DAP 3
Direct and Cross Examination Strategies of Expert Witnesses

2018 Partnership Conference

Thursday, October 4, 2018
1.5 MCLE Credits | 1.5 Skills

Sponsored by the Committee on Legal Aid and the Committee on Continuing Legal Education of the New York State Bar Association

This program is offered for educational 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.

Program Description

NYSBA is proud to present*, DAP 3: Direct and Cross Examination Strategies for Expert Witnesses.* This panel session will review the roles of expert witnesses at Social Security hearings, both vocational and medical experts. Panelists will explore the importance of evidence from medical source statements (MSS) in preparing for cross examination of these experts. The session will introduce or sharpen skills necessary for cross examining SSA's experts. Sample – or "mock" – direct and cross examinations will be conducted.

Program Agenda

DAP 3: Direct and Cross Examination Strategies for Expert Witnesses

11:00 a.m. - Introductions

11:05 a.m. - Role of expert witnesses at hearing

11:15 a.m. - Medical Source Statement evidence as basis for cross examination

11:30 a.m. - How to cross examine expert witness

11:45 a.m. - Mock hearing

12:05 p.m. - Feedback from mock hearing and questions

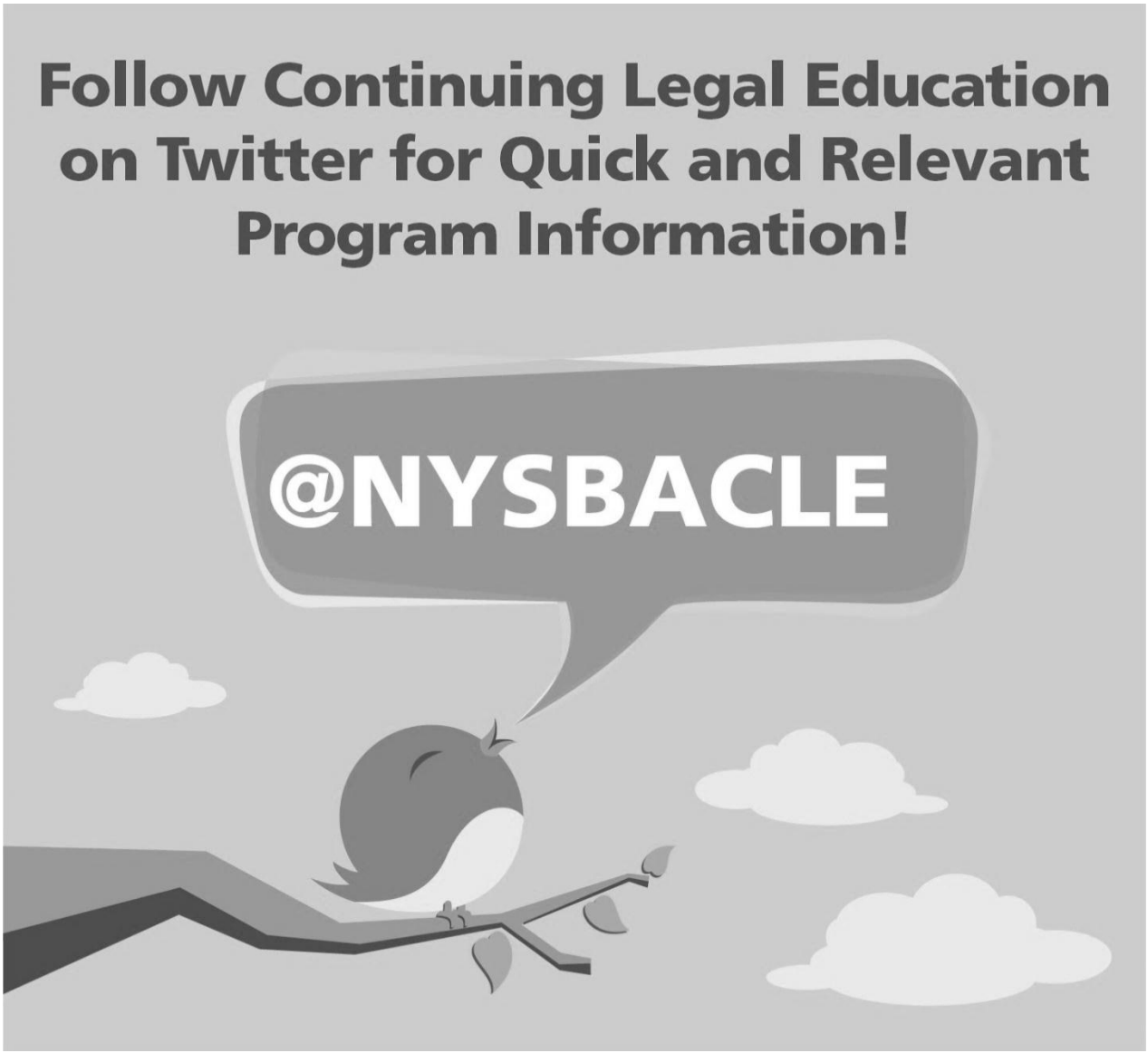
12:15 p.m. - Adjourn

Accessing the Online Course Materials

Below is the link to the online course materials. These program materials are up-to-date and include supplemental materials that were not included in your course book.

www.nysba.org/Partnership2018Materials

All program materials are being distributed online, allowing you more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. WiFi access is available at this location however, we cannot guarantee connection speeds. This CLE Coursebook contains materials submitted prior to the program. Supplemental materials will be added to the online course materials link.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New York Rules of Professional Conduct

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and amended on several occasions thereafter. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

http://nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

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!

Lawyer Assistance Program

1.800.255.0569

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New York State Bar Association
FORMS 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. Therefore, we ask that you complete this form and return to our registration staff at the end of the program. Each person may only turn in his or her form at the appropriate times—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.

Please turn in this form at the end of the program, with your program evaluation form.

DAP 3: Direct and Cross Examination Strategies for Expert Witnesses
2018 Partnership Conference
Thursday, October 4, 2018 | Albany

Name:_____
(please print)

I certify that I was present during this program.

Signature:_____Date:_____

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: DAP 3: Direct and Cross Examination Strategies for Expert Witnesses

Program Code: THLM_4

Program Location: Albany Capital Center

Program Date: Thursday, October 4, 2018

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
-Panel	☐	☐	☐	☐	☐	☐	☐	☐
Germán Castañeda, Paralegal	☐	☐	☐	☐	☐	☐	☐	☐
Rezwanul Islam, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
Michelle Spadafore, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
Michael Telfer, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
-Mock Hearing	☐	☐	☐	☐	☐	☐	☐	☐
Violeta Arciniega, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
Brian Jayakumar, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
Mandy Nguyen, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
Keana Williams, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
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(please turn over)

Additional comments (CONTENT)

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Additional comments (ABILITY)

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3. Please rate the program materials and include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

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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

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

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
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Meeting Site (if applicable)	☐	☐	☐	☐	☐

Additional comments

_____

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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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Direct and Cross Examination Strategies for Expert Witnesses

NEW YORK STATE BAR ASSOCIATION
2018 PARTNERSHIP CONFERENCE

DAP SESSION #3: DIRECT AND CROSS EXAMINATION STRATEGIES FOR EXPERT WITNESSES

October 4, 2018
11:00 a.m. – 12:15 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:

Michelle Spadafore, Senior Supervising Attorney & Project Director, NYLAG, Facilitator
Germán Castañeda, Paralegal, Mobilization for Justice
Rezwanul Islam, Senior Staff Attorney, Nassau Suffolk Law Services Committee
Michael Telfer, Senior Staff Attorney, Legal Aid Society of Northeastern New York

This panel session will review the roles of expert witnesses at Social Security hearings, both vocational and medical experts. Panelists will explore the importance of evidence from medical source statements (MSS) in preparing for cross examination of these experts. The session will introduce or sharpen skills necessary for cross examining SSA's experts. Sample – or "mock" – direct and cross examinations will be conducted.

SSA VOCATIONAL WITNESSES

Louise M. Tarantino
Catherine M. Callery
Empire Justice Center
June 2018

Cross examination of VEs (Vocational Experts)

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* SSRs 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 if 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. *See, e.g., 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

b. *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

c. *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

d. *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

e. *Antonetti v. Astrue,* 399 F.Sipp.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. 2012) – IQ scores in 60s not significant per SSR 85-15, where claimant could understand and carry simple instructions under somewhat closer supervision

f. 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

g. 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

h. 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

i. 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. 2012) – 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 limitation*s in the range of unskilled sedentary work

b. *Colon v. Commissioner,* 2012 WL 162304 (N.D.N.Y. 2012) - 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. 2010) – 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

i. HALLEX I-2-5-50
ii. See also HALLEX I-2-5-30
iii. 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

L. Building on hypothetical versus cross-examining on jobs?

a. Know claimant's limitations
i. I.e., need to be absent at least – workday per month?
ii. Need to take frequent, unscheduled breaks for an hours day?
iii. Need to work at slow pace for 1/3 of an 8 hour day?
iv. Need to lie down at unscheduled times for one hour out of 8 hour workday?
1. See *Cosnyka v. Colvin*, 13-3396-cv; 2014 WL 4099318,(2d Cir. Aug. 21, 2014)
2. ALJ erred in assuming that, 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.
v. Need to elevate both legs to heart level for one hour out of 8 hour work day?

vi. Need to alternative positions every 15 minutes for a minute or two?
vii. Need sit-stand option?
viii. Limited ability to concentrate/maintain attention
ix. *But see McIntyre v. Colvin*, 758 F.3d 146 (2d Cir. 2014).
    1. ALJ's hypothetical should explicitly incorporate any limitations in concentration, persistence, and pace
    2. But ALJ's failure to incorporate moderate limitations in maintaining concentration, persistence, and pace into the hypothetical question was harmless error because ALJ included a limitation to "simple, routine, low stress tasks."

b. Limitations must be quantified
    i. Frequently = >1/3 up to 2/3 of 8 hour day?
        1. SSR 83-10
    ii. Moderate = > slight but < marked?
        1. POMS DI 25290.115
    iii. Repetitive = > 2/3?
        1. See 20 C.F.R. §§ 404.1568(b); 416.968(b)
        2. Semi-skilled work requires dexterity to quickly do repetitive tasks
    iv. Low stress?
        1. See SSR 85-15, 11-2p (Young Adults)

c. Limitations must be supported by evidence of record!!!
    i. Claimant testimony, lay evidence, and medical evidence?

