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I. INTRODUCTION

At the outset, we want to be clear about the thinking behind our training. We are not trying to give a comprehensive overview of how to be an effective disability advocate. Instead, we are looking for some low lying fruit that can be picked to improve the quality of the representation you are already giving. In addition, we throw in some nuggets here and there that can also help you to up your game. If you get many things out of this presentation, that it great. If you get only 1 or 2 things from this training that help you with any regularity, then it will all have been well worthwhile. Our goal is to tell you not only some things that are good to do that you are not doing now, but also to tell you why. (We also mention some things to avoid doing). Hopefully all of this will spark you to continue to learn and be curious. More than any specific technique mentioned in these materials, that attitude will make you a better advocate in the long run.

One major aspect of this training is a philosophical one. Specifically, we believe that the best advocates are not just trying to win cases, they are also simultaneously working to build an appeal in the event that they do not get a fully favorable ALJ decision. The fundamental weakness in advocacy that we have seen over the years is that too many representatives are just trying to win. It sounds counterintuitive, but if you are just trying to win, you are doing your client a disservice. In fact, you are doing only **HALF** of your job. In addition to trying to win, **you should be attempting to build in appeals** into every matter you handle, just to be safe. Accordingly, some of our recommendations here focus on how to build in issues for purposes of Appeals Council and federal court appeals. A related aspect of this philosophy is also to avoid certain traps that can harm us later on if a federal court appeal becomes necessary.

These materials will be divided generally into pre-hearing prep, hearing level issues, and advocacy at the AC level. Integrated into some of our hearing level materials are actions that you should be taking post-hearing in certain circumstances. The overwhelming focus of the in person aspect of this training will be on VE cross-examination and what to do after the hearing once you have done such a VE cross.

On a fundamental level, this training will not help unless you **want to get better**. It does not matter why, but you must be personally committed to getting better. If you are not, then all the training in the world will not do a damn thing. One great reason to want to get better is that no matter how annoying some of our clients are at times, they are almost all amongst the most vulnerable and desperate human beings in our society. They need you to be better.

We encourage questions throughout the presentation.

Up front, here is a short-hand list of the most common mistakes reps make:

1) Just trying to win the case instead of building in appeals.
2) Not crossing the VE in a meaningful way.
3) Not asking the "none beyond" question when a VE has identified jobs in response to any ALJ hypo.
4) Making unnecessary concessions.
5) Not asking whether disabling opinions preclude all full-time competitive work.
6) Writing long letters to ALJs or the AC.

In one way or another we will address at various points in this presentation how to avoid all of these mistakes.

II. PRE-HEARING PREPARATION

A. Get Third-Party Witness Statements

One of the easiest things you can do to help build appeals into your cases is to get third party witness statements from people who know the claimant. These third party witness statements should be completed on SSA's form 3380 which you can find as a PDF on Google. You should help guide the people completing these forms to focus on those things which are critical to winning the case. They should largely ignore what the form asks for and focus only on those things which make the claimant appear disabled.

Such written submissions may help you to win your case in the first instance. They often humanize the claimant and give some flavor to the daily struggles our clients face; a cold medical record often simply cannot do that. Overall, there is very little downside to pursuing this course of action.

However, that is not the main reason we want you to get these witness statements. Rather this is an issue about building in an appeal and not necessarily about winning the case. Of course there are cases where such witness statements or live testimony can be crucial or even outcome-determinative. Getting witness statements is one of those things that lets you do both parts of your job (fighting to win and building an appeal) at the same time.

How do third party witness statements on SSA's own form help to build in an appeal? In many circuits, the federal courts have held that it is legal error warranting remand for an ALJ to fail to address the statements of third-party witnesses. In addition, SSR 06-03p, 2006 WL 2329939 *4 provides that "the Act requires [the Agency] to consider all of the available evidence in the individual's case record in every case." In the vast majority of cases, and contrary to Agency policy, ALJs will fail to address written testimonial submissions from individuals who know the claimant. By submitting such written statements, you are building

in a potential appeal issue if you do not prevail before the ALJ. While such an issue standing alone may not be enough, it certainly tends to amplify any other errors of omission that may be present in an ALJ's decision.

Why do we ask that you get these third party witness statements completed on SSA's own form? Because it helps us should we eventually need to pursue a federal court appeal. What we mean by this is that we can credibly argue that because these statements are on SSA's own forms that the Agency solicited this information itself and then failed to address it. Instead of it being merely an issue of evidence which was not addressed, we have now transformed it into an issue of evidence which the Agency itself sought out and then failed to address. The fact that SSA solicits this information will make the failure to address argument far more compelling.

B. Do Not Give Away Issues in Your Pre-Hearing Memos

If you are required to do a pre-hearing memo for a particular judge or you do it as a matter of course, do not give away issues when you do not need to do so. For example, perhaps you have a case where your theory is purely step 5 and that is your focus. In addressing the listings in your memo, there is no need to say "The claimant does not meet a listing." Sometimes you can miss stuff or things become more clear later on and meeting or equaling a listing may become possible. It is far better to say "The claimant is not making a specific listings argument at this time, but all applicable listings should be considered." This language gets the same thing done, but without giving away an issue that might be useful on appeal later on.

C. Past Relevant Work (PRW)

We are seeing an increasing number of denials at step 4 and so you need to be more prepared on these issues than in the past. The first part of being ready on PRW issues is to go through the claimant's earnings history and SSA-3369. In

fact, if no SSA-3369 has been completed, it may be helpful to you to get one done (or corrected) prior to the hearing. Remember that all prior work is not PRW. Work must have been done at an SGA level and within the past 15 years and done for long enough for the individual to have learned it before it can be considered PRW. Many times you will have VEs erroneously testifying that prior work is PRW even though it was not at an SGA level. This is because SSA is increasingly not providing the entire file to the VE for review. It may be necessary if a VE testifies that something is PRW to cross-examine the VE to confirm that they are unaware if the job was performed at an SGA level.

The other crucial pre-hearing PRW issue is to make sure your client is ready to testify accurately. Hopefully you already prepared an accurate SSA-3369 that you can go over with the claimant again right before the hearing. Do not be afraid to tell them what they said previously. Be fully prepared if you are going to be explaining away any inconsistencies with any prior SSA-3369 that got into the record earlier. One crucial thing to remind claimants of is the heaviest weight lifted issue. This needs to be made extremely clear in witness preparation. This is not the heaviest weight they usually lifted. Rather it is the heaviest weight they ever had to lift at that job, even if it was on only a single occasion in their 30 year career. The most avoidable losses are cases where you would have won had the claimant testified that the job they did as actually performed is the same as it is generally performed. However, due to confusion they testify about an inaccurate maximum lifting or stand/walk requirement and what was a solid grid out is now a step 4 loss. That should never happen if you prepare properly.

In cases where you have a strong chance at a grid out because the claimant is 50+, the entire case may come down to the PRW determination. Prior to the hearing you should have specific DOT codes identified for all of the PRW the claimant performed. You should be prepared to contest any VE testimony that is harmfully inconsistent with what you believe the PRW to be. You should also have several theories as to why PRW cannot be performed as actually performed and as generally performed. Do not put all of your eggs in one basket.

<u>THE MOST IMPORTANT ASPECT OF PRW ISSUES IS TO KNOW THE COMPOSITE JOB RULE, WHICH WE WILL DISCUSS BELOW IN ONE PART OF THE VE CROSS-EXAMINATION SECTIONS. WHEN FILLING OUT THE SSA-3369 WORK HISTORY FORMS FOR ANYONE NEAR 50 YEARS OF AGE OR OLDER, THINK OF ONLY ONE THING: HOW DO I MAKE EVERY JOB A COMPOSITE JOB?</u>

D. 4 Specific Traps You Need to Help Your Clients to Avoid

1. <u>"Because my lawyer told me to..."</u>

Affirmatively tell your clients that they should never ever respond at a hearing "Because my lawyer told me to..." You should inform them that their conversations with you and your staff are all privileged and if they start to discuss such conversations they may lose that privilege. Very simply tell them this: "You are not to discuss any conversations you have had with me or any member of our company. These discussions are confidential and it is in your best interests to keep them that way." There is an issue that this privilege may not extend to non-attorney reps, but it is still the right thing to do to let your clients know not to say such a dumb statement.

2. <u>Never say 10!!!!!!!!!!!!!!!!!</u>

You do not want to inappropriately "coach" witnesses. However, there are some common roadblocks that you should be directly preparing them for. When a judge asks how bad their pain, fatigue, depression, anxiety, etc. are on a scale of 1 to 10, the ALJ is not trying to help them. The ALJ is trying to hurt them. The ALJ **<u>WANTS</u>** the claimant to say 10 because then there is an easily justified adverse credibility finding built in. Here is what you can say to your clients: "Because you have not been in the hospital every single day for the past 2 years, you cannot say 10 when the judge asks you this question. I know it may feel like a 10 some days, but if you did not stay in the hospital every single day for the past 2 years, the

judge will likely say that you are lying. So tell the truth. Because you have not been in the hospital every single day for the past few years, do not say 10 because that is not the truth. You have an obligation to tell the truth always."

3. Sitting and standing during the hearing

Again, inappropriate "coaching" of witnesses is impermissible. However, claimants do need to be prepared on the question of how long they can sit. ALJs LOVE when clients say they can only sit for 5 minutes before they are uncomfortable and then they remain seated throughout a 1 hour hearing. That leads to an easy denial. Now many clients are in pain at the end of those 5 minutes, but because they are in front of a judge they would not feel it is appropriate to just stand up. You need to affirmatively tell the client that they have an obligation to tell the truth. Yet they need to know that if they say they can remain seated only 5 minutes and then remain seated the whole hearing, then they have already lost. The simplest way to say it: "whatever you say, you better do at the hearing. If you say 'I can only sit for 30 minutes at a time' and we are at the hearing for an hour then you have to completely come out of your seat and stand upright at least 2 times. If you are not going to do that then tell the judge that in fact you can sit for an hour at a time. You have to tell the truth."

4. This ain't funny so don't you dare laugh...

It is often a good idea to tell clients, not to laugh, chuckle or be friendly at a hearing. ALJs generally believe that such actions are impossible for the "truly disabled." Avoid this problem ahead of time.

E. A Hidden "Grid Rule"

If you represent individuals who do not speak English then the following tip can be very useful. Most ALJs believe that if a non-English speaking claimant has performed semi-skilled or skilled PRW then they lose the 5 year benefit that non-

English speakers are granted under the grids. However, this is not so. You have a strategic choice as to whether to raise this issue pre or post hearing. We would generally advise you to raise it pre-hearing. However, to fully lay out the specific legal authority for the point we are making here, included below in an excerpt from a post-hearing letter relying upon the hidden "grid rule":

> **An award of benefits is required here under 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.00(h)(1).**
>
> This regulatory provision hereinafter will be referred to as Rule 201.00(h)(1). We will make additional points and preserve other issues, but the simple fact is that an award under Rule 201.00(h)(1) cannot be avoided here. Therefore, all of the additional points we make are in the nature of alternative arguments.
>
> Rule 201.00(h)(1) provides that an individual with the following characteristics must be found disabled:
>
> (i) a restriction to sedentary work;
>
> (ii) an unskilled work history **"OR NO TRANSFERABLE SKILLS;"**
>
> (iii) no PRW or can no longer perform past relevant work; and
>
> (iv) an inability to communicate in English.
>
> Ms. XXXXXXXXXXX is:
>
> i) limited to sedentary work per the post-hearing consultative exam and Your Honor's hypothetical questions;
>
> ii) at the very least without transferable skills (although we believe there is no PRW or at the very least that work was not actually semi-skilled in reality);
>
> iii) incapable of performing her prior medium or light job (again we do not agree there was PRW); and

> iv) unable to communicate in English (as Your Honor noted on the record several times).
>
> We do not believe the claimant has any PRW and that even if she did, it was unskilled in that she did not acquire any marketable skills. But even if it were assumed for the sake of argument that she did have semi-skilled PRW, a finding of disability is still required as a matter of law. Your Honor appeared to believe that grid rule 201.17 could not be applied due to the presence of semiskilled PRW. **Irrespective of grid rule 201.17, Rule 201.00(h)(1) requires a finding of disability, even if there were semi-skilled PRW because the claimant is no longer capable of her PRW and there is no evidence of transferable skills.** Your hypothetical precluded more than simple, unskilled work and in any event the VE did not identify any transferable skills. Rule 201.00(h)(1) therefore controls the outcome of this case and mandates a finding of disability. The fact that the claimant might be capable of the sedentary, unskilled jobs identified by the VE is irrelevant as a matter of law. Rule 201.00(h)(1) would still mandate an award of benefits.

The alternative argument in that case based on grid rule 201.17 was as follows:

> We will again assume for the sake of argument that there is PRW here and that it was semi-skilled (even though this is not so). Even if that were true, the claimant is still disabled under grid rule 201.17. Again, Your Honor limited the claimant to unskilled, sedentary work. 20 C.F.R. §§ 404.1565(a), 416.965(a) provide that "If you cannot use your skills in other skilled work or semi-skilled work, we will consider your work background the same as unskilled." Further, SSR 82-41 states that "The table rules in Appendix 2 are consistent with the provisions regarding skills because the same conclusion is directed for individuals with an unskilled work background and for those with a skilled or semi-skilled work background whose skills are not transferable." Therefore, even if Rule 201.00(h)(1) were ignored, the combined effects of grid rule 201.17, 20 C.F.R. §§ 404.1565(a), 416.965(a), and SSR 82-41 would require an award of benefits here.

Because we are talking about language let's slip in one extra nugget. On so many issues where the regulations or rulings are unclear, the POMS or the HALLEX have the answer. A perfect example is with respect to the meaning of "unable to communicate in English." Here is a summary of the relevant law:

> The Agency's POMS explain what the Commissioner means by "unable to communicate in English." The POMS of course are binding on all Agency adjudicators, including ALJs. SSR 13-2p, 2013 WL 621536, *7. This crucial regulatory term is defined within the POMS in the disjunctive. In other words, a claimant is "unable to communicate in English" if he has:
>
> 1) an inability to read English; **OR**
> 2) an inability to write English; **OR**
> 3) an inability to speak English; **OR**
> 4) an inability to understand English.
>
> POMS DI 25001.001(B)(17). The POMS are absolutely explicit in providing that "any combination" of the above 4 criteria requires a finding that the claimant is "unable to communicate in English." Id.

Most ALJs do not know the law on this point. They go with some gut feel or their perception that the client answered a question before it was fully translated. Don't be shy to state what the law is on the record. Once you do, do not back down. If an ALJ is ever trying to force you to say something and you refuse to and they are asking why, here is a fool proof reply: "Because it is not in my client's interests Your Honor." Why counsel? "Well Your Honor that would require me to get into attorney-work product issues which are privileged. In any event, the regulations nowhere require a representative to stipulate to anything in this non-adversarial process."

II. **AT THE HEARING**

We will break this section down into 3 crucial components: a) the ALJ; b) the VE; and c) the medical expert (ME). We are not going to spend time on how to examine your own witness so that we can concentrate on these other areas where so many cases are lost or effective appeal issues are not developed properly. However, often the key thing to get out of your client's own testimony is anecdotes. Little impactful stories about functional problems they have or support

they need to do certain things often do more to prove a case than hundreds of pages of medical evidence.

A. **ALJs**

As you may have picked up by now, we are not comprehensively reviewing every possible aspect of hearing preparation or hearings. Instead, we are focusing on some "nuggets" that can improve the quality of your advocacy on the margins. Our focus in the ALJ section will mostly be on problems to avoid.

1. Failing to document requests either orally on the record or in writing.

Sometimes much of what happens at a "hearing" is actually off the record. An ALJ may ask you to come into the hearing room alone beforehand in order to have an off the record discussion. Sometimes the hearing begins but the audio recording may not have been started and the proceedings need to begin again. Some ALJs like to have a post-hearing off the record discussion. It is important to remember that while these discussions are significant, there will be no record of them whatsoever to point to if your client's claim is denied. If during one of these discussions you requested something, you will never be able to prove that you did so later on.

In order to avoid this mistake, you should document any requests to the ALJ affirmatively on the record or in writing. Doing both of course is the safest option of all. Making a request in writing before a hearing, highlighting that request orally at the hearing, and then documenting the request again in a post-hearing letter is helping to build your record. There are two advantages to this approach.

First, generally you make it much more likely for the ALJ to grant your request. ALJs are extremely busy with large caseloads. They may forget or ignore a single request. But a request made in writing, orally reiterated at the hearing, and

documented again in a post-hearing letter increases the chances dramatically that the ALJ might recognize and respond to your request.

Second, you are building your case for an appeal, either to the Appeals Council or the district court level. By repeatedly documenting your request you are showing subsequent reviewers that you were persistent in pursuing the issue. At the same time, you are making the ALJ look bad if the request is ultimately totally ignored.

At the very least documenting awkward requests that you would rather not do orally can be made in a pre-hearing letter and you have still preserved the issue effectively.

2. Avoid unnecessary concessions.

We like giving the APPEARANCE of being reasonable always (even when we are not). One way to do that when the ALJ is speechifying and wanting concessions from you while ripping your client's case is to nod and make direct eye contact. The ALJ has the PERCEPTION that you have agreed to certain problems or conceded certain matters when you haven't. And the RECORD afterwards will never show that you agreed to anything.

3. Handling weak cases with bad ALJs.

Assume you have kind of a weak case where you think you will lose. However, you know that your client will testify in both a compelling and a credible way. In such cases, your opening and closing can simply be highlighting a couple favorable pieces of evidence, acknowledging a couple of bad pieces, and then saying "but your Honor I think this case really comes down to an issue of credibility. I think you will have to listen to the testimony, get a feel for this client's condition, and then we would leave it in your discretion to decide whether that testimony is genuine or not." They eat this empowerment up, especially the

bad ALJs. Obviously you are in a tough spot to begin with, but it is amazing how many wins you can get with this approach in bad cases.

4. Know the law on DAA even though the ALJ doesn't.

ALJs generally do not know the law on DAA cases. To the extent that they do, they usually intentionally refuse to adhere to the law. We are not advocating anything specific here, but rather we want to push you to make sure you know the law yourself. Below is an excerpt from a brief that sums up key points pertaining to DAA law. For a more comprehensive review, you should closely read SSR 13-2p. Although claimants reps have suggested that this ruling is problematic, we view it as doing nothing to undercut key arguments that we made previously, while at the same time providing new areas for attack. Here is a brief summary excerpt:

> If an individual would not be disabled but for drug or alcohol abuse then such abuse is a "material" factor in the disability finding and an adjudicator at SSA must find that individual not disabled. 20 C.F.R. § 416.935. However, if the individual would continue to be disabled irrespective of their drug and alcohol abuse, then such abuse is not "material" to the finding of disability and the SSA adjudicator must find that individual disabled. Id. Thus, whether an individual is actively using drugs or alcohol has no direct bearing on the materiality determination whatsoever. In other words, the ongoing use of drugs or alcohol cannot inherently preclude an award of benefits. In SSR 13-2p, SSA confirmed its longstanding policy that abstinence is not required to receive disability benefits. That ruling also confirmed longstanding Agency policy that when drug or alcohol abuse is actually "material," the sequential evaluation process must be completed a second time. SSR 13-2p. Section 7.d of SSR 13-2p confirms that if you cannot tell whether an individual would still be disabled if they stopped abusing drugs and alcohol then an award of benefits is required.

