. *See, e.g., Zedanovich v. Astrue*, 2010 WL 177257 (2d Cir. Feb. 23, 2010) holding that the mere existence of a non-exertional impairment does not alone trigger the need for vocational expert testimony; there must be *significant limitations* in the range of unskilled sedentary work
- b. *Colon v. Commissioner*, 2012 WL 162304 (N.D.N.Y.) - inability to work with public is not a significant non-exertional limitation

H. Who/what are VEs?

- a. Generally, a vocational expert should be someone who has both actual knowledge of the duties associated with a variety of jobs and experience in placing hard to place individuals who have mental and/or physical handicaps
 - i. *See generally* 20 C.F.R. §§ 404.1560(b)(2), 404.1566(e) & 416.960(b)(2), 416.966(e); HALLEX I-2-5-48, et seq
 - ii. But SSA gives no specific guidance re qualifications, although SSR 82-41 provides that evidence from vocational sources may be “based on expert personal knowledge or substantiation by information contained in the publications listed in regulations sections [404.1566\(d\)](#) and [416.966\(d\)](#).”
 - 1. SSA’s *Handbook for Vocational Experts*
 - 2. <http://www.schnaufer.com/ODAR-VEHandBk-2011.pdf>

I. Challenges to VE's credentials?

- a. VE's CV/professional qualifications should be included in Exhibit File – HALLEX I-2-5-55
- b. VE *may* attend entire hearing, but this is not required – *Id.*
- c. VE should be provided with *vocational* evidence of record – HALLEX I-2-5-54
 - i. *But see Collins v. Astrue*, 2010 WL 877541 (N.D.N.Y.) – failure of ALJ to demonstrate full list of exhibits provided to VE not necessarily denial of due process
- d. Is it a mistake to stipulate to credentials???
 - i. Better to object in writing prior to hearing to avoid confrontation with VE?
 - ii. VE's credentials are subject to *voir dire* at hearing – HALLEX I-2-5-55
 - iii. *See Brault v. Social Sec. Admin., Com'r*, 683 F.3d 443 (2d Cir. 2012), where the court implies that stipulation to VE's credentials constituted waiver?

J. On what issues do VEs testify?

- a. What was the exertional and skill level of PRW?
- b. Does this individual have any skills and, if so, are they transferable to other work? If so, to what specific jobs? How many such jobs exist in the local economy and in the national economy?
- c. VE should not be asked to consider what, if any, accommodations might be made that would enable the claimant to perform work. ["Reasonable accommodation" is a requirement under the Americans with Disabilities Act (ADA), to level the playing field for disabled individuals who seek entry into the competitive job market; it is not a requirement under the Social Security Act. *Weigel v. Target Stores*, 122 F.3d 461 (CA7 1997)] ; *see also* SSR 00-1(c); SSR 11-2p
- d. What is the impact of specific functional deficits on employability, e.g., loss of use a hand or arm; need to lie down during the day; need to take frequent trips to the bathroom; limited ability to concentrate, remember or follow even simple instructions; inability to accept supervision, instruction or criticism; problems getting along with co-workers or the public, difficulty keeping a regular schedule, etc.

K. How does the VE testify?

- a. Either in testimony at a hearing, in person, by telephone, by video teleconference or in written responses to interrogatories – HALLEX I-2-5-50
 - i. Failure to provide information obtained from VE is a denial of due process – *see, e.g., Townley v. Heckler*, 748 F.2d 109 (2d Cir. 1986)
- b. Testimony is taken from a VE by use of hypothetical questions that should assume characteristics of an individual identical to the claimant and should include all deficits, limitations and restrictions credibly supported by evidence of record, including claimant testimony
- c. Remember that VE’s opinion is not binding on ALJ - HALLEX I-2-5-48

