Notre Dame Law School
NDLScholarship

Indiana Continuing Legal Education Forum 2020 | Indiana Continuing Legal Education Forum

2020

Social security

Indiana Continuing Legal Education Forum (ICLEF)

Follow this and additional works at: https://scholarship.law.nd.edu/iclef_2020

Recommended Citation

Indiana Continuing Legal Education Forum (ICLEF), "Social security" (2020). *Indiana Continuing Legal Education Forum 2020*. 54.
https://scholarship.law.nd.edu/iclef_2020/54

This Article is brought to you for free and open access by the Indiana Continuing Legal Education Forum at NDLScholarship. It has been accepted for inclusion in Indiana Continuing Legal Education Forum 2020 by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Social Security
September 25, 2020
Index

Index. 6
ICLEF Electronic Publications. 6
MANUAL-Social Security September 25, 2020. 7
Agenda. 10
Faculty. 11
Faculty Bios. 12
Manual Table of Contents. 28
Section-1-Timothy-E-Burns. 41
- Section 1 - Timothy E. Burns. 41
- Table of Contents - Burns. 43
- The First Steps Toward a Disability Hearing. 44
- I. The Genesis of the Rules. Like every specialized practice, Social Security law has its own jargon. 44
- II. Governing Agencies. 44
- III. Types of Claims. Before we decide if the client is medically unable to work, what are they eligible for?. 44
- IV. When we speak of “insurance,” what do we mean?. 45
- V. Common Lawyer/Representative Paperwork. 46
- VI. Common Adjudicative terms to determine eligibility. 47
- VII. Sequential Evaluation/The Five Steps of Disability Adjudicators (hint: it'sreally SIX steps). 48
- VIII. The DDB. 50
- IX. Reconsideration. 51
- Burns PowerPoint - Social Security: A Primer. 52

Section-1-Sarah-M-Crosby. 74
- Section 1 - Sarah M. Crosby. 74
- Table of Contents. 76
- Hearings and Appeals. 77
- I. Requesting and Scheduling a Hearing. 77
- II. What Happens at the Hearing?. 78
- III. Post Hearing. 79
- IV. Types of Decisions. 79
- Appeals. 80
  - I. Appeals Council. 80
  - II. Federal Court Appeals. 81
  - Crosby PowerPoint - Social Security 101 Part II - Hearings and Appeals. 82

Section-2-Annette-L-Rutkowski-Theodore-F-Smith-Jr-Ann-M-Trzynka. 96
- Section 2 - Annette L. Rutkowski - Theodore F. Smith, Jr. - Ann M. Trzynka. 96
- Table of Contents 98
- Cross Examining the Experts. 99
  - Expertise and Qualifications. 99
  - Vocational Experts. 101
  - Medical Experts. 109
  - Conclusion. 112
- Questioning the Vocational Expert. 113
  - PROBATIONARY PERIOD, ABSENCES, ETC. 113
  - SUPERFICIAL CONTACT. 113
  - “OCCASIONAL”. 113
  - WAIS-IV. 114
  - ADDITIONAL QUESTIONS. 114
  - ADDITIONAL INFORMATION/TIPS. 114
- MODIFIED REQUEST FOR ISSUANCE OF A SUBPOENA DUCES TECUM. 116
- Questioning the Medical Expert. 119
  - Preliminary and Background Questions. 119
  - Medical Diagnosis and Symptoms. 119
  - Functioning and Staying on Task in the Work Environment. 120
  - Function Reports. 120
- PowerPoint - Cross Examining the experts 121

Questioning the Vocational Expert. . . . 122
Vocational Resources and Tools. . . . 123
Set the Stage: Negate the “Sponge Rule”. . . . 127
Job Accommodations. . . . 128
Probationary Periods. . . . 129
Effect of Manipulative Limitations on Occupational Base. . . . 130
Outdated DOT Descriptions of Jobs. . . . 131
Effect of Reduced Lifting & Standing on Occupational Base. . . . 132
Production Rate and Two-hours on Task. . . . 134
Superficial Contact & On Task Requirements. . . . 135
Production Rate & End-of-Day Goals. . . . 136
Unscheduled Breaks. . . . 137
Section-3-Thomas-J-Scully-III-Michael-DeYoung-William-M-Krowl-Joshua-M-Matejczyk. . . . 141
Section 3 - Thomas J. Sculy III - Michael Deyoung - William M. Krowl - Joshua M. Matejczyk 141
Table of Contents 143
PowerPoint 144
PREPARING THE CLIENT. . . . 144
Preparing the Client/Witness. . . . 145
PAST RELEVANT WORK. . . . 149
Definition of Past Relevant Work. . . . 150
Is Past Relevant Work Important?. . . . 151
What to Ask your Client. . . . 152
Getting it Right. . . . 153
Why does it Matter?. . . . 154
WHY CAN’T THE CLIENT WORK?. . . . 155
Why is it Important to Know?. . . . 156
DISCUSSING THE CLIENT’SIMPAIRMENTS. . . . 157
Why is it Important to Know?. . . . 158
MEDICAL SOURCESTATEMENTS. . . . 160
Medical Source Statements. . . . 161
ACTIVITIES OF DAILY LIVING. . . . 162
Why is it Important?. . . . 163
Honesty is the Best Policy. . . . 164
OTHER LIKELY QUESTIONS DURING THE HEARING. . . . 167
Prep Your Client. . . . 168
Amended Onset Dates. . . . 170
Possible Disability Offsets. . . . 171
Substance Abuse. . . . 173
Vacations. . . . 174
Criminal Convictions. . . . 175
Earnings. . . . 176
Treatment Gaps/Little Treatment. . . . 177
RULE CHANGES. . . . 178
OLD RULE: 404.1527 (aka, “The Treating Physician Rule”). . . . 179
Acceptable Medical Sources (Cont.). . . . 180
Consideration of Medical Opinions Underthe Old Rule. . . . 181
New Rule: 404.1520c. . . . 184
The 5 Factors. . . . 186
Differences Between the Old Rule and New Rule. . . . 188
Additional New Rules to Consider. . . . 192
Section-4-Lawrence-D-Rohlfing. . . . 194
Section 4 - Lawrence D. Rohlfing. . . . 194
Table of Contents. . . . 196
OccuCollectTM. . . . 197
The Administrative Notice Regulation. . . . 198

For Example. 199
Social Security Ruling 00-4p. 200
42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). 201
The Cases – Cross-examination is Hard. 202
The VE Does Not Have to Cooperate. 203
The VE Does Not Have to Understand. 204
The VE Does Have to Explain Rationally. 205
The Representative Must Raise the Issue. 206
Explanation or Just Substantial Evidence. 207
The DOT per the DOL. 208
SSA Statement about the O*NET. 209
What is the Occupational Requirements Survey (ORS)?. 210
Marker – DOT code 209.287-034 211
Cashier II. 212
Section-5-Adriana-M-de-la-Torre-Timothy-J-Vrana. 213
Section 5 - Adriana M. de la Torre - Timothy J. Vrana. 213
Table of Contents. 215
7th Cir Case Updates July 31, 2018 to August 31, 2020. 220
Horr v. Berryhill, 743 F. App'x 16 (7th Cir. 2018)Aff'd 07/31/18. 220
Spicher v. Berryhill, 898 F.3d 754 (7th Cir. 2018)Rev'd 08/03/18. 220
Collins v. Berryhill, 743 F. App'x 21 (7th Cir. 2018)Aff'd 08/09/18. 220
Richards v. Berryhill, 743 F. App'x 26 (7th Cir. 2018)Aff'd 08/13/18. 221
Barrett v. Berryhill, 734 F. App'x 350 (7th Cir. 2018)Aff'd 08/14/18. On 09/25/18, this case was issued as a published opinion at 904 F. 221
Walker v. Berryhill, 900 F.3d 479 (7th Cir. 2018)Rev'd 08/15/18. 221
Penrod v. Berryhill, 900 F.3d 474 (7th Cir. 2018)Aff'd 08/15/18. 222
West v. Berryhill, No. 18-1021, 2018 U.S. App. LEXIS 22828 (7th Cir. 2018)Aff'd 08/16/18. 222
Plessinger v. Berryhill, 900 F.3d 909 (7th Cir. 2018)Rev'd 08/20/18. 222
Weaver v. Berryhill, 746 F. App'x 574 (7th Cir. 2018)Aff'd 08/20/18. 223
Baldwin v. Berryhill, 746 F. App'x 580 (7th Cir. 2018)Rev'd 08/21/18. 223
Kelham v. Berryhill, 751 F. App'x 919 (7th Cir. 2018)Aff'd 10/31/18. 223
Hardy v. Berryhill, 908 F.3d 309 (7th Cir. 2018)Rev'd 11/08/18. 223
Truelove v. Berryhill, 753 F. App'x 393 (7th Cir. 2018)Aff'd 11/28/18. 224
McHenry v. Berryhill, 911 F.3d 866 (7th Cir. 2018)Rev'd 12/26/18. 224
Hammerslough v. Berryhill, 758 F. App'x 534 (7th Cir. 2019)Aff'd 01/09/19. 225
Radosevich v. Berryhill, 759 F. App'x 492 (7th Cir. 2019)Rev'd 01/22/19. 225
Winsted v. Berryhill, 923 F.3d 472 (7th Cir. 2019)Rev'd 02/08/19. 226
Ray v. Berryhill, 915 F.3d 486 (7th Cir. 2019)Rev'd 02/12/19. 226
Fisher v. Berryhill, 760 F. App'x 471 (7th Cir. 2019)Rev'd 02/15/19. 227
Paul v. Berryhill, 760 F. App'x 460 (7th Cir. 2019)Rev'd 02/15/19. 227
DeCamp v. Berryhill, 916 F.3d 671 (7th Cir. 2019)Rev'd 02/26/19. 228
Mischler v. Berryhill, 766 F. App'x 369 (7th Cir. 2019)Rev'd 03/20/19. 229
Burmester v. Berryhill, 920 F.3d 507 (7th Cir. 2019)Aff'd 04/05/19. 230
L.D.R. v. Berryhill, 920 F.3d 1146 (7th Cir. 2019)Aff'd 04/15/19. 231
Jozefyk v. Berryhill, 923 F.3d 492 (7th Cir. 2019)Aff'd 05/08/19. 231
Dudley v. Berryhill, 773 F. App'x 838 (7th Cir. 2019)Aff'd 05/16/19. 232
Saunders v. Saul, 777 F. App'x 821 (7th Cir. 2019)Aff'd 06/28/19. 232
Krell v. Saul, 931 F.3d 582 (7th Cir. 2019)SSA won. 07/24/19. 233
Crump v. Saul, 932 F.3d 567 (7th Cir. 2019)Rev'd 07/31/19. 234
Rockwell v. Saul, 781 F. App'x 532 (7th Cir. 2019)Rev'd 08/08/19. 234
Williams v. Saul, 782 F. App'x 488 (7th Cir. 2019)Rev'd 09/06/19. 235
Burgos v. Saul, 788 F. App'x 1027 (7th Cir. 2019)Rev'd 10/17/19. 235
Pytlewski v. Saul, 791 F. App'x 611 (7th Cir. 2019)Aff'd 11/12/19. 236
Primm v. Saul, 789 F. App'x 539 (7th Cir. 2019)Aff'd 11/21/19. 236
Dunn v. Saul, 794 F. App'x 519 (7th Cir. 2019)Rev'd 11/26/19. 237
Olivas v. Saul, 799 F. App'x 389 (7th Cir. 2019)Aff'd 12/16/19. 237

Urbanek v. Saul, 796 F. App'x 910 (7th Cir. 2019)Aff'd 12/16/19. 237
Felts v. Saul, 797 F. App'x 266 (7th Cir. 2019)Aff'd 12/18/19. 238
Hinds v. Saul, 799 F. App'x 396 (7th Cir. 2020)Aff'd 01/09/20. 238
Brown v. Saul, 799 F. App'x 915 (7th Cir. 2020)Rev'd 01/10/20. 239
Prater v. Saul, 947 F.3d 479 (7th Cir. 2020)Aff'd 01/15/20. 240
Gebauer v. Saul, 801 F. App'x 404 (7th Cir. 2020)Aff'd 01/17/20. 240
Overton v. Saul, 802 F. App'x 190 (7th Cir. 2020)Aff'd 01/22/20. 241
Gibbons v. Saul, 801 F. App'x 411 (7th Cir. 2020)Rev'd 01/23/20. 241
Lay v. Saul, 791 F. App'x 624 (7th Cir. 2020)Aff'd 01/29/20. 242
Martin v. Saul, 950 F.3d 369 (7th Cir. 2020)Rev'd with instruction to award benefits 02/07/20. 242
Kuykendoll v. Saul, 801 F. App'x 433 (7th Cir. 2020)Aff'd 02/20/20. 243
Vang v. Saul, 805 F. App'x 398 (7th Cir. 2020), petition for cert. filed, (U.S. July 27, 2020)(No. 20-5181)Aff'd 02/21/20. 244
Underwood v. Saul, 805 F. App'x 403 (7th Cir. 2020)Aff'd 03/03/20. 244
Massaglia v. Saul, 805 F. App'x 406 (7th Cir. 2020)Aff'd 03/04/20. 244
Morrison v. Saul, 806 F. App'x 469 (7th Cir. 2020)Aff'd 03/10/20. 245
Reinaas v. Saul, 953 F.3d 461 (7th Cir. 2020)Rev'd 03/16/20. 245
Marquardt v. Saul, 798 F. App'x 34 (7th Cir. 2020)Rev'd 03/17/20. 246
Jeske v. Saul, 955 F.3d 583 (7th Cir. 2020)Aff'd 04/02/20. 246
Atkins v. Saul, — F. App'x —, 2020 WL 2554397 (7th Cir. 2020)Aff'd 05/20/20. 247
Simons v. Saul, — F. App'x —, 2020 WL 3124238 (7th Cir. 2020)Aff'd 06/12/20. 247
Trottier v. Saul, 809 F. App'x 326 (7th Cir. 2020)Aff'd 06/15/20. 247
Bruno v. Saul, 817 F. App'x 238, 2020 WL 3497633 (7th Cir. 2020)Aff'd 06/26/20. 248
Greenwell v. Saul, 811 F. App'x 368 (7th Cir. 2020)Aff'd 06/30/20, rehearing denied 07/14/20. 248
Sosinski v. Saul, 811 F. App'x 380 (7th Cir. 2020)Aff'd 07/01/20. 248
Sosh v. Saul, — F. App'x —, 2020 WL 3969624 (7th Cir. 2020)Aff'd 07/14/20. 249
Apke v. Saul, 817 F. App'x 252, 2020 WL 4018988 (7th Cir. 2020)Aff'd 07/16/20. 249
Hapner v. Saul, — F. App'x —, 2020 WL 4284324 (7th Cir. 2020)Aff'd 07/27/20. 249
Surprise v. Saul, 968 F.3d 658, 2020 WL 4345158 (7th Cir. 2020)Aff'd 07/29/20. 250
Mitze v. Saul, 968 F.3d 689, 2020 WL 4380642 (7th Cir. 2020)Aff'd 07/31/20. 250
Plainse v. Saul, 816 F. App'x 24, 2020 WL 4660255 (7th Cir. 2020)Aff'd 08/12/20. 251
Brace v. Saul, --- F.3d ---, 2020 WL 4727345 (7th Cir. 2020)Rev'd 08/14/20. 251
Barrett v. Saul, --- F. App'x ---, 2020 WL 4783556 (7th Cir. 2020)Aff'd 08/18/20. 251
Rennaker v. Saul, --- F. App'x ---, 2020 WL 4814120 (7th Cir. 2020)Rev'd 08/19/20. 252
Jones v. Saul, --- F. App'x ---, 2020 WL 5105694 (7th Cir. 2020)Rev'd 08/31/20. 253
CASES LISTED BY SUBJECT MATTER 07/31/18 – 08/31/20. 254
Alcoholism. 254
Bad behavior by ALJ. 254
Cane use. 254
Cherry-picking. 254
Composite job. 254
Concentration, persistence, or pace. 254
Conditions can change over time. 255
Credibility and a good work history. 255
Credibility and daily activities. 255
Duty (of the ALJ) to fully and fairly develop the record. 255
Employment records. 255
Evidence contrary to the ALJ's conclusion must be considered. 255
Fast-paced/strict production. 255
"Flexible pace". 255
GED Levels per DOT. 255
Harmless error. 256
Lip service doesn't cut it. 256
Listing analysis. 256
Logical bridge. 256
Misstated the facts. 256

Need to describe limitations that the ALJ should have imposed. . . . 256
Non-severe impairments must be considered in the RFC. . . . 256
"Not entirely credible" is not, by itself, reversible error. . . . 256
Obesity. . . . 257
Playing doctor. . . . 257
Relying on a state-agency consultant's or ME's narrative. . . . 257
Remand for an award of benefits. . . . 257
RFC by an ALJ for a previous period need not be honored. . . . 257
Significant evidence since the last state-agency opinion. . . . 257
Sit/stand. . . . 257
Spotty evidence. . . . 257
Subpoena for VE materials. . . . 257
Surgery not being recommended doesn't mean the claimant doesn't have pain. . . . 257
Third party opinions. . . . 258
Treating Opinion. . . . 258
Unemployment benefits. . . . 258
Unrep'd at hearing. . . . 258
Vague comments/report/opinion by a consultative examiner. . . . 258
VE testimony. . . . 258
Waiver. . . . 258
Section-6-Katie-Brinkmeyer. . . . 259
Section 6 - Katie E. Brinkmeyer. . . . 259
Table of Contents. . . . 261
1. What happens to a case when it reaches OHO?. . . . 263
2. What do ALJs do to get ready for a hearing?. . . . 263
3. How much time do ALJs have to review each case before the hearing?. . . . 263
4. When do ALJs first look at a case?. . . . 265
5. Are pre-hearing briefs helpful?. . . . 265
6. Do requests for OTRs get read and considered?. . . . 265
7. Is there a reason we don't get a response when the request is denied?. . . . 265
8. Who decides whether to schedule an ME? When is that decision made? What kind of analysis goes into that / how is that decision r 265
9. Do you think all ALJs remember that when making decisions?. . . . 265
10. What happens after the hearing is over? Who does what?. . . . 265
11. How extensive are the ALJ's comments to the decision-writer? What topics do the ALJ's comments cover?. . . . 266
12. Is there a form ALJs use to write their instructions? If so, can we see it? See Miller v. Saul (7th Cir. 2020).. . . . 266
13. Is there typically/ever any discussion written or verbal betweenthe decision- writer and the ALJ (like between district court judges a 266
14. Do the ALJs/decision-writers have any type of checklist to make sure the decision is free of mistakes? If so, can we see that?. . . . 266
15. What kind of training is given to ALJs and decision-writers?. . . . 266
16. Do the ALJs read the decision-writer drafts before signing it?. . . . 266
17. Do ALJs pay any attention to case law? How much do ALJs and decision-writers care about 7th Circuit case law? How aware are . 267
18. After you've issued a decision, do you know if it's subsequently appealed? If it is appealed, do you know the outcome on appeal?D 267

ICLEF Electronic Publications

Feature Release 4.1
August 2020

To get the most out of your *ICLEF Electronic Publication,* download this material to your PC and use Adobe Acrobat® to open the document. The most current version of the Adobe® software may be found and installed by clicking on one of the following links for either the free Adobe Acrobat Reader® or the full retail version of Adobe Acrobat®.

Feature list:

1. **Searchable** – All ICLEF Electronic Publications are word searchable. To begin your search, click on the "spyglass" icon at the top of the page while using the Adobe® software.
1. **Bookmarks** – Once the publication is opened using the Adobe Acrobat® software a list of bookmarks will be found in a column located on the left side of the page. Click on a bookmark to advance to that place in the document.
2. **Hypertext Links** – All of the hypertext links provided by our authors are active in the document. Simply click on them to navigate to the information.
3. **Book Index** – We are adding an INDEX at the beginning of each of our publications. The INDEX provides "jump links" to the portion of the publication you wish to review. Simply left click on a topic / listing within the INDEX page(s) to go to that topic within the materials. To return to the INDEX page either select the "INDEX" bookmark from the top left column or right-click with the mouse within the publication and select the words "*Previous View*" to return to the spot within the INDEX page where you began your search.

Please feel free to contact ICLEF with additional suggestions on ways we may further improve our electronic publications. Thank you.

Indiana Continuing Legal Education Forum (ICLEF)
230 East Ohio Street, Suite 300
Indianapolis, Indiana 46204
Ph: 317-637-9102 // Fax: 317-633-8780 // email: iclef@iclef.org
URL: https://iclef.org

SOCIAL SECURITY

September 25, 2020

WWW.ICLEF.ORG

Copyright 2020 by Indiana Continuing Legal Education Forum

DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

The Indiana Continuing Legal Education Forum and contributing authors hereby disclaim any and all responsibility or liability, which may be asserted or claimed arising from or claimed to have arisen from reliance upon the procedures and information or utilization of the forms set forth in this manual, by the attorney or non-attorney.

Attendance of ICLEF presentations does not qualify a registrant as an expert or specialist in any discipline of the practice of law. The ICLEF logo is a registered trademark and use of the trademark without ICLEF's express written permission is prohibited. ICLEF does not certify its registrants as specialists or expert practitioners of law. ICLEF is an equal opportunity provider of continuing legal education that does not discriminate on the basis of gender, race, age, creed, handicap, color or national origin. ICLEF reserves the right to refuse to admit any person or to eject any person, whose conduct is perceived to be physically or emotionally threatening, disruptive or disrespectful of ICLEF registrants, faculty or staff.

INDIANA CONTINUING LEGAL EDUCATION FORUM

OFFICERS

TERESA L. TODD
President

LYNNETTE GRAY
Vice President

HON. ANDREW R. BLOCH
Secretary

SARAH L. BLAKE
Treasurer

ALAN M. HUX
Appointed Member

LINDA K. MEIER
Appointed Member

DIRECTORS

James H. Austen
Sarah L. Blake
Hon. Andrew R. Bloch
Melanie M. Dunajeski
Mark A. Foster
Lynnette Gray
Alan M. Hux
Dr. Michael J. Jenuwine
Dean Jonna Kane MacDougall
Thomas A. Massey
Linda K. Meier
Richard S. Pitts
Jeffrey P. Smith
Teresa L. Todd
Inge Van der Cruysse

ICLEF

SCOTT E. KING
Executive Director

James R. Whitesell
Senior Program Director

Jeffrey A. Lawson
Program Director

SOCIAL SECURITY

Agenda

8:30 A.M. **Registration and Coffee**

8:50 A.M. Welcome and Introduction
- *Timothy J. Vrana,* Program Chair

9:00 A.M. Social Security 101
- *Timothy E. Burns & Sarah M. Crosby*

10:00 A.M. Cross Examining the Experts *(Medical and Vocational)*
- *Annette L. Rutkowski, Theodore F. Smith and Ann M. Trzynka*

11:00 A.M. **Coffee Break**

11:15 A.M. The New Rules / Preparing the Witness for Hearing
- *Michael DeYoung, William Krowl, Joshua M. Matejczyk and Thomas J. Scully III* (moderator)

12:15 P.M. **Lunch (on your own)**

1:15 P.M. Using Government Data to Cross Examine the Vocational Expert
- *Lawrence D. Rohlfing*

2:15 P.M. Significant Cases from the 7th Circuit
- *Adriana M. de la Torre and Timothy J. Vrana*

3:15 P.M. **Refreshment Break**

3:30 P.M. Observations of a Long-Time Decision-Writer: Tips, and a Peek Behind the OHO Curtain
- *Katie Brinkmeyer*

4:30 P.M. **Adjourn**

September 25, 2020

WWW.ICLEF.ORG

SOCIAL SECURITY

Faculty

Timothy J. Vrana - Chair
TIMOTHY J VRANA LLC
628 Third Street
P. O. Box 527
Columbus, IN 47202
Ph: 812-375-9306
Email: tim@timvrana.com

Katie E. Brinkmeyer
STEWART|PHELPS|WOOD
3905 Vincennes Rd Suite 400
Indianapolis, IN 46268
Ph: 317-289-6831
Email: kwbrinkmeyer@gmail.com

Timothy E. Burns
Keller & Keller, LLP
300 E Fall Creek Pkway N. Drive 4th Floor
Indianapolis, IN 46205
Ph: 317.926.1111
Email: timb@2keller.com

Sarah M. Crosby
Law Office of Sarah Crosby
P.O. Box 30956
Indianapolis, IN 46230
317-760-9293
sarah@indydisability.com

Michael DeYoung
Thomas J. Scully III & Associates, LLC
506 Ridge Road
Munster, Indiana 46321
Ph: 219.836.1380
mdeyoung@scullydisabilitylaw.com

William M. Krowl
YOCUM LAW OFFICE
1041 N Royal Ave., Suite B
Evansville, IN 47715
Ph: 812-421-1865
Email: williamkrowl@gmail.com

Joshua M. Matejczyk
Thomas J. Scully III & Associates, LLC
506 Ridge Road
Munster, Indiana 46321
Ph: 219.836.1380
joshua@scullydisabilitylaw.com

Lawrence D. Rohlfing
Law Offices of
Lawrence D. Rohlfing
12631 East Imperial Highway, Suite 115 C
Santa Fe Springs, CA 90670
Ph: 562-868-5886
Email: rohlfing.office@rohlfinglaw.com

Annette L. Rutkowski
Law Office of Annette Rutkowski, LLC
301 East Carmel Drive, Suite G003
Carmel, IN 46032
P: 317-853-6606
Email: Annetter@Annetteatty.com

Thomas J. Scully III
Thomas J. Scully III & Associates, LLC
506 Ridge Road
Munster, Indiana 46321
Ph: 219.836.1380
Email: tjscully@scullydisabilitylaw.com

Theodore F. Smith, Jr., PC
Attorney at Law
215 Historical 8th Street
Anderson, IN 46016-1374
Ph: 765-644-8410
Email: tsmith@tedsmithlaw.com

Adriana M. de la Torre
The de la Torre Law Office LLC
333 North Alabama Street Suite 350
Indianapolis, IN 46204
Ph: (866) 205-4014
Email: adriana@dltlawoffice.com

Ann M. Trzynka
Law Office of Ann M. Trzynka
716 Broadway Street
New Haven, IN 46774
Ph: 260.901.6020
Email: ann@ssappeal.com

September 25, 2020

Timothy J. Vrana

628 3rd Street, Columbus, IN 47201
812-375-9306
tim@timvrana.com

Tim Vrana has practiced law for over 38 years in Columbus, Indiana. He has successfully briefed and orally argued cases before the Indiana Tax Court, the Indiana Court of Appeals, the Indian Supreme Court, the District Court for the Southern District of Indiana, and the Seventh Circuit Court of Appeals. He now limits his practice to Social Security disability cases, which he handles at both the administrative and federal court levels.