M. Use of the Dictionary of Occupational Titles and Selected Characteristics evidence to conduct cross-examination

a. See 20 C.F.R. § 416.966(d) – Administrative notice of job data

    i. *Dictionary of Occupational Titles,(DOT)* published by the Department of Labor;
        1. http://www.oalj.dol.gov/libdot.htm
        2. http://www.empirejustice.org/issue-areas/disability-benefits/misc-ssi-ssd-issues/
    ii. *Selected Characteristics of Occupations (SCO)*
        1. Available on Westlaw
        2. http://www.nosscr.org/sco/sco-ocr.pdf
    iii. *County Business Patterns,* published by the Bureau of the Census;
    iv. *Census Reports*, also published by the Bureau of the Census;
    v. *Occupational Analyses* prepared for the Social Security Administration by various State employment agencies; and
    vi. *Occupational Outlook Handbook*, published by the Bureau of Labor Statistics.

b. *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."

c. Challenging VE jobs in significant numbers can be an up-hill battle in the 2d Circuit

   i. *But see Hamilton v. Comm'r of Soc. Sec.*, 105 F. Supp. 3d, 223, 231 (N.D.N.Y. 2015) (citations omitted) (finding 5,160 jobs nationally is not a significant number, but noting "numbers of jobs in the ballpark of 10,000 to 11,000 nationwide have been held significant"), *accepted and adopted by* 105 F. Supp. 3d 223 (N.D.N.Y. 2015)
   ii. *Waldvogel v. Comm'r of Soc. Sec.*, No. 6:16-CV-0868 (GTS), 2017 WL 3995590, at *13 (N.D.N.Y. Sept. 11, 2017) (clarifying that it is the total number of jobs, not just each job, that is relevant: "Since both jobs combined showed the existence of nearly 14,000 jobs in the national economy, this Court does not agree that the ALJ failed to show significant numbers of jobs.

N. Areas ripe for cross-examination using DOT & SCO?

a. DOT Physical Demands - Strength Ratings
   i. Sedentary, light, medium, heavy
b. DOT Standard Vocational Preparation (SVP)
   i. Time required to learn job, related to skill levels
c. DOT General Education Development (GED)
   i. Reasoning , math and language levels required for job
d. SCO Aptitudes
   i. Includes dexterity, vision, etc.
e. SCO Temperaments
   i. Includes social functioning: ability to work alone, with others, etc.
f. SCO Physical Demands
   i. Includes requirements re stooping, reaching, handling, etc.
   ii. Includes environmental conditions
g. Common sense considerations?
   i. E.g., can there really be numerous nut packing jobs in Florida if 95% of nuts are imported prepackaged into Florida?
   ii. Can there really be numerous burlap bag repairers in the US when it probably costs far less to produce new bags than repair them?

iii. Do ticket takers really only take tickets? Aren't they required to do other chores in theatre as well?
iv. How many jobs really involve only one or two steps?
v. Need to observe/know jobs

O. For more helpful suggestions, see http://californiasocialsecurityattorney.blogspot.com/2018/06/interaction-with-supervisors-and.html

MASTERING MEDICAL EXPERT CROSS EXAMINATION AT ALJ HEARINGS

Ann Biddle
DAP Coordinator LSNYC

Let's Start with the Regulatory Scheme

SSA regulations allow ALJs to call medical experts at administrative hearings. 20 C.F.R. § 404.936.

Where does SSA find them?

Social Security offers contracts to medical professionals to provide medical expert services. Medical professionals include physicians, mental health professionals and other medical professionals. (HALLEX I-2-5-32) SSA uses a blanket purchase authorization process to find experts, and experts who sign BPAs are eligible to be added to master rosters. Local hearing offices rely on these rosters to secure experts. The hearing offices call and schedule the experts and then follow up with fee invoices (HA-590) – these invoices are paid by a different component of the agency.

Want to be one? You can apply to be added to the BPA process by following the link at https://www.ssa.gov/appeals/me.html**.** Other information about BPAs and experts is available in the HALLEX. See, for example, HALLEX I-2-5-31.

How will I know?

SSA must inform the representative and claimant that an ME has been called in the notice of hearing. HALLEX I-2-3-5.D The ME's qualifications must be part of the record (such as medical degree, specialty, and board certification; or state healthcare license or certification and type of practice). HALLEX I-2-1-30.

Any discussions an ALJ has with an ME about a case must be in a writing associated with the record or put on the record at the hearing. HALLEX I-2-6-70.A.

Why does SSA use them?

Current regulations allow an ALJ to request a medical expert at a hearing. 20 C.F.R. § 404.936 (C)(2). The HALLEX allows for expert testimony to be taken during the hearing (live, in person or by telephone) or through the use of interrogatories, but with a strong preference for live testimony so that the claimant or representative may also pose questions to the ME. HALLEX I-2-5-30. The HALLEX used to have a provision that a claimant could request an ME, but that fell out of the current iteration at HALLEX I-2-5-34.

Happily, there is nothing that prohibits it! There is HALLEX noting that a claimant or representative may ask an ALJ to submit interrogatories to an ME. HALLEX I-2-5-42. If interrogatories are used, the ALJ must exhibit the request in the electronic record (in the E exhibits) and must proffer the rogs and responses to the claimant and representative. HALLEX I-2-5-42. And then allow the claimant and representative to object or offer comments. HALLEX I-2-5-43.

"The primary reason an ALJ will request an ME opinion is to help the ALJ evaluate the medical evidence in a case." HALLEX I-2-5-33.

OK, but why this case?

An ME may be called to testify whether impairments could reasonably be expected to produce the alleged symptoms. 20 C.F.R. § 404.1529.

According to HALLEX I-2-5-34, an ME *may* be called in the following other situations:

1. The ALJ is determining whether a claimant's impairment(s) meets a listed impairment(s);
2. The ALJ is determining the usual dosage and effect of drugs and other forms of therapy;
3. The ALJ is assessing a claimant's failure to follow prescribed treatment;
4. The ALJ believes a claimant's drug addiction or alcoholism may be material to finding a claimant disabled;
5. The ALJ believes the ME may be able to suggest additional relevant evidence because the medical record may not be adequate;
6. The ALJ believes an ME may be able to clarify and explain the evidence or help to resolve conflicts in the medical evidence;
7. The ALJ believes an ME may be able to assist the ALJ by explaining/assessing clinical or laboratory findings;
8. To explain or clarify functional limitations and abilities as established by the medical evidence of record (when determining residual functional capacity) – the ALJ here may ask questions about the impact of an impairment on specific functions such as the ability to remember or concentrate. See also HALLEX I-2-6-70.E.
9. If the ALJ has a question about the etiology or course of a disease and how it may affect the claimant's ability to engage in work activities (such as explaining the nature of an impairment and any medically contraindicated activities);
10. Needs an expert to testify about an inference for onset of an impairment. See also HALLEX I-2-6-70.A. Note3.

An ME *must* be called in these situations [HALLEX I-2-5-34.A):

1. The ALJ must obtain an ME's opinion when ordered to do so by the Appeals Council or a court.
2. The ALJ must use an ME to evaluate and interpret background medical test data.
3. When the ALJ is considering if the claimant medically equals a listing, an ME must be called. See also SSRs 86-8 and 17-2p. (Note that the revised regulations on medical equivalence no longer include this requirement. See 20 C.F.R. § 404.1526. And the new ruling, SSR 17-2p, does not require the use of the ME but notes that an ALJ's determination of equivalence must meet evidentiary requirements such as the testimony of an ME.) This line of questioning will include testimony about the claimant's medical impairments, which listing is most appropriate for the comparison and why, whether the impairments meet the durational requirement, and then whether the impairment(s) medically equals a listing. HALLEX I-2-6-70.D.

What won't happen with MEs?

There are some things an ALJ may not do with respect to MEs (see HALLEX I-2-5-32.C):

1. An ALJ may not use an ME who previously treated or consulted about the claimant.
2. An ALJ may not use an ME to give testimony about vocational issues.
3. An ALJ may not engage in off-the-record discussions with MEs about specific cases.
4. An ME is never permitted to examine a claimant – if the ALJ determines an examination is needed, then the ALJ must request a consultative examination. HALLEX I-2-5-34.2.

So, the ME is coming.

The ME testifies about the claimant, not a hypothetical person. Generally, the ME testifies about the evidence in the record, especially objective test results.

The ME need not be present for the entire hearing, but if the ME misses pertinent testimony, then the ALJ will summarize that testimony. HALLEX I-2-6-70.B. The ALJ will verify that the ME has examined all the relevant records – and if records are submitted that the ME has not seen, the ALJ will create time for the ME to review them (this might mean a supplemental hearing or interrogatories – see HALLEX I-2-5-40).

How does the ALJ weigh the ME testimony?

An ME's opinion is not binding on an ALJ. For a claim(s) filed before March 27, 2017, the ALJ will consider the ME's opinion pursuant to 20 C.F.R. §§ 404.1527 and 416.927, and for a claim(s) filed on or after March 27, 2017, the ALJ will consider and articulate consideration of the ME's opinion pursuant to 20 C.F.R. §§ 404.1520c and 416.920c. HALLEX 1-2-5-32.B.