III. Cross Examining VEs

- A. Use of the Dictionary of Occupational Titles and Selected Characteristics evidence to conduct cross-examination
 - d. See 20 C.F.R. §§ 404.1566(d) & 416.966(d) – Administrative notice of job data
 - i. *Dictionary of Occupational Titles*, published by the Department of Labor;
 - ii. *County Business Patterns*, published by the Bureau of the Census;
 - iii. *Census Reports*, also published by the Bureau of the Census;
 - iv. *Occupational Analyses* prepared for the Social Security Administration by various State employment agencies; and
 - v. *Occupational Outlook Handbook*, published by the Bureau of Labor Statistics.
 - e. *But see Brault v. Comm’r*, 683 F.3d 443 (2d Cir.)
 - i. Claimant challenged the VE’s method of “extrapolating” from data to arrive at the numbers of available jobs in the economy
 - ii. ALJ neither required to allow inspection of VE’s sources nor to explain expressly why he rejected plaintiff’s objections
 - iii. But Court acknowledged that an ALJ need never question the reliability of VE testimony, and agreed that evidence cannot be “conjured out of whole cloth.”
- B. Use of claimant testimony, lay evidence, and medical evidence to conduct cross-examination

- a. Consideration of limitations in prior employment, including community placements
 - i. Ability to understand and remember instructions;
 - ii. Ability to persist at work-related tasks;
 - iii. Ability to respond appropriately to supervision; and
 - iv. Whether special supports are needed in order to sustain work
- b. Psychosocial Supports and Highly Structured or Supportive Settings
 - i. See 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.F
 - 1. Placement in a hospital, halfway house, board and care facility, or other environment (including one's home) that provides similar structure in cases involving chronic mental disorders.
- c. Accommodations
 - i. *See supra*
 - ii. SSR 00-1c
 - 1. *Cleveland v. Policy Management Systems Corporation et al.*, 526 U.S. 795, 119 S.Ct. 1597 (1999)
 - 2. "Thus pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work. To survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could 'perform the essential functions' of her previous job, at least with 'reasonable accommodation.'"
 - iii. Supported work, job coach as accommodation?
 - iv. Need for extra, unscheduled breaks?
 - 1. Question of breaks beyond acceptable under industry standards?
 - a. See McManus memo
 - b. Appendix 5
 - 2. Need for breaks not always predictable

- a. *See, e.g., Cosnyka v. Colvin*, 576 Fed. Appx. 43 , 2014 WL 4099318 (2d Cir. Aug. 21, 2014) – the Court questioned the validity of the ALJ’s unsupported hypothesis because the plaintiff’s impairments would cause him to be off-task for 10% of the day; he would be off-task for six minutes an hour, during each working hour.

d. Time off task

- i. *See, e.g., Greek v. Colvin*, 802 F.3d at 376 (2d Cir. 2015) - rejecting a medical opinion regarding days absent from work was not harmless error since the vocational expert testified there were no jobs available in the national economy if a person had to miss four or more days of work per month)
- ii. *See also* Liebkemann materials from DAP Session #1
- iii. Limitations must be supported by medical evidence

e. Effects of Treatment, including Medications

- i. Medication side-effects, especially drowsiness
- ii. Time spent in treatment

C. Work-Related Stress

- a. See SSR 85-15, *supra*, which also contains helpful language about the impact of stress on persons with mental impairments, mirroring substantially, the language about the impact of structured settings in the childhood disability regulation and the adult mental impairment listings
 - i. Stress and Mental Illness -- Since mental illness is defined and characterized by maladaptive behavior, it is not unusual that the mentally impaired have difficulty accommodating to the demands of work and work-like settings.
 - ii. Individuals with mental disorders often adopt a highly restricted and/or inflexible lifestyle within which they appear to function will.
 - iii. The reaction to the demands of work (stress) is highly individualized, and mental illness is characterized by adverse responses to seemingly trivial circumstances. Thus, the mentally impaired may have difficulty meeting the requirement of even so-called "low stress" jobs.

1. A mentally impaired individual may cease to function effectively when facing such demands as getting to work regularly, having his performance supervised, and remaining in the workplace for a full day.
 2. A person may become panicked and develop palpitations, shortness of breath, or feel faint while riding in an elevator; another may experience terror and begin to hallucinate when approached by a stranger asking a question.
- iv. Because response to the demands of work is highly individualized, the skill level of a position is not necessarily related to the difficulty an individual will have in meeting the demands of the job.
1. A claimant's condition may make performance of an unskilled job as difficult as an objectively more demanding job, for example, a busboy need only clear dishes from tables. But an individual with a severe mental disorder may find unmanageable the demand of making sure that he removes all the dishes, does not drop them, and gets the table cleared promptly for the waiter or waitress.
 2. Similarly, an individual who cannot tolerate being supervised may be not able to work even in the absence of close supervision; the *knowledge* that one's work is being judged and evaluated, even when the supervision is remote or indirect, can be intolerable for some mentally impaired persons.
 3. Any impairment-related limitations created by an individual's response to demands of work, however, must be reflected in the RFC assessment.