B. **Vocational Expert Cross-Examination**

There are 4 basic questions that you should ask at every hearing where an ALJ poses a hypothetical to a VE and the VE responds with jobs. We recommend getting these less confrontational issues out of the way up front before you go into some of the more potentially contested cross issues. In other words, get what you need up front from the VE before they potentially become adversarial.

Here are those questions in order:

1. Ask the "magic question" in a VERY leading manner

"It is correct that in responding to the ALJ's hypothetical questions you did not consider any factors or limitations beyond those identified by the ALJ, correct?"

We have never seen a VE say no to this question. Why is it important to ask? Because it helps build an appeal. For example, if the ALJ's hypothetical questions left out a functional limitation or did not include the fact that the claimant is over 55, or illiterate, you have now established a clear factual record that these additional limitations or factors were not considered. Should an appeal to district court be necessary, it becomes much tougher for SSA to argue harmless error or that these missing factors or limitations were somehow considered. There is strong case law in many circuits holding that a denial of benefits premised upon a defective hypothetical question cannot be sustained. This question also undercuts harmful case law which tends to allow a presumption that a VE considered a limitation even if it was not included in the hypothetical question.

There is one further point which is noteworthy in this context. Many ALJs believe that the Psychiatric Review Technique assessment of the four broad functional categories of (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace, and (4) episodes of decompensation is actually an RFC finding. It is not, as SSR 96-8p explicitly states. Remember that at step five,

consistent with the regulations, an ALJ may only consider RFC along with the vocational factors. See 404.1520(g)(1) and 404.1560(c)(2). Because a PRT is absolutely not an RFC as a matter of law, any hypothetical premised upon a PRT instead of a proper RFC is inherently flawed. By pinning the VE down that nothing was considered beyond that specifically identified by the ALJ, you have again cut down any potential attempts by SSA to elide this fatal flaw.

It is important not to add on limitations to an ALJ's hypothetical question thoughtlessly. Through your own experience or from that of more experienced colleagues, there should be very few instances in your entire career where you are unsure as to whether a certain set of limitations will preclude all work or not. It is a great folly to senselessly add on limitations that the ALJ missed. For example, assume the ALJ obviously just posed a hypo based on exhibit 5F and you know that exhibit 5F does not help you. Assume also that exhibit 5F contains limitations 1 through 7. However, the ALJ's hypo includes only limitations 1 through 4. You should **NOT** pose an additional hypo to the ALJ including limits 5 through 7 because you know that those limitations will not eliminate all jobs. All you have done by asking this ill considered follow up question is to help the ALJ write a better denial. While you and I and the ALJ and the VE may be aware that the missing limitations make no difference, the AC can surprise you on such issues and federal courts will often find that the omission of any relevant limitation makes the entire hypothetical question defective. The point is do not fill in the missing limitations unless you are certain they will eliminate all jobs.

2. Get DOT numbers for every jobs discussed

Demand DOT numbers for ALL jobs identified by the VE, even PRW. It becomes incredibly difficult after the fact to nail down what job the VE was referencing. Rather than engage in imprecise and very labor-intensive after-the-fact speculation, it is much better to get the specific jobs and their DOT numbers up front. It helps for any subsequent appeals and for post-hearing objection letters as well.

Some representatives have the perception that it is somehow an error by the VE or the ALJ to fail to identify DOT numbers. That is not so. Never fail to ask for DOT numbers when jobs are identified in response to an ALJ hypo.

3. <u>Make sure you get clean VE testimony indicating that favorable opinions in the record do indeed preclude any full-time competitive work</u>

Why important: We might know and the ALJ might know that certain functional limitations are obviously work-preclusive, but most courts will NOT. Get a clean record. Even better, if the VE notes that certain limitations are work-preclusive, they might be included in the opinion of a medical source that the ALJ later tries to rely on. You then have a built in appeal issue. I am amazed how often reps work so hard to get a medical opinion and then never ask the VE if that opinion precludes work.

Sometimes ALJs do not let you use favorable CE functional assessment forms. "I do not know what 'marked' means counselor so you cannot ask that question." Response? "Your Honor are you saying that the Agency pays for and demands that its own consultative examiners fill out forms which are vocationally irrelevant?" Now the ALJ will not let you go ahead, but you have made your point. Once the ALJ still says NO, never forget to make your objection with an offer of proof/proffer. "Well your honor I object and had you let me offer this question to the VE I believe they would have stated that all competitive full-time work was eliminated." (This works for GAF questions as well). When making offers of proof/proffers, remember that what you say will be accepted as true for purposes of appellate review. It is just like in a real jury trial. This is a crucial point to understand and remember.

At this point you are in a good spot. Go on and defined marked (or even moderate) in a way that you know will eliminate all jobs. "Well then let me ask this. If an individual were unable to perform even simple, repetitive tasks at least

25% of the time that would preclude all full-time competitive work, correct?" You have done several good things here. First, you made a strong point that it is absurd for the Agency to seek vocationally irrelevant information from its own sources. Second, you did not jump into defining marked, you made the ALJ force you to do it first, which is where you want to be for appellate purposes. Third, the only VE testimony that will in any way specifically address the functional limitation you want to address will result in a reply of no jobs. Fourth, there is a nice appellate issue here. If the ALJ wanted to know specifically what that source (usually the Agency's own source) meant by marked then he should have re-contacted them.

Extra nugget: some VEs will say "seriously limited but not precluded" in whatever crucial functional area is not disabling. Here is how you combat that. Now you play the game the ALJ in the above scenario had played. "You said seriously limited but not precluded was not disabling, but that is not sufficiently functional for you to effectively respond. So let me instead put it this way, if 'seriously limited but not precluded' means the individual cannot do that activity 80% of the time then that would preclude all full-time competitive work, correct? And if 'seriously limited but not precluded' means the activity is impossible even up to one third of the time that would preclude competitive work, correct? So the issue would be what that source meant in a specific functional way when they used that terminology Judge." You again have set up a potential re-contacting issue.

You may think after reading the above two scenarios that our position is inconsistent. That is incorrect. Our position is absolutely consistent: act in the client's interests. If "seriously limited but not precluded" being undefined helps your case then you take that route. If "seriously limited but not precluded" being undefined hurts your case then you take a different route. There are often no absolute truths to many questions in the area of disability. The best answer is the one which helps your client win. Avoid looking for absolute answers. For sure SSA's ALJs are often playing a game. You need to learn how to play it better than they do. The above is one of the ways in which you can do that.

4. Ask what sections of the record the VE reviewed before testifying

SSA used to provide the entire record to the VE and now they provide only some parts of the record. Why does that matter? First, it helps you get around adverse case law where courts have given extra credence to the VE testimony because the VE had reviewed the entire record. You have now established that they didn't. Second, it helps with step 4 issues if some of the identified jobs did not reach an SGA level. At that point, SSA cannot rely upon the VE's testimony to show it was PRW because the VE would have no idea whether the job was performed as an SGA level. It is often good to ask this additional question where PRW and whether it was SGA might be an issue: You do not know whether that prior job was performed at an SGA level, correct?

5. Various specific VE cross-examination techniques

a. CROSS ON REASONING LEVEL

This is an extremely useful tool to have on hand. This cross-examination is to be used in mental cases where the ALJ has thrown around the words "simple" or "one to two step tasks." First, we will set forth how the DOT describes the 3 relevant reasoning levels. Then we will give you specific questions to ask the VE. Finally, we will provide you with a short post-hearing objection letter based on the VE cross on reasoning level.

Case law on reasoning level is all over the place due mostly to one single fact: very little or nothing was done by the rep at the hearing and the issue is being addressed for the first time in district court. By raising a reasoning level issue in a legitimate and specific way at the hearing and shortly after in a post-hearing brief, you can often distinguish your case from prior harmful federal court decisions addressing reasoning level conflicts where nothing was done at all on the issue until the case reached court. Even where you have favorable federal court

decisions that you are relying upon, getting useful VE testimony makes any arguments that much stronger.

The idea of this presentation is to suggest that you make reasoning level an issue from the outset and to obtain testimony from SSA's own VE to help you make your argument. That VE testimony can by itself be sufficient to provide you with a basis for arguing that your case is distinguishable from any adverse decisions that OGC might seek to rely upon later on in federal court.

Below are the text of the bottom 3 reasoning levels in DOT:

1-Apply common sense understanding to carry out simple 1 or 2 step instructions. Deal with standardized situations with occasional or no variables in or from these situations encountered on the job.

2-Apply common sense understanding to carry out DETAILED but uninvolved written or oral instructions. Deal with problems involving a few concrete variables in or from standardized situations.

3-Apply commonsense understanding to carry out instructions furnished in written, oral or diagrammatic form. Deal with problems involving several concrete variables in or from standardized situations.

Here are the "reasoning level" VE cross questions to ask:

1) It would be correct to say that the ALJ's limitation to simple X, simple Y, and simple Z would preclude the ability to carry out **DETAILED** written and oral instructions, correct?

There needs to be emphasis in your voice when saying **DETAILED.** If so, the VE will rarely fight your premise. Ask a few meaningless questions in between about numbers or whatever, then circle back to the following questions below.

2) Reasoning level & SVP are independent and distinct aspects of the DOT, correct?

If you get any push back here, be very aggressive. "Well they are listed separately for every single job in the entire DOT aren't they?" "They are defined differently in the DOT aren't they?"

3) According to Appendix C of the DOT and consistent with the Revised Handbook for Analyzing Jobs, it is true that SVP refers strictly to the amount of time it takes to learn a job?

4) According to Appendix C of the DOT and consistent with the Revised Handbook for Analyzing Jobs, the GED reasoning scale reflects the aspects of education (both formal and informal) which are required for satisfactory job performance and which contribute to the person's reasoning development and ability to follow instructions, correct?

5) Optional additional question: it is correct that some jobs are high skill and low reasoning and vice versa, correct?

THE ENTIRE POINT OF THIS LINE OF QUESTIONING IS TO SUBMIT A POST-HEARING LETTER STATING THAT VE TESTIMONY IN ITS **ENTIRETY** PRECLUDED ALL JOBS. At the very least a conflict has arisen which must be resolved under 00-4p. This reasoning level cross knocks out a lot of the commons jobs we hear about from VEs including the dreaded "surveillance system monitor." Immediately below is text from a post-hearing objection letter based on this reasoning level cross:

> As to the VE, testimony we have the following objections. The VE testified that the limitations to simple and repetitive tasks identified by your Honor would preclude the ability to carry out DETAILED written and oral instructions. All of the jobs identified by the VE (509.686-018; 920.587-018; 361.684-014) were reasoning level 2 jobs which require the ability to carry out **DETAILED** written

or oral instructions. The normal Agency response is to then discuss SVP. But in this case there is not just the text of Appendix C of the DOT to contradict any such argument. Rather, there is the testimony of SSA's own VE that reasoning level and SVP are independent and distinct aspects of the DOT. The VE also noted that SVP refers strictly to the amount of time it takes to learn a job whereas the GED reasoning scale reflects the mental prerequisites for performing jobs. SVP and reasoning are distinct components of the DOT, as the Agency's own expert testified. Thus, the Agency cannot attempt to blur SVP and reasoning level because the testimony of its own expert will not permit that blurring.

In short, the jobs the VE had originally believed were possible are actually impossible based upon the ENTIRETY of the VE's testimony at the hearing. At the very least, the claimant has established an affirmative and specific record here to show a reasoning level inconsistency. In this respect it is particularly noteworthy that the VE claimed that she had identified only jobs that require 1-2 step tasks. However, her testimony is inaccurate as all of the jobs require reasoning level 2 abilities and it is only reasoning level 1 jobs that involve 1-2 step tasks. To the extent that the court would attempt to rely upon the VE's testimony as to the 3 jobs mentioned, we explicitly object and request a ruling on the issue in the ALJ decision, as the HALLEX makes absolutely mandatory.

Or here is an alternative:

As to the VW testimony, we object to it and state that it cannot be used to satisfy SSA's step 5 burden here. Reasoning level 2 jobs, by definition, require the ability to carry out detailed written and oral instructions. The VW admitted that the limitations to routine and routine tasks identified by your Honor would preclude the ability to carry out DETAILED written and oral instructions. Thus, reasoning level 2 jobs here are eliminated. The call out operator (237.367-014) job and the order clerk job (209.567-014) identified by the VW are actually reasoning level 3 positions. Thus, they require a level of reasoning far beyond even reasoning level 2, and therefore must be eliminated here. As a result, all of the jobs the VW had originally testified were possible were actually not when one listens to the entirety of the VW testimony.

The normal Agency response is often to then discuss SVP. But in this case there is not just the text of Appendix C of the DOT to contradict any such argument.

> Rather, there is the testimony of SSA's own VW that reasoning level and SVP are independent and distinct aspects of the DOT. The VW also noted that SVP refers strictly to the amount of time it takes to learn a job, whereas the GED reasoning scale reflects the mental prerequisites for performing jobs. SVP and reasoning are distinct components of the DOT, as the Agency's own expert testified. Thus, the Agency cannot attempt to blur SVP and reasoning level because the testimony of its own expert will not permit that blurring. In short, the jobs the VW had originally believed were possible are not all actually possible based upon the ENTIRETY of the VW's testimony at the hearing. At the very least, we have established an affirmative and specific record here to show a reasoning level inconsistency between the VW's testimony and the contents of the DOT. To the extent that the Court would attempt to rely upon the VW's testimony as to these two jobs to meet SSA's step 5 burden, we explicitly object and request a ruling on the issue in the ALJ decision, consistent with HALLEX I-2-5-55.
>
> In addition, SSA's own policy statement (see attached Exhibit A) on this issue indicates that reasoning level 3 jobs are inappropriate where there is a limitation to **<u>EITHER</u>** simple, routine, **<u>OR</u>** unskilled work. Given that Your Honor limited the claimant to unskilled, routine work, these two jobs must be eliminated from consideration under SSA policy.

A reasoning level conflict is always stronger where the reasoning level of the jobs at issue is R3 or higher. But you can get ALJs to eliminate even R2 jobs. Most importantly, this reasoning level issue can become part of your arsenal of weapons that you use to make a fully favorable decision the path of least resistance. In this respect, a reasoning level cross does the two things you should always be trying to do: win now and build in an appeal just in case.

b. MAX RFC QUESTIONS

This cross is for physical cases or cases where you a limitation in terms of public contact. The concept behind it is to get the VE to accidentally admit that the identified jobs would sometimes require more physical activity than the ALJ's RFC/hypo actually permitted. In the end, you will have effectively knocked out all of the jobs when this cross works.

Here are the questions:

1) As a general proposition, the demands of a job can vary from day to day depending on the employer's needs or the circumstances of the day correct? (IF NO, rub their faces in it with the extra question below):

> IF NO:
> So it is your testimony that these jobs require exactly the same functions day in and day out and never change?

2) Some days the job would be LESS physically demanding than generally performed correct?

3) And some days the job would be MORE physically demanding than generally performed correct?

When this cross goes well, you have effectively established that all of the jobs identified by the ALJ would in fact require more than the ALJ's RFC permits.

c. CROSS ON TRANSFERABILITY

If you have a case that comes down to the issue of transferability of skills, there are several questions you can ask a VE in an attempt to knock those jobs out. We will set forth those questions and then discuss the purpose of each question one by one.

1) What other skills are required to perform the jobs you just identified?

The idea here is that you are establishing that the jobs at issue require additional skills beyond those which your client possesses from PRW. Accordingly, those jobs are actually precluded for your client.

2) It is correct that SSR 82-41 and the Revised Handbook for analyzing jobs describe SSA's method for determining transferability of skills, correct?

This is crucial for setting up arguments we like to make on transferability regarding work field codes; MPSMS codes; and industry codes. Why we want that and what we do is not important for you to know. What is important is that you get an assent to this question during your cross of the VE. This question is akin to the first question above. The first question seals a win at the admin level. This second question seals a win at the federal court level.

3) In offering your testimony on transferability, what consideration had you given to the fact that the claimant has not worked since X date?

Under SSA rules, a gap in working may affect the possibility of transferability. This is generally a valid consideration for all jobs, but particularly important for jobs where the relevant technology may have changed significantly since this claimant last performed such work.

4) THIS IS CLUSTER OF QUESTIONS ON THE SAME TOPIC: You just testified that you are familiar with SSA's rules and procedures in general, correct? What are SSA's rules with regard to the transferability of skills? What are SSA's special rules for transferability at 55+? What are SSA's special rules for transferability when 60+?

VEs are very rarely able to effectively answer these questions. (You do NOT need to know the answers, nor do you need to answer the VE's questions. They are there to answer your questions, not the other way around. Further, they need to show they are the expert; the law does not require you to prove you are expert). Why is this important? Because you have now effectively undermined the VE's supposed expertise on the issue of transferability.

Below is text from a post-hearing objection letter that was formulated on the basis of some of the above VE cross on transferability questions:

> The VE's testimony should not be accepted because he did not actually understand SSA's transferability rules. His testimony that he was familiar with and understood these rules is simply not accurate. In addressing the transferability issue, the VE testified that under Agency policy there is no difference between a 55 year old individual and an individual who is 60 years old or older. The only exception he noted was that there is some distinction with respect to sedentary versus light work for individuals of such ages. The VE is wrong. Rules 202.00(c) and 202.00(f) show that the VE is wrong. Both of those regulations show that transferability of skills is more difficult for an individual over 60 than for an individual over 55. The distinction is not between light and sedentary exertions, as the VE wrongly maintained, because both rules address individuals with a light exertional capacity. The key difference is the age difference. That the VE was unaware of this absolutely crucial age distinction under SSA transferability policy for individuals who are 60+ versus 55+ calls into question the entirety of the VE's transferability testimony. Quite simply, the VE did not have an accurate understanding of the rules with regard to transferability.

5) SSA's rules consider being over 55 to be an extremely adverse vocational factor and an important adverse factor in determining transferability of skills. What specific consideration have you given to this SSA rule when you offered your testimony on transferability?

VEs will generally answer this question by saying that they gave it no specific consideration at all. At this point you have potentially set up a good issue to contest the VE's testimony in a post-hearing letter if they are old enough to take advantage of these SSA rules.

6) What do you believe "readily transferable" means?

Generally, VEs cannot answer this question. They fumble and usually define the words by repeating the words. Once again, you have undermined the VE's purported expertise.

Why does this matter? Because mere transferability is not sufficient to support a denial when you are dealing with someone 55 and over. Nor, arguably, is transferability to a singe job enough to show a "significant range." Instead, the Commissioner must present evidence that the claimant has skills that can be "readily transferred to a significant range of other skilled or semi-skilled work." 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rules 202.00(c). You can attack in a post-hearing objection letter the absence of competent VE testimony on the issue of ready transferability and on the lack of a significant range. Here is an example of the lack of a significant range type argument:

> Even if one were to accept the VE's testimony despite all of the foregoing, an award of benefits would still be required. The existence of only one or two positions and a seriously decreased number of jobs even within those two limited positions does not evince "readily transferable skills" to a "significant range" of other skilled or semi-skilled work. Instead, it represents a tremendous diminution of the skilled and semi-skilled occupational bases. Thus, even if one credited the VE's testimony an award would still be required by Rule 202.00(c).

d. SURVEILLANCE SYSTEM MONITOR CROSS

The reasoning level cross above should help you eliminate the SSM position. But in case you need some additional ammo, some of the questions below might present additional ways to eliminate this pesky job.