Tim earned his bachelor's degree from Duke University in 1973, graduating magna cum laude and with distinction in political science.

He worked as a Claims Representative for the Social Security Administration for seven years (Jan. 1974 – Dec. 1980). He graduated cum laude from Indiana University McKinney School of Law at Indianapolis in 1982 and was admitted to the bar that same year. After 22 years with the Sharpnack Bigley firm in Columbus, Indiana, he opened a solo practice in Columbus on January 1, 2005.

Tim has been a member of the National Organization of Social Security Claimants' Representatives (NOSSCR) since 1982. He was chair of the Indiana State Bar Association's Appellate Practice Section from October 2012 to October 2013. He is a member of the American Bar Association's Council of Appellate Lawyers. He has been a member of the Southern District of Indiana's Local Rules Advisory Committee since 2007. He served on the Indiana State Bar Association's Board of Governors from 2016-18. He currently is a member of the governing council of the State Bar Association's Social Security section and is the lone Social Security disability attorney on the ABA's Standing Committee on Specialization.

Res Gestae, Indiana Lawyer, and Appellate Issues, a publication of the ABA's Council of Appellate Lawyers, have published Tim's articles. He has presented at several CLE programs on civil appeals and Social Security disability cases.

In 2010, Tim was awarded the AV Preeminent Rating for Highest Possible Rating in Both Legal Ability and Ethical Standards. In 2019 and 2020, Tim was named a Super Lawyer.

Away from the office, Tim is the public address announcer for Columbus North High School football, girls basketball, and boys basketball teams. He is in his 18th year of announcing for Columbus North.

Katie Brinkmeyer is a first-time ICLEF presenter. While she is new to us, she not new to Social Security law. Katie worked as an attorney advisor at the Office of Hearing Operations in Indianapolis, Indiana, from 2010 to 2019. As an attorney advisor, she conducted in-depth legal analysis on Title II and Title XVI claims and wrote thousands hearing-level decisions covering a wide range of issues, procedural and substantive, in the determination of disability for Title II and Title XVI claims. During her tenure with the agency, Katie acquired a comprehensive knowledge of the Social Security Act, related federal and state statutes, Code of Federal Regulations, and Social Security Ruling. Katie took her knowledge back to the private Sector in September of 2019 and joined Stewart Phelps Wood Injury Lawyers, where she does worker's compensation, medical malpractice, and a limited amount of Social Security, due to post-employment restrictions with the Agency. She is looking forward to taking on more Social Security cases at the District Court this year and is available to assist with any of your brief writing needs.

Katie is a graduate of the Mauer School of Law at Indiana University Bloomington and is admitted to the Indiana State Bar, Northern District of Indiana, Southern District of Indiana, the Illinois State Bar, Northern District of Illinois, and Southern District of Illinois.

Please feel free to send questions or comments to kwbrinkmeyer@gmail.com.

Tim Burns
Keller & Keller LLP, Indianapolis

Tim Burns uses the law to empower his clients to receive the benefits they deserve. He is a nationally recognized speaker on the Disability program, who has taught other lawyers how to practice before the Social Security Administration at both State and National programs. Tim grew up in Pendleton and attended Pendleton Heights High School. He attended Hanover College, receiving his Bachelor's degree in history in 1991. Soon thereafter, Tim began working for the Indiana Department of Disability Determination, processing Social Security claims. It was only after a 10 years with the department that Tim entered law school at the Indiana University School of Law in Indianapolis.
He joined Keller & Keller in 2008, concentrating his practice on Social Security Disability. Onesuch case involved an Indiana man with multiple health issues. Taking the case to the Court of Appeals, Tim won. It is now widely cited by practioners within the Seventh Circuit's jurisdiction. Tim is the Secretary of the Disability Section of the State Bar of Indiana, and a member of the Indianapolis Bar Association, the Federal Bar Association of Indiana and the National Association of Social Security Representatives.

Sarah M. Crosby
Law Office of Sarah Crosby, Indianapolis

Born and raised in Indiana, Sarah is a zealous advocate for her clients. She has represented clients in both administrative proceedings at Social Security, as well as in Federal Court.

Sarah previously worked for the Attorneys General of Washington and Indiana prosecuting cases of Medicaid fraud. She was second chair of a trial involving a Medicaid provider stealing from the citizens of Washington. The trial resulted in a conviction and restitution to the state.

While in law school at Indiana University, Sarah served as the Symposium Editor of the Indiana Law Review.

When she is not working on behalf of her clients you can find her outside, enjoying nature with her husband and dog.

EDUCATION
Indiana University School of Law
Indiana University, Bachelor of Arts

BAR ADMISSIONS
Washington
Indiana

COURT ADMISSIONS
Northern District of Indiana
Southern District of Indiana

Michael DeYoung
Thomas J. Scully III & Associates, Munster

MICHAEL DeYOUNG is an attorney with Scully Disability. He grew up in the south suburbs and currently lives in Northwest Indiana. In 2000, he earned his degree in History from Calvin College in Grand Rapids, MI. Later, he went on to The John Marshall Law School, where he graduated *cum laude.* Mike is very active in his community and especially enjoys coaching youth sports.

Mr. DeYoung is a member of the Lake County and Indiana Bar Associations and is admitted to practice in all courts in the state of Indiana as well as the United States District Court for the Northern District of Indiana.

PROFESSIONAL MEMBERSHIPS

- Lake County Bar Association
- Indiana State Bar Association

William Krowl
Yocum Law Office, Evansville

Will joined Yocum Law Office in January 2016. He graduated from the University of Southern Indiana in 2007 and received his law degree from the Indiana University McKinney School of Law in 2010. Will has worked as an advocate for Social Security Disability clients throughout his legal career and has extensive experience at all levels of the disability process, including Federal District Court and the Seventh Circuit Court of Appeals. Will currently sits on the Board of Directors for the United Methodist Youth Home and is a member of the Affordable Housing Trust Fund Advisory Committee. Will enjoys spending his free time with his wife, Lindsey, and his step-daughter, Adelynn.

Joshua M. Matejczyk
Thomas J. Scully III & Associates, Munster

JOSHUA M. MATEJCZYK is an attorney with Scully Disability. He is a resident of Lake Station, Indiana, and graduated from Valparaiso University School of Law in 2013. While in law school he served as an Associate Editor of the Valparaiso University Law Review and student representative in the Low-Income Tax Clinic, where he developed a passion for helping the underprivileged in the community. Prior to law school, he received a Bachelor of Arts in Political Science and Economics from Valparaiso University while also participating in the Christ College interdisciplinary honors program.

Mr. Matejczyk enjoys having an active role in his community. In 2015, Mr. Matejczyk was elected to serve as Judge of the Lake Station City Court hearing traffic cases, city ordinance violations, and local criminal matters. Mr. Matejczyk continues to serve as the Lake Station City Judge as a way to give back of his time. He also sits on the governing board of his local church.

In his free time, Mr. Matejczyk is an avid boater and enjoys spending time with his wife, daughter, cat and dog. Mr. Matejczyk is admitted to practice law in Indiana. He is also admitted to the Federal Court in both the Northern and Southern Districts of Indiana, as well as to practice in from of the Social Security Administration throughout the United States.

Lawrence D. Rohlfing
Law Offices of Lawrence D. Rohlfing, Santa Fe Springs, CA

Lawrence D. Rohlfing has practiced disability law since 1985. He represents the disabled and seeks to enforce their rights before the Social Security Administration, the United States District Courts, the United States Courts of Appeal, and the United States Supreme Court. Having been involved in thousands of disability claims and training of other lawyers, he brings considerable experience and expertise to the representation of disability claims under Social Security and ERISA.

Mr. Rohlfing has argued disability and other benefit entitlement claims in over a hundred claims before the Ninth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals. He presented briefs in three cases to the United States Supreme Court. Mr. Rohlfing argued Black & Decker Disability Plan v. Nord to the United States Supreme Court in April 2003.

Mr. Rohlfing is a sustaining member of the National Organization of Social Security Claimants' Representatives (NOSSCR). He currently serves as the Ninth Circuit Representative to the NOSSCR Board of Directors and currently serves as the Treasurer of NOSSCR sitting on the Executive Board. Mr. Rohlfing is the past chair of the Los Angeles County Bar Association Social Security Section. Mr. Rohlfing has presented numerous papers to bi-annual meetings of NOSSCR, the Los Angeles County Bar Association Social Security Section, the Beverly Hills Bar Association, the Southeast Bar Association of Los Angeles County, and the National Business Institute.

Mr. Rohlfing graduated from Whittier College in 1982. He graduated from Whittier Law School in 1985 *cum laude.* He is the proud father of seven children that he raises with his wife Maggie. He is actively involved in the community managing baseball and softball teams, coaching football, and serving as the elder of La Habra Christian Church.

<u>COMMUNITY INVOLVEMENT</u>
La Mirada Little League - manager 1994, 1995, Winter 1995, 1996
La Habra Little League - manager 1997, Winter 1997, 2001, 2004, 2005, coach 2003
Whittier Pony Baseball - manager 1998
La Habra Girls Softball - head coach 1999, 2000
La Mirada Jr. All American Football - coach 1998
La Habra Pop Warner - team representative 1999, coach 2000, 2001, 2005, 2006, head coach 2007, 2008
La Habra Christian Church - elder 2001-2006, 2008-current, vice chair 2002, chair 2003 -2006

AREAS OF PRACTICE

- Social Security 95%
- Benefit Litigation 5%

BAR ADMISSIONS

- California, 1985
- U.S. District Court Eastern District of California, 1986
- U.S. District Court Central District of California, 1985
- U.S. District Court Southern District of California
- U.S. District Court District of Arizona
- U.S. Court of Appeals 9th Circuit, 1986
- U.S. Federal Courts, 1985
- U.S. Supreme Court

EDUCATION

- Whittier College School of Law, Los Angeles, California
  - J.D. - 1985
  - Honors: *cum laude*
- Whittier College, Whittier, CA
  - B.A. - 1982
  - Honors: Dean's List, 1980
  - Major: Political Science

HONORS AND AWARDS

- Who's Who in California
- Who's Who Among Rising Young Americans

PROFESSIONAL ASSOCIATIONS AND MEMBERSHIPS

- Ninth Circuit Judicial Council, Appellate Lawyer Representative alternate, 2009
- National Organization of Social Security Claimants' Representatives (NOSSCR), Current Member
- Los Angeles County Bar Association, Social Security Section, Past Chair, 1997 to 1998
- American Association for Justice, Social Security Section
- Association of Trial Lawyers of America
- California Trial Lawyers Association
- Los Angeles Trial Lawyers Association
- American Bar Association
- National Organization of Social Security Claimants' Representatives (NOSSCR), Past President
- NOSSCR, Board of Directors, Ninth Circuit Representative
- NOSSCR, Executive Board, Treasurer

Annette L. Rutkowski
Law Office of Annette Rutkowski LLC, Carmel

Areas of Practice
- Social Security - Disability
- Long-Term Disability
- Assistance For Young Adults With Autism
- Adult Guardianships

Bar Admissions
- Indiana

Education
- Indiana University School of Law, Indianapolis, Indiana

  - J.D.

- State University of New York at Oswego

  - B.A.
  - Major: Public Justice

Classes/Seminars
- Speaker, Disability Practice Clinic, Indiana University Law School
- Speaker, Social Security Practice, Indiana Continuing Legal Education Foundation
- ICLEF Video Hearings, 2012 - Present
- Social Security Bootcamp, National Business Institute, 2012 - Present
- Preparation for Video Conference Hearings and Impact of SSR 11-1p, NOSSCR Conference, San Antonio, 2011 - Present
- Reconsideration, ICLEF, 2007 - Present

Honors and Awards
- Accreditation as Veteran's Attorney by the U.S. Department of Veterans Affairs

Professional Associations and Memberships
- Indiana Bar Association
- Indianapolis Bar Association
- National Organization of Social Security Claimant's Representatives
- National Association of Women Lawyers
- American Bar Association Commission on Disability Rights
- National Disability Lawyers Network

Thomas J. Scully III
Thomas J. Scully III & Associates, Munster

Thomas J. Scully III is a resident of Lake County Indiana, and has represented Social Security claimants since 1984, exclusively focusing his practice in Social Security and SSI law since that time. He has handled thousands of cases representing the disabled, from initial applications through federal court appeals.

Mr. Scully is admitted to practice law in Indiana, Illinois, and Pennsylvania. He is also admitted to the Federal Courts in the Northern and Southern Districts of Indiana, and to the Supreme Courts of Indiana, Illinois, and Pennsylvania, as well as admitted to the United States Supreme Court. Additionally, Mr. Scully is admitted to the U.S. Court of Appeals for Veterans Claims.

Graduating from Temple University in 1970 (BA), Mr. Scully went on to earn his law degree from Rutgers Law School at Camden in 1973 (JD). He began his career in law in 1973, working for the Army Corps of Engineers (1973-1974) and the Immigration & Naturalization Service Department of Justice (1974-1975). He opened his own practice in 1975 and also served as Deputy Prosecutor in Lake County, Indiana, from 1976 through 1978.

PROFESSIONAL MEMBERSHIPS

- Lake County Bar Association
- Indiana State Bar Association
- Chicago Bar Association – Past Chairman, Social Security Committee
- NOSSCR – National Organization of Social Security Claimant's Representatives – 7th Circuit Board Director since 2007
- Military Service – 1965-1967
- Vietnam Veteran – 1966-1967
- Munster Rotary Club President – 1979-1980
- Highland Rotary Club Sustaining Member, Past President and Paul Harris Fellow

Theodore F. Smith, Jr.
Attorney at Law, Indianapolis

Preparatory Education:
- B.A., University of Notre Dame, 1973
- J.D., Notre Dame Law School, 1976

Jurisdictions Admitted to Practice:
- Admitted to Bar, 1976, Indiana

Bar Activities and Memberships:
- Indiana Supreme Court Committee on Rules of Practice and Procedure, 2003-2012, Chair 2010-2012
- American Inns of Court, Master, 2003
- American Trial Lawyers Association, Member
- College of Fellows of Indiana Trial Lawyers Association, Fellow
- Indiana Trial Lawyers Association, President, 2000-2001
- Indiana Trial Lawyers Association, Board of Directors 1990-2001
- Indiana Trial Lawyers Association, Director Emeritus, 2001-present
- Indiana State Bar Association, Board of Managers, 1988-1990

Publications:
- Author: Developments in Social Security Law, 21 Indiana Law Review 1, 1988
- Book Review of Jury Persuasion: Psychological Tactics and Trial Techniques, by Donald E. Vinson, for Trial Magazine, January 1994
- Various continuing legal education speeches and articles for seminars presented by the American Trial Lawyers Association, Indiana Center for Continuing Legal Education Forum and the Indiana Trial Lawyers Association
- Co-Author: Indiana Trial Lawyers Association, Verdict, "In Our Judgment" column

Civic and Community Affiliations and Activities:
- Chairman of the Board of Community Hospital of Anderson and Madison County, 2003-2004
- Member of the Board of Community Hospital of Anderson and Madison County, 1995-2004

Adriana De la Torre
Member and Co-Founder

Adriana M. de la Torre co-founded The de la Torre Law Office LLC, where she focuses her practice exclusively on representing individuals who have been denied Social Security benefits and must seek judicial review of the Social Security Administration's decision in federal court. Adriana has extensive experience in litigating Social Security cases in the federal courts, where she zealously seeks to reverse the agency's erroneous denial of benefits to claimants. Adriana continuously strives to provide the highest level of representation for her clients in administrative and court proceedings to ensure that their claims are adjudicated consistent with applicable statutes, agency regulations, and judicial precedent. Primarily, Adriana represents disability claimants in the United States Court of Appeals for the Seventh Circuit and the seven district courts in its jurisdiction, including Central District of Illinois, Northern District of Illinois, Southern District of Illinois, Northern District of Indiana, Southern District of Indiana, Eastern District of Wisconsin, and Western District of Wisconsin.
Adriana is a member of the National Organization of Social Security Claimant Representatives (NOSSCR) and regularly attends national disability conferences to stay current on the latest developments in Social Security Law that will enable her to continue to provide outstanding representation to her clients. Given her experience, Adriana was invited to be a presenter at several national NOSSCR Conferences, including conferences in Denver 2015, Miami 2016, and Seattle 2016. Adriana also has been a presenter at the Chicago Bar Association's Social Security Disability Conference in September 2016. In addition to her multiple speaking engagements, Adriana has authored several articles on Social Security Disability Law for the Indianapolis Bar Association. Adriana is also active with the Indiana State Bar Association's Social Security Disability group.

Prior to co-founding The de la Torre Law Office LLC in 2011 with her sister and law partner, Carina de la Torre, Adriana served as an Assistant Regional Counsel in the Social Security Administration's Office of the General Counsel, Region V, Chicago. As an Assistant Regional Counsel, she represented the Social Security Administration, defending the Agency in legal actions arising under Titles II and XVI of the Social Security Act before courts of original and appellate jurisdiction and administrative agencies in a five-state region. During her tenure with the agency, Adriana acquired a comprehensive knowledge of the Social Security Act, related federal and state statutes, regulations, Social Security Rulings, Agency interpretation of pertinent court decisions, and the court precedents in the Courts of Appeals for the Sixth, Seventh, and Eighth Circuits. She was also appointed Special Assistant United States Attorney to represent the Agency in various jurisdictions, including: Indiana, Illinois, Michigan, Ohio, Tennessee and Wisconsin.

Given her extensive experience in federal court, Adriana was selected as a member of the United States District Court for the Southern District of Indiana's Social Security Disability Work Group. Adriana has also been appointed by the United States District Court for the Southern District of Indiana as Mediation Assistance Program Counsel. She has been recognized for her Pro Bono work before the United States District Court for the Southern District of Indiana.

Ann M. Trzynka
Law Office of Ann Trzynka, LLC
716 Broadway Street
New Haven, Indiana 46774
ann@ssappeal.com
(260) 901-6020

Ann has extensive experience representing disabled individuals before the Social Security Administration and in federal district court. She accepts referrals from other attorneys for appeals to the Appeals Council and appeals to federal district court. Ann is admitted to the bar of the Supreme Court of the United States, the United States Court of Appeals for the Seventh Circuit, and the United States District Court for the Northern District and Southern District of Indiana. Ann is a frequent speaker on Social Security Disability law topics. She is a member of the National Organization of Social Security Claimant Representatives (NOSSCR) and regularly attends national disability conferences to help her to provide outstanding representation to her clients.