b. See also 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.C.3

- i. In discussing the “B” criteria of concentration, persistence, or pace, the listings state: We must exercise great care in reaching conclusions about your ability or inability to complete tasks under the stresses of employment during a normal workday or work week based on a time-limited mental status examination or psychological testing by a clinician, or based on your ability to complete tasks in other settings that are less demanding, highly structured, or more supportive.
- ii. We must assess your ability to complete tasks by evaluating all the evidence, with an emphasis on how independently,

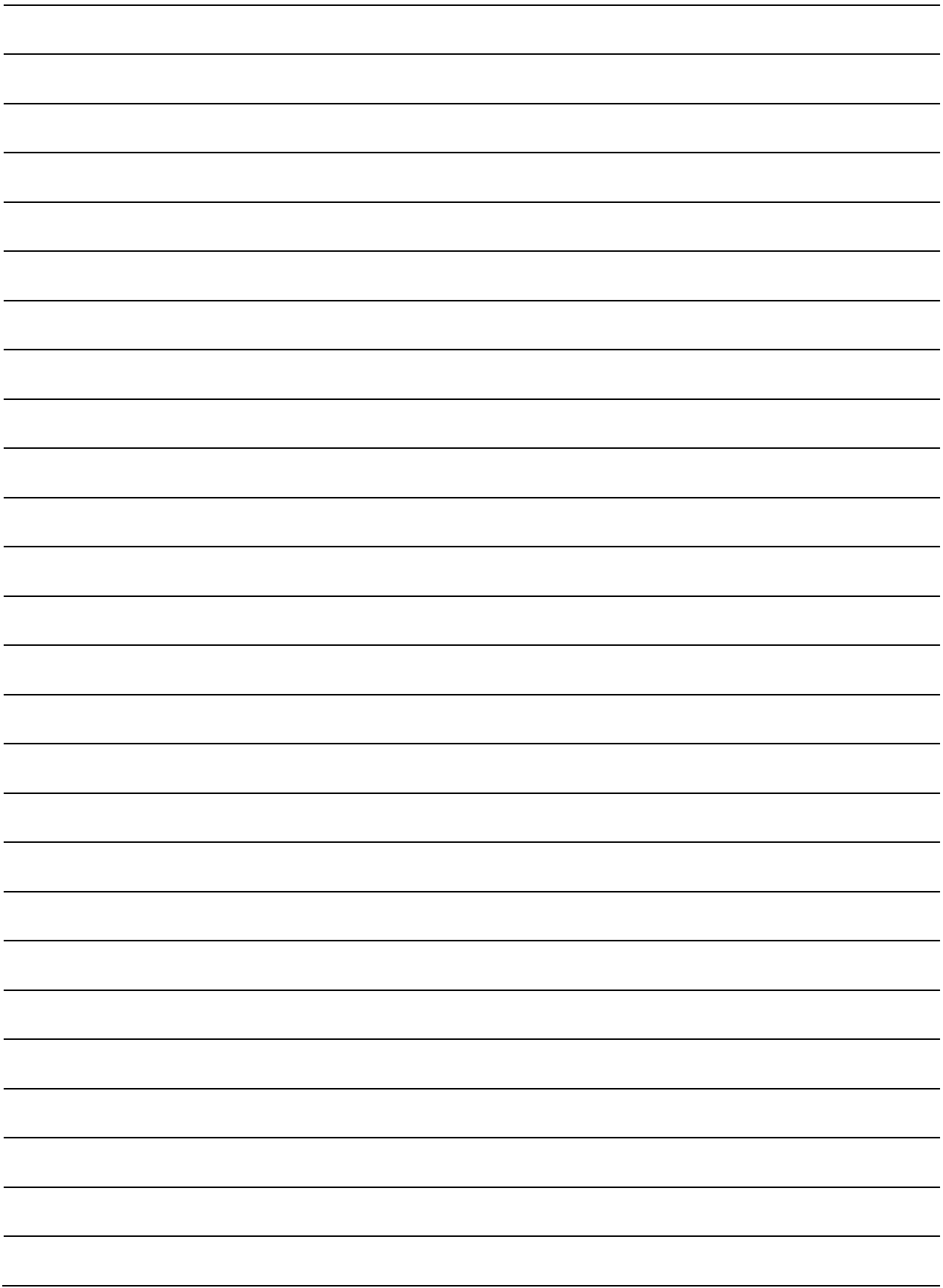
appropriately, and effectively you are able to complete tasks on a sustained basis.