Now, let's prepare for the cross examination

Some practical advice.

Be low key and professional. Keep your tone even and mild.

Define your goals: What do you need to expert to say?

Would it be helpful to put in the record an explanation of the claimant's medical disorders? Typical signs and symptoms of those disorders? Laboratory tests relevant to those disorders? Medication or dosages for those disorders?

Would it be helpful for the ME to address whether treatment is palliative? Is it used to cure a disorder or just ease the symptoms? Is the treatment always effective?

Would it be helpful for the ME to discuss the interplay between several disorders? Discuss how the combination of impairments yields more symptoms (or greater symptoms) then the single disorders considered separately? Or that combined symptoms are worse than what is suggested by the objective medical evidence?

Would it be helpful to have the ME address the episodic nature of particular disorders? To talk about good days and bad days? Or to talk about how it is hard to know when symptoms will flare up or appear?

Consider whether the "right" ME has been called.

Check ME credentials – is it a relevant specialty or a generalist when you need a specialty?

Check if the ME has ever been sanctioned.

Check if the ME has an active practice and sees patients (you may need to ask this at the hearing).

Information is available at the following websites:

www.health.state.ny.us [provides entry into licensing, certification, and sanction information for all medical professionals who need to be licensed in NYS]
www.ama-assn.org [physician credentials and links to AMA publications]

Prepare questions in advance

Check in with colleagues about this ME – get the scoop in advance if you can.

Rules of evidence do not apply, so there are no foundations to be laid or formal objections about evidence.

Know the medical evidence in the record. Locate and mark specific findings, tests and results, symptoms and the like. Understand what the abbreviations stand for. Make the record accessible so you can find the information during the hearing.

Make sure that you understand the claimant's impairments and conditions. This often means research on the impairments, treatments, and medications. *Leave yourself enough time to do this.* Understand the elements of the condition, how it is diagnosed, what tests are run, and what the test results mean. Check the listings for the criteria for the impairment(s). On-line research is helpful only if it is a reliable source. Sometimes nursing books are easier to understand that medical texts.

Remember that the ME is a professional witness!

Avoid open-ended questions unless you are asking the ME to explain or describe information. If you realize that the ME is not being helpful, you may need to switch earlier to questions that can be answered with a yes or no.

Yes/No questions work best if you already know the answer! Your background research will serve you well here. "Is it fair to say…." can work as well.

Stick to fact-based questions as much as possible. Refer the ME to specific exhibits. You can ask the ME to read from exhibits such as medical findings, diagnoses and test results. You can ask if the ME would like to revise her testimony in light of that exhibit.

Steer clear of questions about the ME's own opinion.

Try to emphasize the positive evidence in the record.

Don't bother asking the doctor if s/he thinks the claimant is disabled – the question of disability is reserved for the ALJ to determine.

Keep your ear and mind open to problems that spring up during testimony

Does the ME have views inconsistent with SSA regulations or standard practice (for example, testifies that fibromyalgia is not a real diagnosis or perhaps the ME does not use the DSM to diagnose mental disorders)?

> If so, ask the ME to explain how he or she defines the term or diagnosis, then refer the ME to SSA's rule or definition, and then ask the ME if seeing SSA's definition would change his or her testimony.

Does the ME tend to minimize subjective complaints?

> If so, ask the ME follow up questions. Are the subjective complaints consistent with signs and symptoms of the disorder? Are subjective complaints by definition unique to the individual?

Does the ME just follow the ALJ's lead?

> If so, you have some work to do to draw the ME's attention to contrary evidence in the record.

Does it feel like the ME did not closely read the record or all the pages in it? Many MEs give a prepared statement about the case, citing to specific exhibits and pages.

> If so, direct the ME to specific pages and section in helpful exhibits as a reminder, then ask follow up questions whether the reminder of this evidence would change the ME's answer.

Did the ME testify about limitations but not all of them?

> If so, then direct the ME to parts of the record that document the additional restrictive limitations. You may also need the direct the ME to parts of the record that indicate that restrictions already identified are more severe than the ME initially described in direct testimony.

Does the ALJ start the hearing by saying he or she is going directly to the medical expert?

> If so, *let it happen*. It often means that the ALJ is considering a favorable decision and wants the ME to testify accordingly.

Does the ME testify that the claimant meets or equals a listing?

> If so, *do not ask follow up questions*. A rare exception might be when to clarify that the listing is met or equaled by a specific date.

Using the ME to Bolster Issues about Symptoms

Excerpted from "Cross Examination of the Medical Advisor" by James Shea, Esq., published by the National Organization of Social Security Claimants' Representatives, and reprinted with permission

How do ALJs discount a claimant's symptom testimony? Here is a list of the most common reasons. All are addressed in SSR 16-3p. You may be able to come up with a few more.

- Lack of support in the medical evidence (no medical basis for the symptom complaints)
- Complaints are inconsistent with the medical evidence
- Inconsistent statements made by the claimant regarding his/her symptoms
- So-called "conservative" treatment
- Failure to seek treatment
- Significant treatment gaps
- Non-compliance with treatment recommendations
- Daily activities which suggest the claimant is more functional than claimed

On each of these elements (except, perhaps, the last) even the most recalcitrant ME will often give testimony which favors our case. Know your medical record well and consider exploring the following lines of questioning:

- Doctor, the medical impairments you have noted could be expected to cause some degree of the symptoms which the claimant testified about, correct? (The ME should say "yes.")
- Doctor, can the degree of pain be quantified by objective tests? (The answer will be "no.")
- Doctor, we all know people can have good days and bad days, but, given that, are the claimant's complaints of symptoms generally consistent from one doctor to another?
- Has the claimant been persistent in seeking medical treatment for the conditions which you indicate he/she suffers?
- Doctor, does this record reflect any significant gaps in treatment that would suggest to you the claimant's symptoms are not as bad as he/she says they are?
- Has the claimant been compliant with the treatments provided by his/her doctors?
    - If the answer is no, or if the ME has testified to some degree of non-compliance
    - Do you think better compliance would make a significant difference? If so, how?
- Concerning treatment, do you think there is any additional treatment the doctors can or should reasonably provide in light of the claimant's complaints?
    - Keep in mind that the claimant may be receiving treatment from an under-funded public medical facility that is unable to provide deluxe levels of treatment.
- Do you see any indications that the claimant is malingering, or making things up, or embellishing his/her symptoms?
    - Unless there is overt evidence, the ME will usually say "no." If the answer is yes, get exhibit and page numbers.

The amount of pain suffered by the claimant is relevant evidence. Pain is subjective. So what do we want to ask the ME on cross examination?

- Ask if the claimant *could* suffer pain from the conditions which the ME has identified.
- Try to get the ME to quantify it.
    - The ME will usually testify that this cannot be done.
- Ask the ME about the extent to which pain was factored into the ME's RFC testimony.
    - The ME will usually state they rely only on objective medical evidence.

Since the ME's RFC is often adopted verbatim by the ALJ, the ME's testimony that the claimant's pain was not factored into the RFC testimony provides an argument later that the RFC adopted by the ALJ did not consider "all of the relevant evidence."

* * * * *

BREAKING DOWN MEDICAL EXPERT TESTIMONY: AN INTERACTIVE EXERCISE

Excerpted from Luis Gracia's "Techniques for Dealing with Adversarial MEs," published by the National Organization of Social Security Claimants' Representatives, and reprinted with permission

Let's look at examples of ME cross examination

Here is the fact pattern:

Scenario: The claimant is a 43 year old male with past relevant work (PRW) as a waiter and a bartender. He claims disability as a result of severe pain and weakness due to a back impairment and carpal tunnel syndrome.

Testing: An MRI of the lumbar spine revealed degenerative disc disease, with bulges at the L3-L4 and L4-L5 levels and a large right paracentral herniated disc at the L5-S1 level with mild foraminal encroachment. No frank nerve compromise, impingement or any other abnormalities were shown. EMG testing of the claimant's lower extremities was negative. The claimant underwent a series of epidural-block injections as part of his pain management treatment, which was recommended by his treating orthopedist of 4 years, as a result of his complaints of radiating pain to his legs (mostly the right leg).

Treatment: No surgical recommendation was made by his treating orthopedist. The claimant takes prescription pain medications as indicated by his primary care physician, who (at the time of the hearing) had treated the claimant for over 6 years. In addition, the claimant has been diagnosed with severe carpal tunnel syndrome of his right hand (the claimant is right hand dominant). The diagnosis was confirmed by a positive NCV/EMG of the claimant's right wrist. The claimant alleges that his right hand is not only painful but weak when he has to hold objects weighing "2 or 3 pounds." The claimant's orthopedist did recommend surgery for his carpal tunnel but the claimant could not afford the cost of the surgery due to his insurance plan's deductible and co-pay responsibility.

RFCs: The claimant's treating orthopedist did not provide a physical RFC form on behalf of the claimant. However, he did write a narrative letter stating that the claimant should refrain from lifting more than 10 to 15 pounds repeatedly and should also avoid any repetitive use of his right hand due to pain and weakness caused by carpal tunnel syndrome. The orthopedist also stated that the claimant should be allowed to sit, stand and walk "as tolerated" in order to avoid increasing symptoms of back pain.
The claimant's primary care physician provided an RFC form which stated that (among other things) the claimant would be limited to lifting or carrying no more than 10 pounds occasionally, he could sit as tolerated in an 8 hour day but would need a change in position to alleviate pain or discomfort for 5 minutes every 30 minutes; he could stand or walk at least 2 hours in an 8 hour day but would need a change in position to alleviate pain or discomfort for 5 minutes every 30 minutes; the claimant would need to avoid pushing or pulling. Finally, the PCP stated that he would be expected to miss 3 or more days of work every month due to his back pain symptomatology and related medical treatment.