Education:

-Indiana University- Indiana University- Bloomington
B.A. Political Science and History
-Indiana University Maurer School of Law
J.D. (1993)

Awards:

-Outstanding Service Award 2009
Allen County Indiana Bar Association
-Allen County Indiana Pro Bono Attorney of the Year 1998
Volunteer Lawyer Program of Northeast Indiana

Professional Associations:

-Allen County Indiana Bar Association
Member and Former Social Security Section Chair
-National Organization of Social Security Claimants' Representatives
Sustaining Member
-Benjamin Harrison Inns of Court
Former Member and Treasurer
-Phi Beta Kappa
Member
-Indiana State Bar Association
Former Vice Chair of Social Security Section

Speaking Engagements:

-7th Circuit Social Security Disability Caselaw Update, Social Security Section 2019
Allen County Bar Association (ACBA)

-Vocational Expert Testimony, Social Security Section 2019 ACBA

-Social Security Disability-Navigating the Disability Process, Sickle Cell Empowerment Conference 2018

-Social Security 2018
Indiana Continuing Education Foundation

-Train Your Staff to Obtain Low-Cost Medical Records, Fort Wayne, Indiana 2018 ACBA

-Social Security Disability-Multiple Sclerosis, Anna Yoder Multiple Sclerosis Fund Community Education Event 2018 Anna Yoder MS Fund

-SSA's New Standards for Evaluating Medical Evidence & Complying with the "5 Day Rule" 2017 ACBA

-Round Table Conservations Regarding Revisions to the Evaluation of Medical Evidence Rules, Social Security Section 2017 ACBA

-Medicaid & Social Security Disability Issues for Estate Planners, Estate Planning & Social Security Sections 2016 ACBA

-A Representative's Duty to Submit Evidence: Complying with the New Evidence Submission Rules 2015 NOSSCR

-A Review of Park Center Services & SSA's Mental Impairment Listings, Social Security Section 2015 ACBA

-Social Security Disability and Cancer
2015 Cancer Services of Northeast Indiana

-Social Security, Indianapolis, Indiana 2015
Indiana Continuing Education Foundation

-Updates & Tidbits from NOSSCR's Las Vegas Conference, Social Security Section 2014 ACBA

-Disability and Orthopedic Impairments, Social Security Section 2014 ACBA

-Updates & Tidbits from NOSSCR's 2014 Conference, Social Security Section 2014 ACBA

-Evaluating Treating Source Opinions & Using Medical Opinions to Help Your Client, Social Security Section 2014 ACBA

-Intersection of Family Law and Social Security Disability, Allen County Bench Bar Conference 2013 ACBA

-Social Security, Indianapolis, Indiana 2012
Indiana Continuing Education Foundation

-Tips & Tidbits from NOSSCR's San Antonio Conference, Social Security Section 2011 ACBA

-Three Topics in One Hour, Social Security Section 2011 ACBA

-Updates & Tidbits from NOSSCR's Chicago Conference, Social Security Section 2010 ACBA

-Updates & Tidbits from NOSSCR's New Orleans Conference, Social Security Section 2010 ACBA

-Topics from San Francisco's NOSSCR Conference, Social Security Section 2009 ACBA

-Social Security Disability-Evaluating Cardiovascular Impairments, Social Security Section 2008 ACBA

-Highlights from the Spring NOSSCR Conference, Social Security Section 2007 ACBA

-Bench Bar Conference 2007 ACBA

-Cross Examination of Vocational Experts, Social Security Section 2006 ACBA

Table of Contents

Section One

Social Security 101 (Part I)......................................Timothy E. Burns

The First Steps Toward a Disability Hearing

I. The Genesis of the Rules. Like every specialized practice, Social Security law has its own jargon 1

II. Governing Agencies 1

III. Types of Claims. Before we decide if the client is medically unable to work, what are they eligible for? 1

IV. When we speak of “insurance,” what do we mean? 2

V. Common Lawyer/Representative Paperwork 3

VI. Common Adjudicative terms to determine eligibility 4

VII. Sequential Evaluation/The Five Steps of Disability Adjudicators (hint: it’s really SIX steps) 5

VIII. The DDB 7

IX. Reconsideration 8

PowerPoint Presentation

Section One

Social Security 101 (Part II)....................................Sarah M. Crosby

Hearings and Appeals

I. Requesting and Scheduling a Hearing 1

II. What Happens at the Hearing? 2

III. Post Hearing 3

IV. Types of Decisions 3

Appeals 4

I. Appeals Council 4

II. Federal Court Appeals 5

PowerPoint Presentation

Section Two

Cross Examining the Experts........................... Annette L. Rutkowski
Theodore F. Smith, Jr., PC
Ann M. Trzynka

Cross Examining the Experts 1

Expertise and Qualifications 1

Vocational Experts 3

Medical Experts 11

Conclusion 14

Questioning the Vocational Expert 15

Probationary Period, Absences, Etc. 15

Superficial Contact 15

"Occasional" 15

WAIS-IV 16

Additional Questions 16

Additional Information/Tips: 16

Modified Request for Issuance of a Subpoena Duces Tecum 18

Questioning the Medical Expert 21

Preliminary and Background Questions 21

Medical Diagnosis and Symptoms 21

Functioning and Staying on Task in the Work Environment 22

Function Reports 22

PowerPoint Presentation

Section Three

The New Rules / Preparing the Witness for Hearing..................... Thomas J. Scully III - Moderator
Michael DeYoung
William M. Krowl
Joshua M. Matejczyk

PowerPoint Presentation

Section Four

**OccuCollect™
Creating Conflict in the Record
with Vocational Expert Testimony.................... Lawrence D. Rohlfing**

PowerPoint Presentation

Section Five

Significant Cases from the 7th Circuit.............. Adriana M. de la Torre
Timothy J. Vrana

Horr v. Berryhill, 743 F. App'x 16 (7th Cir. 2018)
Aff'd 07/31/18.. 1

Spicher v. Berryhill, 898 F.3d 754 (7th Cir. 2018)
Rev'd 08/03/18.. 1

Collins v. Berryhill, 743 F. App'x 21 (7th Cir. 2018)
Aff'd 08/09/18.. 1

Richards v. Berryhill, 743 F. App'x 26 (7th Cir. 2018)
Aff'd 08/13/18.. 2

Barrett v. Berryhill, 734 F. App'x 350 (7th Cir. 2018)
Aff'd 08/14/18. On 09/25/18, this case was issued as a published opinion
at 904 F.3d 1029... 2

Walker v. Berryhill, 900 F.3d 479 (7th Cir. 2018)
Rev'd 08/15/18.. 2

Penrod v. Berryhill, 900 F.3d 474 (7th Cir. 2018)
Aff'd 08/15/18.. 3

West v. Berryhill, No. 18-1021, 2018 U.S. App. LEXIS 22828 (7th Cir. 2018)
Aff'd 08/16/18.. 3

Plessinger v. Berryhill, 900 F.3d 909 (7th Cir. 2018)
Rev'd 08/20/18.. 3

Weaver v. Berryhill, 746 F. App'x 574 (7th Cir. 2018)
Aff'd 08/20/18.. 4

Baldwin v. Berryhill, 746 F. App'x 580 (7th Cir. 2018)
Rev'd 08/21/18.. 4

Kelham v. Berryhill, 751 F. App'x 919 (7th Cir. 2018)
Aff'd 10/31/18.. 4

Hardy v. Berryhill, 908 F.3d 309 (7th Cir. 2018)
Rev'd 11/08/18.. 4

Truelove v. Berryhill, 753 F. App'x 393 (7th Cir. 2018)
Aff'd 11/28/18.. 5

McHenry v. Berryhill, 911 F.3d 866 (7th Cir. 2018)
Rev'd 12/26/18 5

Hammerslough v. Berryhill, 758 F. App'x 534 (7th Cir. 2019)
Aff'd 01/09/19 6

Radosevich v. Berryhill, 759 F. App'x 492 (7th Cir. 2019)
Rev'd 01/22/19 6

Winsted v. Berryhill, 923 F.3d 472 (7th Cir. 2019)
Rev'd 02/08/19 7

Ray v. Berryhill, 915 F.3d 486 (7th Cir. 2019)
Rev'd 02/12/19 7

Fisher v. Berryhill, 760 F. App'x 471 (7th Cir. 2019)
Rev'd 02/15/19 8

Paul v. Berryhill, 760 F. App'x 460 (7th Cir. 2019)
Rev'd 02/15/19 8

DeCamp v. Berryhill, 916 F.3d 671 (7th Cir. 2019)
Rev'd 02/26/19 9

Mischler v. Berryhill, 766 F. App'x 369 (7th Cir. 2019)
Rev'd 03/20/19 10

Burmester v. Berryhill, 920 F.3d 507 (7th Cir. 2019)
Aff'd 04/05/19 11

L.D.R. v. Berryhill, 920 F.3d 1146 (7th Cir. 2019)
Aff'd 04/15/19 12

Jozefyk v. Berryhill, 923 F.3d 492 (7th Cir. 2019)
Aff'd 05/08/19 12

Dudley v. Berryhill, 773 F. App'x 838 (7th Cir. 2019)
Aff'd 05/16/19 13

Saunders v. Saul, 777 F. App'x 821 (7th Cir. 2019)
Aff'd 06/28/19 13

Krell v. Saul, 931 F.3d 582 (7th Cir. 2019)
SSA won. 07/24/19 14

Crump v. Saul, 932 F.3d 567 (7th Cir. 2019)
Rev'd 07/31/19 15

Rockwell v. Saul, 781 F. App'x 532 (7th Cir. 2019)
Rev'd 08/08/19 15

Williams v. Saul, 782 F. App'x 488 (7th Cir. 2019)
Rev'd 09/06/19 16

Burgos v. Saul, 788 F. App'x 1027 (7th Cir. 2019)
Rev'd 10/17/19 16

Pytlewski v. Saul, 791 F. App'x 611 (7th Cir. 2019)
Aff'd 11/12/19 17

Primm v. Saul, 789 F. App'x 539 (7th Cir. 2019)
Aff'd 11/21/19 17

Dunn v. Saul, 794 F. App'x 519 (7th Cir. 2019)
Rev'd 11/26/19 18

Olivas v. Saul, 799 F. App'x 389 (7th Cir. 2019)
Aff'd 12/16/19 18

Urbanek v. Saul, 796 F. App'x 910 (7th Cir. 2019)
Aff'd 12/16/19 18

Felts v. Saul, 797 F. App'x 266 (7th Cir. 2019)
Aff'd 12/18/19 19

Hinds v. Saul, 799 F. App'x 396 (7th Cir. 2020)
Aff'd 01/09/20 19

Brown v. Saul, 799 F. App'x 915 (7th Cir. 2020)
Rev'd 01/10/20 20

Prater v. Saul, 947 F.3d 479 (7th Cir. 2020)
Aff'd 01/15/20 21

Gebauer v. Saul, 801 F. App'x 404 (7th Cir. 2020)
Aff'd 01/17/20 21

Overton v. Saul, 802 F. App'x 190 (7th Cir. 2020)
Aff'd 01/22/20 22

Gibbons v. Saul, 801 F. App'x 411 (7th Cir. 2020)
Rev'd 01/23/20 22

Lay v. Saul, 791 F. App'x 624 (7th Cir. 2020)
Aff'd 01/29/20 23

Martin v. Saul, 950 F.3d 369 (7th Cir. 2020)
Rev'd with instruction to award benefits 02/07/20 23

Kuykendoll v. Saul, 801 F. App'x 433 (7th Cir. 2020)
Aff'd 02/20/20 24

Vang v. Saul, 805 F. App'x 398 (7th Cir. 2020), petition for cert. filed, (U.S. July 27, 2020) No. 20-5181) Aff'd 02/21/20 25

Underwood v. Saul, 805 F. App'x 403 (7th Cir. 2020)
Aff'd 03/03/20 25

Massaglia v. Saul, 805 F. App'x 406 (7th Cir. 2020)
Aff'd 03/04/20 25

Morrison v. Saul, 806 F. App'x 469 (7th Cir. 2020)
Aff'd 03/10/20 26

Reinaas v. Saul, 953 F.3d 461 (7th Cir. 2020)
Rev'd 03/16/20 26

Marquardt v. Saul, 798 F. App'x 34 (7th Cir. 2020)
Rev'd 03/17/20 27

Jeske v. Saul, 955 F.3d 583 (7th Cir. 2020)
Aff'd 04/02/20 27

Atkins v. Saul, — F. App'x —, 2020 WL 2554397 (7th Cir. 2020)
Aff'd 05/20/20 28

Simons v. Saul, — F. App'x —, 2020 WL 3124238 (7th Cir. 2020)
Aff'd 06/12/20 28

Trottier v. Saul, 809 F. App'x 326 (7th Cir. 2020)
Aff'd 06/15/20 28

Bruno v. Saul, 817 F. App'x 238, 2020 WL 3497633 (7th Cir. 2020)
Aff'd 06/26/20 29

Greenwell v. Saul, 811 F. App'x 368 (7th Cir. 2020)
Aff'd 06/30/20, rehearing denied 07/14/20 29

Sosinski v. Saul, 811 F. App'x 380 (7th Cir. 2020)
Aff'd 07/01/20 29

Sosh v. Saul, — F. App'x —, 2020 WL 3969624 (7th Cir. 2020)
Aff'd 07/14/20 30

Apke v. Saul, 817 F. App'x 252, 2020 WL 4018988 (7th Cir. 2020)
Aff'd 07/16/20 30

Hapner v. Saul, — F. App'x —, 2020 WL 4284324 (7th Cir. 2020)
Aff'd 07/27/20 30

Surprise v. Saul, 968 F.3d 658, 2020 WL 4345158 (7th Cir. 2020)
Aff'd 07/29/20 31

Mitze v. Saul, 968 F.3d 689, 2020 WL 4380642 (7th Cir. 2020)
Aff'd 07/31/20 31

Plainse v. Saul, 816 F. App'x 24, 2020 WL 4660255 (7th Cir. 2020)
Aff'd 08/12/20 32

Brace v. Saul, --- F.3d ---, 2020 WL 4727345 (7th Cir. 2020)
Rev'd 08/14/20 32

Barrett v. Saul, --- F. App'x ---, 2020 WL 4783556 (7th Cir. 2020)
Aff'd 08/18/20 32

Rennaker v. Saul, --- F. App'x ---, 2020 WL 4814120 (7th Cir. 2020)
Rev'd 08/19/20 33

Jones v. Saul, --- F. App'x ---, 2020 WL 5105694 (7th Cir. 2020)
Rev'd 08/31/20 34

CASES LISTED BY SUBJECT MATTER 35

Section Six

How OHO Works and Tips for Practitioners.. Katie E. Brinkmeyer

1.What happens to a case when it reaches OHO? 1

2.What do ALJs do to get ready for a hearing?... 1

3. How much time do ALJs have to review each case before the hearing?.. 1

4. When do ALJs first look at a case?... 3

5. Are pre-hearing briefs helpful?.. 3

6. Do requests for OTRs get read and considered? 3

7. Is there a reason we don't get a response when the request is denied? 3

8. Who decides whether to schedule an ME? When is that decision made? What kind of analysis goes into that / how is that decision made? Who decides who the ME will be? Is it random?.. 3

9. Do you think all ALJs remember that when making decisions? 3

10. What happens after the hearing is over? Who does what?.................................. 3

11. How extensive are the ALJ's comments to the decision-writer? What topics do the ALJ's comments cover? 4

12. Is there a form ALJs use to write their instructions? If so, can we see it? See Miller v. Saul (7th Cir. 2020).. 4

13. Is there typically/ever any discussion written or verbal between the decision- writer and the ALJ (like between district court judges and their clerks)? 4

14. Do the ALJs/decision-writers have any type of checklist to make sure the decision is free of mistakes? If so, can we see that? 4

15. What kind of training is given to ALJs and decision-writers? 4

16. Do the ALJs read the decision-writer drafts before signing it? 4

17. Do ALJs pay any attention to case law? How much do ALJs and decision-writers care about 7th Circuit case law? How aware are ALJs and decision-writers of S.D. Ind. and N.D. Ind. district court decisions on various issues? 5

17. After you've issued a decision, do you know if it's subsequently appealed? If it is appealed, do you know the outcome on appeal? Does SSA keep stats by ALJ on Federal Court outcomes? If so, how do we get those? 5

Section One

Social Security 101 (Part I)

Timothy E. Burns
Keller & Keller, LLP
Indianapolis, Indiana

Section One

Social Security 101 (Part I)………………………………. Timothy E. Burns

The First Steps Toward a Disability Hearing

I. The Genesis of the Rules. Like every specialized practice, Social Security law has its own jargon 1

II. Governing Agencies 1

III. Types of Claims. Before we decide if the client is medically unable to work, what are they eligible for? 1

IV. When we speak of "insurance," what do we mean? 2

V. Common Lawyer/Representative Paperwork 3

VI. Common Adjudicative terms to determine eligibility 4

VII. Sequential Evaluation/The Five Steps of Disability Adjudicators (hint: it's really SIX steps) 5

VIII. The DDB........ 7

IX. Reconsideration........ 8

PowerPoint Presentation

Social Security 101 (Part I)

Tim Burns – Keller and Keller

The First Steps Toward a Disability Hearing

I. The Genesis of the Rules. Like every specialized practice, Social Security law has its own jargon

- **42 U.S.C. § 405** is the Enabling Act for the Disability program, which broadly defines the purposes of the Program
- **20 C.F.R. § 404** is where you find the regulations which define the day-to-day rules governing the adjudication of these claims. When we speak of Social Security laws, we mean these regulations.
- **Social Security Rulings (SSRs)** which are interpretations of the rules. The Seventh Circuit has indicated are binding on the Administration

II. Governing Agencies

- **Field Office (FO)** A Field Office is the "public-facing" part of SSA. The are 1,230 such offices in the US and 26 in Indiana. All applications, even ones started on the Internet, go through the Field Office.
- **Disability Determination Bureau (DDB)** is the state level organization tasked by SSA to do several forms of Disability claims. Staffed by state workers, but paid for by the Feds. Uses contract doctors and workers to make the first two levels of decisions on your client's case.
- **Office of Hearings Operations**. This office prepares and conducts in-person (in non-plague times) hearings. That's part 2 of this presentation.

III. Types of Claims. Before we decide if the client is medically unable to work, what are they eligible for?

- **DIB/DWB/CDB/Title 2 claims**. These are types of claims under the insurance provisions of Title 2 of the Social Security Act. Title 2 beneficiaries are also eligible for Medicare benefits.
    - Disability Insurance Benefits = DIB
    - Disabled Widow's Benefits = DWB
    - Childhood Disability Benefits = CDB
- **SSI/Title 16** is a type of Disability claim based upon need, not means or insurance. Found in Title 16 of the Social Security Act.

- **Concurrent Claims** refer to the common incidence where a person qualifies for the "technical requirements" of both a Title 2 claim and a Title 16 claim.

IV. When we speak of "insurance," what do we mean?

a. Social Security Disability is a long-term Disability Insurance company in some ways. The only people eligible for the higher disability amount (Title 2 benefits) are people who have worked regularly and recently.
b. As a worker pays their FICA tax, they eventually accumulate the 20 Quarters of Coverage which enables them to receive Disability benefits if they become disabled. Each $1,410 of FICA earns a Quarter of Coverage. Social Security does a lookback of the last 40 quarters – a worker must have enough earnings in 20 out of the last 40 quarters in order to have insured status. This means someone needed to have worked in approximately the last five years in order to qualify for a Title 2 benefit.

c. Supplemental Security Income (Title 16) is a disability program based on need.
    i. The disability (medical criteria) is exactly the same as a Title 2 disability case, but it is a program based on eligibility, not entitlement.
    ii. In order to be eligible, an SSI applicant must have limited income and limited resources
        1. Resources: $2,000 or less in total resources for an individual, $3,000 or less for a couple, including cash on hand, bank accounts, or pensions
            a. Household income counts toward that total, so, if a claimant's spouse works, a claimant may be ineligible for SSI.
    iii. Most (but not all) SSI beneficiaries are people who do not have enough work credits to meet the insured status threshold that qualifies a claimant for Title 2 benefits.

Title 2 – Disability Insurance Benefit Disabled Widow's Benefit Childhood Disability Benefit	Title 16 – Supplemental Security Income
- Claimant has disability insurance through the date of their disability began by virtue of paying FICA taxes on past earnings.	- Claimant has no insured status OR lower Title 2 monthly benefit amount than full SSI check (the latter for a concurrent claim).
- No resource limits	- Resource limits of $2,000 for an individual, $3,000 for a couple.
- Benefit amount max is $3,011, average is around $1,263	- Benefit amount capped at $783 for an individual, $1,175 for a couple.
- Spouse's income does not impact benefits	- Spouse's income may impact eligibility
- Entitlement program	- Eligibility program
- 12 month retroactivity of benefits	- No retroactivity (1st benefit can be paid month after application)

V. Common Lawyer/Representative Paperwork

- **SSA-1696** is the form of identifying information for possible direct payment claims and your client's permission for you to represent them. You WANT direct payment of your fee from your client's past due benefits. Not only do you need permission from the Commissioner to represent his claimants, you need to show the Agency you have the permission of your client.

- **SSA-1699** is the application you will need to complete to register with SSA in order to be allowed to do so. https://www.ssa.gov/forms/ssa-1699.pdf. A person who wishes to represent claimants *pro bono* or as a one time occurrence does not need to complete this form, but, if you

want the Agency to pay you your fee from your client's past-due benefits, then you'll need to complete this form.

- **3368, 3369, 827, and 3441** are the numbers representing the applications for benefits that initiate, continue, or help the Agency process a Disability claim. In order, the numbers refer to forms for an Initial Application for Benefits Medical Form, a Work History Report, a Medical Release form, and a Request for Reconsideration Medical Form.

- It **is** a government program, so there are many, many other forms, but these forms will help you start a claim and get paid for your work.

- **Direct Pay** is the way lawyers receive their fees. The Agency calculates the "primary insurance amount" (PIA), which is the monthly benefit for your client in Title 2 cases, multiplies that from the Onset Date of disability, and that is the client's back-pay. (Title 2 clients must wait five months after their onset for payments to start). The average amount of a Title II recipient's monthly check is around $1,234. You receive 25% of that back-pay as a fee, capped at $6,000.

- In SSI cases, the maximum monthly benefit is $783 for an individual and $1,175 for a couple.

- SSA takes a small processing fee for sending you the direct payment.

VI. Common Adjudicative terms to determine eligibility

- **Initial/Recon** are names for the level of their case at the DDB. A Reconsideration is filed with an SSA-3441 if the claim is denied at the Initial Level (which is surely will be).
- **AOD** stands for Alleged Onset Date. This is the date your client claims they became disabled.
- **DLI** is the "Date Last Insured." Like all insurance plans, Title 2 claimants do not have disability insurance in perpetuity. Eventually, by virtue of not paying FICA taxes, a claimant will run out of insured status (or in some cases, may never gain insured status).
    - DLI is the last date the onset must be established by if the claimant is to receive Title 2 benefits. The claim does not need to

be decided by that date, just that the disability began by that date.

- A **CE** is short for a Consultative Evaluation. Most clients have an independent evaluation with a doctor contracted by SSA. These are ordered by the DDB.
- **Sequential Evaluation**: The Process used to determine Disability. The title of the next portion of the Presentation.

VII. Sequential Evaluation/The Five Steps of Disability Adjudicators (hint: it's really SIX steps)

- **Step 1** – Is the person making SGA (currently defined as $1,260/month)? If yes, not disabled. If no, continue to Step 2.
- **Step 2 –** Does the person have a medical condition which limits their ability to do daily activities? If yes, move to Step 3. If no, not disabled.
- **Step 3** – Does the person **meet/equal** a **Listing** (https://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm). If yes, person is disabled. If no, move to Step 3(a).

  The link takes you to "a List" of medical findings, organized by body system. Each Listing is a direction on how to find presumptive disability, i.e., if a person "meets" the requirements of an illness as directly described, they are disabled.

  If a person has two severe or more severe condition and the ramifications of those illness are similar to a Listing, then that person is said to "equal" the Listing and are found disabled.

  For a look at common listings, see the PowerPoint slides.

- **Step 3a –** Assign limitations due to the non-meeting medical conditions. At this point, we know a condition is "severe," meaning it impacts the claimant's daily life, and we know that like about 90% cases, it does not meet/equal a Listing. So what limits does it impose on the claimant?
- **Step 4** – With the restrictions above codified into the Department of Labor's former criteria, can the person do their past work? If yes, then not disabled. If no, go to Step 5.

In the 1980's, SSA re-wrote its disability program to be less restrictive. Up to that point, a person met or equaled or they were denied. This was particularly unfair to older workers. SSA's new assessment criteria was based on the Department of Labor's recent codification of all jobs in America, known as the Dictionary of Occupational Titles ("DOT"). The DOT described every job and the exertional level and essential job functions of that job.

For SSA purposes, the most important part of the DOT defined work as requiring Very Heavy, Heavy, Medium, Light, or Sedentary Exertion. Since Disability claims are fought on the Sedentary through Medium range, we will focus on those.

Consult https://www.ssa.gov/OP_Home/rulings/di/02/SSR83-14-di-02.html for a comprehensive overview, but for the perfunctory ones (Constantly = 68%- 100% of an 8 hour day, frequently = 33%-67%, occasionally 0%-33%

Sedentary – the ability to frequently lift less than 10 pounds and 10 pounds occasionally. The ability to stand/walk for 2 hours. The ability to sit for 6 or more hours.
Light – the ability to frequently lift 10 pounds and 20 pounds occasionally. The ability to stand/walk for 6 hours. The ability to sit for 6 or more hours.
Medium - the ability to frequently lift 25 pounds and 50 pounds occasionally. The ability to stand/walk for 6 hours. The ability to sit for 6 or more hours.

- **Step 5** – Can the claimant do any work available in the national economy? If yes, denial of application. If no, disabled

  Most cases are fought at this step. You try to establish your client cannot do ANY other work in the entire national economy. This part is hard.

  You are aided by the most important part of any case analysis, e.g., how old is your client? The second part of the Agency's revamping of its rules in the '80's was when the Agency created rules noting it is hard

for older workers to rejoin a workforce than it is for younger people. This brings us to the **GRID RULES**

- **GRID RULES** – Found at https://www.ssa.gov/OP_Home/cfr20/404/404-app-p02.htm, the "grids' (because that is literally what the link takes you to, a grid) explain that at Step 5, 50 year olds limited to sedentary work are disabled, and 55 year olds limited to sedentary or light work are disabled.

  The grid rules do not factor in "non-exertional" impairments, like the inability to be around dust for COPD sufferers, or staying away from hazards for people with seizures, or the inability to concentrate people with anxiety have. (See https://www.ssa.gov/OP_Home/cfr20/404/404-1569a.htm)

VIII. The DDB

- Most DDB's pay 30-35% of applicants at the initial level and around 10% at the reconsideration level. At any one time, the local DDB has between 7,000 to 10,000 claims. The cases are assigned to "Adjudicators." An adjudicator examines the application and writes to the doctors and hospitals from the onset date forward and only information regarding the pre-DLI period
- A good adjudicator sends out follow ups after 10-20 days (via mail or phone call). Ten days from those follow ups, the adjudicator orders a consultative examination or "CE." This is defined in the POMS as "every reasonable effort." DI 22505.035
- Once the Adjudicator collect the medical evidence, usually in the form of the consultative examinations, they send the case to contract physicians who assign the limitations and make the Decisions.

- DDB contract physicians are overworked (and, if I can be so bold, under-caring) doctors. A 2016 recruitment application from the Wisconsin DDB noted that a physical MC must average of 2.6 cases per hour; psychological MCs must average of 2.2 cases per hour https://www.dhs.wisconsin.gov/sites/default/files/legacy/ddb/recruitment.pdf. If we know, and we do, that many cases have hundreds of pages of medical evidence and the reviewing doctors is allowed to spend 20

minutes on it, then it becomes obvious that DDB doctors bend toward the bureaucratic gravity of the institution.