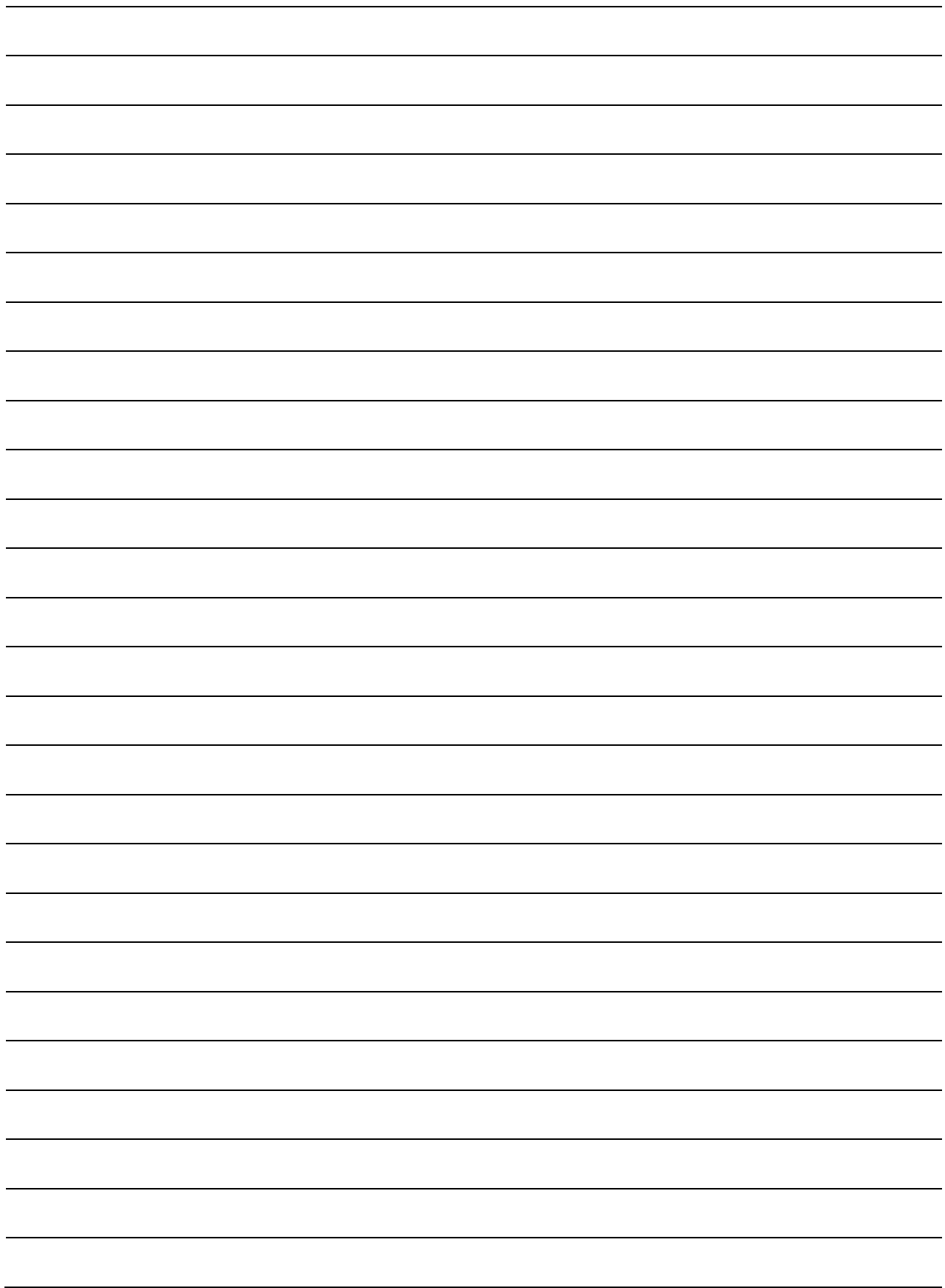
c. And see 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.D.2