ME Testimony: At the hearing, the ALJ called Dr. X, a board certified Family Medicine and Physical Medicine and Rehabilitation (PM&R) physician with over 39 years of experience. The doctor agreed that the claimant's alleged impairments, which he identified as degenerative disc disease, lumbar disc herniation and carpal tunnel syndrome of the right hand, were severe as defined by Social Security regulations. He stated that none of the claimant's impairments met or equaled a listing.

The ME testified that based on his review of the medical records, his opinion was that the claimant could lift and carry 20 pounds occasionally and 10 pounds frequently; the claimant would be able to sit for 6

hours in an 8 hour day with an option to change his position for 2 minutes every 30 minutes; the claimant would be able to walk and stand for at least 2 hours in an 8 hour day with a 2 minute break every 30 minutes; the claimant would be able to use his upper extremities to push or pull objects as long as they do not exceed 20 pounds but would not be able to safely use his lower extremities to push or pull due to his back impairment.

The ME also opined that the claimant could occasionally climb ramps and stairs but never ladders, ropes or scaffolds. The claimant could engage in occasional balancing, stooping, kneeling, crouching and crawling. As for manipulative abilities, the claimant had an unlimited ability to reach, he could frequently handle objects with his right hand, constantly handle object with his left hand, and he had unlimited fingering and feeling capacity. The claimant had no visual limitations but should avoid concentrated exposure to extreme cold, heat, wetness, humidity and fumes, and avoid all exposure to hazards such as machinery and heights.

Sample #1 Cross-Examinations of an ME: Addressing the ME's RFC Testimony

ATT: Doctor, can you state the basis that you relied on to give an opinion regarding the claimant's residual functional capacity?

ME: I based those opinions on my review of the records as well as my experience treating patients with conditions like the claimant has.

ATT: Did those records include the letter from the claimant's orthopedic doctor and the RFC form from the primary care physician?

ME: Yes.

ATT: Ok. I ask because, as you may recall, the orthopedist said that the claimant should refrain from lifting more than 10 to 15 pounds repeatedly and should also avoid any repetitive use of his right hand due carpal tunnel. Also, he said that the claimant should be allowed to sit, stand and walk as tolerated in order to avoid pain. So, first of all, are those recommendations consistent with the condition of the claimant?

ME: I don't understand what you mean by consistent with his condition. To the extent that those recommendations differ from my RFC assessment, I see no reason why someone with degenerative disc disease with no nerve root involvement or objectively diagnosed radiculopathy, couldn't lift anything heavier than 20 pounds. I mean, I agree that the claimant should avoid activities that cause pain. No doubt. But I would expect him to be able to tolerate sitting, standing and walking for 30 minutes taking a break for a few minutes. I do not see anything in the record that would indicate more significant restrictions.

ATT: I'm sorry, doctor. Are you saying that, to a reasonable degree of medical certainty, someone that has degenerative disc disease with a large paracentral herniated disc and carpal tunnel of his dominant hand will automatically be able to lift as much as 20 pounds and sit, stand and walk for a whole hour with a couple of two minutes breaks simply because they have no nerve root involvement in the lumbar spine? Is that what you're saying?

ME: What I'm saying is that I am very familiar with this gentleman's condition. In almost 40 years of treating patients I've seen conditions like his a thousand times. Patients that I've personally treated are able to lift 20 pounds with either the same or similar diagnostic findings. They can also sit and walk with very short breaks.

Personally, once the ME starts talking like this about how long he's been a doctor, I don't think I'm going to get him to change his mind or his testimony. I would wrap it up right here and address his generalizations in a post hearing memo. Thoughts?

ATT: I see. So, are you saying, to a reasonably degree of medical certainty, that because your patients that have similar conditions to those of the claimant are able to lift 20 pounds and sit and stand with very short breaks, this claimant must also be able lift 20 pounds and sit, walk and stand for an hour with a couple of short breaks?

ME: I'm not saying that because my patients can do certain things everyone else can. I'm saying in my experience this gentleman's condition would not preclude the restrictions I spoke about.

ATT: Ok. So let me clarify this. You're not saying that every person that has the conditions that the claimant has, also necessarily experiences the same type of symptoms and has the same type of limitations that he is experiencing, correct?

ME: Correct.

ATT: Ok. So would you agree that people suffering from the same medical condition or impairment can certainly experience different symptoms and limitations; some more severe and intense than others?

ME: Sure.

ATT: Pain is a subjective symptom, right?

ME: Correct.

ATT: And subjective, that means it cannot be objectively measured and people have different levels of tolerance for it because it can feel more intense for one person than another, correct?

ME: Yes.

ATT: I see. So with that in mind, what about your experience allows you to be able to state that **this** claimant can lift 20 pounds for up to two and a half hours during a workday?

ME: I didn't say that. I said that he could lift 20 pound occasionally.

ATT: Doctor, are you aware that occasionally is defined by Social Security regulations as an activity that can occur up to one-third of a work day?

ALJ: Excuse me counsel, but that's not an accurate definition of occasional. You know better than that. Occasional means occurring from very little up to one-third of the time.

ATT: Yeah, but he didn't say that the claimant could lift 20 pounds for very little time. That means that according to his RFC the claimant can lift 20 pounds up to one-third of the time according to the definition. How's that inaccurate judge?

ALJ: Well, it seems that the doctor did not understand your question.

ATT: Really? Well, let me try again. Doctor, how often can this claimant lift or carry 20 pounds?

ME: To be safe, it would be on a limited basis. Most likely once or twice every 30 minutes to an hour.

ATT: I see. So you're not saying that the claimant can lift 20 pounds whenever someone wants him to lift 20 pounds, correct?

ME: Correct.

ATT: Doctor, is it your testimony that the claimant would be able to carry 20 pounds twice an hour for a total of one-third of an hour, which is 20 minutes?

ME: No, that would not be advisable. I'm not necessarily saying that he would not be able to do it, but it would not be ideal.

ATT: And it wouldn't be ideal because is not as medically safe as to have him carry less weight, correct?

ME: True. Or the same weight for a lesser period of time.

ATT: Well, tell me for how long would the claimant be able to lift or carry 20 pounds in a continuous basis? In other words, from the moment he starts lifting or carrying the 20 pound object, how long can he continue to lift it or carry it?

ME: The type of lifting and carrying that I'm referring to is specific and episodic, not repetitive. Basically, taking an object and moving it from one place to another place; a short distance.

ATT: Would a repetitive use of the claimant's right hand be expected to increase pain in his wrist, the one with carpal tunnel syndrome?

ME: Depending on the length of the use, it can.

ATT: Would you be able to say <u>exactly</u> how many repetitions the claimant would have to make with his right hand for the pain to increase?

ME: Exactly? No. It would depend on the state of his wrist at that specific time.

Sample #2 -- Cross-Examinations of an ME: The ME Fails to or Refuses to Consider the Claimant's Subjective Complaints

ATT: Doctor, did you consider the claimant's complaints of pain and numbness when you came up with his RFC?

ME: No, I didn't. I based his RFC solely on the objective evidence in the record.

ATT: And by objective you mean what specific evidence?

ME: The MRI reports in exhibit 14F and the examinations and impressions of [claimant's primary care physician, orthopedic doctor, and pain management doctor] in exhibits 2F, 3F, and 4F.

ATT: And the MRI report describes the claimant's herniated discs in his neck and back, right?

ME: It does. But it doesn't show any frank impingement on nerve roots.

ATT: But one can have discogenic pain even if a disc doesn't impinge on a nerve, right?

ME: Yes.

ATT: Well, the claimant complained of pain and numbness to his doctors in all of those visits and they planned his treatment accordingly, correct?

ME: Yes, subjective complaints.

ATT: But you did not consider his complaints at all, right?

ME: Not to determine his RFC. I only considered objective evidence, as I already stated.

So, to return to the point made above – An RFC must be based on "all the relevant evidence" or it is defective. All the relevant evidence, includes medical evidence, lay witnesses and subjective symptoms. The ME will often freely admit that the scope of his opinion is derived only from the "objective medical record." Therefore, an RFC based on the ME's testimony will not be based on all relevant evidence. A defective RFC finding requires remand and gets the decision of the ALJ vacated.

You should also look at a relevant portion of CFR §§404.1545 & 416.945.

> (3) *Evidence we use to assess your residual functional capacity.*
>
> We will also consider descriptions and observations of your limitations from your impairment(s), including limitations that result from your symptoms, such as pain, provided by you, your family, neighbors, friends, or other persons.

Further, SSR 16-3p states as follows:

> Once the existence of a medically determinable impairment that could reasonably be expected to produce pain or other symptoms is established, we recognize that some individuals may experience symptoms differently and may be limited by symptoms to a greater or lesser extent than other individuals with the same medical impairments, the same objective medical evidence, and the same nonmedical evidence. *In considering the intensity, persistence, and limiting effects of an individual's symptoms, we examine the entire case record, including the objective medical evidence; an individual's statements about the intensity, persistence, and limiting effects of symptoms;* statements and other information provided by medical sources and other persons; and any other relevant evidence in the individual's case record.

The ME's opinion goes contrary to plain language of the CFR and the rule. Still, to continue to question the ME as to why they rejected, dismissed or overlooked the claimant's subjective complaints would simply invite the ME to explain his testimony. Instead, you should point out that the ME's testimony regarding the claimant's RFC is deficient as it goes contrary to SSA regulations.

* * *

Let's look at examples of ME questions you can draft in advance

Physical Medical Expert #1

Isn't it true that a high percentage of patients with lupus experience general fatigue and malaise as the result of the disease?

> The Johns Hopkins Lupus Center says that "Ninety percent of people with lupus will experience general fatigue and malaise at some point during the course of the disease."

And many patients with lupus develop pains, stiffness, and swelling in their joints, correct?