- The bureaucratic gravity of ALL DDB's is to denying case. "Why?" is a doctoral thesis. "How?" is simpler
    - DDB's do not combine a claimant's impairment into one hypothetical. They split the case into physical limits and psychological limits.
    - DDB decisions are not made on the entire record.
    - DDB doctors actively discount the claimant's treating sources.
    - The DDB will not believe your client (unless your client tells them they are disabled).
    - The DDB has no way to answer Past Work questions.
- In the end, the DDB system is designed to move cases, not make the right decision. As such, almost half their Decisions are over-turned at the next level
- In my experience, DDBs approve people over 55, terminally ill cancer patients, folks on dialysis, or those who meet the COPD listing. They deny everything else

IX. Reconsideration

- After the first denial, your client needs to ask Social Security to reconsider the decision. They complete an application and the case returns to the DDB, where a different adjudicator and doctor deny it on the same grounds.
- After that, the case moves on an OHO, for a Federal Administrative Law Judge to rule on it.

Social Security: A Primer

❑THE FRAMEWORK

➢ 42 U.S.C. 405	The Enabling Act for the Disability program	
➢ 20 C.F.R. §404	The Regulations defining the rules the Disability process	
➢ SSR's	Social Security Rulings	Regulatory rulings by the Commissioner of SSA, which define terms, refine priorities, codify approaches to adjudication. Stretching back to the 1980's, these are legally binding on ALJ's and the AC. They are your best friend

GOVERNING AGENCIES AND RULES

- Agencies
  - DDB
  - ODAR
  - AC
- Notable Rules
  - SSR's
  - Regulations

Key Terms and Abbreviations

❑ Filing a claim

Acronym/Form Number/Terms	What it means	Sure, but what does that MEAN?
➢ FO	Field Office	It's the SSA office serving the local community. Claims reps there will handle your client's application and determine if technical eligibility exists.
➢ DIB/DWB/CDB/Title 2	Disabled Individual Benefits, Disabled Widow's Benefits, Childhood Disability Benefits,	These are types of claims under the insurance provisions of Title 2 of the Social Security Act
➢ Concurrent claim	Claim for both SSI and SSDI	

Term	Meaning	Description
➢ SSI/Title 16	Supplemental Security Income Title 16 of the Social Security Act	A type of Disability claim based upon need, not means or insurance
➢ 1695	Identifying Information for Possible Direct Payment	The reason attorneys can do these claims. Your personal information, demonstrating the Commissioner of SSA has approved you to represent clients. This enables SSA to pay you directly.
➢ 1696	Appointment of Representative Paperwork	The form which designates to any part of SSA that you have your client's permission to represent him/her.
➢ 3368, 3369, 827, 3441	Initial Application for Benefits, Work History Report, Release of Medical Information, Request for Reconsideration	Forms completed by client to start the case depending on the level of appeal.
➢ SGA	Substantial Gainful Activity	Does your client's income exceed minimum requirements

❑Then What Happens?

➢ DDB, DDS	Disability Determination Bureau Disability Determination Service	State Agency initially tasked with determining whether your client is disabled
➢Initial, Recon	Initial Claim or Reconsideration Claim	The two types of claims handled by DDB's. A Recon occurs after initial denial
➢AOD	Alleged Onset Date	The date your client claims she became disabled
➢DLI	Date Last Insured	The date your Title 2 Claimant's insurance period ended
➢Sequential Evaluation	The Process used to determine Disability	What the rest of the Presentation is about.
➢CE	Consultative Evaluation	Most clients meet have an independent evaluation with a doctor contracted by SSA

➢Listings	20 C.F.R Appendix 1 to Subpart P to Part 404	Used at Step 3 of Sequential Evaluation for Presumptive Disability
➢ Meets	To meet a Listing	If a claimant’s single medical impairment is the same as the requirement of a Listing, he is disabled at Step 3
➢ Equals	To “equal” the intent of a Listing	If a claimant’s impairment has the same effect of a Listing for another condition or his/her COMBINED impairments have the same effect, the claimant is presumptively disabled at Step 3
“Grid”	Shorthand for Medical-Vocational Guidelines. 20 C.F.R Appendix 2 to Subpart P of Part 404	Taking into account the age, education, and work history of the client, a work adjustment is not feasible. Claimant is disabled

Part Two: SSDI vs Means based benefits

- Medial criteria are the same.
  - Many cases are concurrent claims where winning means both claims are won
  - By the time the process is completed, many people have lost everything and qualify for SSI
  - SSDI benefits are generally worth more. In 2019, the average monthly cash payment is $1,234, while the maximum cash benefit for those approved for DIB is $2,861.
  - SSI’s statutory rate is $733 (https://www.ssa.gov/OACT/COLA/SSI.html)

SSDI Benefits and Eligibility

- Benefits
  - Monthly check
  - Maximum amount is $2,200/month
  - Rich/poor are both eligible
  - After 29 months claimant is eligible for Medicare Benefits
  - Auxiliaries are also eligible
    - Minor children will receive a monthly check
      Also subject to the 25% for attorney fees
- Eligibility
  - Must have a work history which insures the "wage earner" for benefits
  - Wage Earner earned at least 20 Quarters of Coverage during the last 10 years

Quarter of Coverage are earned in increments of $1,410. No matter how high your earnings may be, you can not earn more than 4 QC's in one year. (https://www.ssa.gov/oact/cola/QC.html). So, if the worker in the last 10 years made roughly $5,600+/year, she would be eligible

- Insurance lasts (roughly) 5 years. At the end of the 5 year period is the Date Last Insured. After that date, a new impairment does not count.

- Waiting period
  - A disabled person must wait 5 months after entitlement to receive benefits
  - Disabled people with concurrent claims will receive SSI back-pay for only those 5 months

- 12 month retroactive benefits
  - The earliest a disabled person will receive benefits is 12 months from the day he filed his claim, no matter when his onset date is.
  - If the onset date is more than 5 months before that period, then the waiting period is waived

- Other types of Title 2/SSDI benefits
  - CDB claims (Childhood Disability Benefits claims)
    - Benefit open to Disabled people between the age of 18 and 22
    - Must have a retired or disabled father or mother whose SSN the claim is filed under
    - Disability must be established between the ages of 18 and 22
  - DWB claims (Disabled Widow Benefits)
    - Widow or widower must be between 50 years and 60 years of age
    - Filed under spouse's SSN
    - Must be married at least 9 months prior to number holder's death
    - Disability must be found within the "Prescribed Period."
      - Prescribed Period is the last day of the month after the spouse's death and lasts 7 years or until widow turns 60
      - An expired Prescribed Period is like a DLI
  - One can be eligible for SSDI and DWB

SSI Benefits and Eligibility

- SSI is a floor. It’s the minimum amount we promise a disabled person.
- To be eligible, income and resources must be under $7,200. This number has not changed in eons.
  - Personal home and one auto exempt
- $733/month with increases for the number of dependents in the household
- When a person works, the first $65 is exempt. The remainder is divided by 2. The result of this calculation is subtracted from the monthly amount
- Kids are eligible for SSI Childhood benefits if they are found disabled. These are complicated cases

So, we have a case. Then, what happens?

- Various facts about DDB's
  - State agencies. Usually 1 to a state; sometimes more
  - Most DDB's pay 30-35% of applicants at the initial level and around 10% at the reconsideration level. At any one time, the local DDB has between 7,000 to 10,000 claims.

  - An adjudicator examines the application and writes to the doctors and hospitals from the onset date forward and only information regarding the pre-DLI period
  - A good adjudicator sends out follow ups after 10-20 days (via mail or phone call). Ten days from those follow ups, the adjudicator orders a CE.
  - This is defined in the POMS as "every reasonable effort." DI 22505.035

  - Adjudicators collect evidence; contracted physicians make the Decisions

- What sort of physicians work at the DDB?
  - Folks who are interested "protecting the Treasury."
  - Overworked doctors.
    - A 2016 recruitment application from the Wisconsin DDB noted that a physical MC must average of 2.6 cases per hour; psychological MC's must average of 2.2 cases per hour https://www.dhs.wisconsin.gov/sites/default/files/legacy/ddb/recruitment.pdf
  - DDB's do not combine a claimant's impairment into one hypothetical. They split the case into physical limits and psychological limits
  - The DDB system is designed to move cases, not make the right decision. As such, almost half their Decisions are over-turned at the next level
  - In my experience, DDB's approve people over 55, terminally ill cancer patients, folks on dialysis, or those who meet the COPD listing. They deny everything else.

Important Listings

- Most commonly used Listings
  - 1.02 Major Dysfunction of a joint (not spine).
  - 1.04 A or C Disorders of the Spine
    - These are two of the most common Listings. Both are objective components and functional components. 1.04C and 1.02A require laboratory proof of a condition and then direct you to 1.00(B)(2)(b), while 1.02B sends you to 1.00(B)(2)(c).
    - 1.04A requires a neurological compromise of the spine that is pretty rare

- 2.02 Blindness
  - One must be statutorily blind in both eyes, which means 20/200 vision or worse

- 3.02 Chronic Obstructive Pulmonary Disease (COPD)
  - Requires a pulmonary function test (PFS or PFT) to assess severity. If the claimant scores less than 33%, defined by her height, she meets the Listing.
  - Completely numbers driven. Either you're above or below

- 4.02 Chronic Heart Failure (CHF)
  - Chronic injury to the heart the heart pump insufficiently.
  - Magic terms here is Ejection Fraction or "EF." If on EKG or stress test reveals an EF under 30%

- 4.04 Ischemic Heart Disease
  - More familiar heart condition. The result of blockages in coronary arteries.
  - Confusing Listing, but the two main points are
    1) Chest pain, caused by the heart. Called Angina and relieved by Nitroglycerin
    2) A Treadmill test where exercise tolerance is less than 5 METS

- 6.03 Chronic Kidney Failure requiring Dialysis
  - If your client is on Dialysis, he's Disabled

- 11.04 Late effects of Stroke/CVA
  - Disorganization of motor function in two extremities (see 11.00D1), resulting in an extreme limitation (see 11.00D2) in the ability to stand up from a seated position, balance while standing or walking, or use the upper extremities, persisting for at least 3 consecutive months after the insult.
  - Matches the standard from 1.00(B)(2)(b)

- 11.14 Neuropathy (usually diabetic)
  - Evaluated under 11.04B

- Mental Listings

  - All Mental Listings are based on rating functioning in the “B” criteria
  - The four criteria are
    - 1) Understand, remember, or apply information
    - 2) Interact with others
    - 3) Concentration, Persistence, and Pace
    - 4) Adapt or manage oneself

  - To meet a Listing, the functioning restriction must be “Marked” in two areas. SSA helpfully defines “Marked” as more than “Moderate” and less than “Extreme.” A Listing can also be met by one “Extreme” limit

  - The “A” criteria to most mental Listing is pretty simple to meet. A constellation of symptoms which caused a diagnosis will be enough, except for 12.05.
  - The “B” criteria has also expanded to many physical listings as well, although I have never seen a DDB claim that used that framework.

- 12.03 Schizophrenia or Psychotic Disorders
- 12.04 Affective Disorders (Depression or Bi-polar Disease)
- 12.06 Anxiety
- 12.15 PTSD

•COMMON CHILDHOOD LISTINGS

- Kids can only qualify for SSI
- Sequential evaluation process is almost the same, except the last two steps
- This step is combined into one "functional equals" step
  - At this step the child is graded on how her functioning compares with other children her age

  - 1) Acquiring and Using Information
  - 2) Attention and Concentration
  - 3) Social Skills
  - 4) Moving and manipulating items
  - 5) Taking Care of yourself
  - 6) Health and Well-Being

- Two Marked ratings = disabled

- Listings

- 112.05 Intellectual Disability in Children
  - Completely score driven from standardized tests

- 112.11 Attention Deficit Disorder
  - The most common child allegation.
  - Needs two marked limits

OHO, aka Office of Hearing Operations

- The most data from the Agency indicates the backlog to receive a hearing is 465,000 people. It takes almost 2 years to go from Hearing Request to Hearing

https://www.ssa.gov/appeals/

- SSA employs 85% of ALJ's in the American government.

- ALJ's are encouraged to conduct and dispose of 500-700 cases per year.
  - One ALJ I know told me she works a 2 week schedule. In week 1, she conducts 5 hearings a day on 3 days. On week 2, she conducts 5 hearings a day on 2 days. That's 50 hearings a month

- ODAR's also employ support staff
  - Attorneys who write the decisions
  - Claims specialists who collect medical evidence and prepare *pro se* client folders for hearing

- National average for approvals is 44%. In 2010, it was 62%.

Section One

Social Security 101 (Part II)

Sarah M. Crosby
Law Office of Sarah Crosby
Indianapolis, Indiana

Section One

Social Security 101 (Part II)………………………………Sarah M. Crosby

Hearings and Appeals

I. Requesting and Scheduling a Hearing 1

II. What Happens at the Hearing? 2

III. Post Hearing 3

IV. Types of Decisions 3

Appeals 4

I. Appeals Council 4

II. Federal Court Appeals 5

PowerPoint Presentation

SOCIAL SECURITY 101 (PART II)

Hearings and Appeals

Sarah Crosby, Law Office of Sarah Crosby LLC

I. Requesting and Scheduling a Hearing

- If a claim was denied at both the initial and reconsideration stages, a claimant can request a hearing before an Administrative Law Judge. 20 C.F.R. § 404.929
- A recent change for disability hearings is the Central Scheduling Unit (CSU). Attorneys and representatives provide hearing availability to this unit several months in advance.
    - The CSU schedules hearings for all of Indiana, so can be important for representatives to note they are only available at one hearing office location per day (it's impossible to be in Valpo and Evansville on the same day, but the CSU sometimes forgets that).
- Claimants can appear in person, by video teleconferencing, or in **extraordinary circumstances**, by telephone. 20 C.F.R. § 404.929
    - Since March 2020, all hearings have been held by telephone, with claimants having the option of waiting for in person hearings to resume.
    - We have heard rumors that video hearings are being tested so the claimant can appear by video from his or her home, or a representative's office.
- Prior to COVID, claimants had to show up to Social Security's Office of Hearings Operations (OHO) where their in-person or video hearing was scheduled. There are four OHOs in Indiana:
    - Indianapolis
    - Valparaiso
    - Fort Wayne
    - Evansville
- There are also some field offices, that hold remote video teleconferencing hearings for claimants that live more than 75 miles away from an OHO.

II. What Happens at the Hearing?

- Claimant will check in with the security guard and is instructed to wait in the waiting room. Please advise clients to arrive at least 20 minutes before their hearing. Sometimes even earlier.
- Hearings are not open to the public.
- Participants:
  - ALJ,
  - Claimant,
  - Hearing Monitor,
  - Representative (if applicable),
  - Vocational Expert (if applicable),
  - Medical Expert (if applicable).
- Hearings are typically 45 minutes to 1 hour. ALJs are on a tight schedule, so they may limit questioning or cross examination if time.
- ALJ will swear in the claimant and the experts, if any.
- During the hearing, the hearing monitor will be making a recording of the hearing. This recording will be transcribed if there is a federal court appeal, so it is important that the claimant answer audibly and describe any actions they are doing (i.e. pointing to areas of the body where there is pain, a representative should make the record. An example would be a representative noting out loud "the claimant is indicating pain in the left shoulder" as an example. Often the ALJ will help make this record.

*Hearings are informal proceedings. Unlike typical procedures in state or federal court, attorneys do not need to worry about Rules of Evidence.

Questioning of the Claimant

- During the hearing, the ALJ may do the bulk of the questioning. Other times, the ALJ may do preliminary questions and then turn it over to the representative to ask questions.
- Questions regarding past work
- Questions about symptoms, activities of daily living, functional limitations etc.

Medical Experts

- ALJ may ask a medical expert questions about the claimant's impairments and the medical evidence of record.
- An ALJ is a lawyer, not a doctor, so may rely on medical testimony to determine if a claimant meets or equals a listing.

  - Important to review qualifications of a medical expert. Sometimes they are not experts in the claimant's disability.

<u>Vocational Experts</u>

- At Step Four and Five of the Sequential Evaluation Process, the ALJ must find the claimant can either do their past work or that there is other work a claimant can perform. VEs are used to provide testimony about other jobs that a *hypothetical* person with similar limitations as the claimant might be able to perform.
- The ALJ will typically ask the VE to "assume a hypothetical person with the same age and education as the claimant with the residual functional capacity. . ."
- Multiple hypotheticals with different RFCs are not uncommon during a hearing.

III. <u>Post Hearing</u>

- ALJ will conclude hearing by noting "we are off the record". At this point, the claimant is likely confused by what just happened the past hour. In some circumstances, a representative may know how the ALJ will rule on the case, in other cases, the representative may have some indication

- ALJ issues written decision – usually within six months of the hearing. The decision is not written by the ALJ, but rather by the Social Security decision writers.

- A copy of the decision is mailed to the claimant and the representative.

IV. <u>Types of Decisions</u>

- **Fully favorable decision**
  - The ALJ finds the claimant has been disabled since the alleged onset date.
  - A copy of the decision is sent to the field office for processing/effectuation of benefits. It can be important to read the "decision" section at the end of the written decision carefully to ensure all details are correct. We have had cases where we needed to request an amended decision quickly to avoid errors in benefit processing.
  - Offset computation

- Medicare Benefits – for Title II claims, a claimant becomes eligible for Medicare two years after their first month of entitlement (the first month they are eligible to receive a check). Due to the five-month waiting period, Medicare eligibility comes 29 months after the established onset date.

- **Partially favorable decision**
  - Sometimes an ALJ believes the disability started later than the claimant's alleged onset date. In this case, the ALJ issues a partially favorable decision, and determines the onset date. This is seen most often when someone may allege a disability onset date and then change age categories while the claim is processing. The ALJ may determine the claimant meets the criteria after hitting the new age category, but not prior to that time.

- **Unfavorable decision**
  - The ALJ finds the claimant is not disabled. The decision must provide specific reasons and lay out a legally defensible explanation.

Appeals

I. Appeals Council

- If ALJ issues an unfavorable decision or a partially favorable decision, the claimant has three options:
  - **Claimant can file an appeal to the Appeals Council**
    - Have 60 days from date of the ALJ decision to file appeal
  - **Claimant can file a new application for benefits and start the process over**
    - BE CAREFUL WITH THIS. In most circumstances, the earliest possible date of disability will be the day AFTER the ALJ's decision. If the claimant no longer has insured status, there may not be any benefits to pursue. In this case, an appeal needs to be filed.
    - Claimant CANNOT file an appeal to the Appeals Council AND file a new claim for benefits unless there is a new disability, (i.e.,

claimant has a new diagnosis of cancer while Appeals Council review is pending).

    - **Claimant can do nothing.**

- Appeals Council is not reviewing to see if claimant is disabled, but whether or not the judge made an error in the decision-making.

II. Federal Court Appeals

- If the Appeals Council declines to review the claim, a claimant may appeal the decision to Federal Court.
- Claims are reviewed *de novo*.
- Must be filed within 60 days of Appeals Council declining to review a claim.
- At this stage, claimant can also file a new claim for benefits even if the federal court appeal is pending.

Social Security 101
Part II – Hearings and Appeals

Sarah Crosby, Law Office of Sarah Crosby, LLC

Hearings

- If a claim is denied at both the initial and reconsideration stages, a claimant can request a hearing before an Administrative Law Judge. 20 C.F.R. § 404.929
- Claimant has right to appear in person for a hearing. A claimant can object to appearing by video teleconference or by phone. 20 C.F.R. § 404.936

Scheduling Hearings

- Central Scheduling Unit
  - Representatives must submit their availability (not the claimant's availability) for hearings approximately six months in advance.
  - Region V Central Scheduling Unit covers the following OHOs
    - Akron, Chicago, Cincinnati, Cleveland, Columbus, Dayton, Detroit, Evanston, Flint, Fort Wayne, Grand Rapids, Indianapolis, Lansing, Livonia, Madison, Milwaukee, Minneapolis, Mount Pleasant, Oak Brook, Oak Park, Orland Park, Peoria, Toledo and Valparaiso.
  - If conflict comes up after availability is submitted and hearing is scheduled on date representative is not available, must send written notice to OHO/ALJ advising of issue.
  - Claimants who contact you for representation just before their hearing can get a continuance (20 C.F.R. § 404.936).

Prior to the Hearing

- Develop any outstanding medical evidence
  - Social Security typically won't get new medical evidence, so important to make sure medical is updated.
  - All evidence must be submitted five business days prior to the hearing. 20 C.F.R. § 404.935

What Happens at a Hearing

- Pre-COVID Hearings
  - In person or video teleconferencing
  - Claimant appears at the Office of Hearings Operations (even for video hearings)
  - Hearings held in small, private room. Not open to the public due to sensitive, private medical information being discussed.
  - Participants: ALJ, Hearing Monitor, Claimant, Representative, Medical Expert, Vocational Expert, Witnesses.

What Happens at a Hearing

- Hearings During COVID-19
  - Since March 2020, all hearings have been held telephonically.
  - Claimants still have the right to appear in person, but no idea when, if ever, in person hearings will resume.
  - Some rumors of video hearings have been circulating, but no formal announcements yet.

What Happens at a Hearing

- ALJ will swear in the parties, including the claimant, the vocational expert, and the medical expert
- ALJ will ask preliminary questions of the claimant
  - Each ALJ is different in questioning style, some do only the preliminary questioning and then turn over questioning to the representative, others do majority of the questioning.
  - Questions are typically based around a claimant's past work – what did they do; and their disability – what are symptoms/limitations/impacts on their lives.
    - Important to prep claimant to answer out loud – no shaking of the head and no "mmmhmms" or "nuh-uhs". It is critical to make the record clear in case of an appeal.
    - Claimants should also be told to explain – in detail. Instead of saying "my back hurts," use descriptive words.

What Happens at a Hearing

- Other witnesses
  - With a limited amount of time, be sure any witnesses you want to call will be helpful.
    - i.e. parents of an autistic young adult; guardian for claimant who has mental health problems.
- Medical Experts (ME)
  - Since ALJ is not a doctor, may rely on medical experts to determine if claimant meets or equals a listing.
- Vocational Experts (VE)
  - ALJ may need an expert to clarify what type of work a claimant has performed in the past. The VE also provides information about other work a claimant can perform.

"We Are Off The Record"

- What the heck just happened?
  - Clients want to know if they won or lost.
  - Sometimes you know. Most times you don't know.
    - Likely best not to advise them one way or another unless you are absolutely sure it is a win.
- Judge will issue a written decision, typically within 2-6 months after the hearing.

Types of Decisions

- Fully Favorable
  - ALJ finds claimant has been disabled since their alleged onset date.
  - The best kind of decision.
  - Social Security field office gets copy of decision to process effectuation of benefits.
- Partially Favorable
  - ALJ finds the claimant is disabled, but with a different date of onset than what was alleged.
    - This most often happens when a claimant hits an age threshold and "grids out"
- Denial
  - ALJ finds the claimant is not disabled and is still capable of working.

How to get paid

- Fees
  - SSA Form1695 – authorizing direct payment of fees
    - SEND THIS IN BEFORE THE HEARING!!!
  - ALJ notice will state if the ALJ approved the fee agreement or disapproved the agreement.
    - If not approved need to file a fee petition
  - Fees are based on 25% of any retroactive money the claimant receives and are capped at $6,000, minus administrative processing fees.

My client was denied, now what?

- Choice between filing a new claim or filing an appeal with the Appeals Council.
  - New claim – earliest onset may only be day AFTER the ALJ's written decision was issued.
    - New claim can be problematic if claimant's date last insured is earlier than date of ALJ's decision.
      - If claimant files a new claim and no longer has insured status, claim will either be SSI only, but only if claimant is eligible.
  - Appeal Council
    - AC reviews for errors by the judge, not whether or not claimant is disabled.

Appeals Council

- Appeal must be filed within 60 days of date of ALJ decision. Can file an appeal online or use SSA Form HA-520
- Representative can present a written brief or letter to AC outlining what errors were made during the decisionmaking.
- If AC agrees there are errors in case, will typically issue a remand for a new hearing.