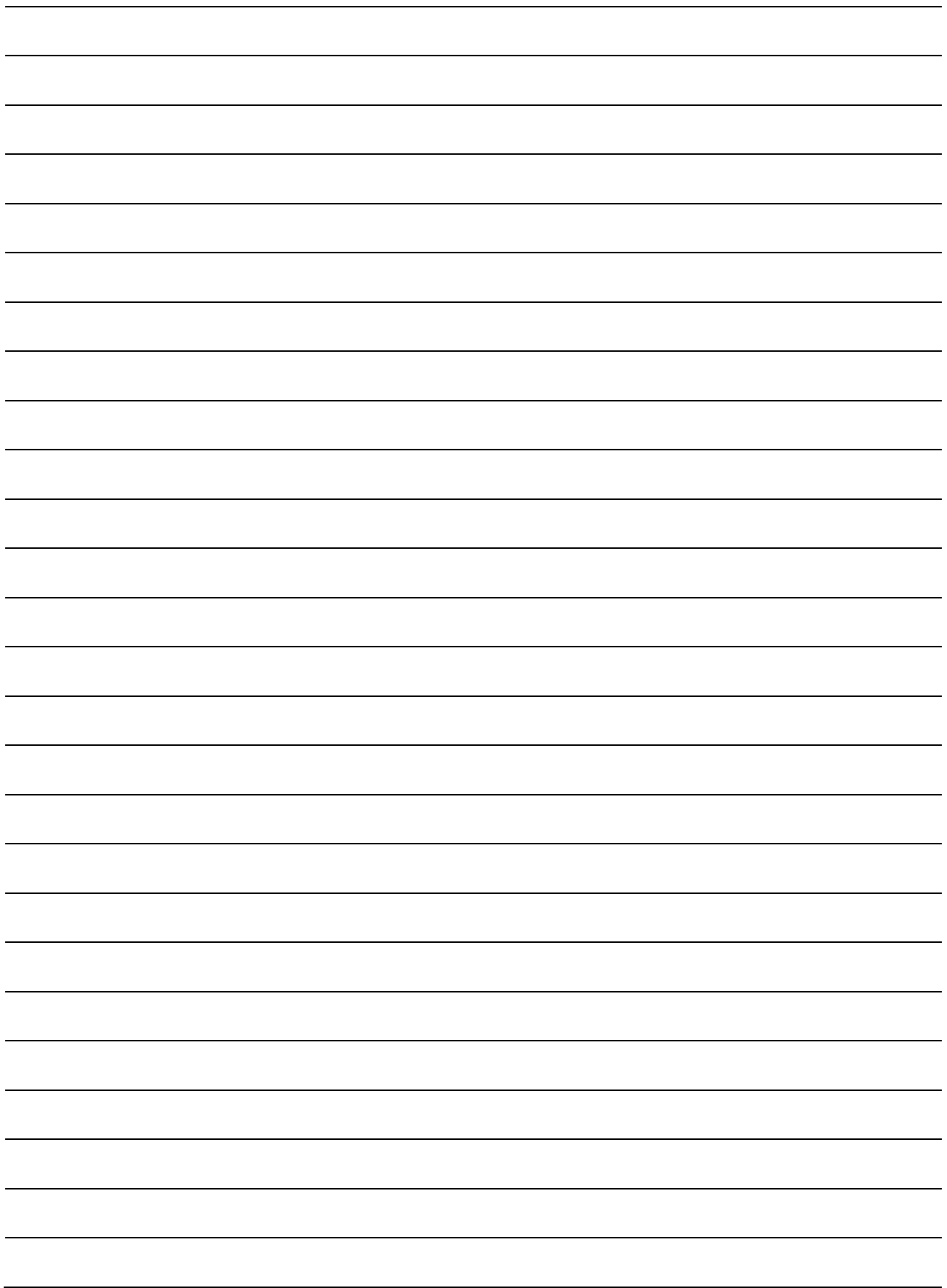
- i. The introduction to the mental impairment listings emphasize the need for longitudinal evidence, recognizing that a person's level of functioning may vary considerably over time.
- ii. "Proper evaluation of your impairment(s) must take into account any variations in the level of your functioning in arriving at a determination of severity over time. Thus, it is vital to obtain evidence from relevant sources over a sufficiently long period prior to the date of adjudication to establish your impairment severity."