> The Johns Hopkins Lupus Center says that "Many lupus patients experience joint stiffness, especially in the morning." And lupus patients should talk to their doctors about "medications that may ease some of this pain and inflammation."

Isn't it true that those symptoms, fatigue and joint pain, often increase significantly during lupus flares?

> The Hopkins lupus cohort study says that "Systemic lupus erythematosus (SLE) has two main patterns: "flare" and constant activity. Corticosteroids are the usual therapy for acute flare, with administration method and dosage schedule primarily dependent on severity and organ involvement."

A lupus flare can last for multiple days, is that correct?

> The Lupus Foundation of America says that "Lupus is a disease of flare and remission, meaning that disease may be active one day and quiet the next. Usually flares last more than a day, and usually an increase in medication dose, or a change of medication, will be necessary to suppress the symptoms."

Lupus flares are often treated with a steroid like Prednisone, right?

> The Johns Hopkins Lupus Center says that "Synthetic cortisone medications are some of the most effective treatments for reducing the swelling, warmth, pain, and tenderness associated with the inflammation of lupus. …However, cortisone can also cause many unwelcome side effects, so it is usually prescribed only when other medications—specifically NSAIDs and anti-malarials—are not sufficient enough to control lupus."
>
> It also says that "Prednisone is the steroid most commonly prescribed for lupus. It is usually given as tablets that come in 1, 5, 10, or 20 milligram (mg) doses."
>
> > SLE is managed with corticosteroids, because they work, work for most organs, and work quickly. The long-term harm caused by corticosteroids is now recognized, and "steroid sparing" is an FDA indication for new SLE treatment. NCBI article.

And isn't it true that **antimalarial drugs, like** plaquenil sulfate, are used to treat lupus symptoms such as fatigue, joint pain, and rashes?

The Johns Hopkins Lupus Center says that "Plaquenil and other anti-malarials are the key to controlling lupus long term, and some lupus patients may be on Plaquenil for the rest of their lives. For this reason, you can think of anti-malarials as a sort of lupus life insurance."

Physical Medical Expert #2

Isn't it true that balance disorders and dizziness affect most head injury patients?

In fact, vertigo occurs in up to 75% of mild traumatic brain injuries and in almost all moderate TBI?

Imbalance and defects in gait, including ataxia, can be caused by vestibular dysfunction?

Isn't it true that hearing loss, tinnitus and headaches are also post-concussive symptoms?

Are Nortriptyline and Topamax prescribed for migraine prevention?

Are depressive symptoms common after a head injury?

Are depressive symptoms common after a physical attack?
See 2 pg psych evaluation (8F) & WC eval (30F)

There appears to have been a delay in the presentation of her vestibular symptoms after the attack –
Isn't it true that post-traumatic hydrops **AND** benign paroxysmal positional vertigo can both present after a delay

And benign paroxysmal positional vertigo is the most common peripheral cause of vertigo after head injury?

VNG results were normal but – Bithermal caloric irrigations produced robust and symmetrical nystagmus. (involuntary rapid eye movement)

Post-traumatic hydrops can present months to years after injury as the result of deregulation of endolymphatic fluid?

And symptoms from this can include fluctuating hearing loss and tinnitus with episodic vertigo and ataxia?

Traumatic endolymphatic hydrops is an accumulation of endolymph in the cochlear duct caused by traumatic insult. The diagnosis of traumatic endolymphatic hydrops is made by a history of trauma; the presence of typical symptoms including fullness, tinnitus, fluctuant hearing loss, and episodic vertigo; and an elevated negative summating potential and an increased summating potential:action potential ratio by electrocochleography. *https://www.ncbi.nlm.nih.gov/pubmed/8572126*

Was an electrocochleography performed?

Would you agree that the standard treatment for vertigo includes rehabilitation?

Rehab includes habituation exercises to improve vertigo as well as gait and balance training. Can rehab sometimes be difficult for patients to engage in since it triggers the vertigo response?

For acute vertigo symptoms, patients can be prescribed vestibulosuppressive medications?

Do those medications generally have side effects like drowsiness (sedation)?

Assistive devices like a walker and a cane could also be prescribed to prevent falls caused by onset of vertigo sxs?

Isn't it true that the symptoms I have described and the treatment with rehabilitation, medication and assistive devices are documented in the record?

> The EMG/NCV report from Dr. G which revealed mild right median nerve neuropathy at the wrist consistent with a clinical diagnosis of Carpal Tunnel Syndrome AND
> X-ray of the hands was consistent with degenerative joint disease involving the PIP & DIP joints bilaterally.
>
> She reported weakness and noted that she could not hold objects and she dropped things.

Based on the record, would you agree that the claimant could have a reduction in her ability to grasp and handle objects with her right hand?

Materials prepared by Ann Biddle

PSYCHIATRIC FUNCTIONAL ASSESSMENT

NAME OF PATIENT:
DOB:

Please answer each of the following questions about the patient. The answers will be used in support of your patient's claim for Social Security disability benefits.

1. Date treatment began: _____

2. Frequency of treatment: _____

3. Diagnoses: _____
_____
_____
_____

4. Describe the clinical findings that indicate the severity of your patient's mental impairment and symptoms:
_____
_____
_____
_____

5. Treatment type and response: _____
_____
_____

a. Prognosis: _____

b. Side effects of medications or other treatment that may affect the ability to work (e.g., fatigue, nausea, dizziness, lethargy, stomach upset, etc.):
_____
_____

6. Has your patient's condition lasted or can it be expected to last at least 12 months? ☐ Yes ☐ No

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

If yes, please explain (with reference to any test results): _____
_____
_____
_____

8. Using the following scale, please estimate how your patient's condition affects the ability to perform the following work-related activities ***independently (without accommodations, extra help, structure, or supervision), appropriately, effectively, and on a sustained, full-time (40-hour workweek) basis in a regular, competitive work setting*** – without unpredictable interruptions

- **None** – no limitation in functioning;
- **Mild limitation** – approximately **less than 5%** of the workday or workweek;
- **Moderate limitation** – approximately **5-10%** of the workday or workweek;
- **Marked or serious limitation** – approximately **11-20%** of the workday or workweek; or
- **Extreme limitation or inability to function** – approximately **more than 20%** of the workday or workweek.

In providing your opinion, you may consider patient's functioning in a treatment or services setting, such as patient's ability to follow through with prescribed treatment, stay on task during evaluation or treatment, manage difficult situations or changes, or interact adequately with providers and staff.

UNDERSTANDING, REMEMBERING OR APPLYING INFORMATION	None	Mild (less than 5%)	Moderate (5-10%)	Marked or serious (11-20%)	Extreme or inability to function (> 20%)
Understand and learn terms, instructions, and procedures					
Describe work activity to someone else					
Ask simple questions or request assistance					
Answer questions and providing explanations					
Recognize a mistake and correct it					
Identify and solve problems					
Use reason and judgment to make work-related decisions					
Remember locations and work-like procedures					
Understand and remember short and simple instructions					
Carry out very short and simple oral instructions (1-2 steps)					
Sequence multi-step activities					
Other (please specify):					

Please explain, or provide examples, particularly if your patient's symptoms are intermittent or marked by fluctuations, resulting in limitations at unpredictable times:

_____

_____

INTERACTING WITH OTHERS	None	Mild (less than 5%)	Moderate (5-10%)	Marked or serious (11-20%)	Extreme or inability to function (> 20%)
State own point of view					
Initiate or sustain conversation					
Understand and respond to social cues (physical, verbal, emotional)					
Respond appropriately to requests, suggestions, criticism, correction, and challenges from co-workers or supervisors					
Cooperate and handle conflict with others					
Keep social interactions free of excessive irritability, sensitivity, argumentativeness, or suspiciousness					
Get along with co-workers or peers without unduly distracting them or exhibiting behavioral extremes					
Other (please specify):					

Please explain or provide examples, particularly if your patient's symptoms are intermittent or marked by fluctuations, resulting in limitations at unpredictable times:

_____

_____

CONCENTRATION, PERSISTENCE OR MAINTAINING PACE	None	Mild (less than 5%)	Moderate (5-10%)	Marked or serious (11-20%)	Extreme or inability to function (> 20%)
Initiate and perform a task they understand and know how to do					
Complete tasks in a timely manner					
Maintain attention for two-hour segment					
Ignore or avoid distractions while working					
Sustain an ordinary routine without special supervision					
Perform at a consistent pace without interruption from symptoms or an unreasonable number and length of breaks					
Work in coordination with or proximity to others without being unduly distracted					
Stay on task					
Other (please specify):					

Please explain or provide examples, particularly if your patient's symptoms are intermittent or marked by fluctuations, resulting in limitations at unpredictable times:

_____

_____

Please estimate, on average, how many days per month your patient is **likely to be <u>absent</u> from work** as a result of symptoms or treatment.

- ☐ Never
- ☐ About 1 day per month
- ☐ About 2 days per month
- ☐ About 3 days per month
- ☐ About 4 days per month
- ☐ More than 4 days per month

Please estimate, on average, how many days per month your patient is **likely to be <u>late</u> to work** as a result of symptoms or treatment.

- ☐ Never
- ☐ About 1 day per month
- ☐ About 2 days per month
- ☐ About 3 days per month
- ☐ About 4 days per month
- ☐ More than 4 days per month

ADAPTING OR MANAGING ONESELF	None	Mild (less than 5%)	Moderate (5-10%)	Marked or serious (11-20%)	Extreme or inability to function (> 20%)
Manage psychologically based symptoms					
Change activities or work settings without being disruptive					
Distinguish between acceptable and unacceptable work performance					
Set realistic goals					
Respond to demands					
Make plans independently of others					
Maintain personal hygiene and attire appropriate to work					
Respond appropriately to changes in a routine work setting					
Deal with normal work stress					
Be aware of normal hazards and take appropriate precautions					
Other (please specify):					

Please explain or provide examples, particularly if your patient's symptoms are intermittent or marked by fluctuations, resulting in limitations at unpredictable times:

_____

_____

9. Does the patient have a "serious and persistent" mental disorder of at least 2 years?

☐ Yes ☐ No ***(If no, please skip to Question 10)***

Is there ongoing medical treatment, medication, mental health therapy, psychosocial support, or a highly-structured setting that diminishes signs or symptoms? ☐ Yes ☐ No

Particularly with chronic disorders, overt symptomatology may be controlled or attenuated by psychosocial factors such as placement in a hospital, halfway house, board and care facility, or other environment that provides similar structure, including the home. ***Please check all that apply:***

☐ Receiving help from family members or others who monitor the individual's daily activities and help them to function.