Federal Court Appeal

- If the Appeals Council declines to review a denial, claimant can appeal case to Federal District Court AND file a new claim.
- 42 U.S.C. § 405(g)
- Must be filed within 60 days of AC declining review.
- Attorney fees for federal court:
  - Equal Access to Justice Act OR
  - 406(b) fees

Section Two

Cross Examining the Experts

Annette L. Rutkowski
Law Office of Annette Rutkowski, LLC
Carmel, Indiana

Theodore F. Smith, Jr., PC
Attorney at Law
Anderson, Indiana

Ann M. Trzynka
Law Office of Ann M. Trzynka
New Haven, Indiana

Section Two

Cross Examining the Experts……………………….... Annette L. Rutkowski
Theodore F. Smith, Jr., PC
Ann M. Trzynka

Cross Examining the Experts 1

Expertise and Qualifications 1

Vocational Experts 3

Medical Experts 11

Conclusion 14

Questioning the Vocational Expert 15

Probationary Period, Absences, Etc. 15

Superficial Contact 15

"Occasional" 15

WAIS-IV 16

Additional Questions 16

Additional Information/Tips: 16

Modified Request for Issuance of a Subpoena Duces Tecum 18

Questioning the Medical Expert 21

Preliminary and Background Questions 21

Medical Diagnosis and Symptoms 21

Functioning and Staying on Task in the Work Environment 22

Function Reports 22

PowerPoint Presentation

Cross Examining the Experts

Social Security
ICEF
September 25, 2020

Presented by Annette Rutkowski, Ted Smith, and Ann Trzynka

For some administrative law judges, it is routine to have medical, psychological, and vocational witnesses. For other administrative law judges, it is rare that medical or psychological witnesses are asked to testify. For many[1] administrative law judges, a vocational witness is the only expert called. The administrative law judge is required to notify the claimant's representative that medical or vocational experts will be present at the hearing to offer testimony. The notice of expert witnesses is incorporated into the Notice of Hearing. By regulation, the Notice of Hearing is sent not less than 75 days from the date of the hearing.

- **Expertise and Qualifications**

Once it has been made known that a medical or vocational witness will testify at the OHO hearing and the witness has been identified, the first step to preparing for cross-examination of the witness is to review, before the OHO hearing, the curriculum vitae of the witness. If the witness is a medical or psychological witness, it is important to determine whether the professional witness's professional license is current.

The Social Security Administration does not require that the medical or psychological witness have an active practice. However, the Social Security Administration does require that the witness have a valid and active professional license. Most of the time the medical witness will have a valid professional license, however, sometimes the license is expired or in a rare instance

[1] The Office of Inspector General of the Social Security Administration issued an audit report on "Availability and Use of Vocational Experts" in May 2012 [http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-11124.pdf]. In its report, the Inspector General found that vocational witnesses were used in about 76 percent of SSA hearings in fiscal year 2010. Ten years later, this trend seems to continue.

suspended. With the use of teleconferencing either by video or telephone, many medical witnesses are residing out of state. Therefore, it is important to check their license status in the state in which they are licensed.

A "vocational expert" is expected to have knowledge of the following matters set out in the Vocational Expert Handbook:

- The skill level and physical and mental demands of occupations
- The characteristics of work settings
- The existence and incidence of jobs within occupations
- Transferrable skills analysis and SSA regulatory requirements per transferability of work skills
- Up-to-date knowledge of, and experience with, industrial and occupational trends and local labor market conditions
- An understanding of how SSA determines whether a claimant is disabled, especially at steps 4 and 5 of the sequential valuation process
- Current and extensive experience in counseling and job placement of people with disabilities
- Knowledge of an experience using, vocational reference sources, including: the Dictionary of Occupational Titles (DOT) and the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCO)
- County Business Patterns published by the Bureau of Census
- The Occupational Outlook Handbook published by the Bureau of Labor Statistics
- Any occupational surveys of occupations prepared for SSA by various state employment agencies.

Generally, the administrative law judge will ask either at the beginning of the hearing or when the expert testifies whether the representative has any objections to the qualifications of the expert. Sometimes this question is asked in the form of whether the representative will "stipulate" to the qualifications of the witness. It is important to remember that the representative does not determine qualifications of the professional witnesses, rather, it is the job of the administrative law judge to make a finding that the witness is qualified.

Sometimes SSA construes a representative "stipulation" that the vocational witness is in fact a "vocational expert" to mean that the vocational witness has knowledge of the job numbers. However, the Seventh Circuit has indicated that the failure to object to an expert's "qualifications" does not forfeit the right to object to the expert's "methodology." *See Brace v. Saul,* 2020 U.S. App. LEXIS 2585, at *10 (7th Cir. 2020). So, how should an attorney respond to the administrative law judge's question of whether you stipulate to the qualifications? Part of the answer depends on the exact question the administrative law judge asks. Be sure the record is clear that a failure to object to qualifications, or a "stipulation" to qualifications, is not a concession that the substance of the testimony is correct nor does it forfeit the representative's right to examine the witness and explore the basis of the testimony.

Regarding stipulating to the qualifications of a medical or psychological witness, if there is no licensing issue, then consider offering a qualified stipulation as to the educational background contained within the curriculum vitae but expressly do not stipulate to any other matters concerning the medical expert.

- **Vocational Experts**

When a vocational expert is used at a hearing, the administrative law judge asks about the claimant's vocational background to determine the claimant's past relevant work. You should also

not assume that the vocational witness has correctly classified the claimant's past work or testified correctly about transferable skills. Prepare your client and elicit testimony about the details of the claimant's past work. Upon eliciting evidence from the claimant that a job had significant parts of the different occupations not described in one DOT code, ask about composite jobs. This may be outcome determinative and avoid a step four denial. You must be sure the claimant worked long enough to meet the SVP level of a job and had sufficient earnings within right period of time for work to be considered "past relevant work." Also be prepared to exam the vocational witness about transferable skills, particularly for claimants who are over 50 years old.

After eliciting testimony about the claimant's vocational background, the ALJ then asks one or more "hypothetical questions" of the vocational witness which are a series of "what if" type questions. The administrative law judge is asking the vocational witness "what if" I find that the claimant has the following limitations what is your opinion as to whether: (1) the claimant can perform his/her past relevant work; (2) whether there is other work which exists in the economy which will accommodate those limitations and (3) what are the number of jobs for those jobs identified as "other work?" Confirm that the vocational witness has taken into account only the limitations provided in the ALJ's hypothetical question.

The residual functional capacity assessment, which forms the basis of the hypothetical question, is designed to be an assessment of the most a claimant can still do despite his/her impairments. The residual functional capacity is the individual's maximum remaining ability to perform sustained work on a regular and continuing basis, i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule. The source of the limitations are both the severe impairments and the non-severe impairments. Both physical and mental impairments should be included.

Typically, the hypotheticals are offered in a series of questions. The first hypothetical is

often based on the State Agency's residual functional capacity assessment. From that point increasingly restrictive limitations are added. Some administrative law judges appear to have meticulously prepared their hypothetical questions. Others seem to have prepared them on the fly. Most administrative law judges know, before they ask a hypothetical question, whether the answer will result in "no jobs available" or "jobs available." When there are hypothetical questions asked of the vocational witness and the response to those questions elicit a response of jobs, then you must cross the vocational witness. When there are hypothetical questions asked of the vocational witness and the response to those questions elicit a response of jobs, then you must cross the vocational witness.

A hypothetical question must include all limitations supported by evidence in the record. Sometimes the administrative law judge may have failed to offer a hypothetical question to the vocational witness including all the limitations supported by the medical evidence in the record. When that has occurred, the representative must the vocational witness about the omitted limitation(s). Each limitation must be based on evidence of record. There are times when some of the limitations are not corroborated in the medical record, e.g. the lifting ability of the claimant; the length of time the claimant can sit. In those instances, testimonial corroboration must be obtained to support the assessment.

When preparing the hypothetical, it is important to speak "vocational language". "Vocational language" is language is contained in the "residual functional capacity testimony form". It is that language with its modifiers contained in the Selected Characteristics of Occupations (SCO) of "never;" "occasional;" "frequent;" and "constant" that the vocational witness will respond. Not using that language may confuse the expert and cause an "objection" from the administrative law judge.

Standard introductory language for any hypothetical question is:

> I want you to assume a hypothetical individual of the same age, education and work experience of the claimant and further assume that because of [whatever illness is substantiated by the record] the hypothetical individual has [identify the symptoms e.g. pain, fatigue] and as a consequence has the residual functional capacity to do the following: [include the limitations identified in the "residual functional capacity testimony form"].
>
> Is there any other work available in several regions throughout the United States?

In addition to using hypothetical questions, you may want to ask open-ended questions about the impact of various limitation on the occupational base and the witness's knowledge of occupations. The DOT was last updated in 1991 and the description of many jobs are outdated. How does the witness know that the jobs are still performed the way they are described in the DOT? Has the skill level changed? Is the witness aware of the O*Net? Do they agree that the O*Net is more updated than the DOT?

It is important to be aware of the General Education Development (GED) level of jobs including the reasoning, math, and language levels, particularly when mental limitations are included in a hypothetical. When the claimant is limited to simple, routine repetitive instructions or tasks, there may be a conflict with the jobs identified and the hypothetical. You also should be aware of potential inconsistencies between the temperaments of the jobs identified and a limitation in the hypothetical.

Although vocational evidence is usually received into evidence by oral testimony (in

person, video teleconferencing, or telephone), the Social Security Administration also allows the use of written interrogatories to obtain expert testimony. If the administrative law judge uses written interrogatories to elicit vocational evidence, the administrative law judge is required by the HALLEX[2] to proffer a copy of the responses to the representative. The representative will be given time within which to either object, comment on or refute the responses to the interrogatories. The representative will also be allowed to submit a written statement as to the facts and law that the claimant believes applied to the case and to request a supplemental hearing. There will be a time limit within which to do all the above.

The administrative law judge is required to allow the claimant to propose additional interrogatories to the witness or request a supplemental hearing to question the expert. A supplemental hearing is conditioned upon the administrative law judge hearing not granting a fully favorable decision. If the administrative law judge has not yet decided to grant a fully favorable decision, then the administrative law judge is required to hold a supplemental hearing if requested. Strongly consider making a demand for a supplemental hearing contingent on the ALJ not issuing a favorable (or fully favorable) decision.

A vocational witness testifies not only about the DOT codes for jobs identified at hearing and the demands of those jobs but also about the availability of those jobs ("job numbers"). Most vocational witnesses are certified rehabilitation specialists who have knowledge about the skill level and physical and mental demands of certain occupations as described in the DOT and the SCO. Not many, if any, of the vocational witnesses deal with job numbers in the national, regional, or local economy. In fact, the curriculum vita of the vocational witness generally has no information from which a person may conclude that the vocational witness has any qualification

[2] HALLEX is an acronym for Hearings, Appeals and Litigation Law Manual created by the Social Security Administration.

to testify as to job numbers. It is the unfamiliarity of the vocational witness about job numbers that provides a fruitful area of cross-examination. Representatives must have access to resource to confront incorrect and false testimony.

Recently, the courts have taken to task the sources and accuracy of the statistics used by vocational witnesses. For example, in *Herrmann v. Colvin*, 772 F.3d. 1110, 1113 (7th Cir. 2014) the court wrote:

> Asked at oral argument, the government lawyers in both social security disability cases argued before us on October 28 confessed ignorance of the source and accuracy of such statistics, about which we had expressed profound doubt in the Browning case. We are not alone in harboring such doubts. See *Brault v. Social Security Administration*, 683 F.3d 443, 446-47 (2d Cir. 2012) (per curiam); *Guiton v. Colvin*, 546 F. App'x 137, 143-45 (4th Cir. 2013) (concurring opinion); Jon C. Dubin, "Overcoming Gridlock: Campbell After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social [9] Security Administration's Disability Programs," 62 Administrative L. Rev. 937, 964-71 (2010); Peter J. Lemoine, "Crisis of Confidence: The Inadequacies of Vocational Evidence Presented at Social Security Disability Hearings, Part II," Social Security Forum, Sept. 2012, p. 4.

Why are the job numbers important in disability cases? At Step 5 of the sequential evaluation process, the Commissioner of Social Security has the burden of going forward to show that there are a substantial number of jobs which exist in several regions throughout the country. Typically, the vocational witness will offer jobs by name in the DOT and then by giving the DOT number for that job and finally by giving a number of those jobs in the national economy or the national and state economy. The vocational witness is rarely asked to identify the sources of the job numbers. Based on those job numbers, the administrative law judge must decide whether the Commissioner of Social Security has met his burden of going forward by deciding whether the job numbers constitute a substantial number.

If you choose to stipulate to the qualification of the vocational witness, you should stipulate, if appropriate, to the qualifications as vocational rehabilitation counselor or placement specialist but indicate that you are not stipulating to any job numbers or the substance of the testimony to which the vocational witness may testify. A qualified stipulation may not sit well with some administrative law judges, especially if the qualified stipulation is offered during the live hearing. For this reason, some thought should be given to filing a pre-hearing notice of informing the administrative law judge that the claimant will not stipulate to the qualifications of the vocational witness as to any testimony which relates to job numbers.

A confusing part of this system is that the DOT, while describing the job numbers, does not have job numbers. Instead, the vocational witness must look elsewhere for the number of jobs which correspond to the DOT numbers offered. As indicated previously, the vocational witness does not have career experience in working with national or state job numbers which correspond to the DOT. Typically, the vocational witness does not research job numbers by searching public data. Rather, the vocational witness will pay a third-party vendor to produce the job numbers which allegedly correspond to the DOT identified with the jobs that the vocational witness believes matches the administrative law judge's hypothetical question. It is at the intersection between the DOT and job numbers that an attorney can be most helpful. Here is how to cross-examine a vocational witness regarding job numbers.

1.) Does the Dictionary of Occupational Titles incorporate job numbers?

2.) If not, identify the source of the job numbers to which you testified. [If the source is U.S. Publishing Occupational Statistics or Occupational Employment Quarterly (which is a publication of U.S. Publishing Occupational Statistics) then consider asking the following questions:]

a. U.S. Publishing Occupational Statistics is a private vendor and not a federal or state agency, correct?

b. The jobs which U.S. Publishing Occupational Statistics identifies are grouped by the SOC (Standard Occupational Classification System) codes, correct?

c. There are several specific jobs in each SOC, correct?

d. The job numbers furnished by U.S. Publishing Occupational Statistics represent the total number of jobs for each SOC, correct?

e. The DOT job which you identified in your answer to the judge's hypothetical are one of several DOT jobs contained within an SOC, correct?

f. How many DOT jobs are in the same SOC?

g. How many jobs are in the entire SOC? [Do not be surprised if the number of jobs given for the entire SOC is the same number of jobs for the DOT. If the job numbers are different, then ask how the vocational witness reduced the job numbers.]

h. The job numbers in the SOC include full- and part-time jobs, correct?

i. Are you able to tell the judge how many of the jobs you identified are actually full-time jobs? If so, explain your methodology.

j. When is the last time you updated your job numbers? [U.S. Publishing Occupational Statistics has at least quarterly updates. Some vocational witnesses do not purchase the update.]

3.) If the job source is not U.S. Publishing Occupational Statistics, then ask the vocational witness to identify the source, the last date published, the methodology

employed to find that a particular DOT has the number of jobs testified, whether the jobs identified are full time or part time.

Courts have recognized that it is very difficult to cross-examine vocational experts during a Social Security disability hearing because of the lack of pre-hearing discovery. The courts encourage that the bench and bar cooperate.

> We recognize that the lack of pretrial discovery in Social Security [12] hearings can make the task of cross- examining a VE quite difficult. As we held in McKinnie, the data underlying a VE's testimony must be available on demand to facilitate cross-examination and testing of the VE's reliability. But we refuse to endorse a system that drags out every Social Security hearing to an interminable length. We encourage ALJs and the Social Security bar to cooperate in such a way that makes data underlying VE testimony available on demand without making every hearing impossibly long. Perhaps brief recesses should be provided so attorneys can examine the sources relied upon by VEs or perhaps, as we believe was offered in this case, the claimant's attorney should have access to copies of the pages of those sources on which the VE relied. And an attorney who wants to make an argument based on data unavailable at the hearing should have the opportunity to do so by supplementing the record after the hearing. (Britton's attorney was given that opportunity and did not take it.) We believe that our "available on demand" rule and these suggestions can be applied to achieve the proper balance between the needs of the claimant to effectively cross-examine the VE and the needs of the Commissioner to hold efficient hearings.

Britton v. Astrue, 521 F.3d 799, 804 (7th Cir. 2008).

In cases where you object to vocational testimony, follow-up with a post-hearing brief and rebuttal evidence. Rebuttal evidence can come from a variety of publicly sources available as well as private sources. You may also need to hire your own vocational expert to provide a report.

- **Medical Experts**

In the initial review of the expert's curriculum vitae is important to establish the witness's status and specialty. It the CV is unclear about whether a doctor is currently in practice, or retired

this is highly relevant to informed testimony. Even if the expert may be from a specialty that has much background knowledge on the claimant's diagnoses, they need to have current knowledge as treatment and science evolve over time. Therefore, if this expert has never treated the impairments you are presenting or has no experience with most recent class of drugs or treatment regime, his testimony may be less persuasive. It is common to be listening to testimony from witnesses who have not treated patients in many years or may not even have the correct specialization. Make sure you understand the limits of the testimony.

It is also important to verify that the expert has really reviewed the entirety of the medical file and not simply skimmed the agency findings. It is necessary to ask specifically what the last exhibit number the medical witness has in his or her file. The HALLEX requires that the OHO staff send the medical witness all relevant records. Sometimes that does not occur, particularly if some medical records were submitted closer to the hearing date. If the medical witness does not have all the records that are in the ERE file, then the administrative law judge must decide whether to recess the hearing and reset it so that the medical witness can review all the records or summarize the missing exhibits for the medical witness. Sometimes, the administrative law judge will request the representative to summarize the missing exhibits. Unless those exhibits are very brief and easy to read and understand, declining the invitation by the administrative law judge to summarize an exhibit may be the better course.

If the testimony of the medical witness at the OHO hearing is damaging to your case and if there is a medical source statement by a treating physician which offers contrary evidence, it may be worth asking the medical witness whether the physician who has a long-term treatment history with the claimant is in a better position to know that claimant's limitations than someone who has never examined the claimant, never treated the claimant, and never seen the claimant.

Even with the risk of offering the testifying medical witness a platform on which to bolster his/her testimony, cross-examination is necessary. It can highlight conflicts. For example, a medical witness at an OHO offered an opinion that a claimant could function at a medium level of exertion. That same medical witness a few years before had offered an opinion for the same claimant that the claimant was restricted to light work. (The case had been remanded by a federal district court.) When the medical witness testified for the second time that the claimant could do medium work, cross-examination was offered by reading the transcript of the testifying medical witness testimony at the first hearing during which he gave the opinion of light work. The medical witness was asked what in the record caused him to change his opinion and increase the exertional level over a span of two years. The medical witness was unable to point to any records.

When an expert testifies about the listings, be sure the expert tracks the correct information and definitions in the listings. Closely review pertinent listings and supporting evidence to ensure that the expert understand not only what the listing demands but that the expert has considered the pertinent medical findings and symptoms and functional limitations satisfying the requirements. You may also need to clarify that the expert understands the concept of medical equivalence.

On cross examination a medical witness may be confronted with evidence they just missed or did not consider. It is important to cite to exhibit and page number of the conflicting evidence. The medical expert should be able to cite evidence by exhibit and page to support his direct testimony. If cross examination shows errors in testimony, an objection may be supported.

Even unhelpful testimony from a doctor can help support your client's contentions on symptoms. It is important to ask whether your client's impairments or treatments are known to cause the symptoms that support ability to work. Does condition X cause pain, fatigue, nausea? You may also want to clarify the extent to which the medical expert has considered the claimant's

symptoms in formulating an opinion. Social Security Ruling 16-3p contains information about SSA's policy for evaluating a claimant's subjective symptoms. This ruling has useful information for formulating cross examination questions where an expert has failed to account for subjective symptoms. The symptom analysis hinges on credibility, and it can be helpful to use the medical witness to educate the judge on symptoms.

If the medical witness on direct examination did not cite to exhibit and page numbers when discussing his opinion, you may consider asking the medical witness to cite to the exhibit and page numbers which support his opinion.

- **Conclusion**

One of the most important jobs of a representation is cross-examining the experts. It is claimant's duty to prove disability by a preponderance of the evidence. Evidence from the experts can assist in fulfilling that obligation and set the case of for the win at a hearing. You can also demonstrate through cross examination that the Agency has failed to meet its duty produce evidence of a significant number of jobs existing in the "national economy." If the case is lost at hearing, it is also necessary to create a solid record for appeal and demonstrate that errors are harmful.

Questioning the Vocational Expert
Social Security ICLEF
September 25, 2020

Presented by Annette Rutkowski, Theodore Smith & Ann Trzynka

PROBATIONARY PERIOD, ABSENCES, ETC.

Do these jobs typically have probationary periods?

How long does a probationary period typically last?

During the probationary period, how much absenteeism, if any, is tolerated?

How do employers treat arriving late or leaving early?

SUPERFICIAL CONTACT

If anyone has opined/suggested a limitation to superficial contact: For at least the first day or two of the probationary period, a new worker at these jobs you've mentioned is going to have more than superficial contact with a co-worker or supervisor, are they not?

And that is true of any job that the judge's hypothetical individuals can do, is it not?

"OCCASIONAL"

"Occasional," whether referring to a psychological or a physical limitation: "Occasionally" means from very little up to 33% of the time, is that correct?

So if someone can [bend][interact][whatever] 33% of the time, that would be in the "occasional" range?

And you're saying that if the judge's hypothetical individual(s) could do that 33% of the time, they could do the jobs you've listed?

If a person can do that only 10% of the time, that's still within the "occasional" range, is it not?

But if the judge's hypothetical individual can only do that 10% of the time, are they still going to be able to do the jobs you've listed?

Bending: The judge's hypothetical individuals could bend no more than occasionally, but the judge didn't say anything about how far these hypothetical individuals could bend. What if the hypothetical individual can bend occasionally, but when they bend they can only bend 15 degrees [or whatever is supported by the record]? Could that person do the jobs you've mentioned?

WAIS-IV

If the client has been administered a WAIS-IV, there should be a Processing Speed Index score in addition to the IQ scores. If the PSI is 70 or less, consider asking:

As a VE, are you familiar with the WAIS-IV?

As a VE, are you familiar with the Processing Speed Index part of the WAIS-IV?

If a person has a Processing Speed Index score of [whatever the record shows], are there any jobs in full-time, competitive employment that that individual can sustain?

ADDITIONAL QUESTIONS:

How did you come up with those **job numbers**? (Ask not only for the source but also for the methodology)

If claimant has an **RFC for light work**, with standing and walking a combined 6 out of 8, "At the jobs you've mentioned, doesn't the worker have to be on their feet all day except for breaks and lunch?"

If a person has a job coach, are there **any jobs in full-time**, competitive employment that **individual can sustain**?

"Of those [usher][school-bus monitor][other] jobs, **how many are part-time?"**

"Is there any government source that says **how many jobs there are for a particular DOT number**?"

"In answering hypothetical questions today from the judge and me, have you assumed any facts about the hypothetical individuals other than those given to you by the questioner?"

"I know the DOT says that that job is light as generally performed, but what is your opinion of the exertional level of that job AGP?" This does not come up much, but there are times when you and everybody else on the planet knows that the DOT is wrong about something. **Do not be afraid to ask the VE for their thoughts about the issue.**

Individual needs to elevate their feet: Ask client how high, and then ask the VE if that is work preclusive, or ask the VE the highest that would not be an accommodation.

ADDITIONAL INFORMATION/TIPS:

"Work that exists in the national economy" means, according to the Social Security Act itself, the regs (404.1566), and the ALJ's letter to the VE (p.2), work that exists in significant numbers either in the region where the claimant lives or in several other regions of the country. As of a few years ago, VEs started giving only national numbers. That should never be enough to carry the

Commissioner's step-five burden. So, ask about state numbers. VEs usually don't have them. That's OK; it's not your burden. *See Schadenfroh* (S.D. Ind. 2014) and *Jesus F.* (S.D. Ind. 2019).

Be alert to the possibility that some of the PRW might be composite jobs.

What to do if the VE says that a hypothetical individual can do the job of a surveillance-system monitor.