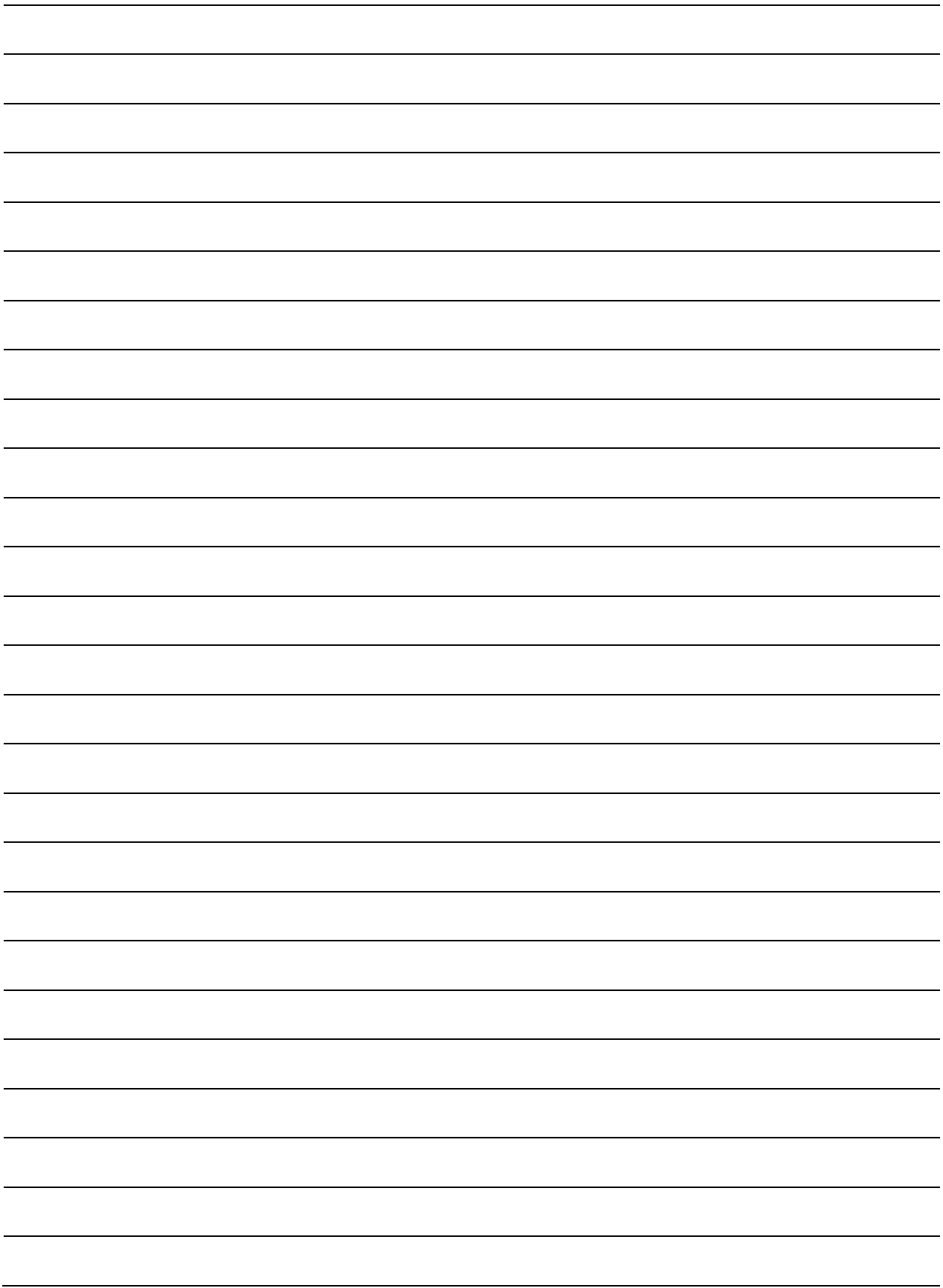
D. Testimony of family members, case managers, other lay witnesses