☐ Participating in a sheltered, supported, or transitional work program.

☐ Receiving assistance from a crisis response team, social workers, case managers, day treatment programs, or other community-based mental health care providers who help to meet the individual's needs.

☐ Living alone, but creating a highly-structured environment by eliminating all but minimally necessary contact with the outside world.

☐ Living alone, but receives a high level of outpatient care or social services.

Is there minimal capacity to adapt to the following without an exacerbation of signs/symptoms and deterioration in functioning:

Changes in environment?

☐ Yes ☐ No

Increased mental or stress-related demands, not already a part of daily life?

☐ Yes ☐ No

10. Does your patient have difficulty performing activities of daily living (ADLs) such as getting out of bed, grooming, dressing, shopping, cleaning, laundry, and taking medications independently as the result of his or her psychiatric condition?

☐ Yes ☐ No

If yes, please explain: _____

_____

11. Are there physical factors (e.g. pain, lack of sleep, fatigue), that exacerbate the psychiatric condition?

☐ Yes ☐ No

If yes, please explain: _____
_____

12. Does the psychiatric condition exacerbate patient's experience of pain or any other physical symptom? ☐ Yes ☐ No

If yes, please explain: _____
_____

13. Is your patient compliant with prescribed treatment? ☐ Yes ☐ No

If no, please indicate any reasons or factors affecting the patient's compliance: _____
_____

14. Please describe patient's level of insight into his or her impairment: _____
_____

15. Are your patient's diagnoses and clinical findings, including Mental Status Exams, reasonably consistent with the symptoms and functional limitations described in this evaluation? ☐ Yes ☐ No

Please explain: _____
_____

16. Does patient's condition include maladaptive patterns of alcohol or substance use? ☐ Yes ☐ No

If yes, would the limitations set forth above remain in the absence of such use? ☐ Yes ☐ No

Please explain what changes you would make to your description of your patient's limitations if your patient were not using alcohol or drugs:
_____
_____
_____
_____

Signature: _____ Date: _____

Printed Name: _____ Phone: _____

If form is not completed by psychiatrist or psychologist, please have supervising psychiatrist or psychologist review and co-sign below.

Co-signed by:

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CROSS EXAMINING SSA EXPERT WITNESSES

Michelle Spadafore
German Casteneda
Rezwanul Islam
Michael Telfer
NYSBA Partnership Conference
October 2018

Empire Justice Center

Medical Experts (MEs)

- Medical experts are generally Board certified MDs or PhD psychologists who sign up with SSA to perform the function of medical expert.
- See generally HALLEX I-2-5-32 et. seq

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Why Are MEs Called?

- To help ALJ understand
  - nature of a diagnosed impairment
  - meaning and importance of medical test results
  - nature and effect of various treatments
  - side-effects of treatment
  - functional impact of an impairment, treatment, etc.,
- May also be needed to help establish an onset date, or to offer an opinion as to an "equivalency to a listing."

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Who Cannot Act As An ME?

- ME who has treated a claimant in the past or has examined a claimant as a CE, or reviewed case, such as a DDD non-examining review physician
- ME cannot act in a dual capacity as VE
- ME's specialty should be appropriate to claimant's particular impairment(s)

Who Shouldn't Act as an ME?

- Check ME credentials
  - Is the ME licensed?
  - Is ME a specialist and it the specialty relevant?
- Has the ME ever been sanctioned?
- Does the ME have an active practice treating patients?
- Information available at:
  - www.health.state.ny.us [provides entry into licensing, certification, and sanction information for all medical professionals who need to be licensed in NYS]
  - www.ama-assn.org [physician credentials and links to AMA publications]
- Social media presence?
- How to challenge ME's credentials?

What Does An ME Consider?

- ME must take into consideration the medical findings and signs of record, as well as the claimant's symptoms
- ME should have been sent a complete copy of the medical data in SSA's disability file

How Is The ME Questioned?

- An ME is questioned about the evidence actually in the record, including any new records submitted on the day of the hearing, or if post-hearing testimony is taken, any additional documentation.
- The ME is generally present throughout a hearing (usually by phone) and is expected to listen to the claimant's testimony and to consider that as well in evaluating the claim

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Preparing for ME Testimony

- Identify the objective findings and symptoms related to each diagnosis
- Does the record support claimant's contentions of pain, weakness, fatigue or any other subjective symptom?
- Look up medication in the Physician's Desk Reference (PDR) or another relevant source
  - Why is it prescribed?
  - Side effects?
  - Does the dosage prescribed suggest any thing about severity?

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Preparing for ME Testimony

- Is there a Medical Source Statement (MSS) from a treating source?
  - If so, what RFC does treating source limitations support?
  - Is opinion supported by relevant findings?
- What limitations have been identified by the CE?
  - Are CE findings generally consistent with treating source findings?

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Crossing MEs

- What evidence did ME reviewed?
- Which specific exhibits support ME's opinion?
- Identify treating source opinions
  - Does ME agree?
  - If not, why not?
  - Identify evidence supporting treating source opinion and ask the ME to clarify opinion in light of the evidence

Practical Situations

- What if the ME testifies the client meets Listing 12.15 based on ALJ's questioning?
  - Typically do not ask any follow up questions
  - But know your ALJ and ME
- If ALJ does not indicate s/he agrees with ME, argue finding is consistent with the other opinion/medical evidence

Practical Situations

- What if ME gives an opinion supportive of current disability, but suggests a later onset?
  - Cross the ME for an earlier onset, citing/referring ME to supporting evidence
  - Could mean thousands of dollars in retro benefits

Is The ALJ Bound By The ME?

- No. An ME's opinion is not binding on an ALJ.
- The ALJ must weigh all the evidence, including testimony of an ME, and must independently reach a conclusion.

Vocational Experts

- Necessity for vocational testimony?
  - Applicability of the Grid?
    - 20 C.F.R. §§404.1569a(d) & 416.969a(d)
    - SSR 83-14
    - See also SSRs 83-12, 96-9p
  - Exertional vs. non-exertional limitations
    - Types of limitations
    - See SSRs 96-9p, 85-15, 83-14

Who are VEs?

- Vocational expert should have
  - 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 limitations

Who are VEs?

- 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.
- SSA's *Handbook for Vocational Experts*

VE Credentials?

- CV/Qualifications in Exhibit File
  - HALLEX I-2-5-55
- Per SSA's Blanket Purchase Agreement, VE's area of expertise include current knowledge of:
  - Working conditions and physical demands of various occupations;
  - Transferability of skills;
  - Knowledge of the existence of number of jobs *at all exertional levels* in the national economy;
  - And involvement in or knowledge of placing adult, handicapped workers into jobs.

Ethical Considerations

- ALJ may not engage in off the record discussions about the case with the VE
  - Any discussions must be summarized on the record or in a written statement added to the record
  - HALLEX I-2-5-48
- VE cannot have prior professional contact with claimant
  - HALLEX I-2-5-48
- Can the representative engage the VE in conversation?
  - What about "befriending" the VE?
  - What if the representative knows the VE personally?

What Evidence Is the VE Given?

- Vocational Evidence and summaries of any vocational testimony from a prior hearing in the same case
  - HALLEX I-2-5-54.C
- Ethical Consideration
  - Can the VE be "fed" other information about the claimant?

Role of VE?

- Exertional and skill levels of PRW
- Transferability of skills
- Impact of specific functional deficits/limitations on ability to work

Not the role of the VE?

- Not the role of the VE?
  - Whether hypothetical claimant could work with accommodations
    - SSR 00-1(c), SSR 11-2p

How does the VE testify?

- In person, by telephone, by video teleconference or in written responses to interrogatories
  - HALLEX I-2-5-50
  - HALLEX I-2-5-30
- Post hearing?
  - HALLEX I-2-5-56

How does the VE testify?

- Testimony in form of hypothetical questions that should include all characteristics, limitations, etc. of claimant

VE Voir Dire

- Stipulate to qualifications as to testifying as an expert, but not to reliability of testimony
- Review resume
- Consult other advocates for VE idiosyncrasies
- Check expert's social media (Twitter, Facebook, discussion boards, etc.) for possible objections based on bias

Questions re Credentials?

- Last time VE placed someone in jobs?
- How does VE keep up with current occupational knowledge?
- What additional training or specialties has VE received?
- Does VE attend conferences that provide continuing education sessions focusing on social security testimony and methodology?
- What services does VE provide in practice that support opinions and ability to provide testimony?