1) When was the job of SSM in the DOT last updated?

Just so you know the DLU (date last updated) is 1986. This is an important fact to establish that any information the VE gives on this job is presumptively out of date. We make this point through some of our additional cross below. In addition, this question subtlety pushes the VE to rely on more current information, which is the EXACT trap we want them to wander into, as discussed more fully below.

2) The DOT actually refers to that position of surveillance system monitor 379.367-010 as "surveillance system-monitor GOVERNMENT SERVICE," correct?

This fits in perfectly with the next question, as you will see. If the VE starts on a tangent about casinos and monitoring at malls, we will get to that. But do not allow any testimony like that to deter you from asking the next question. In any event, read the DOT description of this SSM job. It is a government position without question.

3) More specifically, the DOT lists this as a governmental occupation involving monitoring mass public transportation sites. Didn't these jobs convert to the TSA or DHS after the tragedy of September 11th?

The VE is in an awkward position at this point. They will now, if they have not already done so, launch into discussions about casinos and malls. That is what we wanted and we will undermine that with the following series of questions. If instead they try to play games and stick to the DOT, the SOC question you ask

below will nail them because the SOC descriptions have no resemblance at all to the occupation described as a SSM in the DOT.

4) The SOC number for the surveillance system monitor job is 33-9031, correct?

There are a few reasons why we ask this question in exactly this way. First, VEs will often thoughtlessly assent to this leading question. Why is this helpful? Because the SOC lists that job as an SVP 4-6 job. You can find the ONET description at: http://www.onetonline.org/link/summary/33-9031.00 and submit it as an exhibit post-hearing with your objection brief. Your client cannot perform such semi-skilled or skilled work even under the ALJ's hypo. Remember, since the VE has tried to eliminate the problem you have raised about the DOT description no longer reflecting current reality, the VE will want to make the job they are talking about sound current. That fits in nicely with an ONET attack. Second, it avoids the VE claiming that the SOC code is in the 33-9099.00 family.

If the VE will not go along with 33-9031 and instead says 33-9099.02, then just walk them through some of the tasks that ONET lists for that occupation. So this job involves X. And it involves Y. And it involves Z. At that point, you should have enough ammunition through a series of admissions to point out in your post-hearing brief that this job is NOT unskilled.

If the VE instead cites to a generic SOC code like 33-9099.00, you have several points to make. First, you can ask the VE the following: Isn't 33-9099.00 akin to the DOT's "any industry" designation in that it does not correspond to any specific occupation at all? If you get a yes here then you have effectively defeated that "job" because they just admitted that they did not identify a specific job. If you get a no, then your next question is the same no matter what. That second question is: OK, well the only job in that family that I see spelled out with any specificity is 33-9099.02, so I am going to ask you about tasks pertaining to that occupation because it is the only one in this family which the ONET discusses

with any specificity. After saying that, you then go into what we first discussed above about what 33-9099.02 involves.

If you have a VE who is really not qualified at all, they may say they do not know the corresponding SOC code. At that point you object that this purported "expert" is unqualified as they do not know even very basic information that is required of anybody who performs their job. At the very least, they should be required by the Court to research that matter and report back as to the appropriate SOC code for that job.

e. SPRINKLE THE WORD ACCOMMODATE IN YOUR CROSS

In cases involving mental impairments where the number or kind of limitations are a bit more than usual, it can be advantageous to get the VE to agree to the fact that employers are hiring such afflicted individuals with an accommodation. This is also true to an extent with the use of stools or eve sit/stand options. A full frontal statement by you to the VE or ALJ will generate harmful push back. Therefore, it is much better to phrase the question strategically and present the objection later and more fully in a post-hearing brief. Here is the question that we suggest:

The ALJ asked you about an individual who had the following limitations: X, Y, and Z. You are saying that some employers will accommodate these cluster of limitations while others will not, correct?

Why is this important? Because SSA cannot rely upon reasonable accommodation to satisfy its step 5 burden. See SSR 00-1c; see also Poulos v. Comm'r of Soc. Sec., 474 F.3d 88, 95 (3d Cir. 2007) ("We further remind the ALJ that, under the Supreme Court's decision in Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 803, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999), he is not entitled to consider potential accommodation by employers in determining the availability of jobs in the national economy that Appellant can perform."). The temptation might

be to use the words "reasonable accommodation." However, this tends to set off alarm bells and defensiveness by the VE and ALJ. If instead you insert this question almost in passing and say it in a very casual, soft way it can often elicit a very quick yes from the VE and you move on to save the point for your post-hearing objection letter.

f. HOW MANY STEPS?

When you are in a situation where the ALJ has limited the claimant to 1 to 2 step tasks and the VE has identified jobs, you can often effectively attack the VE testimony. Here is the question to ask:

Please explain in detail the entirety of what an individual performing that job has to do in order to complete all of their job duties.

VEs love pretending to be experts. You can often get a very long explanation from them when you ask a question like this, even for the most simple of jobs. This allows you to make an argument in a post-hearing brief akin to the one offered based on the reasoning level cross. Either the entirety of the VE's testimony shows that these jobs are actually precluded, or there is a conflict in the VE's testimony that was not resolved.

g. DAVE TRAVER METHODOLOGY CROSS

We have given you a lot to work with already and some things you can start field testing. Given that fact and the time constraints, we are not going to explore here how you can attack VEs on the numbers of jobs as a general proposition. The truth is that doing this effectively requires a great deal of study. A great place to start is by purchasing Dave Traver's 2 volume set dedicated to cross-examining VEs. The topic is too large and too intense to squeeze into this training and its materials. But if you are curious, search out Traver's materials and start experimenting. Although Dave Traver is a super-sharp guy, we do not recommend

this type of cross and see it as a big waste of time when compared to some of the specific record-based VE crosses that we recommend herein.

h. KNOW & USE THE COMPOSITE JOBS RULE

This subsection is not entirely about cross-examining VEs. In many ways it is merely about filling out the SSA-3369 carefully, making sure your client testifies properly, and only then getting the VE to confirm the obvious. But let's start out by defining the composite jobs rule.

The composite jobs rule is that an ALJ cannot properly issue a PRW step 4 denial on an "as generally performed" basis when a composite job is involved. We will discuss how to make jobs composite jobs below, but at the outset you have to understand the monumental importance of this rule. There are only two ways to deny at step 4: "as generally" or "as actually." The composite jobs rule allows you to take our most dangerous obstacle, "as generally," completely off the table. This rule and using it is the single most important thing you will hear today in terms of generating more wins and more appeals starting right now.

The composite jobs rule is probably one of the most important and yet under-utilized Agency rules. Why does this rule matter so much? First, it matters because if you can eliminate "as generally performed" then the only issue you have left at step 4 is "as actually performed." "As actually performed" can usually be defeated by some quirky, specific thing your client used to do at their PRW (e.g., one time in their career at that job they moved a filing cabinet weighing 100 pounds). Again, if you are paying attention and have prepared on the PRW issue, the quirky, specific thing should be fairly obvious to you. Accordingly, being able to eliminate "as generally performed" is highly strategically beneficial to you. In individuals over 50, eliminating "as generally performed" can be an outcome-determinative issue. Even for individuals under 50, your ALJ may issue a sloppy step 4 denial that you can then effectively be challenged to the AC or federal

court. Again, that is usually only true if you had previously executed on a plan to establish that PRW was actually a composite job.

So how do you establish that PRW was actually a composite job? Again, this goes back to speaking to your client in detail about prior work and nailing down what they specifically did. Your goal is to establish that significant elements of their prior job actually involved the performance of tasks associated with a different DOT job title. Eliciting testimony that the claimant was responsible for performing certain tasks not listed in the DOT description which the VE was referencing is sufficient, but you are on firmer ground when you can nail down that those additional tasks are actually listed under a different DOT job title altogether.

It is extremely common that claimants had to perform certain tasks which are not listed in the DOT description which the VE was relying upon because the DOT is now so terribly outdated. If you push hard enough, it is rare that you will not be able to create a record showing that all PRW actually involved the performance of a composite job.

In terms of VE cross, the only thing you will sometimes need to do is to get the VE to confirm the obvious. In other words, list to the VE work activities your client had to do and merely say "And those tasks are not listed anywhere in the DOT job description that you were saying was the claimant's PRW, correct?" If you get that done, then both the client's testimony and the VE's testimony confirm that the work the claimant used to perform requires the performance of tasks not listed in the DOT description of the job the VE had discussed as PRW. As noted above, it is even better is you can get confirmation from the VE that these additional tasks are actually listed in an entirely different DOT job description. Included below is an excerpt from a winning federal court brief on this issue. The excerpt will explain the rule in more detail and give you a more complete context to understand what you need to do in order to build this issue into your cases.

The composite jobs issue is a real winner. However, if you have not gone out of your way ahead of time to establish that the PRW involves a composite job, and then follow through at the hearing with a specific plan to show that, the issue may not be available to you after the hearing. A simple post-hearing letter stating that the PRW was a composite job because it involved A & B (one DOT job title) but also required X & Y (a second DOT job title) can be the difference between winning and losing. If you merely include a citation to the POMS in that letter and assert that a step 4 "as generally performed" denial is impossible in this case, then you have likely established an excellent record to pursue this issue down the road, if necessary. In many cases, this effective objection may also be the last straw that convinces the ALJ to simply pay the case (especially for those over 50).

Here is an example of a successful composite jobs argument to an ALJ after a hearing:

> Second, in POMS DI 25005.020(B), 2011 WL 4753471, SSA clarified that because composite jobs have no counterpart in the DOT, Agency adjudicators must not evaluate such jobs "at the part of the step 4 considering work 'as generally performed in the national economy.'" In other words, an adjudicator can deny a claim at step 4 where the claimant remains capable of performing a composite job "as actually performed," but an adjudicator is not permitted to make an adverse step 4 finding that the claimant remains capable of performing a composite job "as generally performed." POMS DI 25005.020(B), 2011 WL 4753471. The POMS notes that a "composite job" is one that involves "significant elements of two or more occupations." Id. SSR 13-2p, 2013 WL 621536, *7 makes the POMS binding on this Court. Here, Ms. XXXXXX performed a composite job. Among other points, she had to perform shredding activities regularly and exertionally medium box lifting activities at certain times during the year. The testimony of the VEs and the description of the accounting clerk job in the DOT confirm that these activities are not part of the job of accounting clerk job as described in the DOT. Because the claimant's job as performed involved significant elements that are not generally required for the occupation of accounting clerk a composite job is present in this case. Thus, a denial on the basis of how that job is generally performed is precluded by Agency policy.

We will provide additional examples of composite job rule arguments written in the federal court context below when we discuss effective Appeals Council advocacy.

C. **Medical Expert Cross-Examination**

(Caveat: We rarely encounter medical experts in our administrative practices in Philadelphia and Pittsburgh. As a result, we do not hold ourselves out as having deep experience in this aspect of administrative practice. We are aware of course that a well prepared representative may be able to change an ME's opinion about whether someone meets a particular Listing and may obtain a different opinion based on reference to evidence in the record that the ME may have overlooked, etc. Other presenters would very likely have much more to say to you on these topics. What we are aiming at in our presentation are some tried and true general approaches to effective ME cross.

1. A PRT is not an RFC (mental cases only).

We touched on this issue earlier and will now discuss it in a bit more depth. At steps two and three of the sequential evaluation process, the ALJ must assess four broad areas of functioning to determine whether a claimant's mental impairments are severe and if they satisfy a listing. See 20 C.F.R. §§ 404.1520a(b)-(e), 416.920a(b)-(e). The four broad areas of functioning are: (1) activities of daily living, (2) social functioning, (3) concentration, persistence, or pace, and (4) episodes of decompensation. The first three areas are rated on a five point scale of none, mild, moderate, marked, and extreme. This analysis is called the PRT or Psychiatric Review Technique.

Many ALJs use their PRT findings as the **entirety** of their RFC finding with respect to mental functional limitations. In particular, they include such PRT findings in their hypothetical questions to vocational experts. This is unquestionably wrong. SSR 96-8p explicitly provides that:

> The adjudicator must remember that the limitations identified in the"paragraph B" and"paragraph C"criteria are not an RFC assessment but are used to rate the severity of mental impairment(s) at steps 2 and 3 of the sequential evaluation process. SSR 96-8p.

SSR 96-8p thus establishes without any ambiguity whatsoever that a PRT is not an RFC assessment. 20 C.F.R. §§ 404.1520(g)(1) and 404.1560(c)(2) provide that the only things which can be properly considered at step five are RFC and the vocational factors (age, education, and work experience). If an ALJ includes PRT findings in his hypothetical question (without also including a proper RFC), then his question to the VE is inherently flawed as a matter of law. Because the question is flawed, any response to it cannot constitute substantial evidence. Again, the only proper considerations at step five are RFC and the vocational factors.

Given the foregoing, if an ME gives damaging testimony as to the claimant's mental condition but only does so in the context of a PRT (as opposed to an RFC), you may want to decide NOT to cross-examine the ME. This occurs rather frequently. The reason why you may not want to cross is because the ALJ cannot use the ME's testimony to formulate a proper RFC finding or a proper hypothetical question. If the ALJ uses the ME's PRT testimony in his hypo as the sole description of the claimant's mental limitations, that creates a potentially very strong appeal issue.

2. Doing the "reasonable" ME cross-examination.

It is very often the case that MEs at a hearing will specifically disagree with the functional assessments of treating sources and offer less restrictive assessments. Attempting to convince the ME to change their mind is usually fruitless. And, attempting to try usually just ends up with even more testimony that hurts your client's case. Many times the best you can do through cross-examination is

establish that certain things that the ME said were inaccurate or some of their statements were unduly sweeping.

Yet there is more you can, and should, do. The key to obtaining useful information from an ME is to talk about anything but the ME's testimony regarding functional limitations. That same ME may be willing to concede that the treating source's opinion is at least **reasonable**, even if they disagree with it. This concession will likely appear meaningless to the ME (and probably even to most ALJ's). In addition, fellow doctors, as a matter of professional courtesy, may not prefer to characterize the findings of their colleagues as "unreasonable." The ME may feel that they have given the ALJ what the ALJ wanted by disagreeing with the treating source opinion and they are "throwing you a bone" in saying that the treating source opinion is not beyond reason. However, this concession can be of enormous strategic benefit to you. It is amazing how often this line of questioning works.

Please understand that the following questions should ONLY be asked based on your familiarity with the record. If, for instance, the claimant has a history of noncompliance, DO NOT ask question number 5 below. This type of questioning is unlikely to be available if, for instance, your claimant has had a history of inadequate treatment because of finances or whatever. Also, since this questioning is designed to be open-ended, it is extremely important that you force the ME to not turn your question into another chance to shoot down the claimant. For instance, an ME trying to hurt your client might turn question number 1 below into a chance to again state his opinion about functional limitations. Politely state that "Yes, I understand that, I am just looking for general information about the claimant's diagnoses."

1) You previously testified that the claimant suffers from (the following medically determinable impairments); (taking them one at a time) please describe the most likely symptoms you would find a person with this diagnosis. (You should of course have a pretty good idea of the answer to this already, and have prepared

your client accordingly (i.e., no "the pain runs up my back to my shoulders" type testimony). The ME often just repeats whatever your client just said).

2) From your review of the record, would you agree that appropriate medications and other treatment modalities have been employed in this case? (Obviously do not ask this if the ME's testimony so far shows he does not agree).

3) From your review of the record, would you agree that appropriate diagnostic testing has been ordered? (If the ME says no and that more is needed, this of course is not a bad thing for a duty to develop argument because you can ask the ALJ in a post-hearing brief to do what the ME had suggested).
4) From your review of the record, would you agree that the claimant has been compliant with the advice of her physician(s)? (Obviously do not ask if not true)

5) **HERE IS THE KILLER FINAL QUESTION:** Now, I understand already from your previous testimony that you do not agree with the treating source's functional assessment. That is **NOT** my question. My question is: would you deny that the opinion of the txing source is at least **reasonable**, even though you disagree with it?

(Emphasizing the word "reasonable" just a touch, not too dramatically, tends to lead to much better ME responses. You MUST include the preface that you understand already that they disagree. If you do not, this question blows up in your face. You often have to ask this question twice and be a little more pushy the second time if the ME's response is to avoid your question and merely repeat what they believe the RFC to be. Stand firm. Get your question answered.).

In closing or a post-hearing brief (far better in a brief than in closing, unless the ME has already left the room and cannot try to undo the damage), you can argue two points in combination. First, the ME stated that while she disagreed with the treating source's opinion, that opinion was not unreasonable. Second, given the deference that is due to the opinions of treating sources, it would be appropriate to

defer to that opinion given that it is not unreasonable and is based on a direct treatment relationship.

Remember, a medical expert is, legally speaking, not entitled to much more weight, if any, than any other physician who renders opinions without examining the claimant, such as state agency reviewing physicians. Of course if the ME has just absolutely shredded the treating source opinion as utterly baseless, this is not going to be an effective approach. But many cases are not nearly so cut and dry. It is in those cases where this line of questioning can be exceptionally effective.

We attach to these materials a post-hearing objection based on this ME reasonable cross along with a favorable decision issued consistent with this argument.

3. Doing "foundational" questioning of the ME

Briefly, what you can often also do is some basic questioning to challenge the underlying assumptions in the ME's testimony. We will demonstrate this through just one example that you can tailor to individual situations. For instance, in a case where the primary impairment is a bad back, MEs will typically refer to things like "moderate" degenerative disc disease, full range of motion, ability to get on and off the examination table, and ability to ambulate without an assistive device as a basis to find that a claimant can perform "light work." This is despite a treating source opinion to the effect that the claimant can perform only sedentary work or no work. In addition to a "reasonable" cross, you could try something like the following, keeping in mind that the idea is to take a couple of quick hits, hope for a good answer, and stop talking (resist swinging for the fences):

1) You testified that your opinion of the claimant's functional limitations was based in part upon (moderate DJD/full ROM/on and off the table/ambulate without cane). Can you cite to any medical textbook, journal article, or any other source independent of your personal judgment, which

establishes a connection between (moderate DJD/full ROM/on and off the table/ambulate without cane) and the capacity for (light work)?

2) Put another way, are you saying that (moderate DJD/full ROM/on and off the table/ambulate without cane) always and only supports a functional capacity for (light work) and only light work?

3) Have you personally ever had a patient with (moderate DJD/full ROM/on and off the table/ambulate without cane) who you believed was unable to perform (light work)?

4. One extra question

Even the most belligerent MEs can give you opportunities that may help you win your case or at least build a decent appeal. If all else fails, this final question can sometimes salvage a bit of something useful for you. Assume that you have been pushing the ALJ to schedule a consult and he has not done so. Or perhaps you want the ALJ to re-contact a treating or consultative source. Or maybe you are just playing games to make it look like that's what you are doing, but really you are just trying to build an appeal. It can be very effective to get the ME to testify that securing certain additional information would be useful. This tends to work with the MEs who are against your claimant and who at some point have gone through a long list of what they don't see. You can direct their belligerence into helping you create an appeal issue. Ultimately what you are doing is making the point that a) the record is not really properly developed, per SSA's own expert and b) the damaging opinions given by the ME are actually equivocal and are based more on an absence of necessary evidence. You might phrase the question this way:

Would it help you to better evaluate the claimant's overall condition and resultant functional limitations if we were able to obtain X, Y and Z?