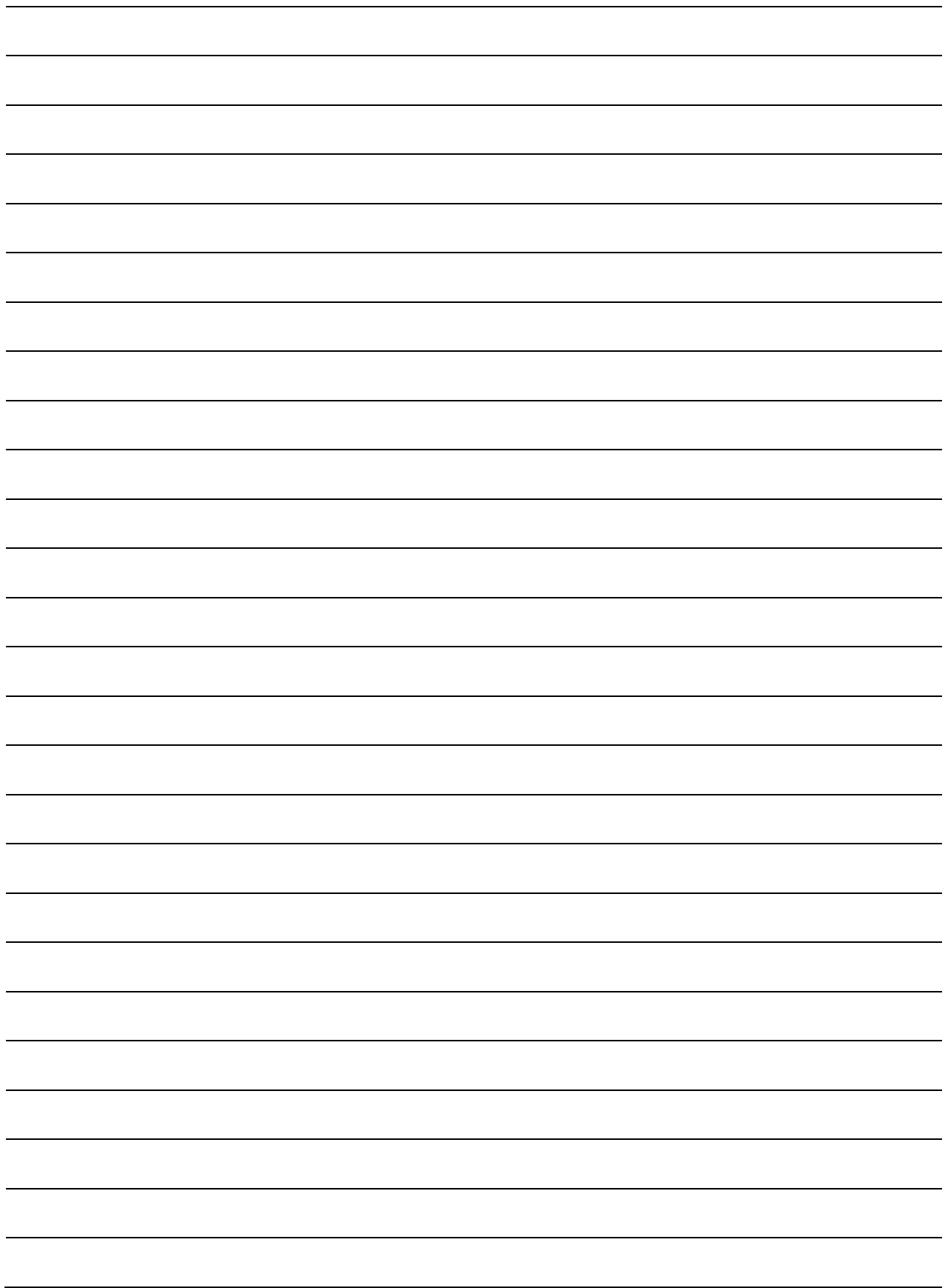
- a. Issues of adaptive functioning?
- b. See sample questionnaire, *Appendix #6*











Developing Medical Evidence for Limitations in The Ability To Attend
and Focus on Tasks

Biographies

Panel Biographies

Latanya White

Latanya White is the Director of the Disability Advocacy Project at Brooklyn Legal Services. She has worked at Brooklyn Legal Services since 2005, first as a staff attorney in the Comprehensive Rights Unit, and then in the Disability Advocacy Project. She began her legal career as a staff attorney at the Defender Association of Philadelphia where she represented low income adults and juveniles in criminal proceedings. She holds a B.S. from St. John's University in New York and a J.D. from Washington and Lee University School of Law.