ALJs are may ask if a person who is off task 20% of the time and misses three days of month will be able to work. Of course, the answer is no, which sounds great. But the rep needs to ask about each of those things separately and needs to ask for cutoff numbers for each.

Cane: most VEs will say that the individual can do sedentary work if they just need to use the cane to walk for the 2/8 walking. But if they need the cane to stand, they will usually say that that is work preclusive.

If client is 55 or older and has transferable skills, there must be very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry (unless, of course, the VE said that none of the client's skills transfer to work that the hypotheticals can do).

Don't assume that you can simply ask the VE to assume the limitations described by the client. Most ALJs will not allow that and will tell you to provide specific abilities and limitations.

When you want to know how limitations A, B, and C will affect the judge's hypothetical, ask about them one at a time. If you lump them together in one question and then the judge finds A but does not find B or C, you don't have anything, unless you follow up with "why is that?" It's possible that if you add A or B to the judge's hypothetical, there are still jobs, but if you add A and B, there are no jobs.

<u>You are allowed to submit post-hearing rebuttal evidence, but you need to get it to the file before the decision is issued.</u>

Office of Hearings Operations
Social Security Administration

In the Matter of the Application of	Social Security Number:

MODIFIED REQUEST FOR ISSUANCE OF A SUBPOENA DUCES TECUM

The undersigned attorney received a copy of an Order Denying Subpoena Duces Tecum Request and Overruling of Objection to VE Testimony Regarding Number of Jobs ("Denial Order"). Because the nature of these proceedings is non-adversarial XXX has modified her request for issuance of a Subpoena Duces Tecum to the vocational expert or VE[1] to ensure that the vocational expert brings to the hearing certain documents upon which Mr. VE may rely in forming opinions during the course of the hearing.

20 C.F.R. § 404.950(d) predicate for the issuance of the issuance of a subpoena duces tecum:

(1) Names of the witnesses or documents to be produced:
Names of witness is: Mr. VE

Documents to be Produced:

- Copies of any data summaries or "crib sheets" which Mr. VE has prepared in anticipation of testifying in Social Security hearings which identify occupations and numbers of jobs in those occupation; and

- Printed copies of screen display from all computer programs and/or web pages, including the name and source of the programs and any web addresses (URLs), upon which Mr. VE would rely in forming opinions as to the number of jobs that exist in the labor market.

(2) Describe the address or location of the witnesses or documents with sufficient detail to find them:

The documents sought to be produced are described above.

(3) State the important facts that the witness or document is expected to prove.

At Step 5 of the sequential evaluation process, the Commissioner has the burden to show that there exists, as of February 2, 2018, a significant number of jobs in several regions throughout the country which XXXXXXX can perform. If the GRIDS do not apply in

[1] Vocational Expert witness or VE is used as a term of art within the practice of Social Security laws. My use of the term "expert" here does not indicate my agreement that the witness is qualified to testify as an expert in any capacity.

this case, the ALJ may ask the VE to offer his opinion as to the number of jobs which exist in regions throughout the country which fit the hypothetical of the ALJ.

It is believed that the VE has no personal knowledge of the number of jobs which existed in regions throughout the country on DATE. Rather, his testimony regarding job numbers will be based on documents. The documents which XXXXX has requested be subpoenaed are some of the documents from which Mr. VE will testify.

(4) State why these facts could not be proven without issuing a subpoena.

As stated above, it is believed that Mr. VE has no personal knowledge of the number of jobs which exist in regions throughout the country on DATE. Rather, his testimony will be based, in part, on the documents set out above to offer job numbers. The best source for "proving" the facts of the number of jobs are the documents from which he will testify. It is not known what Mr. VE which documents Mr. VE will chose to bring to the hearing.

In addition, because Mr. VE will "appear" by telephone, it will be very difficult, if not impossible, for XXXXXX to review, during the hearing, any documents from which Mr. VE may testify. Consequently, without reviewing the documents from which Mr. VE will testify, XXXXXXX will not be able to fully present her case.

The issuance of a subpoena to Mr. VE is reasonably necessary for the full presentation of XXXXXX's case. XXXXXX has complied with all of the procedural requirements set forth in 20 C.F.R. § 404.950(d) and 416.1450(d).

XXXXXXXX reserves the right to submit vocational evidence following the hearing depending upon the testimony offered by Mr. VE. *McClesky v. Astrue,* 606 F.2d 351 (7th Cir. 2010).

XXXXXXXX would appreciate it if this subpoena would be issued with the enclosed attachment identifying the documents which Mr. VE should provide prior to the hearing. The cost of issuing the subpoena, witness fees, and mileage should be paid by the Social Security Administration. See *20 C.F.R. §404.950(d)(3) & (4).*

Respectfully submitted,

Dated:

____

Theodore F. Smith, Jr.
Attorney for claimant

ATTACHMENT TO SUBPOENA DUCES TECUM

- Copies of any data summaries or “crib sheets” which the vocational witness has prepared in anticipation of testifying in Social Security hearings which identify occupations and numbers of jobs in those occupation; and

- Printed copies of screen displays from all computer programs and/or web pages, including the name and source of the programs and any web addresses (URLs), upon which the vocational witness would rely in forming opinions as to the number of jobs that exist in the labor market.

Questioning the Medical Expert

Social Security ICLEF
September 25, 2020

Presented by Annette Rutkowski, Theodore Smith & Ann Trzynka

<u>Preliminary and Background Questions</u>

Do you currently practice/see patients?   When did you last practice?

What did you review?

How much time did you spend reviewing the case?

What does one need to do be qualified to testify as a ME for Social Security?

You have never examined my client, correct?

How many times have you testified as an ME at a hearing as witness called for and paid by SSA?

And how many times have you testified at a disability hearing as a witness called by the claimant and not SSA?"

<u>Medical Diagnosis and Symptoms</u>

Have you worked with patients who are diagnosed with the same impairments as my client?

In your practice would you treat this type of illness or refer the care of this illness to the relevant specialist?

From your review of the record, you would agree that appropriate diagnostic testing has been ordered, correct? Anything missing testing or evaluations?

Are you familiar with the medications my client has been prescribed and their side effects, if any?

Please describe the most likely symptoms you would find in a person with my client's diagnoses.

My client complains of "_______" symptom (of the diagnosis or the medications).   Is this symptom consistent with your experience with your patients?

Have you considered the issue of pain in your functional evaluation?

Would a patient with this type of impairment experience pain (or any other relevant symptom like fatigue, bowel issues, etc.?

Would if it be consistent that pain would increase with exertion across an 8-hour workday?

Would pain interfere with the ability to concentrate and focus?

It is correct that doctors do not write down everything in their progress notes?

In the medical community, it is not an accepted practice to diagnose or assess a patient and prescribe medications without ever having actually examined the patient, correct?

Consider asking about a ME psychologist's lack of medication prescribing ability and familiarity with psychotropic medications that have been prescribed if the opinion is less favorable than the opinion of the treating psychiatrist.

Would you agree that reports from third parties, friends, family, case managers, shelter staff, who can tell us about the claimant's symptoms and functioning, is important?

If you have a supportive opinion from a consulting or examining source: Would you generally agree that a doctor/psychologist who has regularly treated and personally examined a patient over a period of years and has all of the patient's medical records is in a better position to continue to treat that patient and assess their condition than a doctor who has never examined that patient?

Functioning and Staying on Task in the Work Environment

What evidence do you consider in evaluating functional limitations?

Would you agree that evidence about functioning in familiar situations does not necessarily show how the claimant would function on a sustained basis in a work setting?

Likewise, would you agree that the ability to complete tasks in a supportive situation does not necessarily demonstrate ability to complete task in competitive employment?

For a mental health practitioner, make sure to ask how limited the claimant must be in terms of

superficial interactions with the co-workers, and the public. With anxiety disorders and/or PTSD, ask whether the claimant would need to be separated or sequestered away from other workers and the public. This is relevant to vocational testimony.

Function Reports

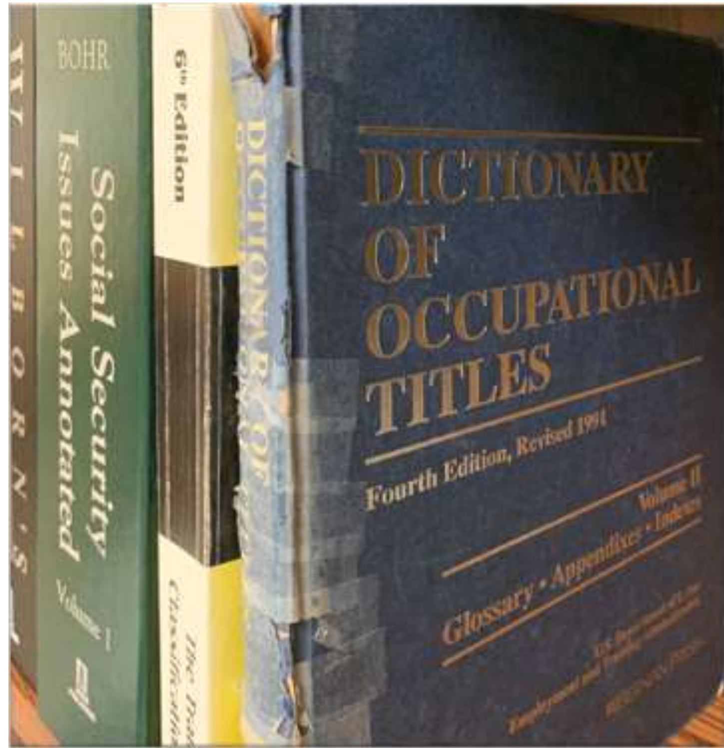
Consider asking whether the claimant's level of functioning described in a function report would be reasonably consistent with his/her impairments.

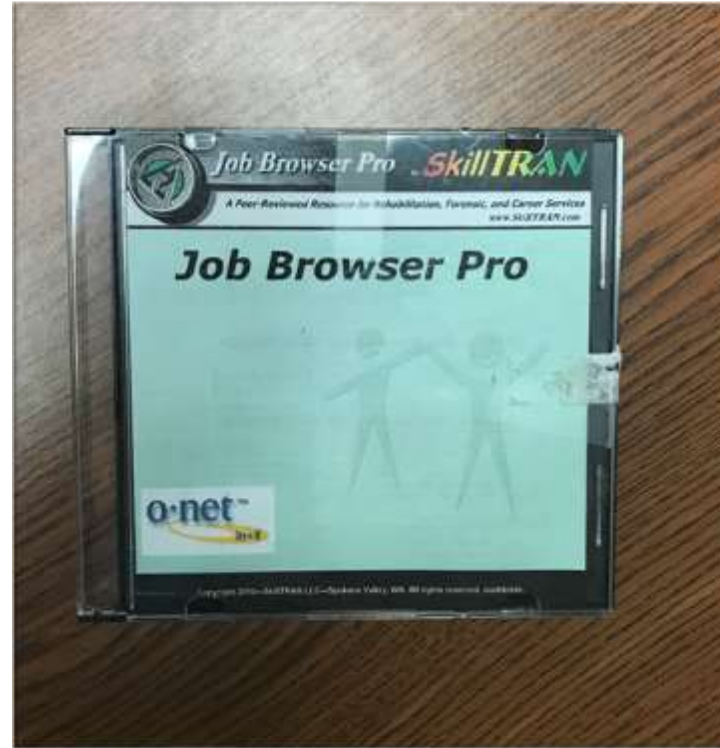
Cross Examining the Experts

Presented by

Annette L. Rutkowski, Theodore F. Smith and Ann M. Trzynka

Questioning the Vocational Expert





Vocational Resources and Tools

SSA's Step-Five Burden of Production: The Medical Vocational Guidelines and VE Testimony

Sit/Stand Option
Assistive Devices
Leg Elevation
Bariatric Chair

Probationary Periods
Absences
Breaks
“Off task” tolerance

Set the Stage: Negate the “Sponge Rule”

Q Mr. Bond, this Ann Trzynka. I have a few questions for you. First of all, did you take into account any limitations, other than the Judge provided to you in the hypothetical question?

A No.

Q And did you have an opportunity to review any sections of the file, other than those that pertain to the vocational information?

A Just the documents in the E section. Nothing other.

Job Accommodations

Q Okay. The -- in a competitive employment environment, is -- would a bariatric chair typically be an accommodation? Something that the individual would need to ask their doctor to get a special permission for that? Are those customarily provided?

A No, I don't think so.

Q So, would it be an accommodation?

A I would say yes.

Q If the individual needs to elevate their leg at heart level for one to two hours per day, is that consistent with sedentary employment?

A No, if an individual needed to elevate their legs and could do it in 12 to 18 inches high, that would not necessarily impact their ability to perform sedentary work. But they need to elevate to heart and waist height, that would eliminate sedentary jobs.

Probationary Periods

Q Okay. Is the tolerance for absences typically stricter in an unskilled employment setting?

A I wouldn't say the tolerances are more restrictive, I think there is -- as far as time off, and scheduling time off, it would be more restricted for unskilled tasks.

Q Do most of these sorts of jobs come with a 90-day probationary period?

A 30, 60, 90 days, would be standard, yes.

Q Okay. And is the tolerance for absences often different in that probationary period, and more strict?

A Yes. Essentially, during that probationary period, there would be the expectation of zero absences during that time period.

Effect of Manipulative Limitations on Occupational Base

Q if an individual could only use their hands for grasping, turning, twisting objects and fingers for fine manipulation bilaterally for only 10 percent of the time, is there work at the light or sedentary exertional level?

A There's probably no work at the light or sedentary level, and there certainly is no entry level, unskilled, light or sedentary work.

Q I'm sorry?

A There's probably no jobs at all at the light or sedentary level. That's not to say that an individual so limited could never work, but there are no entry level, unskilled light or sedentary jobs that would exist for somebody so limited.

Outdated DOT Descriptions of Jobs

Q Okay. What about the equipment that's used in these settings?

A Again, anything that could be learned from a short demonstration to 30 days.

Q Sure. I guess I'm asking you what equipment would be used in these jobs?

A Computers, fax machines, scanners.

Q So, would it be fair to say that these jobs may have changed in terms of the standing and walking requirements that would be involved given the technology changes?

A Yeah, and that's why I say it's limited range of light duty. I think the new technology affects the sitting and standing requirements. The sitting requirements are much more than the standing requirements, but the lifting requirements are going to be up to 20 pounds.

Q So, these jobs would typically require an individual to learn how to use computers, faxes, scanners?

A Yes. They are unskilled occupations, so again, from a short demonstration up to 30 days.

Q Okay. And that classification of unskilled, is that based on the DOT description back as they were described 1977, '87, and '81?

Effect of Reduced Lifting & Standing on Occupational Base

Q The last hypothetical of the Judge was our primary question about the reaching occasionally in all directions, clearly no past work there. Let me go back to the Judge's first hypothetical. If person were limited to 5 to 10 pounds lifting, would that eliminate the jobs you've given?

A Yes, Sir.

Q As a matter of fact if the person is limited to 5 to 10 pounds lifting, that would take them out of the medium and light levels would it not?

A That's correct.

Q If the person could only stand four hours a day maximum total day, would that take them out of the medium level?

A Yes, Sir.

Q Would that remove them from the light level?

A Yes, sir.

MENTAL LIMITATIONS

- Concentration, Persistence and Pace
- Social Limitations
- Adaption Limitations

Production Rate and Two-hours on Task

Q Yes. With respect to the limitation that the individual could maintain concentration for two-hour intervals, how did you interpret that as it pertains to a full workday?

A It -- I really -- it goes back upon the on task and off task limitations, and to pay attention to the work task that's at hand. And there are momentary interruptions in the work routine that essentially are able to attend to the task and be productive during the period.

Q Okay. Did you take into account any interruption or inability to attend to a task after a two-hour interval?

A No.

Q Okay. Did you hear the Claimant's testimony that she was able to complete about an estimated 25 to 50% at that pace of the other individuals working around her at the Walmart and Metaldyne jobs? Maybe even less at the Metaldyne job.

A Yes.

Q Okay. Would that be permissible within competitive employment?

A No.

Q So even though those jobs don't have production expectations, do they have expectations with respect to end-of-day goals?

A Yes.

Q Okay. Assuming an individual who could meet a 50% -- even a 50% rate of end-of-day goals, is that consistent with competitive employment?

A No. It is not.

Superficial Contact & On Task Requirements

Q. And during the probationary period, the contacts that the workers have with whoever is teaching them how to do the job is going to be more superficial, is it not? At least at the start?

A. Well, these are all unskilled jobs, and for the most part we assume he can learn the job within a 30-day period of time, but, some jobs are a little more technical, so it would take -- could take up to 90 days.

But, reference to the training, it can either be by instructional book, or it can be done with a fellow worker, and it's usually done with a fellow worker, and it's usually done with a fellow worker. So the intensity is a little higher than casual.

Q. You testified, Dr. Parsons, that four percent would not be tolerated, four percent off task.

A. Yeah, he could easily continue to perform work at four percent.

Q. Is there a cutoff number here?

A. It depends on the job, but, in these cases I would say definitely sometime 15 percent would probably make it difficult for him to sustain.

Production Rate & End-of-Day Goals

Q So even though those jobs don't have production expectations, do they have expectations with respect to end-of-day goals?

A Yes.

Q Okay. Assuming an individual who could meet a 50% -- even a 50% rate of end-of-day goals, is that consistent with competitive employment?

A No. It is not.

Q Okay. What is -- is there a percentage of an end-of-day goal that an individual would need to meet to be able to be competitively employed?

A The Department of Labor standards, with varying time studies, go to the minimum of 72% production rate. So it's saying that less than that, essentially would be considered not competitively employable.

Unscheduled Breaks

Q What -- if an individual were -- needed to take an unscheduled break for up to -- or, on average, between six and eight times a shift, is that tolerated in competitive employment?

A No.

Q Is there -- can you just describe, in general, what the tolerance is for being able to take unscheduled breaks?

A Well, most employers, I would say, would allow maybe two or three breaks a week -- extra breaks, but if they needed to have extra breaks on a daily basis, that would not be acceptable.

Questions about Job Numbers and Methodology

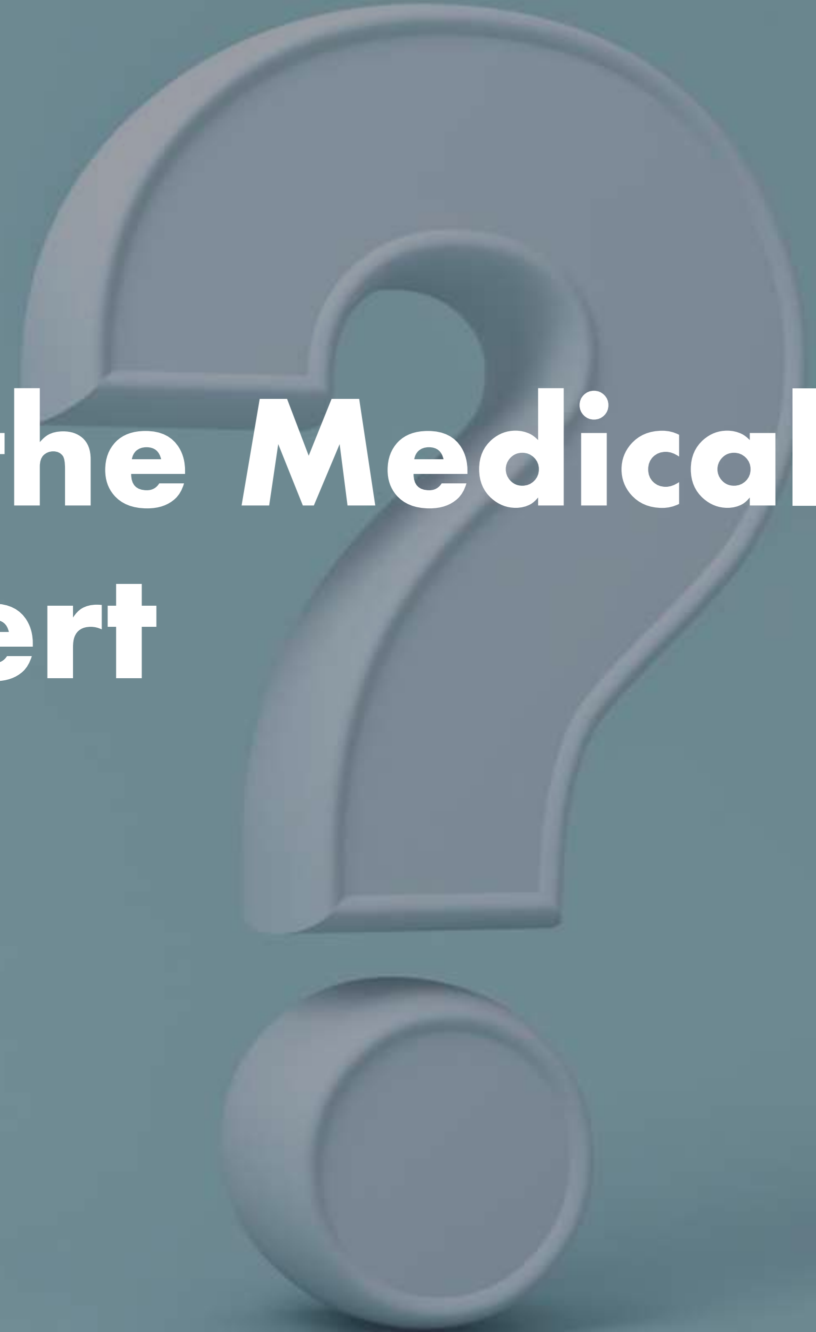
Biestek v. Berryhill:

Supreme Court 2019

Brace v. Saul:

Seventh Circuit 2020

Questioning the Medical Expert



Qualifications
Exhibits reviewed
Expertise vs. Treating Source
Listings: Equals vs. Meets
Residual Functional Capacity
Onset date
Symptom Consistency

Section Three

The New Rules / Preparing the Witness for Hearing

Thomas J. Scully III - Moderator
Thomas J. Scully III & Associates, LLC
Munster, Indiana

Michael DeYoung
Thomas J. Scully III & Associates, LLC
Munster, Indiana

William M. Krowl
YOCUM LAW OFFICE
Evansville, Indiana

Joshua M. Matejczyk
Thomas J. Scully III & Associates, LLC
Munster, Indiana

Section Three

The New Rules / Preparing the Witness for Hearing………………... Thomas J. Scully III - Moderator
Michael DeYoung
William M. Krowl
Joshua M. Matejczyk

PowerPoint Presentation

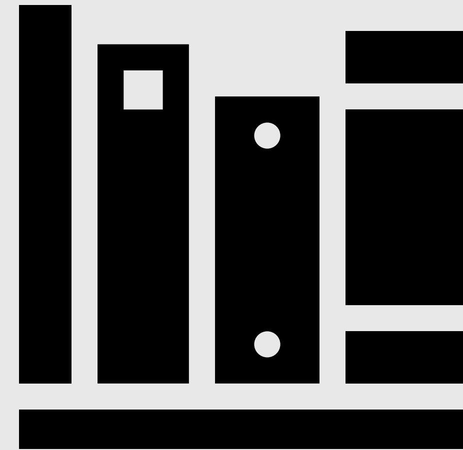
PREPARING THE
CLIENT

Preparing the Client/Witness

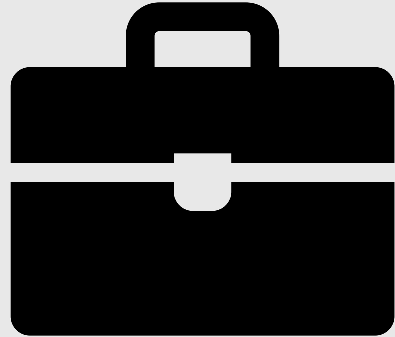
- Know your Judge!
  - Does your judge handle the questioning or want you to do the bulk of the questioning?
  - What is your judge's temperament?
    - Easygoing?
    - Gruff?
    - In between?

Preparing the Client/Witness

- Know your VE!
  - Always review the VE's resume
  - Is your VE claimant friendly?
    - Does your VE like to use "real" jobs or out-of-date jobs like Surveillance Systems Monitor?



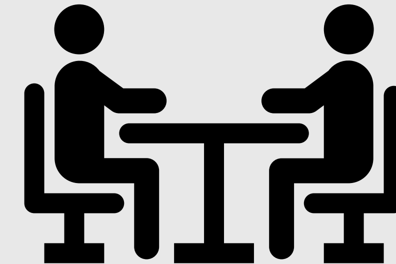
Preparing the Client/Witness



- Know your Case!
  - How Important is Past Relevant Work?
    - Critical at age 50
  - What are the Claimant’s impairments?
    - Physical?
    - Mental?
    - Combination?