VE Testimony

- Administrative notice of job data
  - 20 C.F.R. § 416.966(d)
  - *Dictionary of Occupational Titles (DOT)*
    - http://www.oalj.dol.gov/libdot.htm
    - http://www.empirejustice.org/issue-areas/disability-benefits/misc-ssi-ssd-issues/
  - *Selected Characteristics of Occupations (SCO) (companion publication to DOT)*
    - *Available on Westlaw*
  - *County Business Patterns*
  - *Census Reports*
  - *Occupational Analyses*
  - *Occupational Outlook Handbook*
- *But see Brault v. Comm'r*, 683 F.3d 443 (2d Cir. 2012)

VE Testimony

- DOT
  - DOT Physical Demands - Strength Ratings
    - Sedentary, light, medium, heavy
  - DOT Standard Vocational Preparation (SVP)
    - Time required to learn job, related to skill levels
  - DOT General Education Development (GED)
    - Reasoning , math and language levels required for job

VE Testimony - Work Experience

- Specific Vocational Preparation (SVP) is the amount of time required by a typical worker to learn a job for average performance.
  - It does not include the orientation time of a new job
- Per SSR 00-4p:
  - Unskilled work=SVP of 1-2
  - Semi-skilled work=SVP of 3-4
  - Skilled work=SVP of 5-9

SVP Levels Per DOT

- 1 -Short demonstration only
- 2-Anything beyond short demonstration up to and including 1 month
- 3-Over 1 month up to and including 3 months
- 4-Over 3 months up to and including 6 months
- 5-Over 6 months up to and including 1 year
- 6-Over 1 year up to and including 2 years
- 7-Over 2 years up to and including 4 years
- 8-Over 4 years up to and including 10 years
- 9-Over 10 years

Education

- POMS DI 25001.001(A)(16)(2)-(4):
- Marginal Education
  - 6th grade education or less.
- Limited Education
  - 7th through 11th grade education.
- High School Education or Above
  - 12th grade education and above. A GED certificate applies.

Language Ability

- POMS DI 25001.001(A)(16)(1):
  - Illiterate or Unable to Communicate in English
    - The inability to perform the following:
      - **Read** OR **write** OR **speak or understand English**; OR
      - **Any combination of the above**.
    - "Regardless of formal education level, use this category for claimants who cannot speak, understand, read, or write a simple message in English such as instructions or inventory lists."

Transferability of Skills

- "An individual has transferable skills when the ***skilled or semi-skilled*** job functions he or she has performed in his or her PRW can be used to meet the requirements of other work within his or her RFC."
  - POMS DI 25015.017(C)(3)
- "In order to find transferability of skills to skilled sedentary work for individuals who are of advanced age (55 and over), there **must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry**."
  - Medical Vocational Guideline 200.01(f).

Areas for Cross Examination

- SCO
  - SCO Aptitudes
    - Includes dexterity, vision, etc.
  - SCO Temperaments
    - Includes social functioning: ability to work alone, with others, etc.
  - SCO Physical Demands
    - Includes requirements re stooping, reaching, handling, etc.
    - Includes environmental conditions

Prehearing Prep

- Know your client's PRW
  - unskilled, semi-skilled, or skilled?
- Know which, if any, grids your client meets
  - Age, language, educational, exertional, transferability, and past work requirement
  - Borderline grid argument?
    - POMS DI 25015.006
- Any transferable skills?
- Which limitations result in no jobs?
  - Past experience with VE, SSRs, etc.
- Research VE's usual testimony re: off task/absences
  - Ask colleagues or listserves.

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Pre Hearing Prep

- Have available a summary of the definitions of occasional, frequent, unskilled, semi-skilled, skilled, light, and sedentary
- Know corresponding SSRs for non-exertional limitations
- Know applicable grid rules
- Know exhibit numbers of medical opinions supporting limitations

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Preparing Hypos

- Does the individual have difficulty with people or stressful situations as a result of the trauma suffered?
  - Prepare hypos with limitations to changes in the workplace setting/tasks, ability to understand and remember instructions, and social interaction
- Does the individual have a urological/digestive impairment, i.e., Crohn's disease/colitis?
  - Prepare hypos with frequent, unscheduled breaks for bathroom use and access to a bathroom

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Preparing Hypos, cont'd

- Does pain or mental symptoms cause the person to lose concentration/be in bed?
  - Use these to support off task/absences
- Does the client have flashbacks caused by specific things in the environment?
  - Limit the individual's tolerance for noise, smells
  - Need to avoid heavy machinery, hazards, environmental pollutants?

Build on Hypo or Cross-Examine?

- Know claimant's limitations
- Limitations must be supported by evidence of record!!!
  - Claimant testimony, lay evidence, and medical evidence?

Countering vague hypos

- Ask the VE and/or ALJ to defined vague limitations:
  - How many hours a day would brief and superficial interaction be?
  - What does availability of a bathroom mean?
  - Define non-scheduled, brief breaks to use the restroom?
    - *See Lowe v. Colvin*, No. 6:15-CV-06077(MAT), 2016 WL 624922, at *6 (W.D.N.Y. Feb. 17, 2016) (collecting cases).

Questioning the VE

- Modify the ALJ's hypos and change one limitation at a time
  - By asking one at a time, you build appellate record to show which limitations result in no jobs
- With each added limitation, ask if jobs noted still exist?
- Don't ask if there are jobs that exist in the national economy
  - Opens window for VE to list more jobs!

Add Claimant Limitations

- Do not phrase limitations as mild, moderate, marked, or extreme
  - Ask ALJ or VE to define if these terms are used
  - Instead use quantifying factors: unable to, occasionally, frequently, etc.

Quantifying Limitations

- See SSR 83-10
  - Occasional
    - Up to 1/3
    - Two hours out of 8 hour day
  - Frequent
    - 1/3-2/3 of day
    - Six hours out of 8 hours day
  - Repetitive = > 2/3?
    - Semi-skilled work requires dexterity to quickly do repetitive tasks
    - See 20 C.F.R. §§ 404.1568(b); 416.968(b)

Quantifying limitations, cont'd

- Mild, Moderate, Extreme
  - See "definitions" in mental impairment listings
  - 20 C.F.R. Pt. 404, Subpt. P, App. 1, Section 12.00F.2

Time Off Task/Absences

- What percentage of the work day can a hypothetical employee be off task (for example, due to pain, side effects of medication, unscheduled work breaks, difficulty with concentration)?
  - Unskilled work requires ability to concentrate for two hour segments between breaks
  - POMS DI 25020.010
- See 2012 Time Off Task Survey
  - Amy E. Vercillo, ScD: Adjunct Instructor, Rehabilitation Counseling, University of Massachusetts Boston

Absences

- How many unplanned absences per month will an employer tolerate?
- Government Data on absences
  - Selected Paid Leave Benefits
    http://www.bls.gov/news.release/ebs2.t06.htm
  - National Compensation Survey
    http://www.bls.gov/ncs/
  - Paid *Leave in Private Industry Over the Last Twenty Years*. Published 2013, Bureau of Labor Statistics.
    http://www.bls.gov/opub/btn/volume-2/paid-leave-in-private-industry-over-the-past-20-years.htm

Supervision

- Unskilled work requires ability to respond appropriately to supervision
  - POMS DI 25020.010
- Superficial, remote supervision, non-direct, non-adversarial?
  - See SSR 85-15 re stress & supervision
  - See 85-16 re intellectual functioning & supervision
  - Employer accommodation?

Contact with Others

- Unskilled work requires ability to respond appropriately to co-workers
  - POMS DI 25020.010
- Review DOT, etc. to verify amount of contact required

Stress

- Hypo limited to low stress work?
  - How does ALJ define low stress in hypo?
  - See SSR 85-15, 11-2p (Young Adults)
    - Reactions to demands of stress highly individualized
    - Not necessarily related to skill level
    - Issues of supervision?
      - Superficial, remote supervision?
      - Employer accommodation?

Sit/Stand Option

- Sit/stand option?
  - SSR 83-12
  - Probably jobs with this option?
    - See "Employer Validation of Jobs Performed with a Sit/Stand Option," Dr. Irmo Marini, et. al, published in *The Rehabilitation Professional* 16(3), pp. 171-178
    - Vercillo survey, *supra*
- But also need to elevate legs?

Areas for Cross Examination

- Common Sense approach?
  - Know/observe jobs
    - Is there really sit/stand option as parking lot attendant?
    - Question whether jobs really involve only one-two steps?
    - Is there really an option for non-adversarial supervision?

Crossing the VE

- After hypothetical questions, question VE re numbers
  - Are job numbers full or part time?
  - What is source of job #s?
    - What year?
- Are the numbers based on DOT Codes or grouping of job codes?
  - Occupational Employment Statistics (OES)
  - Standard Occupational Classification System (SOC)
- It is possible the job numbers contain DOT codes with different limitations than the jobs cited?
- How are jobs separated?

Crossing the VE

- Did the VE use a program as a source for jobs?
  - If so, what program?
  - Did the program note all the limitations in the hypo?
  - If not, how did the VE account for the limitations?
- Stand-alone job duties performed now as they are described in DOT?
  - Source?

Crossing the VE

- Has VE placed someone in this position or seen anyone else place someone in this position before?
  - Where?
  - When?
  - Last time?
- Can VE name an employer who would hire a person with these limitations in such position?

Countering the VE's Testimony

- Request posthearing brief if warranted
  - "Whenever a VE is used, the individual has the right to review and respond to the VE evidence prior to the issuance of a decision."
    - SSR 96-9p fn. 8.
- Challenge VE's testimony as unsupported by the record using the evidence/opinions of record
- Demonstrate how VE's testimony in response to limitations you imposed is supported by the substantial evidence of record

Countering the VE's Testimony

- If warranted, attack the support for the VE's testimony
- The Second Circuit has held "that evidence cannot be substantial if it is conjured out of whole cloth."
  - *Brault v. Soc. Sec. Admin., Comm'r*, 683 F.3d 443, 450 (2d Cir. 2012)
  - See above questions

Countering VE's Testimony

- Job numbers & DOT Codes
- "It is apparently undisputed, and even conceded by the Commissioner . . . that there is no data presently existing that shows the number of jobs available in a particular DOT category."
  - *Boston v. Colvin*, No. 4:14-CV-206-D, 2016 WL 721563, at *9 (E.D.N.C. Feb. 2, 2016) (citing cases), *adopted by* 2016 WL 738762 (E.D.N.C. Feb. 23, 2016).
  - "DOT-specific job numbers simply do not exist." *Vandermark v. Colvin,* No. 3:13-CV-1467 (GLS/ESH), 2015 WL 1097391, at *16 (N.D.N.Y. Jan. 7, 2015), *accepted by* 2015 WL 1097391 (N.D.N.Y. Mar. 11, 2015).