Tanya Douglas

Tanya Douglas is the Director of the Disability Advocacy Project (DAP) at Manhattan Legal Services (MLS) and coordinates the Veterans Justice Project at MLS which is a program of Legal Services NYC. Tanya is a graduate of Cornell University and Cornell Law School. Tanya is admitted to the Southern District of New York and the Eastern District of New York. Tanya has spent her entire 24 year legal career as a public interest attorney with Legal Services NYC. Tanya has been a DAP advocate for 24 years. During her legal career, Tanya has represented clients primarily in Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) and education cases. Tanya has represented hundreds of clients in their claims for SSI/SSDI benefits at the Administrative Law Judge (ALJ) hearing and Appeals Council levels. Additionally, she has represented clients in their SSI/SSDI claims at the Federal Court level. She has handled a significant of SSI/SSDI benefit cases for children. She has offered trainings on a variety of substantive legal issues (SSI/SSDI and education) as well as conducted trainings for public interest managers.

Tanya has spent a significant amount of her legal career focused on diversity and cultural competency matters for legal services/legal aid programs. She is the first chair of the Legal Services NYC's Diversity Committee. The Committee has focused on recruitment and retention issues, drafted an exit interview policy and offered trainings on cultural competency.

Joseph V. Maslak

Joseph V. Maslak has been a staff attorney at the Legal Aid Society of Mid-New York, Inc., since January of 2014. Joe's primary focus in that time has been Social Security Disability law, as well as Landlord/Tenant and Family Law. He received his Bachelor's degree in Public Justice from the State University of New York at Oswego, and his J.D. from Florida Coastal School of Law. Joe is admitted to practice in New York and Florida.

Peter Racette

Peter Racette has been a Deputy Director of the Legal Aid Society of Northeastern New York since 2004. From 1988 until 2004, he was a staff attorney and then executive director at North Country Legal Services. He has represented more than a thousand clients in their claims for Social Security disability and SSI benefits and has often served as a trainer and panelists in disability-related training events. Mr. Racette is a graduate of Bennington College and Vermont Law School. He is admitted to practice in New York and Vermont.

APPENDIX 1

Case Summary



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

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Peter D. Racette
Deputy Director

Wendy Wahlberg
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**.

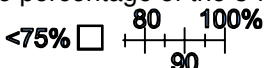
For each activity shown below:

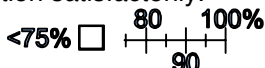
1. Mark the following scale with an "X" to reflect the **percentage of an 8-hour work day** the individual can be expected to sustain a **satisfactory** level of functioning.

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) 

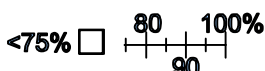
ii. Relate to co-workers 

vi. Deal with ordinary work stresses 

iii. Deal with the public 

vii. Function independently 

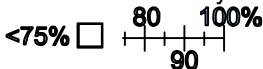
iv. Use judgment 

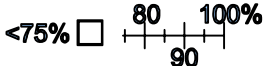
viii. Maintain attention/concentration 

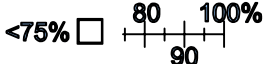
B. Describe any limitations and include the medical/clinical findings that support this assessment. If some of these actions cannot be sustained for an 8 hour work shift, explain why.

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 

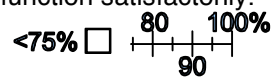
iii. Understand, remember and carry out **simple** job instructions 

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

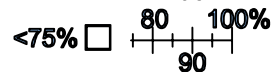
III. Making Personal-Social Adjustments

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

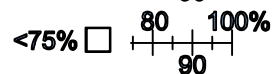
i. Maintain personal appearance



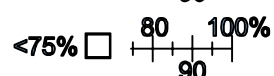
ii. Behave in an emotionally stable manner



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

(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. SSF referral is based on:

Is referral to the district's CASAC for substance abuse assessment 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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Pittsford, NY 14534

Office: (585) 248-3886; Cell (585) 465-2365
E-mail: cmcmanus679@gmail.com

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.