IV. POST-HEARING ACTIONS

As the foregoing materials suggest, a great deal of what you are doing at the hearing should be done with an eye towards writing a post-hearing letter containing specific arguments and/or objections. In addition to doing all of that, it will be beneficial to start accumulating far more specific data on how various VEs and ALJs respond to these issues and cross-examinations. Just as important is knowing precisely what limitations that specific VE will say are disabling.

V. APPEALS COUNCIL BRIEFS

The focus of this section is to give a sense of the types of issues we look for in unfavorable ALJ decisions. Our ideas are based upon experience and having successfully appealed on the grounds suggested. At a minimum, what we hope to do is to begin to create a "meeting of the minds." You know the case you appeal to the Appeals Council, but when we review the case, sometimes years later, all we will have to work with in reviewing the case is the ALJ's decision and your request for review. If you do not spot a good issue and raise it, we will likely not pursue that case to federal court. For instance, if the ALJ altogether failed to discuss a medical opinion, that will never be apparent to us on the face of the ALJ's decision itself. If it is not in your AC request for review, a great appeal opportunity will be lost. The following is a list of general observations with respect to the language and form of briefs, along with a partial list of issues we know are winners when they are raised and argued properly. Since the Supreme Court ruled in Sims that issue exhaustion is not required at the AC level, the failure to raise an issue to the AC is not fatal. However, we do hope to create a situation where we are "on the same page" in terms of the kinds of arguments that are worth presenting to the Appeals Council. Again, if you don't raise them, we likely will not spot them.

We will start out by mentioning some errors that we see advocates make before the Appeals Council routinely. Avoid these mistakes and you have upped your Appeals Council game quite considerably.

A. Mistakes to Avoid at the AC Level

We are attorneys. In some sense our entire business is the proper use of words and correcting the improper use of words. Yet imprecise or even flatly erroneous word usage occurs in Appeals Council briefs on a routine basis. Our goal here is to get you to avoid these common mistakes. The easiest way to improve the quality of your AC level advocacy is to simply stop making some obvious mistakes. This will increase your credibility with the individual AC analyst and allow your more compelling arguments to shine through more brightly.

1. Never say "clearly" (or any of its synonyms)

This is a subliminal, or sometimes very direct, indication to the reader that the point in question is: a) in dispute; b) actually not clear at all; c) not proven; and/or d) not well explained by the writer. The use of clearly is inherently weaker than just saying that something IS, in fact, true. Stating that something is "clear" implies that one has to look through or past other things in order to see the point. Using the word "clearly" really adds nothing to your point, other than doubt. More than anything, such terminology is often used when the writer knows that they have not comprehensively set forth what may be a compelling argument. When you find yourself reaching for this word, it is **CLEARLY** (joke intended) an indication that you need to put some more time into writing your argument.

2. Never say "ignored" (unless it is absolutely 100% true)

Many briefs we read use the word "ignored" quite a bit. Of course, the word ignore is a strong word, meaning "to take no note whatsoever of." In our experience, this word is often used incorrectly, much to the detriment of the writer's position. The word "ignored" is often used when in fact what occurred was that evidence was "rejected." There is a HUGE difference between an opinion being wrongly rejected versus an opinion being completely ignored.

To use our example above, if the ALJ truly failed to consider a medical opinion, that is a great argument and we suggest always raising it. However, if the ALJ in fact discusses the opinion of Dr. X, he did not ignore it. You should not claim that the ALJ "ignored" that opinion because you are wrong and will lose credibility with the AC analyst reviewing the case. The ALJ may have done many things

wrong, but if he ever mentions that opinion anywhere in the decision, then you cannot truthfully say he "ignored" it. What error do you really mean? Did the ALJ: fail to give it appropriate weight; improperly fail to weigh the opinion as a treating source opinion; fail to discuss certain parts of the report; fail to ever specify what weight the opinion was given; or misstate what the report says? Those may be strong arguments, but you will never get the reader to take them seriously if you falsely claim that the ALJ "ignored" the opinion at issue. As with the preceding error, the word "ignore" is usually just a sign of lazy writing. The writer has not committed him or herself enough to even think through how to frame the issue properly. Simple rule: never say "ignore" or "ignored" unless it is unequivocally true. **IGNORE** this advice at your own peril!

3. Avoid excessive boilerplate (or just avoid boilerplate period!)

Obviously, we all benefit greatly from word processing. We probably could not do what we do without it. However, just like anything else, over-reliance on it can lead to poorly developed arguments. What is "excessive?" There is no specific answer to that question, but there is no question in our experience that many overly "word-processed" briefs simply fail in their goal: *effectively* representing the claimant's interests at the Appeals Council level.

A look at the Appeals Council's and SSA OGC's own internal procedures shows this. When OGC wants to ask the Appeals Council to accept a voluntary remand in a federal court case, it uses a form called a short-form RVR. That form lists at the top all of the commonly applicable rulings and regulations and directs the OGC attorney completing that form to not cite the text of any specific ruling or regulation unless it is absolutely necessary. You should do the same. Get to the point quickly. Boilerplate informs and impresses no one. Get to the point and then move on to your next case. Boilerplate for its own sake is madness.

4. Stop arguing for "controlling weight"

In our opinion, you should almost never be discussing "controlling weight." A review of the regulations, 404.1527(c)(2) with respect to the weighing of medical opinions describes the "controlling weight" standard as follows:

> If we find a treating sources opinion on the issue of the nature and severity of your impairments is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other <u>substantial evidence</u> in your case record, we will give it controlling weight.

Why the funny use of the phrase "substantial evidence," a term found nowhere else in the medical opinion regulations? Why is the agency using language that usually relates to an appellate standard of review? This term sticks out like a sore thumb in this regulation that is otherwise dedicated to guiding an adjudicator in the weighing of medical opinions in the first instance.

The effect of this regulatory language is that "controlling weight" (which is really conclusive or dispositive weight) is only accorded to an opinion which is consistent with all of the other evidence of record. The substantial evidence language was included in this regulation because SSA did not want reviewing courts feeling comfortable finding that controlling weight should be given to a particular treating source's opinion. Although the agency wanted deference shown to treating source opinions, it felt that without this "substantial evidence" language in the regulation, SSA might cede too much of its authority as the ultimate fact-finder to treating sources and reviewing courts. SSA did not want the courts making controlling weight determinations. Remember, "substantial evidence" is an extremely low standard – the existence of almost *any* contrary evidence (a state agency consultant's opinion, or perhaps even far less) could justify a refusal to accord a treating source's opinion "controlling weight." Therefore, "controlling weight" can actually only be accorded in very limited circumstances. As a result, if you understand the law properly, you will not find yourself arguing for controlling weight almost ever. In fact, the exceptions are so minimal that the following simple rule makes the point best: stop using the term "controlling weight!"

Generally then, arguing for controlling weight is a mistake. In the vast majority of cases there are very legitimate reasons why the narrow controlling weight standard cannot be met. Thus, in these cases an ALJ is correct in refusing to accord the treating source's opinion "controlling weight." An AC brief which argues that the ALJ erred by failing to accord "controlling weight" to a treating source opinion is usually inherently defective and offers the AC analyst an easy path to denying the request for review. Worse yet, your defective argument may have caused you to

miss the opportunity to make a strong legal point about deference to treating source opinions. We will return to the issues of deference and the weighing of medical opinions below in a number of places.

It might help to look at an excerpt from a reply brief where we ripped OGC and an ALJ for not understanding the concept of controlling weight:

> I. ALJ Benitz Failed to Apply the Proper Legal Standard In Evaluating the Opinion of the Treating Specialist and Further Erred by Relying Upon an Outdated Non-Examining State Agency Opinion.
>
> In her opening brief, Plaintiff showed that ALJ Benitz's decision is legally flawed because the ALJ failed to consider all of the relevant factors under the regulations are never once acknowledged the deference that a treating specialist's opinion must be accorded under the Commissioner's regulations (Pl.'s Br. at 6-18). In response, the Commissioner argues that Plaintiff is in error to argue that the treating specialist's opinion was entitled to "controlling weight" and that only the ALJ may make the residual functional capacity (RFC) determination (Def.'s Br. at 12-13). What is revealing about the Commissioner's opening brief is that it is non-responsive to the arguments Plaintiff actually made. [1] In any event, Defendant has not in any way refuted Plaintiff's central contention that ALJ Benitz erroneously failed to consider certain mandatory factors under the regulations in evaluating the treating specialist's opinion. Plaintiff provided a lengthy and detailed discussion of each of these mandatory factors in her opening brief. Nowhere in its opening brief does SSA show where ALJ Benitz considered

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[1] Of course Plaintiff has never argued that the RFC determination is reserved to the treating source. Nor has Plaintiff ever contended that the treating specialist's opinion was entitled to "controlling weight." Any such arguments would be frivolous and a waste of this Court's time. Indeed, "controlling weight" is a discrete regulatory concept with narrow applicability. See 20 C.F.R. § 404.1527(d)(2). As thoroughly discussed in Plaintiff's opening brief, the issue in this case is deference, not "controlling weight." Under both the Commissioner's policy and the law of this Circuit a treating physician's opinion is always entitled to "deference" and may well be entitled to "the greatest weight" regardless of whether or not it is entitled to "controlling weight." See 20 C.F.R. § 404.1527(d); Social Security Ruling (SSR) 96-2p, 1996 WL 374188 *4; see also Brownawell v Comm'r of Soc. Sec. Admin., 554 F.3d 352, 355 (3d Cir. 2008); Morales v. Apfel, 225 F.3d 310, 317 (3d Cir. 2000); Plummer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999); Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993). It appears that the Commissioner devotes so much time and effort to refuting these phantom arguments in order to create a perception of responsiveness when in reality the Commissioner has been evasive with respect to the true substance of Plaintiff's arguments.

> each and everyone of these factors, as he was legally required to do under the regulations.
>
> The point in this case is not that Plaintiff is asking this Court to re-weigh the treating specialist's opinion. Rather, Plaintiff's argument is that ALJ Benitz's entire legal analysis is fraught with legal error because it failed to consider certain mandatory factors and failed to acknowledge the deference owed to treating specialist's opinions. In this case, ALJ Benitz's analysis of the treating specialist's opinion is fundamentally flawed because it was not conducted under the relevant legal standards mandated by the Commissioner's regulations and binding circuit precedent.

5. Stop citing case law in AC briefs

An AC analyst who sees you argue case law often presumes that you have no regulatory or ruling basis for your argument. Within SSA, all federal court decisions are viewed as inherently defective. Even in a situation where there has been an acquiescence ruling, you should cite to the AR alone and not the case itself. In only exceptionally rare instances will use of case law at the AC level be proper. But those exceptions are so few that it is better to stick with this simple rule: stop citing case law in your AC requests for review.

We should note one thing at this point given what we have just said. Some of the arguments excerpted below include case law citations. That is because many of the documents we took these arguments from were federal district court briefs. So while you may see some case law citations below, we generally do not include such citations, unless there is no other option, in our briefs to the AC.

6. If the error is harmless, maybe do not appeal

Is very important in evaluating issues in the appellate context, either at the AC or in federal court, to keep in mind the concept of "harmless error." A harmless error is simply an error that would not affect the outcome of the case. For instance, if the claimant is 48 years old, but the ALJ finds in his decision that she is 38, this error is "harmless" because the difference in age does not affect the legal standard applicable to the case (except, for instance, if the claimant is unable to communicate in English and has an RFC for sedentary work, in which case the error is not harmless). Neither the AC nor a federal court is going to grant relief to

a claimant when the error alleged does not actually harm the claimant in any meaningful way. This is not to say you should avoid "technical error" arguments. To the contrary, we **LOVE** such arguments. But if you are fairly certain the error really does not matter, then perhaps a new application is better than an AC appeal.

B. Issues Worth Pursuing at the AC Level

1. The ALJ accords "great" or "significant" weight to an opinion, but the RFC excludes limitations contained in that opinion

This is a VERY common error and an excellent one for us to pursue on appeal. Unfortunately, this slam-dunk issue is probably the most over-looked appeal issue we see. Further, if you do not spot it in your AC appeal brief, we will likely miss the issue and refuse to pursue it in federal court.

This argument captures our general philosophy perhaps more than any other: embrace the evidence the ALJ likes and show why even that evidence requires remand. In other words, take what the Agency likes and then shove it back down their throats. To identify and pursue this error requires a proper mind set. Think like a wrestler. The best wrestlers are not trying to move in any specific direction. Instead, they are attempting to encourage their opponent to commit to exerting their force in one specific direction. A good wrestler does not fight that exertion. Instead, they embrace it and use it against their opponent. They use their opponent's weight and momentum against them. Do the same with these ALJs. Instead of reflexively attacking the opinion that the ALJ relies upon to deny benefits, try to embrace it. Look to see that every single aspect of that opinion is accounted for in the ALJ's RFC. Very frequently the ALJ has not accounted for all of the limitations in an opinion he or she claims to have accepted. Similarly, an ALJ may make a PRT finding where he finds moderate limitations in social functioning and then includes no relevant limits in his RFC finding. Again, the ALJ's decision is undermined by his own findings. It is a far more compelling argument to say that the ALJ's decision cannot be affirmed given his own findings than it is to claim that the ALJ weighed the evidence improperly. When you can show that the ALJ is wrong by his own terms, you have an excellent appeal in the works.

Ultimately, the foregoing is a violation of the baseline principle of medical opinion evaluation. That all-important fundamental principle of disability law is the following: accept and include or reject and explain. Below is an excerpt of an AC brief making this point. Because of the unique formulation and clarity of this point, along with its pithiness and inherent persuasiveness, it is one of the few times where something approaching boilerplate should be included in your AC brief. Here is that sample:

> Social Security law in regard to medical opinion evidence is unambiguous: Accept and include or reject and explain. If the ALJ accepted the opinion of Dr. X, then she was required to include the limitations identified by that medical expert in her RFC finding and VE hypothetical. See 20 C.F.R. §§ 404.1545(e), 416.945(e); SSR 96-8p; SSR 96-5p (all providing that an RFC finding must account for all of the limiting effects of a claimant's impairments). If the ALJ did not accept all or parts of that medical opinion, then the ALJ was required to explain her reasons for rejecting the probative evidence that she did not accept. See 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) (requiring ALJs to provide good reasons in their decisions for the weight given to a medical source's opinions); SSR 96-8p (stating that the "RFC assessment must always consider and address medical source opinions. If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain why the opinion was not adopted."); SSR 96-5p (stating that an adjudicator must explain the consideration given to each medical source opinion); see also SSR 06-03p (stating that "the Act requires [the Agency] to consider all of the available evidence in the individual's case record in every case"). Because the ALJ here did neither, her decision must fail.

2. The ALJ fails to perform a PRT analysis

There are a number of errors related to the ALJ's obligation to follow the "special technique" set forth in the regulations for the analysis of mental health impairments, i.e., the PRT. Even when the ALJ finds a mental impairment not severe, he must complete a PRT. In fact, the law provides that an ALJ can only reach a non-severity determination by completing the PRT. It is **ALWAYS** improper for an ALJ to merely conclude that a mental impairment is non-severe. The ALJ has an absolute obligation to perform a PRT analysis in every single case where a mental impairment may exist. In cases where everyone is focused on the physical conditions, ALJs will frequently fail to perform the mandatory PRT analysis. Below is an argument noting the legal error:

> The Commissioner's regulations require adjudicators to assess a claimant's mental impairments pursuant to a special technique, called the PRT. 20 C.F.R. §§ 404.1520a, 416.920a. This requires an assessment of the claimant's degree of functional limitation in four broad areas. Id. The PRT is used to determine severity at step two and whether a listing is satisfied at step three. Id. The findings in the PRT are then used in shaping the RFC. Id.; see also Ramirez v. Barnhart, 372 F.3d 546 (3d Cir. 2004) (explaining that RFC findings must be consistent with and account for the PRT findings made at steps two and three). Utilization of the PRT is absolutely mandatory for all SSA adjudicators. Id.; see also Carpenter v. Astrue, 537 F.3d 1264, 1268 (10th Cir. 2008) (stating that ALJs are required by law to document completion of the PRT analysis in the text of their decisions). In short, longstanding Agency policy precludes an adjudicator from merely offering bare conclusions as to mental impairments. Instead, Agency policy mandates that a very specific process be used for analyzing severity, the listings, and functional capacity when a claim involves the possibility of a mental impairment.
>
> Despite this longstanding authority, the ALJ here did not complete a PRT analysis at all (Tr. 11-19). There are no PRT findings or analysis of any kind. Again, this is a facial and fundamental violation of the regulations. This error is particularly troubling given the evidence discussed above. The ALJ failed in a very basic way to properly adjudicate this case. The ALJ failed to perform the PRT analysis that he was legally required to perform. No doubt this legal error played a part in the ALJ's deficient and conclusory RFC finding. In any event, this is yet another example of how sloppy and careless the ALJ's decision was in this case.

3. The Agency fails to have a qualified mental health source review the case

This is an extremely common error where either: a) everyone is focused on compelling physical conditions; or b) the evidence of mental impairment arose after the initial level proceedings occurred. This issue is completely and totally distinct from the PRT issue noted immediately above. It is an issue that the AC **LOVES** to remand on because it is such a black and white violation of Agency policy. It is also an issue that OGC will frequently agree to voluntary remands on in federal court. Below is an excerpt from a federal court brief where this issue was successfully pursued:

I. The ALJ Committed Harmful Legal Error by Failing to Have a Qualified Psychologist or Psychiatrist Review the Medical Evidence, Complete the Mandatory PRT Analysis, and Offer an Opinion as to Listing Equivalence.

It is long-standing Agency policy that in all cases involving evidence of a mental impairment, the Commissioner will have a qualified psychiatrist or psychologist review the record evidence and offer an opinion as to listing level equivalence. This longstanding Agency policy is confirmed by statute, the regulations, the rulings, and other Agency policy documents. The Social Security Act itself provides that the Commissioner must make "every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment." 42 U.S.C. § 421(h). Consistent with this statutory mandate, the regulations specify that "in any case where there is evidence which indicates the existence of a mental impairment," the Commissioner will make "every reasonable effort" to ensure that the record is reviewed by a qualified psychiatrist or psychologist. See 20 C.F.R. §§ 416.903(e), 416.1015(d). The rulings similarly provide that "longstanding policy requires the judgment of a physician (or psychologist) designated by the Commissioner" to assess whether a claimant's mental impairments are equivalent to a listing. SSR 96-6p, 1996 WL 374180. In other words, SSR 96-6p mandates that a qualified psychologist or psychiatrist specifically addresses whether a claimant's combined impairments are equivalent to a listing. Id.; see also POMS DI 24515.056 (requiring qualified psychiatrists or psychologists to document equivalency consideration through completion of a PRT analysis). In the Federal Register, the Commissioner confirmed his own policy that adjudicators **must** obtain such an opinion from a medical consultant in any case involving a mental impairment. 60 Fed. Reg. 20023, 20025 ("Testing Modifications to the Disability Determination Procedures" 1995). Based on all of this authority, there is no question that in cases involving any evidence of a mental impairment, an adjudicator must have a qualified psychologist or psychiatrist review the record and offer a specific opinion as to whether the individual's mental impairment is equivalent to a listing.