Countering the VE's Testimony

- "[B]ecause the DOT codes do not report the number of available jobs in the national economy, VEs must obtain additional information to assess whether positions exist for the occupations disability claimants can still perform."

  Renee D. v. Comm'r of Soc. Sec., No. 5:17-CV-0667 (DJS), 2018 WL 4266044, at *4 (N.D.N.Y. Sept. 6, 2018)

Countering VE's Testimony

- "The Occupational Employment Statistics ("OES") Survey is a federal-state cooperative program between the U.S. Department of Labor's Bureau of Labor Statistics and the state workforce agencies that provides national occupational employment and wage rate estimates."
- "Job data in the OES naturally varies from the DOT, as the OES classifies jobs by census codes, known as Standard Occupational Classification ("SOC") codes, rather than DOT codes."
  - *Griego v. Colvin*, No. CV 15-1112 GJF, 2017 WL 545788 (D.N.M. Jan. 18, 2017)

Countering VE's Testimony

- "VEs . . . use the [Occupational Employment Quarterly ("OEQ")] job incidence data as a basis for determining the number of jobs for a particular DOT occupation."
- The "OEQ organizes job incidence data according to the occupational codes used by the Census Bureau and their corresponding Standard Occupational Classification System ("SOC") codes developed by the [Bureau of Labor Statistics] for use by federal statistical agencies."
- SOC codes "are broader designations than DOT codes, and a single [SOC] code may comprise numerous DOT-coded occupations."
  - *Boston v. Colvin*, No. 4:14-CV-206-D, 2016 WL 721563, at *9 (E.D.N.C. Feb. 2, 2016), *adopted by*, 2016 WL 738762 (E.D.N.C. Feb. 23, 2016)

Countering the VE's Testimony

- VE should be able to explain how the VE narrowed the job numbers he or she cites when questioned.
- VE's testimony does not amount "to substantial evidence where it identifies the job numbers set forth in a general DOT occupational group, but does not identify the number of jobs attributable to the specific job titles the VE identified." It is erroneous for a VE to "not reduce the overall numbers to account for jobs within [the DOT occupational group] that [a claimant] could not perform nor provide an estimation of the numbers of jobs available in the proposed titles."
  - *Walker v. Colvin*, No. 3:15-CV-465 (CFH), 2016 WL 4768806 (N.D.N.Y. Sept. 13, 2016).

Countering the VE's Testimony

- Do jobs cited no longer exist?
- E.g., surveillance system monitor no longer sedentary
  - See Wolstein article, available as DAP #584.
  - See also *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007)
    - "The Commissioner [has] confirmed that a surveillance system monitor is a security position that requires sustained concentration and attention, as well as the ability to act immediately in emergencies"
- Addresser
  - SSA has acknowledged probably obsolete
  - See http://www.ssa.gov/oidap/Documents/PRESENTATION--TRAPANI%20AND%20HARKIN--OIDAP%2005-04-11.pdf,

Countering the VE's Testimony

- Look up the DOT and SCO for exertional and non-exertional requirements.
- Raise SSR-04p challenge if warranted:
  - "[A] VE whose evidence conflicts with the DOT must provide a reasonable explanation to the ALJ for the conflict." *Brault v. Soc. Sec. Admin., Comm'r*, 683 F.3d 443, 446 (2d Cir. 2012) (citations omitted).
  - "When vocational evidence provided by a VE . . . is not consistent with information in the DOT, [including its companion publication, the SCO], the adjudicator must resolve this conflict before relying on the VE . . . to support a determination or decision that the individual is or is not disabled." SSR 00-4p.

Countering the VE's Testimony

- Recent caselaw regarding reaching inconsistency between SCO and VE's testimony:
- *Carbee v. Comm'r of Soc. Sec.*, No. 1:17-CV-0051 (GTS), 2018 WL 333516, at *17 (N.D.N.Y. Jan. 9, 2018) (remanding as ALJ failed to resolve a conflict between the VE's testimony and DOT where there existed "a material difference between the overhead reaching requirement indicated by the RFC assessment and the SCO's definition/specification of Plaintiff's past work as a fast food worker and the other jobs identified by the VE.")

Countering the VE's Testimony

- Challenge number of jobs as insignificant.
- 10,000 to 11,000 jobs nationwide has been held to be significant in NDNY.
  - See *Hamilton v. Comm'r of Soc. Sec.*, 105 F. Supp. 3d 223, 231 (N.D.N.Y. 2015) (citations omitted), *accepted and adopted by* 105 F. Supp. 3d 223 (N.D.N.Y. 2015).
    - ***Hamilton* held 5,160 jobs was not significant.**
- Each job can't be attacked on its own for job numbers as the analysis is based on the total number of jobs from the hypo. *See Waldvogel v. Comm'r of Soc. Sec.*, No. 6:16-CV-0868 (GTS), 2017 WL 3995590, at *13 (N.D.N.Y. Sept. 11, 2017).
- If VE testifies to jobs under 10K, offer a brief and to give ALJ authority on job #s.

Interrogatories

- If ALJ solicits opinion from ME/VE via interrogatory, consider the following:
  - Respond in writing to proffer and argue why opinion of ME/hypos answered by VE are not supported
  - Send your own interrogatories to expert
  - Request supplemental hearing to cross the VE/ME

Practical Situations

- What if the ALJ gives multiple hypothetical questions to VE resulting in jobs and no jobs?
  - Don't assume ALJ will rely on testimony of no jobs
  - Cross examine VE on hypos resulting in jobs with additional limitations
  - Cite evidence of record supporting "no jobs" testimony

Practical Situations

- What if the ALJ gives only one hypo for sedentary work resulting in jobs, but your client grids out at sedentary, has no transferable skills, and has no PRW or is unable to perform PRW?
  - Answer: Offer no questions and argue your client meets the grid rule at sedentary citing the opinion/medical evidence
- What if the VE's resume is not in the Exhibit File?
  - Voir dire the VE on qualifications
  - See above

Further Reading

- Pocket Guide to DOT and SCO
  - https://skilltran.com/pubs/SkillTRAN_DOT_PocketGuide_2016_new.pdf

Faculty Biographies

DAP Sessions 2018 Partnership Conference – Speaker Bios

A. Direct and Cross Examination Strategies of Expert Witnesses

Michelle Spadafore is the Senior Supervising Attorney and Project Director of NYLAG's Disability Advocacy Project (DAP). Michelle was previously a staff attorney at the AIDS Center of Queens County, a community-based nonprofit organization that provides services to people living with HIV/AIDS. Her background includes advising clients on Social Security, access to public benefits and health care, fair hearings, consumer credit issues, and other civil matters. Michelle graduated Phi Beta Kappa from University of California, Berkeley and magna cum laude from New York Law School.

German Castaneda is a paralegal in the Government Benefits Project at Mobilization for Justice, Inc. He assists individuals who are experiencing issues with their SNAP, Public Assistance, and Medicaid. He also represents clients at Social Security hearings. Additionally, he is a B.I.A. accredited representative and assists client with obtaining immigration benefits. He earned his B.A. in History from DePaul University.

Rezwanul Islam was born and raised in Long Island, New York. He received a B.S. in Pharmacology and Toxicology and a B.A. in Sociology from the State University of New York at Buffalo. Following undergrad, he received his J.D. from the City University of New York School of Law. He is the Supervising Attorney for the Disability Advocacy Project (DAP) at Nassau Suffolk Law Services Committee Inc., focusing on Social Security and Supplemental Security Income disability issues. He is admitted to practice in New York and New Jersey, the United States District Court for the Eastern District of New York, and he is registered to practice before the United States Patent and Trademark Office. He has represented numerous clients before the Social Security Administration and in federal court.

Michael Telfer is a Senior Attorney with the Legal Aid Society of Northeastern New York's Disability Advocacy Project. Previously, he was an Associate Attorney with Olinsky Law Group. He represents clients who have been denied Social Security disability benefits before ODAR, the Appeals Council, and the U.S. District Court for the Northern District of New York. He has also drafted briefs for clients appealing the denial of Social Security disability benefits in multiple federal district courts across the country as well as the U.S. Court of Appeals for the Second Circuit. He is a graduate of the University at Albany and Albany Law School. He is admitted to practice in New York State and before the U.S. District Court for the Northern District of New York.

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Brian Jayakumar is a staff attorney for the Legal Aid Society of Mid-New York. He graduated from Albany Law School in 2007. Mr. Jayakumar is admitted to practice in New York (2008) and the United States District Court for Northern District of New York (2015). His practice focuses mainly on Social Security and disability law. He has represented clients before the Social Security Administration and in federal court. He has presented at community legal education programs on Social Security Disability in Herkimer County. He is a member of the New York State Bar Association and the Oneida County Bar Association.

Mandy Nguyen is a staff attorney in the Disability Advocacy Project's Social Security Income Maximization Program at The Legal Aid Society in Brooklyn, New York, focusing on Social Security and Supplemental Security Income disability appeals to the Appeals Council and federal court. She is a graduate of Texas A&M University and The University of Texas Law School. She is admitted to practice in New York, as well as the United States District Court for the Southern District of New York and the United States District Court for the Eastern District of New York.

Keana Williams is a staff attorney with the Disability Advocacy Project at the Empire Justice Center in Rochester, New York. She represents claimants in Social Security and Supplemental Security Income disability appeals. She also works on issues surrounding disabled victims of domestic violence. She is a graduate of Hampton University and The Pennsylvania State University Dickinson School of Law. She is admitted to practice in New York.

Notes Pages


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