Preparing the Client/Witness

- The Client Meeting
  - What to Cover
    - Past Relevant Work
    - Why Can’t You Work?
    - Discuss the Impairments
    - Medical Source Statements
    - Activities of Daily Living
    - Other Probable Questions



PAST RELEVANT
WORK

Definition of Past Relevant Work

- 20 C.F.R. 404.1560
  - Past Relevant Work is work that you have done within the past 15 years, that was substantial gainful activity, and that last long enough for you to learn to do it.
    - Substantial Gainful Activity (SGA) limits available at https://www.ssa.gov/oact/cola/sga.html

Is Past Relevant Work Important?

- Answer: It Depends!
  - Under 50?
    - Not very important usually
  - 50-54?
    - Important
  - 55 and up?
    - Very Important

What to Ask your Client

- What was the job title and/or general nature of the job?
- How many hours a day was the client on his/her feet?
- What was the heaviest weight the client had to lift?
- Did the claimant have authority to supervise other employees?
- Did the claimant make schedules and staffing decisions?
- Did the claimant have authority to hire/fire employees

Getting it Right

- Make sure you review any work history reports in the file, and make sure you have a very good understanding what the claimant ACTUALLY did. **DO NOT RELY ON JOB TITLES**!
  - Example: Claimant states her past job was an assistant manager at a grocery store. Claimant spent most of her day stocking shelves, unpacking merchandise, and running a cash register. She did not hire/fire anyone, did not make up the schedules, and had not real authority over other employees. Her title might be “assistant manager”, but there were not management skills involved

Why does it Matter?

- The more skilled the past work, the more likely the Vocational Expert is to find that there are transferable skills to a less exertional position
- In the previous example, the claimant's past work was probably performed at the "light or "medium" level of exertion. However, if a VE determines that claimant acquired management-type skills, the VE could testify that the claimant's skills would transfer to a sedentary position. Depending on the claimant's age, this determination could possible sink what was otherwise a good case.

WHY CAN'T THE CLIENT WORK?

Why is it Important to Know?

- It may seem obvious to know why a client can't work, but the real issue is making sure the Client can articulate the reasons in a way that the ALJ finds useful and acceptable.
  - Remember, especially if the client is under 50, the client is essentially arguing that: "I cannot work at all," not just their past relevant work
  - Many, if not most, ALJs will ask the client something like: "I understand you couldn't lift a lot of weight and maybe have a hard time being on your feet all day, but why couldn't you do a job where you didn't have to lift very much weight and could sit down most of the day?"
    - "Why couldn't you do a job as simple as polishing eyeglasses" (Real job in the DOT)
  - If the client is 50 or older, it's possible the more relevant question is "Why can't you do one of your old jobs?"

DISCUSSING THE
CLIENT'S
IMPAIRMENTS

Why is it Important to Know?

- The Hearing is your client's opportunity to tell his/her side of the story. You need to make sure the impairment(s) line up with why they can't work
- Discuss all impairments for which the claimant is receiving treatment. For each impairment ask:
  - How does this impairment affect your ability to work?
  - What have your medical providers told you about this impairment?
    - Is it expect to improve or get worse?
    - Will surgery be required?
  - Is there anything that helps this impairment? (e.g. Medication? Physical Therapy? Injections?)
  - Medications: are there side effects?

Why is it Important to Know? (Cont.)

- When discussing the client's medical history, make sure you have all the relevant evidence. Sometimes clients will have recent treatment they forgot to tell you about. Make sure you have a complete record!
- By the same token, check to make sure what your client is saying is actually in the record. If the client says that they have Fibromyalgia, make sure that's in the record. Sometimes it's because you don't have a complete record. Sometimes it's because one doctor told the client five years ago that they might have Fibromyalgia.

MEDICAL SOURCE STATEMENTS

Medical Source Statements

- RFC Forms—try to have your client obtain an opinion from his/her medical provider with an RFC form
- A good medical opinion that is supported by the record can have a strong impact on the claim!
- Give your client enough time to get the form completed! Don’t forget about the 5-day rule

ACTIVITIES OF
DAILY LIVING

Why is it Important?

- Because most disability applicants are not working, or only working part-time, most judges want to know what the client is doing all day
- Examples Include
  - Can your client drive?
  - Can your client make meals?
  - Can your client do household chores?
  - Does your client do anything socially?
  - Does your client take care of any pets?
  - Does your client attend church?
  - Does your client do any yardwork or gardening

Honesty is the Best Policy

- Tell your client to be honest!
  - Embellishing or exaggerating will only hurt the case
  - The flip side is also true: make sure your client doesn’t undersell his/her limitations
    - Example: Veteran says he can still walk a mile without a break. He couldn’t walk to his car without a break

Honesty is the Best Policy (Cont.)

- Most clients can probably do several types of ADLs, but probably not nearly as well as they used to do them. Be sure the client addresses any limitations he/she may have with each activity. ("Yes, but. . .)
  - Yes, I can make a meal, but generally small, simple things like a sandwich or bowl of oatmeal
  - Yes, I can fold some laundry, but I have to do it sitting down and only for about 10 minutes
  - Yes, I can drive, but only for about 20 minutes at a time

Honesty is the Best Policy (Cont.)

- Let the medical records convince the ALJ the claimant is disabled, don’t give the ALJ a reason to find your client less than credible. Tell the truth.

OTHER LIKELY
QUESTIONS DURING
THE HEARING

Prep Your Client

- Depending on the ALJ, your clients are likely to be asked certain question at his/her hearing. Some common questions are:
  - How much weight can you lift (in lbs)?
  - How far can you walk?
  - How long can you sit?
- Make sure the client has a reasonable estimate prepared
  - Right way to answer: I can walk half a block
  - Wrong way to answer: I can’t walk very far
  - Right way to answer: I can lift about 10lbs
  - Wrong way to answer: I can’t lift very much

Prep Your Client (Cont.)

- Clients need to be honest with themselves
  - Claimant’s with a long steady work history may not want to admit he/she cannot do what he/she used to do. Tell your client to swallow his/her pride. This not a job interview. As unpleasant as it might be for many client to discuss what they CANNOT do, it is necessary to present the strongest case

Amended Onset Dates

- Is there a prior decision that could have an impact on the Alleged Onset Date?
- Is there a GRID rule that could affect the Alleged Onset Date?
- Was there an injury/incident where the Claimant clearly became disabled?
- Whenever possible, try to discuss these prior to the Hearing.

Possible Disability Offsets

- Is the Claimant Receiving Long-Term Disability
  - Tip: Try to get something from the LTD carrier or former employer confirming the absolute last day worked and the amount of LTD the client is/was receiving. Often this income will show up after the Alleged Onset Date and may look like income above SGA levels
- Is the client receiving worker's compensation?
  - Worker's Comp. settlements may need to be structured a certain way to minimize offsets

(DISCUSS WITH YOUR CLIENT)

Substance Abuse

- Whether it's current abuse or abuse in the past, if it is even hinted at in a record, most ALJs will address it/bring it up
- Tell the client there is no sense in denying the past or present abuse. Don't try to hide it.

Vacations

- Sometimes records will indicate a claimant took a trip.
- Some ALJs just routinely ask a claimant if he/she took any trips/vacations.
- Most ALJs will want to know what a client did on vacation, how he/se traveled etc. Don’t let your client be caught off-guard
  - If a long car ride is indicated, perhaps the client needed to stop the car every hour to get out and stretch, or the client was lying flat in the back seat due to back pain.

Criminal Convictions

- Tell the Client to just be honest about them if asked.
  - Remember if the ALJ asks, he/she probably already knows the answer

Earnings

- Make sure your client tells you about ALL work for money, even if it was a part-time basis. You don’t want surprises at the hearing!

Treatment Gaps/Little Treatment

- If a client has long gaps in treatment, find out why! The ALJ should take legitimate reasons into consideration (e.g. transportations issue, no insurance, etc.)

RULE CHANGES

OLD RULE: 404.1527 (aka, "The Treating Physician Rule")

- Applies to cases filed before March 27, 2017
- Acceptable Medical Sources under the Old Rule (404.1502)
  - Licensed physician (M.D. or O.D.)
  - Licensed psychologist
    - Licensed or certified psychologist
    - Licensed or certified school psychiatrist

Acceptable Medical Sources (Cont.)

- Licensed optometrist
- Licensed podiatrist
- Qualified speech-language pathologist

Consideration of Medical Opinions Under the Old Rule

- “Regardless of its source, we will evaluate every medical opinion we receive.” 404.1527c
- Unless opinion is given “controlling weight,” these were the factors in considering medical opinions:
  - Examining relationship—more weight given to medical source who actually examined the client

Consideration of Medical Opinions Under the Old Rule (Cont.)

- Treatment relationship—more weight given to opinions from someone that treats the client so long as findings consistent with other substantial evidence in the record
  - Length of treatment relationship—Generally the longer the treatment relationship, the more weight given to the opinion
  - Nature and extent of the treatment relationship

Consideration of Medical Opinions Under the Old Rule (Cont.)

- Supportability: does the other medical evidence in the record support the opinion?
- Consistency: Is the opinion consistent with the other medical evidence in the record?
- Specialization: A cardiologist who provides an opinion on a client's heart condition would likely be given more weigh than a general practitioner who offers an opinion a client's heart condition
- Other factors: "Any other factors you or others bring to our attention. . .which tend to support or contradict the medical opinion"

New Rule: 404.1520c

- Applies to cases filed on or after March 27, 2017
- Adds new acceptable treating sources (404.1502)
  - Advanced Practice Nurses
  - Physician Assistants
  - Audiologists

New Rule: 404.1520c—Consideration of Opinions

- Evidentiary weight not given to medical opinions, instead, the Agency will consider 5 factors in evaluating the persuasiveness of <u>medical opinions</u> and <u>prior administrative findings</u>.

The 5 Factors

- Supportability
- Consistency
- Relationship with the Claimant
  - Length of Relationship
  - Frequency of Examinations
  - Purpose of the Treating Relationship
  - Extent of the Treatment Relationship
  - Examining Relationship
- Specialization
- Other Factors

The 5 Factors (Cont.)

- **The Most Important Factors are Supportability and Consistency**

Differences Between the Old Rule and New Rule

- The New Rule places a large emphasis on supportability and Consistency—Does the medical evidence outside the opinion support the opinion?

Differences Between the Old Rule and New Rule (Cont.)

- Old Rule required ALJs to assign "weight" to each opinion
  - Common phrases were:
    - "Some weight"
    - "Little weight"
    - "No weight"
    - "Significant weight"

Differences Between the Old Rule and New Rule (Cont.)

- New Rule requires ALJs to articulate how persuasive he/she finds the medical opinion
  - Common phrases under the New Rule
    - “Persuasive”
    - “Somewhat persuasive”
    - “Partially Persuasive”
    - “Not Persuasive”

Differences Between the Old Rule and New Rule (Cont.)

- Are there significant differences between the Old Rule and the New Rule or is this just semantics?

Additional New Rules to Consider

- 5 Day Rule
  - Remember, you still need to submit a subpoena request 10 business days in advance
- SSR 17-4
  - “To satisfy the claimant’s obligation to ‘inform’ us about written evidence, he or she must provide information specific enough to identify the evidence (source, location, and dates of treatment) and show that the evidence relates to the individual’s medical condition, work activity, job history, medical treatment, or other issues relevant to whether or not the individual is disabled or blind”

Additional New Rules to Consider (Cont.)

- 20 C.F.R. 404.1740
  - Representative's "Affirmative Duties" include
    - Disclose in writing, at any time a medical or vocational opinion is submitted to us or as soon as the representative is aware of the submission to us if:
      - The representative, the representative's employee, or any individual contracting with the representative drafted, prepared, or issued the medical or vocational opinion (includes templates sent to doctor); or
      - The representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence.

Section Four

OccuCollect™
Creating Conflict in the Record with Vocational Expert Testimony

Lawrence D. Rohlfing
Law Offices of
Lawrence D. Rohlfing
Santa Fe Springs, California

Section Four

OccuCollect™
Creating Conflict in the Record
with Vocational Expert Testimony………………... Lawrence D. Rohlfing

PowerPoint Presentation

OccuCollect™

Creating Conflict in the Record with Vocational Expert Testimony

September 25, 2020

10:15 PM PST

Lawrence D. Rohlfing

For 15 days free/extension the code: Training

The Administrative Notice Regulation

§ 404.1566, § 416.966. Work which exists in the national economy.

(d) *Administrative notice of job data.* When we determine that unskilled, sedentary, light, and medium jobs exist in the national economy (in significant numbers either in the region where you live or in several regions of the country), we will take administrative notice of reliable job information available from various governmental and other publications.

For Example

§ 404.1566, § 416.966. Work which exists in the national economy.

(d) […] For example, we will take notice of—

(1) *Dictionary of Occupational Titles,* published by the Department of Labor;

(2) *County Business Patterns,* published by the Bureau of the Census;

(3) *Census Reports,* also published by the Bureau of the Census;

(4) *Occupational Analyses,* prepared for the Social Security Administration by various State employment agencies; and

(5) *Occupational Outlook Handbook,* published by the Bureau of Labor Statistics.

Social Security Ruling 00-4p

In making disability determinations, we rely primarily on the DOT (including its companion publication, the SCO) for information about the requirements of work in the national economy. We use these publications at steps 4 and 5 of the sequential evaluation process.

42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B)

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which **exists** in the national economy, regardless of whether such work **exists** in the immediate area in which he lives, or whether a specific job vacancy **exists** for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), “work which **exists** in the national economy” means work which **exists** in significant numbers either in the region where such individual lives or in several regions of the country.

The Cases – Cross-examination is Hard

- *Britton v. Astrue*, 521 F.3d 799 (7th Cir. 2008)
- *Shaibi v. Berryhill*, 883 F.3d 1102 (9th Cir. 2018)

The VE Does Not Have to Cooperate

- *Biestek v. Berryhill*, 139 S.Ct. 1140 (2019)
- *Ford v. Saul*, 950 F.3d 1141 (9th Cir. 2020)
- *Bayliss v. Barnhart*, 427 F.3d 1211 (9th Cir. 2005)

The VE Does Not Have to Understand

- *Purdy v. Berryhill*, 887 F.3d 7 (1st Cir. 2018)

The VE Does Have to Explain Rationally

- *Chavez v. Berryhill*, 895 F.3d 962 (7th Cir. 2018)

The Representative Must Raise the Issue

- *Shaibi v. Berryhill*, 883 F.3d 1102 (9th Cir. 2018)
- *Meanel v. Apfel*, 172 F.3d 1111 (9th Cir. 1999)

Explanation or Just Substantial Evidence

- *Taylor v. Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228 (9th Cir. 2011)

The DOT per the DOL

The O*Net is now the primary source of occupational information. It is sponsored by ETA through a grant to the North Carolina Department of Commerce. **Thus, if you are looking for current occupational information you should use the O*Net.**

https://www.dol.gov/agencies/oalj/topics/libraries/LIBDOT

SSA Statement about the O*NET

Why are you developing a new occupational information system (OIS)? Why can't the Department of Labor (DOL) update the Dictionary of Occupational Tiles (DOT), or why can't you use the Occupational Information Network (O*NET)?

The Department of Labor (DOL) developed the DOT in the late 1930s to match jobseekers to jobs. For almost 50 years, the DOT has been our primary source for occupational information. The DOL discontinued updating the DOT in 1991, and replaced it in 1998 with another job placement tool, the Occupational Information Network (O*NET). We studied whether O*NET could take the DOT's place in our disability adjudication process but found *it does not describe the physical requirements of occupations at the level of detail needed for claims adjudication*.

What is the Occupational Requirements Survey (ORS)?

The ORS is a test by the Bureau of Labor Statistics' (BLS) National Compensation Survey (NCS) in association with the Social Security Administration (SSA). The ORS seeks to provide data regarding current job characteristics to aid the SSA in their disability determination process. The ORS is testing questions that ask for information on the job duties and mental demands of jobs. Your organization is being asked to provide occupational information to help determine future survey guidelines and data collection methods.

https://www.bls.gov/ncs/ocs/ors_info_sheet_2013.pdf

Marker – DOT code 209.287-034

- Light
- Unskilled
- Reasoning level 2
- Math and Language level 1
- Frequent Reaching, Handling, and Fingering
- Frequent Near Acuity
- No Hazards
- Moderate Noise

Cashier II

- Light
- Unskilled
- Reasoning level 3
- Math and Language level 2
- Frequent Reaching, Handling, and Fingering
- Frequent Talking, Hearing, and Near Acuity
- No Hazards
- Moderate Noise

Section Five

Significant Cases from the 7th Circuit

Adriana M. de la Torre
The de la Torre Law Office LLC
Indianapolis, Indiana

Timothy J. Vrana
TIMOTHY J VRANA LLC
Columbus, Indiana

Section Five

Significant Cases from the 7th Circuit………….. Adriana M. de la Torre
Timothy J. Vrana

Horr v. Berryhill, 743 F. App'x 16 (7th Cir. 2018)
Aff'd 07/31/18 1

Spicher v. Berryhill, 898 F.3d 754 (7th Cir. 2018)
Rev'd 08/03/18 1

Collins v. Berryhill, 743 F. App'x 21 (7th Cir. 2018)
Aff'd 08/09/18 1

Richards v. Berryhill, 743 F. App'x 26 (7th Cir. 2018)
Aff'd 08/13/18 2

Barrett v. Berryhill, 734 F. App'x 350 (7th Cir. 2018)
Aff'd 08/14/18. On 09/25/18, this case was issued as a published opinion
at 904 F.3d 1029. 2

Walker v. Berryhill, 900 F.3d 479 (7th Cir. 2018)
Rev'd 08/15/18 2

Penrod v. Berryhill, 900 F.3d 474 (7th Cir. 2018)
Aff'd 08/15/18 3

West v. Berryhill, No. 18-1021, 2018 U.S. App. LEXIS 22828 (7th Cir. 2018)
Aff'd 08/16/18 3

Plessinger v. Berryhill, 900 F.3d 909 (7th Cir. 2018)
Rev'd 08/20/18 3

Weaver v. Berryhill, 746 F. App'x 574 (7th Cir. 2018)
Aff'd 08/20/18 4

Baldwin v. Berryhill, 746 F. App'x 580 (7th Cir. 2018)
Rev'd 08/21/18 4

Kelham v. Berryhill, 751 F. App'x 919 (7th Cir. 2018)
Aff'd 10/31/18 4

Hardy v. Berryhill, 908 F.3d 309 (7th Cir. 2018)
Rev'd 11/08/18 4

Truelove v. Berryhill, 753 F. App'x 393 (7th Cir. 2018)
Aff'd 11/28/18 5

McHenry v. Berryhill, 911 F.3d 866 (7th Cir. 2018)
Rev'd 12/26/18 5

Hammerslough v. Berryhill, 758 F. App'x 534 (7th Cir. 2019)
Aff'd 01/09/19 6

Radosevich v. Berryhill, 759 F. App'x 492 (7th Cir. 2019)
Rev'd 01/22/19 6

Winsted v. Berryhill, 923 F.3d 472 (7th Cir. 2019)
Rev'd 02/08/19 7

Ray v. Berryhill, 915 F.3d 486 (7th Cir. 2019)
Rev'd 02/12/19 7

Fisher v. Berryhill, 760 F. App'x 471 (7th Cir. 2019)
Rev'd 02/15/19 8

Paul v. Berryhill, 760 F. App'x 460 (7th Cir. 2019)
Rev'd 02/15/19 8

DeCamp v. Berryhill, 916 F.3d 671 (7th Cir. 2019)
Rev'd 02/26/19 9

Mischler v. Berryhill, 766 F. App'x 369 (7th Cir. 2019)
Rev'd 03/20/19 10

Burmester v. Berryhill, 920 F.3d 507 (7th Cir. 2019)
Aff'd 04/05/19 11

L.D.R. v. Berryhill, 920 F.3d 1146 (7th Cir. 2019)
Aff'd 04/15/19 12

Jozefyk v. Berryhill, 923 F.3d 492 (7th Cir. 2019)
Aff'd 05/08/19 12

Dudley v. Berryhill, 773 F. App'x 838 (7th Cir. 2019)
Aff'd 05/16/19 13

Saunders v. Saul, 777 F. App'x 821 (7th Cir. 2019)
Aff'd 06/28/19 13

Krell v. Saul, 931 F.3d 582 (7th Cir. 2019)
SSA won. 07/24/19 14

Crump v. Saul, 932 F.3d 567 (7th Cir. 2019)
Rev'd 07/31/19 15

Rockwell v. Saul, 781 F. App’x 532 (7th Cir. 2019)
Rev’d 08/08/19 15

Williams v. Saul, 782 F. App’x 488 (7th Cir. 2019)
Rev’d 09/06/19 16

Burgos v. Saul, 788 F. App’x 1027 (7th Cir. 2019)
Rev’d 10/17/19 16

Pytlewski v. Saul, 791 F. App’x 611 (7th Cir. 2019)
Aff’d 11/12/19 17

Primm v. Saul, 789 F. App’x 539 (7th Cir. 2019)
Aff’d 11/21/19 17

Dunn v. Saul, 794 F. App’x 519 (7th Cir. 2019)
Rev’d 11/26/19 18

Olivas v. Saul, 799 F. App’x 389 (7th Cir. 2019)
Aff’d 12/16/19 18

Urbanek v. Saul, 796 F. App’x 910 (7th Cir. 2019)
Aff’d 12/16/19 18

Felts v. Saul, 797 F. App’x 266 (7th Cir. 2019)
Aff’d 12/18/19 19

Hinds v. Saul, 799 F. App’x 396 (7th Cir. 2020)
Aff’d 01/09/20 19

Brown v. Saul, 799 F. App’x 915 (7th Cir. 2020)
Rev’d 01/10/20 20

Prater v. Saul, 947 F.3d 479 (7th Cir. 2020)
Aff’d 01/15/20 21

Gebauer v. Saul, 801 F. App’x 404 (7th Cir. 2020)
Aff’d 01/17/20 21

Overton v. Saul, 802 F. App’x 190 (7th Cir. 2020)
Aff’d 01/22/20 22

Gibbons v. Saul, 801 F. App’x 411 (7th Cir. 2020)
Rev’d 01/23/20 22

Lay v. Saul, 791 F. App’x 624 (7th Cir. 2020)
Aff’d 01/29/20 23

Martin v. Saul, 950 F.3d 369 (7th Cir. 2020)
Rev'd with instruction to award benefits 02/07/20 23

Kuykendoll v. Saul, 801 F. App'x 433 (7th Cir. 2020)
Aff'd 02/20/20 24

Vang v. Saul, 805 F. App'x 398 (7th Cir. 2020), petition for cert. filed, (U.S. July 27, 2020) No. 20-5181) Aff'd 02/21/20 25

Underwood v. Saul, 805 F. App'x 403 (7th Cir. 2020)
Aff'd 03/03/20 25

Massaglia v. Saul, 805 F. App'x 406 (7th Cir. 2020)
Aff'd 03/04/20 25

Morrison v. Saul, 806 F. App'x 469 (7th Cir. 2020)
Aff'd 03/10/20 26

Reinaas v. Saul, 953 F.3d 461 (7th Cir. 2020)
Rev'd 03/16/20 26

Marquardt v. Saul, 798 F. App'x 34 (7th Cir. 2020)
Rev'd 03/17/20 27

Jeske v. Saul, 955 F.3d 583 (7th Cir. 2020)
Aff'd 04/02/20 27

Atkins v. Saul, — F. App'x —, 2020 WL 2554397 (7th Cir. 2020)
Aff'd 05/20/20 28

Simons v. Saul, — F. App'x —, 2020 WL 3124238 (7th Cir. 2020)
Aff'd 06/12/20 28

Trottier v. Saul, 809 F. App'x 326 (7th Cir. 2020)
Aff'd 06/15/20 28

Bruno v. Saul, 817 F. App'x 238, 2020 WL 3497633 (7th Cir. 2020)
Aff'd 06/26/20 29

Greenwell v. Saul, 811 F. App'x 368 (7th Cir. 2020)
Aff'd 06/30/20, rehearing denied 07/14/20 29

Sosinski v. Saul, 811 F. App'x 380 (7th Cir. 2020)
Aff'd 07/01/20 29

Sosh v. Saul, — F. App'x —, 2020 WL 3969624 (7th Cir. 2020)
Aff'd 07/14/20 30

Apke v. Saul, 817 F. App'x 252, 2020 WL 4018988 (7th Cir. 2020)
Aff'd 07/16/20 30

Hapner v. Saul, — F. App'x —, 2020 WL 4284324 (7th Cir. 2020)
Aff'd 07/27/20 30

Surprise v. Saul, 968 F.3d 658, 2020 WL 4345158 (7th Cir. 2020)
Aff'd 07/29/20 31

Mitze v. Saul, 968 F.3d 689, 2020 WL 4380642 (7th Cir. 2020)
Aff'd 07/31/20 31

Plainse v. Saul, 816 F. App'x 24, 2020 WL 4660255 (7th Cir. 2020)
Aff'd 08/12/20 32

Brace v. Saul, --- F.3d ---, 2020 WL 4727345 (7th Cir. 2020)
Rev'd 08/14/20 32

Barrett v. Saul, --- F. App'x ---, 2020 WL 4783556 (7th Cir. 2020)
Aff'd 08/18/20 32

Rennaker v. Saul, --- F. App'x ---, 2020 WL 4814120 (7th Cir. 2020)
Rev'd 08/19/20 33

Jones v. Saul, --- F. App'x ---, 2020 WL 5105694 (7th Cir. 2020)
Rev'd 08/31/20 34

CASES LISTED BY SUBJECT MATTER 35

ICLEF 7th Cir Case Updates
July 31, 2018 to August 31, 2020

***Horr v. Berryhill*, 743 F. App'x 16 (7th Cir. 2018)**
Aff'd 07/31/18

Horr's (pronounced "Harr's") arguments were underdeveloped and therefore waived. *Id.* at 19-20. Horr claimed that the ALJ's discussion of the objective medical evidence was an error but did not explain why. *Id.* at 19. Horr claimed that the ALJ's evaluation of the intensity, persistence, and limiting effects of her symptoms was patently wrong but did not explain why. *Id.* at 20.