To be clear, having an independent psychiatrist or psychologist review a file and offer an analysis and opinion when that file contains any evidence of a mental impairment is **NOT** part of Plaintiff's burden of proof or persuasion. Instead, it is an affirmative obligation placed on the Agency alone.

In this case, no qualified psychiatrist or psychologist ever reviewed the record to complete a PRT analysis or offer an opinion as to Mr. Gibson's mental functional abilities. This is unacceptable given that the record contained evidence showing that Mr. G suffers from depression. In January of 2008 his doctors noted that Plaintiff was depressed (Tr. 597). He was diagnosed with depression in partial

remission (Tr. 648). However, his global assessment of functioning (GAF) score was only 44, which was indicative of very serious and disabling mental functional limitations. See Diagnostic and Statistical Manual of Mental (DSM-IV-TR), at 34 (4th ed., text rev., 2000). At a follow up exam in march 2008, he continued to be diagnosed with major depressive disorder, single episode, moderate to severe (Tr. 658). He was assessed a GAF score of 55-60, which was consistent with at least moderate mental symptoms and functional restrictions. DSM, at 34. Further, Plaintiff's counsel raised the issue of depression at the hearing and this condition was discussed in testimony (Tr. 35, 39, 44-45).

Given these facts, there cannot be any dispute that there was an issue of mental impairment in this case. Despite this, the ALJ violated unambiguous SSA policy which required him to have a qualified mental health professional evaluate the evidence of mental impairment, perform a PRT analysis, and offer an opinion as to listings equivalency. This is unmistakable legal error warranting remand.

4. The RFC fails to incorporate limitations established by the ALJ's own PRT analysis

Assume that you are dealing with a case where everyone is focused on the physical impairments. In such circumstances, the mental aspect of those cases is likely to get short shrift. This opens the door to legal error. A classic example is where the ALJ finds mild limitations in social functioning or concentration, persistence, or pace when he completes his PRT analysis. Yet in formulating his RFC finding, the ALJ fails to include any limitations that might account for his own prior PRT findings. While this error may be harmless in many cases, it is not harmless if the jobs identified by the VE involve a great deal of public contact. It is also a significant error in a context where the ALJ is returning the claimant to semi-skilled or skilled PRW.

5. The RFC is more restrictive than the hypothetical question posed to the VE

This is a perfect example of something we might miss unless you pointed it out to us by raising it in your AC request for review. Again, this is another issue where you embracing the ALJ's findings may be much more effective than fighting the premise of how he weighed the medical evidence. When you can argue that the ALJ's RFC is correct but was not accurately presented to the VE such that SSA cannot meet its step 5 burden, you have an exceptionally strong

appeal. This type of argument can be particularly effective when the VE has premised their step 5 testimony so heavily on their own personal "experience." How can we possibly know the effect of the missing limitations given that the step 5 evidence relies so heavily on one individual's experience?

Many times the hypothetical question at the hearing, which forms the basis for the denial, actually does not consider limitations that the ALJ found to be present in his RFC determination. This can happen in a number of ways. First, there may simply be a transcription error between the ALJ's notes and what actually happened at the hearing. Second, there may have been post-hearing evidence such as a CE or other evidence, which suggest additional limitations to the ALJ that were not explicitly considered by the VE. Third, some judges just try to get away with it. Regardless of what caused the discrepancy, an ALJ may not as a matter of law:

1) misrepresent the VE's testimony (intentionally or otherwise); nor
2) deny benefits on the basis of VE testimony which does not include each and every limitation demonstrated by the record.

However, if you do not spot this issue in your AC request for review, we will never even know it is there. As a result, a fantastic appeal opportunity has been lost.

6. <u>The hypothetical question does not consider every limitation proven in the record</u>

There are many tie-ins between the other issues discussed above and this one. For instance, this argument is also available in ANY case where, as above, the ALJ accepted a medical opinion but did not include every limitation set forth in that opinion and did not explain why he rejected such limitations. As an example, assume an ALJ finds that the claimant has severe "migraine headaches," but then fails to incorporate any functional limitations relevant to that impairment in the RFC finding. At that point the ALJ's RFC finding, and the hypothetical question it is premised upon, is defective based on the ALJ's own findings. This argument would also be available in the case where an ALJ finds that the claimant's mental limitations are "not severe" but fails to include PRT/MRFC findings in the

decision, as even "non-severe" impairments must be considered in the formulation of an RFC.

7. The RFC violated SSRs 83-12 and 96-6p, which require specificity in the formulation of a sit/stand option

These two Social Security rulings could not be more clear in requiring that the formulation of an alternate sit/stand RFC must explicitly state the precise frequency of the need to change positions between standing and sitting. Pursuant to these rulings, there is no such thing as an undefined "sit/stand option." This argument can be extremely important in cases where the claimant is over 50, over 55, as the case may be where the difference between winning and losing the case depends on the grid rule framework being used to decide the case. This argument is also a good example of where "harmless error" may be committed by an ALJ: it is our opinion that although technically incorrect, an undefined alternate sit/stand RFC finding is usually by itself harmless error. Nevertheless, it is a strong secondary issue for an AC appeal.

8. The RFC is not a function by function analysis

This issue works very well as a secondary issue where you have other stronger points attacking the RFC finding. It is especially compelling where the ALJ generically uses the words light or sedentary and offers no specific findings on various exertional and non-exertional activities.

9. PRW errors

We have noticed a lot more denials based on the ability to do PRW in your cases than we are used to seeing historically in the Third and Fourth Circuits. Not all of these decisions are illegitimate, but it is hard not to notice that ALJs seem to reach for PRW denials in cases where the claimant otherwise has a favorable vocational profile (i.e., has a restricted RFC to light or sedentary, and are 50+ or 55+). There are a number of things to keep in mind in evaluating such denials.

First and foremost, a job can only be considered PRW if it is 1) performed within the last 15 years; 2) performed at and SGA level; and 3) was performed long enough to learn how to do the job. With respect to (1), this is simple enough, but

you would be surprised how often ALJ's reach back past the 15 year period. VEs will do so routinely as well, which is one reason why in every case we ask the VE what sections of the record they reviewed.

With respect to (2), again we have seen many cases where the ALJ used non-SGA level work as PRW. Work not performed at an SGA level can never be considered PRW.

(3) can present opportunities in certain types of cases. We have also seen cases where an ALJ makes a PRW finding with respect to an SVP 4 job but the job was only performed by the claimant for a short period of time -- the DOT defines SVP 4 as a job which takes between six months and one year to learn. Attention to these details, even in a pre-hearing brief (and certainly in a post-hearing brief and an AC request for review), can make a huge difference.

Two quick facts: 1) the issue with respect to PRW includes both "as performed" and "as generally performed." Assume the VE testifies that the claimant's PRW was medium as performed, but sedentary as defined in the DOT. If the job involved the same work processes, then it would be legitimate for the ALJ to deny at step 4 on an "as generally performed" basis if he makes a sedentary RFC finding. 2) A "composite job", that is a job which is comprised of two or more jobs as defined in the DOT combined into one job (i.e., a cashier who also stocks shelves and pumps gas), **CANNOT** be used to make a PRW finding. As a result, it definitely pays to establish that a claimant's PRW is actually a combination of a number of different DOT occupations.

Here is a federal court brief excerpt on the composite jobs issue:

A. The ALJ Was Legally Barred from Making a PRW "as Generally Performed" Determination Because Mr. XXXXXXX's PRW Was a Composite Job.

"Composite jobs," are jobs that require the performance of significant elements of two or more jobs, and such composite jobs "have no counterpart in the DOT." SSR 82-61, 1982 WL 31387 * 2. SSA's precise policy on composite jobs was somewhat ambiguous for a rather long period. Still, this Court has issued a published decision finding that a PRW determination involving a composite job was defective and required remand. Armstrong v. Sullivan, 814 F.Supp. 1364, 1372 (W.D. Tex. 1993). In October 2011, SSA issued a very significant official

statement to its adjudicators in order to clarify the Agency's policy with respect to composite jobs. In POMS DI 25005.020(B), 2011 WL 4753471, SSA clarified that because composite jobs have no counterpart in the DOT, Agency adjudicators must not evaluate such jobs "at the part of the step 4 considering work 'as generally performed in the national economy.'" In other words, an adjudicator can deny a claim at step 4 where the claimant remains capable of performing a composite job "as actually performed," but an ALJ is not permitted to make an adverse step 4 finding that the claimant remains capable of performing a composite job "as generally performed." POMS DI 25005.020(B), 2011 WL 4753471. The POMS also notes that a "composite job" is one that involves "significant elements of two or more occupations." Id. Finally, it notes that if "the main duties of PRW" cannot be captured by a single DOT occupation, then the claimant may have performed a composite job. Id. Given this crucial POMS provision, a further recent Agency policy clarification must be emphasized. Specifically, in SSR 13-2p, 2013 WL 621536, *7 SSA affirmatively stated its policy that "[w]e require adjudicators at all levels of administrative review to follow agency policy, as set out in the Commissioner's regulations, SSRs, Social Security Acquiescence Rulings (ARs), and other instructions, such as the Program Operations Manual System (POMS), Emergency Messages, and the Hearings, Appeals and Litigation Law manual (HALLEX)."

Plaintiff agrees that the occupation of Heavy Equipment Operator (DOT, 859.683-010, 1991 WL 681950) does accurately describe a portion of his duties working for XXXXX County. However, Mr. XXXXXXX's work for the county for over 23 years also involved significant duties that are not captured by that job title in the DOT. Those additional duties included: a) supervising a crew of 6 other workers (Tr. 167); b) cutting trees along streets that could affect traffic (Tr. 55); c) chopping wood (Tr. 55); d) carrying 80 pound bags of cement (Tr. 55, 167, 173); e) removing rocks from drainage ditches (Tr. 55); f) discarding dead animals (Tr. 167, 173); and g) moving guard rails (Tr. 173). The crucial task of supervising a team of 6 workers is not in any way a part of the job of Heavy Equipment Operator as that job is described in the DOT. See DOT, 859.683-010, 1991 WL 681950. The remaining tasks of b) through g) above are also not part of the job of Heavy Equipment Operator. Id. These two facts cannot be seriously disputed. In addition, it appears that those additional tasks are more akin to a Municipal Maintenance Worker (DOT, 899.684-046, 1991 WL 687689). In any event, the key point is that these tasks were significant elements of Mr. XXXXX's work and they have nothing whatsoever to do with the DOT description of a Heavy Equipment Operator. Accordingly, Mr. XXXXXXX's work for XXXXX County was a composite job under SSA policy.

In this case, the ALJ denied Mr. XXXXXX's application st step 4, finding that the claimant could return to his PRW as a Heavy Equipment Operator (Tr. 23-24).

However, the ALJ explicitly stated that this step 4 finding was "only as this job is generally performed" (Tr. 24). The ALJ likely stated this because the vocational expert (VE) had explicitly testified that an individual with the limitations identified by the ALJ could not possibly have performed Mr. XXXXXX's job as the claimant had actually performed it (Tr. 56-57). The ALJ made no alternative step finding of any kind (Tr. 24). Thus, the ALJ's decision must stand or fall solely on the determination that Plaintiff can return to his PRW as that job is "generally performed." Because that job was actually a composite job, as explained above, the ALJ was prohibited by Agency policy from finding that Mr. XXXXX was capable of that job as it is generally performed. POMS DI 25005.020(B), 2011 WL 4753471. As a result, the ALJ's step 4 denial here is defective as a matter of law and remand is thus required.

Here is another exemplar from federal court on the composite jobs issue:

II. The ALJ Erred in Finding That Mr. XXXX's Past Relevant Work as a Night Watchman/Boiler Operator Was Light Work.

The ALJ found that Mr. XXXXX was not disabled because he could perform his past relevant work as a night watchman, which was a light job (Tr. 21). There is one simple problem with the ALJ's finding – Mr. XXXXX never worked as a night watchman. Instead, he worked a composite job as a night watchman/boiler operator for thirty years (Tr. 30-31, 118, 140). The ALJ erred in separating out the least strenuous aspects of Mr. XXXXX's past relevant job and defining it as light work.

"Composite jobs," jobs that require the performance of significant elements of two or more jobs, "have no counterpart in the DOT." SSR 82-61, 1982 WL 31387 * 1 (S.S.A.). "To classify an applicant's 'past relevant work' according to the least demanding function of the claimant's past occupation is contrary to the letter and spirit of the Social Security Act." Valencia v. Heckler, 751 F.2d 1082, 1086 (9th Cir. 1985). The ALJ erred by dividing Mr. XXXXX's composite job into two separate jobs and finding that he was not disabled because he could perform the least demanding of these two jobs.

At all times, Mr. XXXXX described his past job, which he performed for thirty years, as a composite night watchman/boiler operator position (Tr. 30-31, 118, 140). As a required part of this composite job, Mr. XXXXX had to maintain the boiler, which entailed shoveling sawdust, carrying boiler racks, firing the boiler itself, and carrying 50 to 100 pounds of coal cinders with a wheelbarrow (Tr. 30-31, 118, 140). The ALJ cannot ignore these required duties of Mr. XXXXX's composite job. This job cannot be separated into two separate jobs, one light and one heavy (Tr. 53).

> This is not a case where Mr. XXXXX was employed as a night watchman and his former employer required him to do exertional tasks beyond those normally required for the job. Instead, it was a case of one individual hired to perform a composite job that required "significant elements" of both night watchman and boiler operator jobs. Accordingly, SSR 82-61 applies and the ALJ erred in finding that Mr. XXXXX was not disabled because he could perform the least demanding aspects of his composite job. See Carmickle v. Comm'r of Social Security, 533 F.3d 1155, 1166 (9th Cir. 2008) ("It is error for the ALJ to classify an occupation 'according to the least demanding functions'" (quoting Valencia, 751 F.2d at 1086)).

As with all of these issues, the assertion of error only works when the error causes harm. Thus, PRW errors are not usually effective arguments in cases where the claimant is less than 50 years old.

10. "Borderline age" cases

When a claimant is close to an age change which may or would result in a different decision under the grids, then this argument may be available. SSA policy is that the grids are not to be "applied mechanically" so that a claimant who is very close, for instance, to his 50th birthday can still benefit from the grid rule which would award benefits based on age 50, no transferable skills, and no PRW at sedentary. The Agency has intentionally not been very specific about what exactly is a borderline case and what isn't. SSA indicates only that if the claimant's age change is "a few days or a few months" after the date of the decision that the ALJ must discuss this fact. At the district and circuit court levels the decisions are somewhat varied, but in general it is probably true to state that someone who was within three or four months of the significant birthday is entitled to the special treatment afforded those whose birthdays are imminent. At the very least, the ALJ must show that this issue was specifically identified and considered.

11. The ALJ improperly relies on the assessment of a non-medical source

This happens mostly in the prototype states which allow non-physician adjudicators, under certain conditions, to complete the RFC forms. Virtually all ALJs know that these opinions may not be given weight in the RFC formulation. However, either by mistake or lack of knowledge of the law, ALJs will from time

to time give weight to these opinions in their decisions. It is always error to do so. Here is an excerpt of a federal court brief where this issue was successfully pursued:

> The ALJ's errors in evaluating the opinion evidence go on. Specifically, ALJ Swank is apparently unfamiliar with the procedures relevant to prototype states. See generally, Oakes v. Barnhart, 400 F.Supp.2d (E.D. Pa. 2005). In prototype states such as Pennsylvania, non-medical state agency employees often review the evidence and offer opinions as to RFCs. It is black letter agency policy that not only can ALJs not treat such lay opinions as medical evidence, ALJs are actually totally barred from considering such opinions at all. See Attached Exhibit B (Chief Administrative Law Judge's Memo dated September 14, 2010 on the Evaluation of Single Decision-Maker Residual Functional Capacity Assessments); see also SSA POMS DI 24510.050 (providing that such assessments "are not opinion evidence" at subsequent levels of adjudication). Yet the ALJ here wrongly presumed that "the state agency" source was a medical doctor (when she was not) and erroneously considered that opinion in violation of clear Agency policy (Tr. 30). This is another example of ALJ Swank's lack of familiarity with relevant law applicable to this jurisdiction.

Many people cite to an outdated Chief Judge law memo from Chief ALJ Frank Cristaudo. However, that is not the most current Chief Judge policy statement on the issue. To find a copy of the Chief ALJ Memo referenced above, here is a link:

http://myphiladelphiadisabilitylawyer.com/wp-content/uploads/2012/10/SDM-ChiefALJ-2010-09-14-2.pdf.

Another version of this argument is the following (although it includes that outdated citation):

I. The ALJ's Decision Improperly Relied Upon The Assessment Of A Non-Examining, Non-Medical State Agency Employee.

The ALJ gave "great weight" to the State Agency's residual functional capacity (RFC) assessment that Mr. XXXXXX was able to do light work (Tr. 15). Notably, the ALJ did not acknowledge that this was a non-acceptable, non-medical assessment. See 20 C.F.R. § 404.1513 (identifying acceptable medical sources).[2] In fact, the ALJ's weighing of this assessment was a direct violation of Agency policy, which provides that such assessments are not opinion evidence at the ALJ level, and that ALJs may not accord them any evidentiary weight. See Attached Exhibit C (Chief Administrative Law Judge Cristaudo's Memo on the Evaluation of Single Decision-maker Residual Functional Capacity Assessments); see also SSA POMS DI 24510.050 (providing that such assessments "are not opinion evidence" at subsequent levels of adjudication); SSA Emergency Message 08068-REV (indicating that such assessments are adjudicatory documents only and should not be accorded any evidentiary weight). Clearly, evidence that the Agency has declared to be entitled to no evidentiary weight, cannot represent substantial evidence to support an ALJ's decision. Because this ALJ's decision relies upon, and gives "great weight" to (Tr. 15), an assessment that is entitled to no evidentiary weight, remand is required as a matter of law.

12. The ALJ relies upon receipt of unemployment comp benefits as a basis to deny benefits

Some judges falsely believe that receipt of unemployment compensation (UC) per se precludes the receipt of SSD, but this is not true. A per se finding like this is always error. Most (but not all) ALJs have wised up and do at least acknowledge that receipt of UC benefits alone is not dispositive of the issue of whether or not the claimant is disabled. Agency policy, as expressed in Chief Judge Cristaudo's memo, shows that receipt of such benefits is only one of many factors to be considered in evaluating credibility. The facts of the case matter a lot on this issue. The ALJ's reliance upon receipt of UC benefits is not per se error, nor is it per se appropriate. If you see the ALJ relying upon this issue almost exclusively to support an adverse credibility finding, then you may have a strong appeal. In addition, this issue can work well as a secondary issue where other aspects of the

[2] This assessment was rendered by XXXXXXXXXX, a non-medical employee of the Department of Disability Services (DDS), who opined "I believe the claimant can do light work" (Tr. 1167). The number 360 printed above XXXXX's name on the Disability Determination and Transmittal form (Tr. 36) indicates that no medical consultation was involved.

ALJ's credibility analysis are potentially defective. Below is an excerpt from a federal court brief where we successfully pursued this issue:

> Like the ALJ, SSA on appeal may attempt to rely upon the receipt of unemployment compensation benefits as effectively conclusive evidence of non-disability. However, any such argument would be flatly contrary to Agency policy which recognizes that the receipt of unemployment benefits is not inconsistent with an application for disability benefits and that an adverse credibility finding should not be premised upon this fact alone. See Receipt of Unemployment Insurance Benefits by Claimant Applying for Disability Insurance – REMINDER (National Chief Administrative Law Judge Frank Cristaudo's Policy Statement of August 9, 2010. That is particularly true in this case involving a mentally retarded individual who cannot read and write effectively and whose family applied for unemployment benefits on his behalf (Tr. 28).

Here is a link to the memo referenced above:

http://myphiladelphiadisabilitylawyer.com/wp-content/uploads/2012/02/1.pdf

One extra little nugget that few disability attorneys know and virtually no ALJs know is that in the SSI context 20 C.F.R. § 416.210 actually requires a claimant to apply for all benefits to which they might be eligible. That regulation specifically includes unemployment compensation benefits.

13. The ALJ finds standing/walking limited to 2 hours of 8 but finds an RFC for "light work"

Increasingly ALJs are labeling the above functional limitations as being consistent with "light work" by simply adding in a 20/10 lifting ability. Obviously we all really hate when an ALJ is doing this merely to avoid entering a fully favorable decision in a case where a sedentary RFC would require a grid out. Although we are not aware of any one else in the country making this argument, the reality is that such an RFC cannot be considered "light" under Agency policy. The best way to explain this point is just to include a sample argument.

We won a case on this issue which is available on west law at Campbell v. Astrue, 2010 WL 4689521 (E.D.Pa. 2010). Here is an excerpt of that winning brief:

I. The ALJ's Residual Functional Capacity (RFC) Finding Is An RFC For Sedentary Work. Under the Commissioner's Medical-Vocational Rules, Mr. XXXX Must Be Found Disabled If He Is Limited To Sedentary Work.

The ALJ found that Mr. XXXX could stand or walk for "no more than one to two hours in an eight-hour workday" (Tr. 12), but concluded that he could perform light work (Tr. 12). In fact, an RFC that restricts a claimant to "no more than one to two hours of standing and walking in an eight-hour workday" is an RFC for a limited range of sedentary work. See SSR 83-10, 1983 WL 31251 *5-6 (stating that the frequent lifting and carrying requirements of light work mandate standing and walking for one-third to two-thirds of the workday, and that even sedentary work requires standing and walking for up to one-third of the workday). This is critically important because Mr. XXXXXX must be found disabled under the Commissioner's medical-vocational rules even if he is able to perform a full range of sedentary work. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.14 (qualifying a person of Mr. XXXXXX's age, education and work experience as disabled if limited to sedentary work).

Under the Commissioner's regulations, light work requires "frequent lifting and carrying." 20 C.F.R. § 404.1567(b). The Commissioner's policy explains that frequent lifting and carrying means "being on one's feet for up to two-thirds of the workday," and that a "good deal of standing or walking" is "the primary difference between sedentary and most light jobs." SSR 83-10, 1983 WL 31251 *5-6; see also SSR 83-14, 1983 WL 31254 *4.

In the "relatively few" cases when a seated job is classified as "light," it is because it involves "pushing and pulling of arm-hand or leg-foot controls which require greater exertion than in sedentary work." Id. [3] In fact, even "the full range of sedentary work requires that an individual be able to stand and walk for a total of approximately 2 hours during an 8-hour workday." SSR 96-9P, 1996 WL 374185 *6. By contrast, this ALJ found that Mr. XXXXXX could not stand or walk for more than two hours, and would have the option of standing and walking for as little as one hour in an eight-hour workday (Tr. 12).

The VE testified that the ALJ's hypothetical would allow Mr. XXXXXX to do jobs (cashier, assembler and survey worker), which are listed in the Dictionary of Occupational Titles (Dep't of Labor, 4th ed., 1991) (DOT) as light. But the fact that the DOT identifies a job as light, does not make it light, because "the DOT lists maximum requirements of occupations as generally performed." See SSR 00-4p, 2000 WL 1898704 *3. In fact, although the DOT identifies the jobs at issue as light, they are at best, sedentary jobs (under the Commissioner's

[3] The jobs identified by the VE are not this type of job.

definitions of light versus sedentary work) if performed in accordance with the ALJ's findings. See SSR 83-10, 1983 WL 31251 *5-6. The relevant question is not how a job is classified, it is how it must be performed given the claimant's RFC.

The Commissioner's policy is clear: An ALJ may not rely on evidence provided by a VE or any other source "if that evidence is based on underlying assumptions or definitions that are inconsistent with [Agency] regulatory policies or definitions. Although there may be a reason for classifying the exertional demands of an occupation differently than the DOT, the regulatory definitions of exertional levels are controlling." SSR 00-4p, 2000 WL 1898704 *3.

In this case, the evidence presented by the VE is inconsistent with the controlling regulatory definition of light work. Unless Mr. XXXXXX can stand and walk for one-third to two-thirds of an eight-hour day, then he cannot perform even the minimum level of standing and walking required for light work as defined by the Commissioner. See SSR 83-10, 1983 WL 31251 *5-6. Under the Commissioner's definitions, one cannot take a sedentary RFC and make it light by adding a twenty pound lifting and carrying allowance (Tr. 42). Rather, the Commissioner recognizes that lifting and carrying require standing and walking. Id.

The ALJ's misapplication of the Commissioner's policy resulted in part from his erroneous assumption that the rule for light work was applicable in this case (Tr. 16). In contrast to this assumption, the Commissioner's policy provides that, when a claimant's exertional abilities fall between two rules, which direct opposite conclusions, both rules must be considered. See SSR 83-12, 1983 WL 31253 *2. If, as in this case, the claimant's exertional capacity under the higher rule is "significantly reduced in terms of the regulatory definition," the ALJ must consider the possibility that the remaining job base is "little more than the occupational base for the lower rule and could justify a finding of disabled." Id. Only when the claimant's RFC fall more in the middle range "in terms of the regulatory criteria for exertional ranges" is VE testimony even needed. Id.

The ALJ compounded his error when questioning the VE. The Commissioner's policy requires an ALJ to assess a claimant's work-related abilities on a function-by-function basis before expressing his RFC in terms of exertional level. See SSR 96-8p, 1996 WL 374184 *1. In this case, however, the ALJ asked the VE to assume that Mr. XXXXXX could perform light work with certain limitations, and with that assumption in mind, the VE identified light DOT jobs that could essentially be performed at the sedentary exertional level (Tr. 41-44).

Because the jobs identified by the VE would need to be performed at the sedentary level under the ALJ's RFC finding, they cannot be relied upon to support a decision of non-disability for a claimant who is disabled if limited to sedentary work. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.14 (directing a finding of disability for a claimant of Mr. XXXXXX's vocational profile who is limited to sedentary work); SSR 83-10, 1983 WL 31251 *5-6 (specifying that only sedentary work can be performed with standing and walking for less than one-third of the day except in jobs that rely on pushing or pulling of hand or foot controls); SSR 00-4p, 2000 WL 1898704 *3 (stating that vocational evidence must be consistent with regulatory definitions).

When the ALJ's findings are considered in light of the Commissioner's controlling regulatory definitions, an award of benefits is warranted. See Brownawell v. Comm'r of Soc. Sec., 554 F.3d 352, 358 (3d Cir. 2008); Morales v. Apfel, 225 F.3d 310,320 (3d Cir. 2000) (both citing Podedworny v. Harris, 745 F.2d 210, 221-22 (3d Cir. 1984), to hold that the Court may award benefits "when the administrative record of the case has been fully developed and when substantial evidence on the record as a whole indicates that the claimant is disabled and entitled to benefits"). If benefits are not awarded, then remand for further VE testimony is required, because nothing in the existing record explains how the identified jobs can be classified as light if performed in accordance with the ALJ's RFC finding.

14. The ALJ failed to address objections to the VE in his decision

HALLEX requires that properly lodged objection must be ruled upon by the ALJ explicitly, with an explanation for why the objections were denied. Under HALLEX I-2-5-55 in particular, when an objection is made to a VE's opinion, the ALJ has an absolute obligation to "rule on the objection and discuss any ruling in the decision." The AC likes to remand on this issue when an ALJ fails to address an objection to VE testimony in the ALJ decision. Hopefully the above materials and our training have given you many opportunities to start objecting more and more to VE testimony. We have repeatedly emphasized the need to preserve objections with respect to the vocational testimony. In many cases, even most cases, ALJs will ignore your objections entirely. This is one of the great reasons for objecting to VE testimony. We hope they ignore you! Their failure to address your objections to the VE testimony in their decision can provide a very strong basis for remand by the AC pursuant to HALLEX I-2-5-55.

15. Failure to properly weigh a medical opinion

As you can see from where we placed this issue, it is FAR FAR FAR from a compelling basis for appeal. The vast majority of practitioners argue only 2 issues to the Appeals Council: weighing of the medical opinions and credibility. Those arguments are generally doomed to failure. If you are going to pursue "re-weigh" issues like those, then they should be extremely specific and present compelling factual reasons why the ALJ fundamentally got something wrong.

Yet in some cases where the ALJ's analysis of a treating source opinion (in a strong case) is particularly cursory, a broad objection to the ALJ's weighing analysis may be useful. For example, if the ALJ offered only a sentence or so, you can effectively argue that all of the mandatory factors listed by 20 C.F.R. 404.1527(c) were not considered. You can then go on and show how some of those specific factors might be crucial to evaluating the favorable opinions in your case. The AC likes to remand due to the failure to consider all of these factors.

If you want a particularly compelling brief that won on an issue like this, just email Dave Chermol and ask for a copy of his "KINSEY" brief from Delaware. It is too long to excerpt effectively in these materials.

16. Extra-record evidence

Sometimes ALJs rely upon evidence not in the record. This is especially common in cases involving prior denials, but happens in other contexts as well. Reliance upon extra-record evidence is a violation of 20 C.F.R. § 404.953(a). Keep an eye out for this issue. You would be shocked how often this happens.

17. Failing to provide a copy of the VE's qualifications

This is a violation of HALLEX I-2-5-55. The ALJ has an obligation to introduce into the record evidence of the VE's qualifications. This error generally occurs in one of two scenarios. First, the ALJ obtains post-hearing VE ROGS. Second, a

scheduling error has occurred and the ALJ randomly grabs a VE out of the lobby. However, it happens in other instances as well.

18. The ALJ fails to proffer post-hearing evidence to the attorney

This is a facial violation of HALLEX I-2-7-30.

19. The ALJ cites to a medical text in the decision

This is a legal error and below is an example of an AC argument based on this issue:

> In the decision the ALJ repeatedly references the Diagnostic and Statistical Manual of Mental Disorders (DSM) in support of her interpretation of certain mental health records and her overall RFC finding (ALJ Decision, Findings 4 & 5 on pages 5 & 9). Neither this medical text nor any of the referenced material therein was provided to the claimant or her representative for review and comment as required by SSA HALLEX I-2-8-25(D). Likewise, this material was never made a part of the record (ALJ Decision, Index).

This point can tend to go well with an issue where the ALJ cherry-picked only unfavorable GAF scores.

20. Failure to discuss a strong work history

The best way to make this point is just to include an excerpt of an argument:

> The ALJ violated Third Circuit precedent, the regulations, and SSR 96-7p by failing to discuss the claimant's outstanding work history prior to the alleged onset date.
>
> Nowhere in his credibility assessment did the ALJ discuss the fact that Ms. XXXXXXiewski had an outstanding work history in the years prior to becoming disabled. This was a violation of black letter legal authority. See 20 C.F.R. §

404.1529(c)(3) (requiring an ALJ to consider a claimant's work history in evaluating credibility); Taybron v. Harris, 667 F.2d 412, 415 n.6 (3d Cir. 1981) (holding that the testimony of a claimant with a strong work history is worthy of substantial credibility); see also SSR 96-7p, 1996 WL 374186 * 5 (requiring an ALJ to consider the claimant's prior work record in evaluating credibility). Moreover, this error is particularly egregious because counsel affirmatively highlighted this fact at the end of the hearing and mentioned to the ALJ that his prior decision had failed to account for this fact. Even worse, the ALJ acknowledged the validity of this point just before the hearing concluded. Yet the ALJ does not mention this factor even a single time in his credibility analysis. Ms. XXXXXX **earned** the right to such consideration. In any event, the ALJ violated clear and binding legal authority in performing his credibility analysis.

21. Failure to ask the VE whether their testimony was consistent with the DOT

We have seen single issue AC remands on this issue. It obviously goes nicely with any possible argument that there is some arguable conflict between the VE testimony and the DOT.

22. The ALJ never asked the rep whether they objected to the VE testifying

We have seen this work as well. In one specific case, on remand the ALJ asked what objections there were to the VE and the rep said none with an impish grin. The ALJ still paid the case on remand.

23. No exhibit list was attached to the ALJ denial

This happens less than it used to, but it still does occur. The AC LOVES to remand on this issue. Pursuing this argument is particularly effective when there is some dispute as to what evidence was actually before the ALJ. That can still frequently happen with paper cases.

24. Opinions solicited by a claimant's lawyer are NOT inherently suspect; in fact the opposite is true for treating source opinions.

This will not get you anywhere with the AC, but it is a good thing that you should remind yourself of. Treating source opinions are not inherently suspect. To the contrary, the regulations provide that they are presumptively entitled to deference. Here are two cases you may want to read on the topic.

In the Seventh Circuit you have: Punzio v. Astrue, 630 F.3d 704, 712 (7th Cir. 2011) ("As for the ALJ's second reason for rejecting Dr. Mahmood's opinion (as well as the opinion of the YWCA therapist), the fact that relevant evidence has been solicited by the claimant or her representative is not a sufficient justification to belittle or ignore that evidence."). In the Ninth Circuit you have: Reddick v. Chater, 157 F.3d 715, 726 (9th Cir. 1998) ("Our opinions reveal that the mere fact that a medical report is provided at the request of counsel or, more broadly, the purpose for which an opinion is provided, is not a legitimate basis for evaluating the reliability of the report.").

Both cases can be used for sources beyond treating sources given their broad language. But they are particularly helpful for treating source opinions. To me though both opinions are defective in some way and neither case was properly argued by Plaintiff's counsel (at least given that the sources at issue were treating sources). It must be remembered that this is not a question for a court to decide. The Commissioner already decided this issue in her regulations. Although the Agency could have promulgated a policy to the contrary where such reports are inherently suspect, SSA instead chose a policy that defers to treating sources. Period. This is consistent with what the Supreme Court said in Black and Decker v. Nord. Here is a blurb about Nord:

> Under the law of this Circuit and the Commissioner's own rules and regulations, an ALJ must accord significant deference to an assessment by a claimant's treating physician. See Brownawell v. Comm'r of Soc. Sec., 554 F.3d 352, 355 (3d Cir. 2008) (holding that treating opinions are entitled to "great weight");

20 C.F.R. § 404.1527(c)(2) (stating that the Commissioner gives "more weight" to opinions from "treating sources"); Social Security Ruling (SSR) 96-2p, 1996 WL 374188 *4 (stating that a treating opinion is always entitled to "deference" and may be entitled to "the greatest weight" even if it is not controlling). The "treating physician doctrine," which is the "long established" law of this Circuit, requires that "a court considering a claim for disability benefits must give greater weight to the findings of a treating physician than to the findings of a physician who has examined the claimant only once or not at all." Mason v. Shalala, 994 F.2d 1058, 1067 (3rd Cir. 1993) (citing Gilliland v. Heckler, 786 F.2d 178, 183 (3rd Cir. 1986); see also Brownawell, 554 F.3d at 355 (holding that a treating physician's opinion is entitled to "great weight").

The Act's regulations specify that the Agency will generally "give more weight to opinions from your treating sources." 20 C.F.R. § 404.1527(c) (listing the nature of the treating relationship, length of treatment, supportability, consistency, and specialization as primary factors which must be considered when assessing the weight to which a medical opinion is entitled). Further, the governing SSR states that a treating source's opinion is always entitled to "deference" and may be entitled to "the greatest weight" even if it is not controlling. SSR 96-2p, 1996 WL 374188 *4. In accordance with the Agency's own policy, treating source opinions are entitled to deference because treating sources are most likely to be "able to provide a detailed longitudinal picture" of a claimant's medical history, and "usually have the most knowledge about their patients' conditions." 20 C.F.R. § 405.1527(c)(2); 56 Fed. Reg. 36,93201, 36935 (Aug. 1, 1991). Further, in probably the most overlooked policy statement in all of disability, all things being equal, when a treating source has seen a claimant for long enough to develop a longitudinal picture, the Agency "will always give greater weight to the treating source's opinion than to the opinions of non-treating sources even if the other opinions are also reasonable or even if the treating source's opinion is inconsistent with other substantial evidence of record." Id., at 36,936. The Supreme Court has noted that the Agency's rules provide that "special weight" is accorded to the opinions of a claimant's treating physicians. See Black & Decker Disability Plan v. Nord, 538 U.S. 822, 825 (2003).

We hope you got at least 1 or 2 useful nuggets out of this training. My email address is dave@ssihelp.us.

INDEX TO ATTACHMENTS

1. Exhibit A - SSA Memo on Reasoning Level (3 pages)

2. Exhibit B - Current SDM Memo (1 page)

3. Exhibit C - Prior SDM Memo (1 page)

4. Post-hearing brief using reasonable ME cross (3 pages)

5. Decision resulting from reasonable ME cross (3 pages)

6. Physical RFC form (4 pages)

7. Mental RFC form (6 pages)

8. Example of a "hidden" favorable consult (7 pages)

SOCIAL SECURITY

MEMORANDUM

Date: December 28, 2009 Refer To: 09-2139

To: Regional Management Officers

From: Susan Swansiger /s/
Director, Division of Field Procedures

Subject: Use of Electronic Occupational References for Administrative Law Judge and Senior Attorney Adjudicator Decisions - **UPDATE**

This memorandum is an update of the memorandum of the same name issued on October 10, 2008. It reflects the policy guidance revisions stated in the Office Disability Programs (ODP) Question and Answer (Q & A) Number 09-026, "What acceptable electronic occupational resources are currently available for use?" dated June 9, 2009. This memorandum supersedes all previous guidance regarding the use of electronic occupational references by ODAR adjudicators, and should be shared with all Administrative Law Judges (ALJs), Senior Attorney Adjudicators (SAAs), and Hearing Office Management Teams (HOMTs). These tools are not intended to replace reliance on the regulations, rulings and vocational expert testimony.

Consistent with Q&A 09-026 and the reminders listed below, four acceptable electronic versions of the Dictionary of Occupational Titles (DOT) are currently available at http://ssahost.ba.ssa.gov/digitallibrary:

- **OccuBrowse:** This program is searchable through a series of tabs along the top. The "Browse" tab allows users to search for occupations in multiple ways. Through the "Trait" button, users can search for occupations at any skill level that are within a claimant's residual functional capacity (RFC). On the "Browse" page, they can perform searches based on keywords within the job title, within the task description, or within both. This program also allows searches by a variety of other lists such as industry, Guide for Occupational Exploration (GOE), or occupational group, all of which can be useful when performing a transferability of skills analysis. After locating an occupation, users can find all DOT and Selected Characteristics of Occupations (SCO) information on the "Description," "Requirements," and "Codes" tabs. The "Requirements" tab also provides definitions of terms.

- **SkillTRAN, Job Browser Pro**: This program provides a searchable copy of the DOT. Users can search by job title, DOT code or keyword(s) within the title, and task description. After selecting an occupation and clicking "Details", users can find all DOT/SCO information on the "Quick View – Codes" button. Through the advanced search, it also allows searches by a variety of other lists, such as GOE or occupational group, all of which can be useful when performing transferability of skills analysis.

- OASYS: This program contains much the same functionality as OccuBrowse but with a different user interface. It can perform a wide variety of searches.

- **Westlaw Direct, SSA Excellence**: This program is a web-based version of the DOT. Formally known as LawDesk, this program provides a searchable copy of the DOT through the "SSA Excellence" tab on the main page of Westlaw Direct. The search is based on keywords within job titles and task descriptions. This results in a list of occupations containing the keywords and descriptions of the individual occupations. The descriptions look like a printed copy of the DOT and keywords are highlighted. SSA Excellence also provides a searchable version of the SCO.

REMINDERS

All of the above references contain DOT occupational information developed by the Department of Labor (DOL), meet the requirements of Social Security Ruling 00-4p, and are acceptable sources of occupational information for adjudicating disability cases. However, users are reminded that the references also contain information that we do not use in our disability adjudications, including:

- Access to web crawlers that provide listings of job vacancies for an occupation. Medical-vocational evaluation guidelines are based on the existence of jobs, not job openings.

- DOT ratings for General Education Development (GED). We do not rely on these ratings to conclude whether a claimant can perform a particular occupation when we cite occupations that demonstrate the ability to do other work. However, adjudicators should consider GED ratings that may appear to conflict with the claimant's RFC and the cited occupation(s); for example, an occupation with a GED reasoning level of 3 or higher for a claimant who is limited to performing simple, routine, or unskilled tasks. (See POMS DI 25015.030)

- DOT ratings for Temperaments and Aptitudes. These ratings are not to be used because they reflect the personal interests, natural abilities, and personality characteristics of job incumbents rather than limitations or restrictions resulting from a medically determinable impairment(s), as are required for SSA's disability programs.

- DOT ratings for Guide for Occupational Exploration (GOE) codes and DOL's O*NET. These ratings and rating systems are not to be used in the medical-vocational evaluation process to identify the demands of work (e.g., walking, lifting, stooping, handling, etc.), but may be used to find similar DOT occupations for a transferability of skills decision.

- The SkillTRAN, Job Browser Pro available through commercial means contains occupational groups created by SkillTRAN to enable access to OES data for specialized teaching occupations and other Occupational Employment Statistics (OES) occupations to which no DOT occupations have been linked; however, this data has been removed from SSA's version of the program.

While OccuBrowse, SkillTRAN, OASYS, Job Browser Pro, Westlaw Direct, SSA Excellence, and "Social Security CD Library" are useful electronic occupational references tools, they cannot be relied upon to produce results that always conform to SSA medical and vocational policy, nor do they replace reliance on SSA regulations and rulings, VE testimony, and adjudicative judgment and decisionmaking.

Nevertheless, the use of the above-referenced tools provide quick access to DOT occupational information and to employment data that ALJs and SAAs may use to support fully favorable decisions without having to obtain testimony from Vocational Experts in every case. However, ALJs must continue to use VEs as appropriate in partially favorable and unfavorable cases.

If you would like to discuss this matter with me, please let me know. My staff contact is Attorney-Advisor Richard Ciaramello, who may be reached at 703-605-7957.

cc: Regional Chief Administrative Law Judges
Regional Office Management Teams

SOCIAL SECURITY

Office of the Chief Administrative Law Judge

MEMORANDUM

Refer To: 10-1691

Date: September 14, 2010

To: Regional Chief Administrative Law Judges

From: John P. Costello/s/

Acting Associate Chief Administrative Law Judge

Subject: Consideration of Single Decisionmaker (SDM) Residual Functional Capacity Assessments and Other Findings -- REVISED

This memorandum revises and replaces all previously issued memoranda addressing the evaluation of SDM residual functional capacity (RFC) assessments.

Under procedures set out in 20 CFR 404.1615 and 416.1015, a team comprised of a State agency disability examiner and a State agency medical consultant (MC) or psychologic consultant (PC) ordinarily makes the State agency's disability determination. Both members of the team are responsible for the determination. However, under the test modific to the disability determination process found in 20 CFR 404.906(b)(2) and 416.1406(b)(2), State agency disability examiners designated as SDMs may make disability determinat alone in many cases. In making these determinations, SDMs may consult with State agency MCs or PCs, but they are not required to, and MCs and PCs do not approve these determinations even when SDMs ask for their assistance. Since the SDMs are solely responsible for the determinations, they must make all of the necessary findings of fact, inc their own assessments of RFC when necessary.

For this reason, many case files that come from States that use SDMs will include Physical RFC Assessment forms (Form SSA-4734-BK) signed by SDMs, or their electronic equivalents in States that use the Electronic Claims Analysis Tool (eCAT) program. There may also be other forms containing other SDM findings. Agency policy is that findin made by SDMs are not opinion evidence that Administrative Law Judges (ALJs) or Attorney Adjudicators (AAs) should consider and address in their decisions. See, for exa POMS DI 24510.050C, which states that SDM-completed forms are not opinion evidence at the appeal levels. SDM findings are not "medical opinion" evidence since they do come from medical sources. However, agency policy is that they are also not the opinions of non-medical sources as described in SSR 06-3p.

Therefore, ALJs and AAs must not consider SDM RFC assessment forms and other findings as opinion evidence and must not evaluate them in their decisions. ALJs and, by extension, AAs must continue to consider findings made by State agency MCs and PCs as opinion evidence and weigh that evidence together with the other evidence in record when they make their decisions. 20 CFR 404.1527(f) and 416.927(f) and Social Security Ruling 96-6p.

The State agency should clearly identify any forms that are signed by SDMs. Nevertheless, the ALJ or AA is ultimately responsible for checking the signature lines of any relev forms and ensuring that the decision does not erroneously include an evaluation of SDM findings. In addition, since SDMs are permitted to consult with MCs and PCs, some ca will include RFC assessment or other forms that are signed by MCs and PCs in addition to forms signed by SDMs. ALJs and AAs should be aware that the case file may cont some forms that they must evaluate and some forms that they must not, and ensure that they are evaluating only forms that contain opinions from MCs and PCs.

When a case that contains a copy of an SDM's SSA-4734-BK is appealed to the hearing level, the form will be located in the "F" section (Medical Records). At case workup SDM's form should be moved to the "A" section (Payment Documents/Decisions); any forms signed by MCs or PCs should be left in the "F" section. If the State agency u eCAT to make the determination, the electronic equivalent of the SDM's physical RFC assessment form will already be in the "A" section.

Please share this information with all hearing office personnel in your region. If you would like to discuss this matter, please let me know. My staff contact is Attorney-Advisor Richard Ciaramello, who may be reached at 703-605-7957.

cc: Regional Office Management Teams

RELEASED BY:

Armando L. Rosa

Management Analyst

Office of the Chief Administrative Law Judge

HQ Support Branch

Social Security Administration

SOCIAL SECURITY

MEMORANDUM

Date: May 19, 2010 Refer To: 10-1280

To: Regional Chief Administrative Law Judges

From: Frank A. Cristaudo
Chief Administrative Law Judge

Subject: Evaluation of Single Decisionmaker Residual Functional Capacity Assessments -- **REMINDER**

We are issuing this memorandum as a reminder of how Administrative Law Judges (ALJs) and Attorney Adjudicators (AAs) should evaluate Residual Functional Capacity (RFC) assessments from State agency Single Decisionmakers (SDM).

Under 20 C.F.R. §§404.906(b)(2) & 416.1406(b)(2), the SDM will make the disability determination and may also determine whether the other conditions for entitlement to benefits based on disability are met. The SDM will make the disability determination after any appropriate consultation with a medical or psychological consultant. However, the medical or psychological consultant is not required to sign the disability determination forms the State agency uses to certify the determination of disability. See 20 C.F.R. §§404.906(b)(2) & 416.1406(b)(2).

SDMs often complete the Physical RFC Form, SSA-4374-BK, which is commonly completed by State agency medical consultants. Some ALJs and AAs treat the SDM RFC assessments as non-medical opinions and weigh them accordingly. However, this approach is inconsistent with agency policy clarified by POMS instruction DI 24510.050C, which states SDM forms are not opinion evidence at the appeal levels. Thus, agency policy requires ALJs and AAs to evaluate SDM RFC assessments as adjudicatory documents only, and not accord them any evidentiary weight when deciding cases at the hearing level. See also EM 08068-REV.

Please share this information with the ALJs and AAs in your region. If you would like to discuss this matter, please let me know. The staff contact is Attorney-Advisor Richard Ciaramello, who may be reached at 703-605-7957.

cc: Regional Office Management Teams

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January 28, 2014

VIA ERE & FACSIMILE TO: (717)236-3150
The Honorable Theodore Burock
Social Security Administration, ODAR
2 North 2nd Street, 8th Floor
Harrisburg, PA 17101

RE: Claimant:
SSN:

Dear Judge Burock,

We have not received the post-hearing information from the ME that was agreed to at the hearing. Nevertheless, we will submit our post-hearing objections to the vocational witness's (VW) testimony. Before doing so we would note a crucial point.

The ME here testified that the opinions of the treating specialists in this case are reasonable. The VW testified that those opinions would preclude competitive full time work; and so those opinions would support a finding of disability. While the ME disagreed with the treating source opinions, the ME's concession that those opinions are in fact reasonable requires this Court to defer to the treating source opinions. Thus, a finding of disability is appropriate.

SSA itself has stated in explaining the deference owed to treating source opinions, "all things being equal," when a treating source has seen a claimant for long enough to develop a longitudinal picture, the Agency "**will always give greater weight to the treating source's opinion than to the opinions of non-treating sources even if the other opinions are also reasonable or even if the treating source's opinion is inconsistent with other substantial evidence of record**." Standards for Consultative Examinations and Existing Medical Evidence, 56 Fed. Reg. 36932 *36936 (Aug. 1, 1991) (emphasis added). The foregoing is probably the most overlooked and unknown policy statement in the history of the disability program. But it is binding on this Court. Indeed, the Supreme Court cited to this exact Federal Register policy statement by SSA in explaining the inherent

deference to treating source opinions created by SSA's regulations. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 825 (2003). Given the deference to treating source opinions and the fact that SSA's own expert agrees that the treating source opinions are reasonable, a finding of disability is warranted here.

As to the VW testimony, we object to it and state that it cannot be used to satisfy SSA's step 5 burden here. Reasoning level 2 jobs, by definition, require the ability to carry out detailed written and oral instructions. The VW admitted that the limitations to routine and routine tasks identified by your Honor would preclude the ability to carry out DETAILED written and oral instructions. Thus, reasoning level 2 jobs here are eliminated. The call out operator (237.367-014) job and the order clerk job (209.567-014) identified by the VW are actually reasoning level 3 positions. Thus, they require a level of reasoning far beyond even reasoning level 2, and therefore must be eliminated here. As a result, all of the jobs the VW had originally testified were possible were actually not when one listens to the entirety of the VW testimony.

The normal Agency response is often to then discuss SVP. But in this case there is not just the text of Appendix C of the DOT to contradict any such argument. Rather, there is the testimony of SSA's own VW that reasoning level and SVP are independent and distinct aspects of the DOT. The VW also noted that SVP refers strictly to the amount of time it takes to learn a job, whereas the GED reasoning scale reflects the mental prerequisites for performing jobs. SVP and reasoning are distinct components of the DOT, as the Agency's own expert testified. Thus, the Agency cannot attempt to blur SVP and reasoning level because the testimony of its own expert will not permit that blurring. In short, the jobs the VW had originally believed were possible are not all actually possible based upon the ENTIRETY of the VW's testimony at the hearing. At the very least, we have established an affirmative and specific record here to show a reasoning level inconsistency between the VW's testimony and the contents of the DOT. To the extent that the Court would attempt to rely upon the VW's testimony as to these two jobs to meet SSA's step 5 burden, we explicitly object and request a ruling on the issue in the ALJ decision, consistent with HALLEX I-2-5-55.

In addition, SSA's own policy statement (see attached) on this issue indicates that reasoning level 3 jobs are inappropriate where there is a limitation to **EITHER** simple, routine, **OR** unskilled work. Given that Your Honor limited the claimant to unskilled, routine work, these two jobs must be eliminated from consideration under SSA policy.

The final two jobs, assembler and table worker occur in a factory manufacturing setting according to the VW. A factory manufacturing setting would be inappropriate for an individual with the respiratory problems like Mr. XXXXXXXXXXXX has. Indeed, the VW admitted that these jobs are not performed in isolation and would involve environmental exposure to other people who at times could be wearing perfumes or other noticeable scents. This would be intolerable for someone like Mr. XXXXXXXXXXXX, as the medical records demonstrate. Based on this, we explicitly object to these two jobs as well and request a ruling on the issue in the ALJ decision, consistent with HALLEX I-2-5-55.

Thank You for Your consideration of our client's application.

Respectfully submitted,

David F. Chermol, Esq.

3. The claimant has the following severe impairments: respiratory impairment and obesity (20 CFR 404.1520(c)).

As noted in the records cited by the Court and other evidence, the claimant has some depression related to his physical impairments and resultant limitations. The record does not reveal significant objective clinical findings or a level of care indicative of a separately severe mental impairment. Further, the related limitations stem more so from his respiratory impairment. Because the undersigned finds disability based on the physical impairments alone, he will not fully discuss depression other than to note the obvious compounding effect this has on the already extremely limited residual functional capacity.

4. The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and 404.1526).

5. The claimant is incapable of sitting, standing or walking in any combination totaling an 8-hour workday.

In making this finding, the undersigned considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and SSRs 96-4p and 96-7p. The undersigned has also considered opinion evidence in accordance with the requirements of 20 CFR 404.1527 and SSRs 96-2p, 96-6p and 06-3p.

The claimant alleges disability due to severe respiratory impairment with chronic fatigue, persistent coughing and related depression precluding the performance of any work-related activities on a full-time sustained basis (Testimony and Section E).

After considering the evidence of record, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to produce the alleged symptoms, and that the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are generally credible.

The record shows that the claimant had a strong work history with only two employers, with significant earnings at his last place of employment at the Harley Davidson Plant. He has been unable to engage in substantial gainful activity since the alleged onset date, due to severe respiratory impairment resulting from exposure to muriatic acid at work.

Dr. Pella testified that the medical evidence shows the claimant has a history of asthma followed closely at the specialty level, with documented wheezing, chest pain, coughing and fatigue. He has had many lung function tests, which showed mild to moderate severity. One test in April 2012, pre-bronchodilator, was above listing level and showed mild obstruction. There is no indication of any hospitalizations due to asthma. Dr. Pella noted that the claimant is morbidly obese, with a body mass index (BMI) of 45, that he has intolerance for prescribed CPAP, and that he has recurring sinus infections although this is not a significant problem at this time. Dr. Pella opined that the claimant's impairments do not meet or medically equal a listing, and that he

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is capable of sedentary work with no exposure to environmental irritants such as dust and fumes. Dr. Pella indicated coughing would be an issue but that any restrictions from environmental odors/smells are dependent on self-reporting and credibility. Dr. Pella stated there are no objective tests for these and that it is usually a clinical determination made by treating or examining sources. Dr. Pella felt that, due to obesity and because his inability to use the CPAP could contribute to persistent fatigue, the claimant should be limited to occasional postural activities and restricted from hazardous situations such as unprotected heights, moving machinery and parts, and commercial driving. Dr. Pella felt the extreme functional limitations assessed by the claimant's treating physicians are disproportionate to the testing data and clinical findings. However, Dr. Pella would not characterize these unreasonable if from a treating source with better position to evaluate the credibility of subjective complaints and acknowledged the claimant's symptoms are consistent with his medical diagnoses. The state agency physician who initially reviewed the case also opined the claimant had a residual functional capacity for a range of sedentary work consistent with Dr. Pella's testimony (Exhibit 5A). The undersigned gives little weight to these opinions since the opinions from treating sources and overall record supports the claimant is more limited.

As noted by the Court, Dr. Bascom, the treating pulmonary specialist, indicated in her notes throughout 2008 that the claimant was unable to work in any capacity. The claimant has continued treating with Dr. Bascom since that time. As recently as January 2014, Dr. Bascom reiterated that opinion noting the claimant has demonstrated no improvement since the onset and that his condition is permanent and difficult to control (Exhibit 34F). The claimant's family physician, Dr. Kellett, also characterized chronic severe persistent asthma that is not under good control based on frequent contacts and pulmonary studies. Dr. Kellet indicated the claimant is capable of performing sedentary activity for an 8-hour workday, but not on a sustained or consistent basis due to his need to take unscheduled breaks every 30 minutes and expected absences more than four days a month. Dr. Kellet also indicated the claimant must avoid all exposure to temperature extremes and virtually all respiratory irritants including perfumes and even second hand cigarette smoke on someone's clothing (Exhibit 26F). Dr. Kellet and a consultative psychologist (who examined the claimant in conjunction with the subsequent claim) also indicated the claimant would have difficulties maintaining attention/concentration and communicating with others due to increased anxiety and persistent coughing related to exertional/respiratory irritants (Exhibits 16F, 27F).

Third party statements also support the extreme functional limitations and environmental restrictions alleged. The claimant's wife reported a significant decrease in the quality of family relationships and overall life due to his severe physical restrictions and persistent symptoms, despite extensive modifications made within the home and socially to avoid exposure from odors and situations that may exacerbate them (Exhibit 20E). The undersigned found the report from Juanita Jones, a longtime friend who is also the coordinator of a local charity that the claimant has been involved in, very persuasive. She noted that the claimant was previously regularly involved in various projects but has rarely done any volunteer work due to his respiratory problems and constant coughing exacerbated by physical exertion and environmental irritants. She also stated clients are uncomfortable and avoid him because of his cough and their misconstrued belief he has a contagious upper respiratory infection and that he has difficulty with even behind-the-scene activities because of his severe physical limitations (Exhibit 19E).

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Dr. Pella testified that the claimant's symptoms are consistent with his medical problems and that further reduction of his residual functional capacity depended on the claimant's credibility and clinical determination by treating sources. The claimant's strong work and earnings history further strengthens his credibility. The overall record shows that the claimant's functional capacity is so severely limited that he could not even perform sedentary work on a full-time sustained basis, consistent with the opinions from his treating physicians. Accordingly, the undersigned gives significant weight to the treating physician opinions.

6. The claimant is unable to perform any past relevant work (20 CFR 404.1565).

The demands of the claimant's past relevant work exceed the residual functional capacity.

7. The claimant was a younger individual age 45-49 on the established disability onset date (20 CFR 404.1563).

8. The claimant has at least a high school education and is able to communicate in English (20 CFR 404.1564).

9. The claimant's acquired job skills do not transfer to other occupations within the residual functional capacity defined above (20 CFR 404.1568).

10. Considering the claimant's age, education, work experience, and residual functional capacity, there are no jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 404.1560(c) and 404.1566).

In determining whether a successful adjustment to other work can be made, the undersigned must consider the claimant's residual functional capacity, age, education, and work experience in conjunction with the Medical-Vocational Guidelines, 20 CFR Part 404, Subpart P, Appendix 2. If the claimant can perform all or substantially all of the exertional demands at a given level of exertion, the medical-vocational rules direct a conclusion of either "disabled" or "not disabled" depending upon the claimant's specific vocational profile (SSR 83-11). When the claimant cannot perform substantially all of the exertional demands of work at a given level of exertion and/or has nonexertional limitations, the medical-vocational rules are used as a framework for decisionmaking unless there is a rule that directs a conclusion of "disabled" without considering the additional exertional and/or nonexertional limitations (SSRs 83-12 and 83-14). If the claimant has solely nonexertional limitations, section 204.00 in the Medical-Vocational Guidelines provides a framework for decisionmaking (SSR 85-15).

If the claimant had the residual functional capacity to perform the full range of sedentary work, considering the claimant's age, education, and work experience, a finding of "not disabled" would be directed by Medical-Vocational Rule 201.21. However, the additional limitations so narrow the range of work the claimant might otherwise perform that a finding of "disabled" is appropriate under the framework of this rule. The vocational expert testimony and Social Security Ruling(s) 96-8p and 96-9p support these conclusions.

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PHYSICAL RESIDUAL FUNCTIONAL CAPACITY ASSESSMENT

Patient Name:______________________________

Patient SSN:______________________________

IDENTIFICATION OF DIAGNOSES

Please identify the diagnoses which support the opinions that you offer in this assessment:

1. ______________________________
2. ______________________________
3. ______________________________
4. ______________________________
5. ______________________________

Due to these conditions, it is my opinion that within a reasonable degree of medical certainty, this individual would have the following functional limitations if placed in a **competitive** work situation on a full time basis (regular and continuing 8 hours a day, 5 days per week).

A. Please indicate how long your patient can sit and stand/walk ***total in an 8-hour working day*** (with normal breaks):

Sit	Stand/walk	
☐	☐	less than 2 hours
☐	☐	about 2 hours
☐	☐	about 4 hours
☐	☐	at least 6 hours

B. Does your patient need a job that permits shifting positions at will from sitting, standing or walking? ☐ Yes ☐ No

C. Will your patient occasionally need to take unscheduled breaks during a working day? ☐ Yes ☐ No

For this and other questions on this form, "rarely" means 1% to 5% of an 8-hour working day; "occasionally" means 6% to 33% of an 8-hour working day; "frequently" means 34% to 66% of an 8-hour working day.

D. How many pounds can your patient lift and carry in a competitive work situation?

	Never	Rarely	Occasionally	Frequently
Less than 10 lbs.	□	□	□	□
10 lbs.	□	□	□	□
20 lbs.	□	□	□	□
50 lbs.	□	□	□	□

E. How often can your patient perform the following activities?

	Never	Rarely	Occasionally	Frequently
Crouch	□	□	□	□
Stoop (bend)	□	□	□	□
Twist	□	□	□	□
Climb stairs	□	□	□	□
Kneel	□	□	□	□

F. Does your patient have significant limitations with reaching, handling or fingering?
□ Yes □ No

If yes, please describe: ______________________________

G. How much is your patient likely to be *"off task"*? That is, what percentage of a typical workday would your patient's symptoms likely be severe enough to interfere with *attention and concentration* needed to perform even simple work tasks?

□ 0% □ 5% □ 10% □ 15% □ 20% □ 25% or more

H. Are your patient's impairments likely to produce "good days" and "bad days"?

□ Yes □ No

If yes, assuming your patient was trying to work full time, please estimate, on the average, how many days per month your patient is likely to be absent from work as a result of the impairments or treatment:

□	Never	□	About three days per month
□	About one day per month	□	About four days per month
□	About two days per month	□	More than four days per month

I. Are your patient's symptoms as demonstrated by signs, clinical findings and laboratory or test results *reasonably consistent* with the diagnoses and functional limitations described above in this evaluation?

□ Yes □ No

If no, please explain: ______________________________________

J. How often can your patient tolerate the following environmental exposures:

	Never	Rarely	Occasionally	Frequently
Temperature Extremes	□	□	□	□
Dust	□	□	□	□
Humidity	□	□	□	□
Hazards (heights and moving machinery)	□	□	□	□
Fumes, Odors, Chemicals	□	□	□	□

K. Have your patient's impairments and their effects lasted or can they be expected to last for a continuous period of at least 12 months?

□ Yes □ No

EXPLANATION OF OPINION:

Please attach a report or discuss below: a) the nature and onset date of the patient's symptoms; b) the clinical and objective findings supporting your opinion; c) the patient's response to treatment and any side-effects; and d) the prognosis.

____

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____________________ DATE

____________________ Medical source's printed name

____________________ Medical source's signature

____________________ Medical source's degree

MEDICAL ASSESSMENT OF ABILITY TO DO WORK-RELATED ACTIVITIES (MENTAL)

Name of Individual:____________________ SSN:________________________

This form will be used to help determine this individual's ability to do work-related activities in a normal work setting 8 hours per day, 40 hours per week. Your assessment must be based on your treatment and/or examination of this claimant. The focus is upon how this individual's mental/emotional capabilities are affected by their impairments.

For each activity shown below:

(1) Describe the individual's ability to perform the activity according to the following terms

Unlimited or Very Good - Ability to function in this area is more than satisfactory.
Good - Ability to function in this area is limited but satisfactory.
Fair - Ability to function in this area is seriously limited.
Poor or None - No useful ability to function in this area.

(2) Identify the particular medical or clinical findings (i.e., mental status examination, behavior, observations, intelligence test results, and symptoms) which support your assessment of any limitations.

IDENTIFICATION OF PSYCHOLOGICAL DIAGNOSES

Please identify the diagnoses which support the opinions that you offer in this assessment:

1. ____

2. ____

3. ____

4. ____

5. ____

MAKING OCCUPATIONAL ADJUSTMENTS

Mark the blocks representing the individual's ability to adjust to a job and complete item number 9.

	Unlimited/ Very Good	Good	Fair	Poor/None
1. Follow work rules	☐	☐	☐	☐
2. Relate to co-workers	☐	☐	☐	☐
3. Deal with the public	☐	☐	☐	☐
4. Interact with supervisors	☐	☐	☐	☐
5. Use judgment	☐	☐	☐	☐
6. Deal with work stresses	☐	☐	☐	☐
7. Function independently	☐	☐	☐	☐
8. Maintain attention and concentration	☐	☐	☐	☐

9. Please discuss the medical or clinical findings that support this assessment. You are encouraged to specifically explain the basis for your opinion.

MAKING PERFORMANCE ADJUSTMENTS

Mark the blocks representing the individual's ability to adjust to a job and complete item number 4.

	Unlimited/ Very Good	Good	Fair	Poor/None
1. Understand, remember & carry out complex instructions	☐	☐	☐	☐
2. Understand, remember & carry out detailed, but not complex instructions	☐	☐	☐	☐
3. Understand, remember & carry out simple instructions	☐	☐	☐	☐

4. Please discuss the medical or clinical findings that support this assessment. You are encouraged to specifically explain the basis for your opinion.

MAKING PERSONAL-SOCIAL ADJUSTMENTS

Mark the blocks representing the individual's ability to adjust to a job and complete item number 5.

	Unlimited/ Very Good	Good	Fair	Poor/None
1. Maintain personal appearance	☐	☐	☐	☐
2. Behave in an emotionally stable manner	☐	☐	☐	☐
3. Relate predictably in social situations	☐	☐	☐	☐
4. Demonstrate reliability	☐	☐	☐	☐

5. Please discuss the medical or clinical findings that support this assessment. You are encouraged to specifically explain the basis for your opinion.

ADDITIONAL QUESTIONS

1. Is this individual likely to decompensate in a work setting due to stress? Y or N

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2. Is this individual likely to miss three or more days of work per month due to psychological symptoms or difficulties? Y or N

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3. Does this individual have a significant limitation in their ability to complete a normal workday and work week without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods? Y or N

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4. As a result of their impairments, would this individual be expected to often or frequently experience deficiencies in concentration, persistence, or pace resulting in a failure to complete tasks in a timely manner? Y or N

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5. Can this individual manage benefits in his or her own best interest? Y or N

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6. Has this individual's impairments lasted or can they be expected to last at the level of severity identified in this assessment for a continuous period of not less than 12 months? Y or N

EXPLANATION

Please attach a report or discuss below: a) the nature and onset date of the patient's symptoms; b) the clinical and objective findings supporting your opinion; c) the patient's response to treatment and any side-effects; and d) the prognosis.

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Signature of medical source **DATED**

____

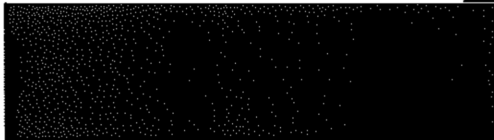
Printed Name of Medical Source

____

Title and degree of medical source

April Colbert, Psy.D.
4913 North Broad Street
Philadelphia, PA 19141
Phone: (267) 608-8715
Fax: (215) 329-3217

DISABILITY EVALUATION



DOB: 1/11/1964
AGE: 48
SERVICE: Mental Status Exam

General Observations:

The claimant arrived to the appointment on time.
He was dropped off by his daughter. An interpreter present to assist in communication needs.

The claimant does have PA driver's license.

The claimant appeared to be his reported chronological age. He reported that he was born in 1965, which also appeared on his state ID; however documents from Bureau of Disability Determination indicated 1964.
He was appropriately dressed and groomed, with good basic functioning and hygiene. He had no prominent gait abnormalities or gross motor coordination problems. He had no fine motor shakes or tremors. He was able to complete paper work independently and demonstrated no difficulty writing.

His approximate weight is 155 pounds and 5'6 in height. He mentioned that he has been eating less. "I used to weigh 165, due to depression, phobia and panic."

The claimant's emotional reaction was flat during this evaluation.
His speech was logical and coherent.
He was cooperative in answering questions during this evaluation. He sustained limited eye contact.

Presenting Problem/History of Illness:

When asked what symptoms are preventing the claimant from working at this time, he stated "depression, phobia, my hands, legs, and the pain (pointing to his back)."

When the claimant was asked how long ago his mental health symptoms began, he did not know.
He has been diagnosed with depression, panic with agoraphobia, and ADHD

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Presenting Problem/History of Illness (continued):

Currently, he experiences depression on a daily basis. He is sometimes socially withdrawn and wants to be left alone. His sleeping pattern is poor. He sleeps about three to four hours. He moved to Philadelphia, PA about twelve years ago so that his daughter could get treated for lupus. However, the claimant's daughter died about one year ago from lupus, he continues to have crying spells about her death. The claimant has no interest or pleasure in activities. He has no appetite, often feeling fatigue with loss of energy.

The claimant has a lot of anger which occur four to five times a week. He is easily agitated and short tempered. He will stay in his room to avoid conflict. He denied history of physical aggression or destruction. He experiences racing thought, which greatly affected and his concentration and ability to function and remember things that need to get done.
"I was shot in the mouth in Puerto Rico in 1995." The claimant reportedly continues to have flashbacks and memories about it. "I feel like I am going to get assaulted again." He worries that something bad will happen again. He does not take public transportation and does not trust others.

Childhood History:

The claimant was born and raised in Puerto Rico. He was raised by his mother. His father was not involved in his life. He was killed.
He grew up with four brothers and four sisters. Since then two brothers have passed.

The claimant reported to have experienced no abuse as a child.
The claimant has no history of DHS involvement.

Background Information:

The Bureau of Disability Adjudication staff provided the following records for review:

1. Records from Social Security Administration (form OMB No. 0960-0681) completed by Sheileemarie Carrion, BSW (unknown relation to claimant) dated December 23, 2012.

Psychiatric History:

	GENERAL APPEARANCE & GENERAL BEHAVIOR				DAILY PATTERNS		
	Neat		Poor Hygiene		Hypersomnia	X	Poor Quality Sleep
	Disheveled		Agitated	X	Social Withdrawal	X	Nightmares
	Well Groomed	X	Cooperative		Binging	X	Decrease Work
X	Appropriate Attire		Uncooperative		Anger/Fights		No disturbance in patterns

	GENERAL INTELLECTUAL FUNCTIONING				MOTORIC BEHAVIOR		
	Normal Intelligence		Able to Abstract		Normal	X	Agitated
X	Subnormal Intelligence		Memory Impairment		Apraxia		Tics
	Disoriented/Confused		Other:		Retardation		T/D

Psychiatric History (continued):

MOOD/AFFECT				THOUGHT CONTENT			
	Blunted	X	Labile		Unremarkable		Phobias
	Normal Range		Depressed/Sad		Obsessions		Delusions
	Constricted		Euphoria/Elated		Compulsions		Depersonalization
	Inappropriate		Angry/Hostile		Ideas of Reference		Derealization
X	Anxious		Anhedonia		Suicidal Ideation		Homicidal ideation
	Euthymic		Other:		Hallucinations	X	Other: RACING THOUGHTS

THOUGHT PROCESSES				PERCEPTION			
	Normal		Loose Associations	X	Normal		Hallucinations
X	Logical	X	Goal Directed				- Auditory
	Tangential		Circumstantial				- Visual
	Flight of ideas		Other:				- Tactile

SENSORIUM/ORIENTATION				MEMORY			
X	Oriented X3		Oriented X2		Good	X	Fair
	Oriented X1		Oriented X0		Poor		Other:

INSIGHT				JUDGEMENT			
	Good	X	Fair		Good	X	Fair
	Poor		Other:		Poor		Other:

The claimant has a history of suicidal ideations. He denied current suicidal thoughts. There is no history of suicidal attempts.
There is no history of homicidal thoughts /attempts.

The claimant has no history of psychiatric hospitalizations.
He currently attends the Multicultural Center once a week for therapy and once a month for a psychiatrist. He has been attending for about four or five months. This is his first time in therapy.

It is unknown if there is a family history of mental illness.
There is no reported family history of substance abuse.

The claimant is currently prescribed medications: Celexa, Xanax, Trazodone, and Restoril since November 2012, which he reports as not effective.

Medical History:

The claimant was diagnosed with lumbago, carpel tunnel, hyperlipidemia, allergic rhinitis, and indigestion. He also complains of back and leg pain. He has a degeneration of L5-S1 since about 2004.
He has no reported allergies.
He has no long term history of medical hospitalizations.

The claimant reports his last physical exam was in January 2012.
He is prescribed the following medications for medical problems: Tramadol, Cetirizine, Flonase, Amytripyline, and Cortisone shot once a month

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Legal History/Military History/Substance Abuse History:

The claimant has no legal history.

The claimant denied any affiliation with the military.

The claimant denied any history of substance abuse.

Educational & Vocational Histories:

The claimant completed the eleventh grade. He has not obtained his GED thus far.
When asked about his interest in returning to school he replied, "No."

When asked about his interest in returning to work he replied, "But I can't"
His last job was about two years ago. He worked as a mechanic's assistant. He worked for about one year then was laid off. This is his longest place of employment.
The claimant's current source of income is DPW.

PsychoSocial History:

The claimant is married. He had three daughter one passed (25 and 29). He also has one granddaughter, who is reportedly handicap. His relationship with wife and children are good and they are very supportive. He resides with wife and grand- daughter in North Philadelphia, PA.

The claimant reported that "my health" is the major stressors. He is unable to maintain current friendships and has no interest in obtaining new friendships. His social life is inactive with no friends. He attends church services when he feels like it.
He currently has no interest in engaging in pleasurable activities. He used to enjoy going out, since he was shot he discontinued going out.

The claimant has reported limitations in sitting, walking, standing, running. He is reported incapable of cooking and cleaning due to his hands.
His personal hygiene and personal grooming are sometimes affected by his moods.

Cognitive Functions:

Cognitive Tasks	Response	Degree of Deficit *(Mildly/Moderately/Markedly impaired; unimpaired)*
Digits forward (5, 3,7,2, 9,1, 4)	5678910	*Markedly impaired*
Digits backward (5, 3,7,2, 9,1, 4)	423578	*Markedly impaired*
Simple math	2+4=3 12-3=5 3x4=6	*Markedly impaired*

Complex math	6x8= don't know 60/12= don't know	*Markedly impaired*
Spell world in reverse	Unable to write or read in English	n/a
Fund of Information	**Response**	**Degree of Deficit** *Markedly impaired*
Days in the year	250	n/a
Months in a year	9	n/a
Hours in one day	7	n/a
Current President	Bill Clinton	n/a
First President of U.S.	Skip	n/a
Vocabulary	**Response**	**Degree of Deficit** *Markedly impaired*
Word: summer	Cold	n/a
Word: reputation	I don't know	n/a
Opposite of happy	No	n/a
Opposite of hard	No	n/a
Abstract Information (Similarities)	**Response**	**Degree of Deficit** *Markedly impaired*
Drums / guitar	I don't know, both are the same	n/a
North / South	I don't know	n/a
Desk / chair	I don't know	n/a
Judgment	**Response**	**Degree of Deficit** *Markedly impaired*
What to do if you are lost when driving	"stay there"	n/a
What to do if you are given incorrect order at restaurant	"I would eat it"	n/a
What to do if someone lies to you	"get upset"	n/a

Psychometric Test Results:

No psychological instruments were conducted during this evaluation.

Functional Assessment:

Based on the current assessment, the claimant demonstrated moderate impairment in his ability to understand, remember, and carry out one to two-step instructions. This claimant demonstrated moderate impairment in his ability to understand, remembers, and carries out detailed instructions. His attention and concentration skills appear to be moderately impaired.

Functional Assessment (continued):

The claimant's reported limitations in behavior (depression, anxiety) and cognition/memory/concentration/ attention were commensurate with those observed and those reported in the background information provided.

The claimant put forth average effort when completing the evaluation. The claimant provided his own history. His report of historical information appears to be reliable.
The results are believed to be an accurate representation of the claimant's current level of functioning.

The claimant may have moderate impairment in his ability to interact appropriately with supervisors, co-workers, and the public as he presented as socially withdrawn. This claimant may mildly be able to tolerate day to day work pressures with compliance to mental health treatment.

Diagnosis:

AXIS I:	296.32 Major Depressive Disorder, Recurrent, Moderate 300.00 Anxiety Disorder NOS
AXIS II:	Deferred
AXIS III:	lumbago, carpel tunnel, hyperlipidemia, allergic rhinitis, and indigestion (per claimant)
AXIS IV:	Limited social support
AXIS V:	GAF= 65

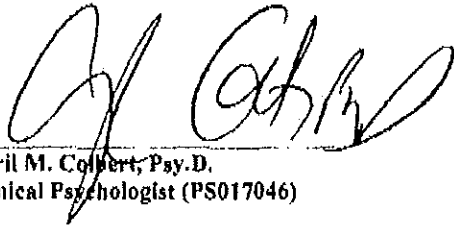
Prognosis:

The claimant's prognosis is fair. Continued psychiatric care is highly recommended. It is also recommended he attend individual therapy at least twice a month in order to work on ways to overcome assault, grieve the loss of his daughter, increase social supports, and identify the triggers to onset of anxiety. Additionally, the claimant reported that medical/physical problems are the primary reason he is unable to sustain employment at this time. For this reason, a medical evaluation is recommended and his prognosis in terms of occupational functioning may be better determined by a physician. Once psychiatrically and medically stabilized, he may benefit from vocational rehabilitation.

Capability:

The claimant appears that he cannot manage personal funds in a competent manner as demonstrated by his ability on cognitive tasks.

Respectfully submitted,



2/24/13

April M. Colbert, Psy.D.
Clinical Psychologist (PS017046)

Date