* * * *

***Spicher v. Berryhill*, 898 F.3d 754 (7th Cir. 2018)**
Rev'd 08/03/18

Spicher's first argument was unsuccessful. After the case was previously remanded from district court, the ALJ at the remand hearing asked Spicher's counsel if he and his client would like to amend the onset date. *Id.* at 756. After counsel declined, the ALJ replied, "Oh, you want to go to Federal Court again?" *Id.* Spicher then claimed that she had been deprived of due process. *Id.* The Court of Appeals wrote that the ALJ's remarks were "troublesome" but fell short of the "deep-seated and unequivocal antagonism" required to justify a remand. *Id.*

Spicher was successful with her other arguments. The consultative examiner's report undercut the ALJ's RFC finding in two respects, and the ALJ did not address either. *Id.* at 758. Also, in assessing the RFC, the ALJ did not consider the effects of two non-severe impairments. *Id.* at 759, *citing* 20 C.F.R. § 404.1545(a)(2) ("We will consider all of your medically determinable impairments of which we are aware, including your medically determinable impairments that are not 'severe' … when we assess your residual functional capacity.")

* * * *

***Collins v. Berryhill*, 743 F. App'x 21 (7th Cir. 2018)**
Aff'd 08/09/18

Although Collins was represented by counsel at the hearing, he claimed that the ALJ failed in his duty to develop the record because the ALJ did not collect certain records from a particular doctor's office. *Id.* at 24. The Court noted that an ALJ has an independent duty to develop the record fully and fairly. *Id.* at 25, *citing* 20 C.F.R. § 416.912(b) and *Thomas v. Colvin*, 745 F.3d 802, 807 (7th Cir. 2014). As the Commissioner conceded, this duty is not eliminated when a claimant has counsel. 743 F.App'x at 25, *citing Smith v. Apfel*, 231 F.3d 433, 437 (7th Cir. 2000). But a claimant must still show that the ALJ's failure caused prejudice to the claimant. 743 F.App'x at 24. The Court held that the ALJ's failure to collect the specific records did not prejudice Collins. *Id.* at 25.

Collins also claimed that there was an apparent and unresolved conflict between the VE's testimony that Collins could find sedentary work as a food preparer, lobby attendant, assembler, or office helper and the DOT, which classifies food preparer and office helper as light. *Id.* The Court held that there was a conflict but added that the error was harmless because the VE testified that a person with Collins's RFC could perform 55,000 sedentary assembler jobs. *Id.*

* * * *

***Richards v. Berryhill*, 743 F. App'x 26 (7th Cir. 2018)**
Aff'd 08/13/18

The Court affirmed because Richards waived or failed to develop any tenable argument that the ALJ's decision was not supported by substantial evidence. *Id.* at 27.

Arguments are waived at the appellate level if they were not developed at the district court level or if they were not developed in the opening brief on appeal. *Id.* at 30.

* * * *

***Barrett v. Berryhill*, 734 F. App'x 350 (7th Cir. 2018)**
Aff'd 08/14/18. *On 09/25/18, this case was issued as a published opinion at 904 F.3d 1029.*

Barrett argued that substantial evidence did not support the ALJ's conclusion that Barrett's alcoholism was material. *Id.* at 352. The ALJ concluded that Barrett was not disabled considering *all* of his impairments, including his alcoholism. Thus, any error in the materiality analysis was harmless. *Id.* An ALJ must determine if a claimant's drug or alcohol addiction is material to his disability only if the ALJ first finds that the claimant is disabled considering the addiction. *Id.*

* * * *

***Walker v. Berryhill*, 900 F.3d 479 (7th Cir. 2018)**
Rev'd 08/15/18

In March 2012, Walker filed for DIB and SSI and alleged an onset date of January 15, 2008, which was shortly after he suffered a stroke. *Id*. at 481. The SSI claim was apparently denied for non-disability reasons. The DIB claim was denied throughout the administrative process but was remanded by the district court. *Id.* Walker filed a second SSI application, which was approved as of December 5, 2014.

Thus, the issue on remand of the DIB claim was whether Walker was disabled during the period from January 2008 to December 2014. *Id.* After the remand hearing, the ALJ found that Walker had not been disabled at all during this period. *Id.* at 482-83.

The Court noted that "Walker's condition was in no way static and indeed changed substantially over the seven-year period in question." *Id.* at 480. The Commissioner argued that Walker was never disabled during that period, but the

Court's review of the record left it "unpersuaded that the question presented is amenable to such an all-or-nothing answer in either party's favor." *Id.* at 484. The Court reversed and wrote that "[t]he ALJ's error stemmed from considering evidence from particular points between 2008 and 2014 to support a conclusion covering the entire period." *Id.* According to the Court, "the ALJ failed to remain watchful for the intermediate possibility of Walker becoming disabled sometime between the bookends of January 2008 and December 2014." *Id.* The Court wrote that the evidence revealed progressive deterioration in Walker's condition over time and "the reality" that at some time during that period, his condition may have become disabling. *Id.*

* * * *

***Penrod v. Berryhill*, 900 F.3d 474 (7th Cir. 2018)**
Aff'd 08/15/18

"When the ALJ asked Penrod why he could not work, Penrod focused on the difficulty of finding a job with his limited education and job skills…. He added that, even if there were jobs he could perform, he would not sell his house and move for 'a $9.00 an hour job.'" *Id.* at 476.

One of Penrod's arguments was that the ALJ failed to reconcile her RFC with that of the ALJ who denied Penrod's previous application. *Id.* at 477. The Court wrote that Penrod "cite[d] no authority—and we have found none—that requires an ALJ to use the same RFC that a different ALJ used in denying benefits for a prior period." *Id.*

* * * *

***West v. Berryhill*, No. 18-1021, 2018 U.S. App. LEXIS 22828 (7th Cir. 2018)**
Aff'd 08/16/18

"We struggle to discern from West's appellate submissions any coherent challenge to the ALJ's decision. *Id.* at *6-7.

This was *not* a pro se appellant.

* * * *

***Plessinger v. Berryhill*, 900 F.3d 909 (7th Cir. 2018)**
Rev'd 08/20/18

A treating neurosurgeon, Dr. Phookan, wrote that surgery might not be the best treatment for Plessinger. *Id.* at 915. The Court wrote that the ALJ "treated this opinion as if it showed that Plessinger's condition was not severe enough for surgery." *Id.* "Actually," wrote the Court, "Dr. Phookan's full assessment undermines that view. He pointed out that Plessinger was suffering from failed back surgery syndrome, which mean that surgery was less promising than it would otherwise be, despite the pain Plessinger was suffering." *Id.*

The Court wrote that the ALJ's "most fundamental error" was that the ALJ accepted the testifying medical expert's opinions without recognizing the limits that the ME put on them. *Id.* The ME, Dr. Pella, "acknowledged that his opinions did not take into account Plessinger's own account of the disabling effects of his pain." *Id.*

Also, after stating the proper factors to consider in analyzing a claimant's symptoms, the ALJ erred by failing to actually conduct that analysis. *Id.* at 916.

* * * *

***Weaver v. Berryhill*, 746 F. App'x 574 (7th Cir. 2018)**
Aff'd 08/20/18

The ALJ violated 20 C.F.R. § 404.1527(c) by not considering an emergency room physician's opinion, but the error was harmless because those restrictions would not have prevented Weaver from doing her past relevant work as an auditor clerk, a sedentary job. *Id.* at 578.

Weaver also contended that because of her long and continuous work history, the ALJ should have found her credible. *Id.* at 579. "But a good work history 'is still just one factor among many, and it is not dispositive.'" *Id., citing Summers v. Berryhill*, 864 F.3d 523, 529 (7th Cir. 2017) and 20 C.F.R. § 404.1529(c)(3).

* * * *

***Baldwin v. Berryhill*, 746 F. App'x 580 (7th Cir. 2018)**
Rev'd 08/21/18

The ALJ concluded that Baldwin became disabled on January 14, 2013, and that his disability continued through May 15, 2014, at which time it ended. *Id.* at 582. The Court reversed on the issue of when Baldwin's disability ended, writing that the record "reveal[ed] that the ALJ cherry-picked the evidence in determining that Baldwin's condition improved after May 15, 2014." *Id.* at 583.

* * * *

***Kelham v. Berryhill*, 751 F. App'x 919 (7th Cir. 2018)**
Aff'd 10/31/18

Appellant's counsel overstated physicians' notes, *id.* at 920, misstated the appellant's medical history, *id.*, and cherry-picked doctors' observations. *Id.* at 922.

* * * *

***Hardy v. Berryhill*, 908 F.3d 309 (7th Cir. 2018)**
Rev'd 11/08/18

The ALJ discredited the opinion of the treating neurologist, Dr. Bauer, because Dr. Bauer's notes reflected "essentially normal physical exams." *Id.* at 312. The Court

wrote that "that one sentence … tells us very little." *Id.* It was not clear, wrote the Court, how several normal findings in different parts of Hardy's body undermined his claim of *back* problems. *Id.*

The Court noted that the ALJ also did not engage Dr. Bauer's observations that Hardy showed up at his appointment dependent on a cane. *Id.* "An ALJ must grapple with lines of evidence that are contrary to her conclusion, and here the ALJ did not do so." *Id.*

The ALJ compounded that error by failing to consider that Dr. Bauer's opinion was supported by the opinions of the state-agency physicians and another doctor. *Id.* The ALJ erred because she failed to even mention the opinions of the state-agency physicians despite her obligation to consider all of the medical opinions in the record. *Id.*, *citing* 20 C.F.R. § 404.1527(c) and *Roddy v. Astrue*, 705 F.3d 631, 636 (7th Cir. 2013). "On remand, the ALJ must grapple with the treating doctors' opinions, including the medical evidence in the record that supports the doctors' findings, and determine how, if at all, that evidence alters her assessment of Hardy's limitations." 908 F.3d at 313.

* * * *

***Truelove v. Berryhill*, 753 F. App'x 393 (7th Cir. 2018)**
Aff'd 11/28/18

Truelove argued that the ALJ failed to include in the RFC the limitations caused by his temper and blackouts, such as the "safety risks" that once caused him to be fired and one time to head-butt a cow. The Court wrote that this argument fell short, "primarily because he fails to identify or point to evidence of any functional limitations the ALJ should have imposed that would take proper account of his mental impairments." *Id.* at 397. There was evidence that Truelove had sufficiently managed his psychological symptoms with medication. *Id.*

Truelove also contended that the ALJ should have placed "more pronounced" limitations on his concentration, persistence, and pace. *Id.* The Court wrote that Truelove failed to develop the point. *Id.* In addition, he did not raise it in the district court and had therefore waived it. *Id.*

"Truelove also generally argues that his low IQ required the ALJ to impose additional, unspecified, work-related limitations. But this argument appears in a single-sentence footnote, without record support, and so is also waived." *Id.* at 397-98.

* * * *

***McHenry v. Berryhill*, 911 F.3d 866 (7th Cir. 2018)**
Rev'd 12/26/18

McHenry alleged that she was disabled as of January 1, 2011, because of degenerative disc disease, fibromyalgia, and depression. *Id.* at 869. Her date last insured was December 31, 2013. *Id.*

An MRI of the lumbar spine, done in 2005, showed mild findings, *id.* at 868-69, but an April 2014 MRI showed that McHenry had multiple impinged nerve roots as well as spinal cord compression. *Id.* at 869-70. McHenry argued that the ALJ erred by not subjecting the 2014 MRI to medical scrutiny. *Id.* at 871. The Court agreed that "the ALJ impermissibly assessed the MRI report on his own without the assistance of a medical expert. We have said repeatedly that an ALJ may not 'play doctor' and interpret 'new and potentially decisive medical evidence' without medical scrutiny." *Id.*

The Court called out McHenry's counsel for disparaging remarks about the ALJ. *Id.* at 874.

* * * *

***Hammerslough v. Berryhill*, 758 F. App'x 534 (7th Cir. 2019)**
Aff'd 01/09/19

Hammerslough argued that the ALJ erred in evaluating his credibility by discounting his allegations as "not entirely credible." *Id*. at 539. The Court responded, "The phrase 'not entirely credible' is meaningless boilerplate only when the ALJ substitutes it for a proper, full-bodied explanation of why credibility is lacking. Here, the ALJ went on to identify and explain all of his credibility findings and grounded each of them in the record." *Id.*

* * * *

***Radosevich v. Berryhill*, 759 F. App'x 492 (7th Cir. 2019)**
Rev'd 01/22/19

The ALJ found that Radosevich had limitations with concentration, persistence, or pace. *Id.* at 494. The ALJ's RFC limited Radosevich to "simple, routine, and repetitive tasks, performed in a work environment involving only simple, work-related decisions, and with few, if any, workplace changes." *Id.* The Court held that the RFC (and the matching hypothetical question) did not adequately account for the claimant's CPP limitations. *Id.* The Court explained,

> [A]lthough Radosevich may have the mental capacity to complete a single, simple task, the hypothetical did not capture the limitation in her ability to execute that simple task over an extended time. Therefore, we are left with a disconnect between the limitations identified by the doctors and the ALJ's hypothetical to the vocational expert.

Id.

* * * *

***Winsted v. Berryhill*, 923 F.3d 472 (7th Cir. 2019)**
Rev'd 02/08/19

The ALJ found that Winsted had moderate CPP limitations, then limited him to "simple, routine, repetitive tasks with few workplace changes." *Id.* at 476. Winsted argued that such a limitation in the RFC and the hypothetical questions to the VE did not fully account for his CPP limitations. *Id.* The Court agreed. *Id.* "Again and again," wrote the Court, "we have said that when an ALJ finds there are documented limitations of concentration, persistence, and pace, the hypothetical question presented to the VE must account for these limitations." *Id.* (listing cases).

* * * *

***Ray v. Berryhill*, 915 F.3d 486 (7th Cir. 2019)**
Rev'd 02/12/19

Ray had both physical and intellectual impairments. *Id.* at 489. The ALJ denied Ray's claims on the basis that Ray could perform his past work as a school-bus monitor, not as he actually performed it but as it is generally performed in the national economy. *Id.*

Ray's first argument was that the ALJ's evaluation of Ray's symptoms was "patently wrong." *Id.* at 490. The Court agreed. *Id.* In concluding that Ray's back pain was not as limiting as he alleged, the ALJ "cited irrelevant records from treatment he received for a staph infection and she noted that his extremities were not fractured, tender, or swollen. The connection between those characteristics and Ray's alleged pain and restricted mobility is nowhere explained." *Id.* The Court also observed that the ALJ wrote that straight-leg raising was negative when in fact it was positive. *Id.*

The Court also held that Ray's daily activities of showering while seated, fixing simple meals, using the dishwasher, and sitting and watching television did not support the ALJ's finding that Ray exaggerated his symptoms. *Id.* at 491.

Ray also argued that the ALJ improperly denied his claim at step four because the school-bus monitor job was a composite job. *Id*. at 488. The Court pointed out that when denying a claim at step four because the claimant can do the job as generally performed, an ALJ cannot use work that was a composite job. *Id.* at 491. [Tim: There is no such thing as a composite job as generally performed. Composite jobs combine "significant elements of two or more occupations and, as such, have no counterpart in the [Dictionary of Occupational Titles]." SSR 82-61.] Ray argued that his past work as a school-bus monitor involved substantial activities from both the school-bus monitor and child-care attendant occupations as they are described in the DOT. *Id.* at 490. Because substantial evidence did not support the ALJ's conclusion that Ray's school-bus monitor job was not a composite job, the Court held that the ALJ erred. *Id.* at 492.

* * * *

***Fisher v. Berryhill*, 760 F. App'x 471 (7th Cir. 2019)**
Rev'd 02/15/19

"We agree with [Fisher] that it is impossible to follow the ALJ's reasoning, and so we must remand for further proceedings." *Id.* at 472. The ALJ's reasons for discounting the opinions of Fisher's treating physicians were not supported by the facts in the record. *Id.* at 476-77. The record also failed to support two of the ALJ's main reasons for discrediting Fisher's testimony. *Id.* at 477.

First, the ALJ relied on records showing that Fisher's pain had abated. *Id.* But, explained the Court, the ALJ failed to appreciate the well-documented fluctuating nature of her sarcoidosis. *Id.* "Fisher's doctors opined that she was likely to experience good days and bad days, but the ALJ focused exclusively on Fisher's good days." *Id.*

Second, the ALJ's heavy reliance on Fisher's decision to seek unemployment benefits was "suspect." *Id.* The ALJ discredited Fisher's testimony because she told the unemployment office that she was seeking work. *Id.* "Even so, we have recognized that seeking work is not the same as actually working or being demonstrably able to work. Raw economic need can lead honest people to seek both types of benefits." *Id.* The Court added that "the applicant may be genuinely unsure whether the agency in question will regard her as able to work, and so she may not know which type of benefit may be available for her, until she applies and learns what the agency thinks." *Id.* at 477-78, *citing Cole v. Colvin*, 831 F.3d 411, 415 (7th Cir. 2016), and *Lambert v. Berryhill*, 896 F.3d 768, 778-79 (7th Cir. 2018).

* * * *

***Paul v. Berryhill*, 760 F. App'x 460 (7th Cir. 2019)**
Rev'd 02/15/19

At a psychological consultative examination, Dr. Leah Powell evaluated Paul and wrote that the claimant "is impulsive, has difficulty making good decisions, and has difficulty controlling her own behavior" and that "[t]hese symptoms are contraindicated with work related activities." *Id.* at 461-62. The ALJ decided that Dr. Powell's opinions were only entitled to "little weight" because it was a one-time examination, was not specific in terms of functioning, and was inconsistent with Paul's daily activities and treatment records. *Id.* at 463. Paul challenged each of the ALJ's reasons. *Id.* at 464.

The Court initially noted that the ALJ's decision to give "little weight" to Dr. Powell's opinion was "perplexing" because "although an ALJ may discount the opinion of the agency's examining physician when contrary evidence exists, *see Beardsley v. Colvin*, 758 F.3d 834, 839 (7th Cir. 2014), Dr. Powell's examining notes *are* consistent with Paul's treatment records." *Paul*, 760 F. App'x at 464 (emphasis in the original).

The Court then held that the ALJ wrongly discounted Dr. Powell's opinion for being based on a one-time evaluation when the ALJ gave "great weight" to a state-agency psychologist who had not evaluated Paul at all. *Id.*

Next, the Court held that the ALJ's finding that Dr. Powell's opinion was "vague and not specific in terms of functioning" was unsupported by the evidence. *Id.* The Court wrote that "Dr. Powell's opinion *was* sufficiently specific…." *Id.* (emphasis in the original). The Court also noted that if the ALJ believed that Dr. Powell's opinion was deficient, the ALJ should have sought additional clarification from Dr. Powell before discounting it outright. *Id.*, *citing* 20 C.F.R. § 416.919p and *Simila v. Astrue*, 573 F.3d 503, 516 (7th Cir. 2009).

The ALJ also discredited Dr. Powell's opinions because "the claimant was not consistent with attending her mental health therapy…." *Id.* at 465. The Court wrote that the ALJ did not explain how Paul's inconsistent attendance at therapy provided a reasonable basis to discount Dr. Powell's opinion. *Id.* The Court added that "ALJs assessing mental illness and bipolar disorder must consider possible alternative explanations before racing to conclusions about noncompliance with medical directives." *Id.*, *citing Jelinek v. Astrue*, 662 F.3d 805, 814 (7th Cir. 2011).

Finally, the ALJ found that Paul had moderate CPP limitations and limited her to simple, routine, repetitive tasks that could be done at a flexible pace, defined as "free of production rate pace where there are no tandem tasks or teamwork or one production step that's dependent upon the prior step." *Id*. at 463. Paul contended that these limitations did not fully account for her CPP limitations. *Id.* at 465. She also argued that "flexible pace" failed to specify the pace at which she can work. *Id.*

The Court held that the ALJ's RFC and hypothetical questions did not acknowledge Paul's moderate limitations with following a schedule and sticking to a given task. *Id.* The Court also held that "flexible pace" was insufficient. *Id.* "Without more, the VE cannot determine whether someone with Paul's limitations could maintain the proposed pace or what the proposed pace even is." *Id.*

* * * *

***DeCamp v. Berryhill*, 916 F.3d 671 (7th Cir. 2019)**
Rev'd 02/26/19

The ALJ concluded that DeCamp had moderate CPP limitations. *Id.* at 674. The ALJ limited DeCamp to "unskilled work with an SVP of 2 or less, with no fast-paced production line or tandem tasks, at a job that allows her to be off task up to 10% of the workday." *Id.* at 675.

The Court held that the ALJ erred by not including DeCamp's moderate CPP limitations in the hypothetical questions to the VE. *Id.* The hypotheticals did not include any mention of the claimant's four specific moderate limitations as found by a state-agency psychologist upon whom the ALJ relied:

- maintaining attention and concentration for extended periods;
- performing activities within a schedule, maintaining regular attendance, and being punctual within customary tolerances;

- working in coordination or proximity to others without being distracted; and
- completing a normal workday and workweek without interruptions from psychologically-based symptoms and performing at a consistent pace.

Id. The Court found the ALJ's RFC and hypothetical questions lacking. "We have previously rejected similar formulations of a claimant's limitations because there is no basis to suggest that eliminating jobs with strict production quotas or a fast pace may serve as a proxy for including a moderate limitation on concentration, persistence, and pace." *Id.* at 675-76.

The Commissioner argued that the ALJ properly relied on the narrative explanation of the state-agency psychologist. *Id.* at 676. The Court responded, "But even if an ALJ may rely on a narrative explanation, the ALJ still must adequately account for limitations identified elsewhere in the record, including questions raised in check-box sections of standardized forms such as the PRT and MRFC forms." *Id.*

* * * *

***Mischler v. Berryhill*, 766 F. App'x 369 (7th Cir. 2019)**
Rev'd 03/20/19

The ALJ erred in evaluating a treating physician's opinion. *Id.* at 374. The ALJ cherry-picked facts from that physician's records. *Id.* The ALJ also misstated facts from the record. *Id.*

Also, the ALJ found moderate CPP limitations. *Id.* at 376. In the RFC and relevant hypothetical question, the ALJ limited Mischler to simple, routine, repetitive tasks in a low-stress job. *Id.* "Low-stress job" was defined as one involving only occasional decision-making, occasional changes in the work setting, occasional interaction with the public or co-workers, no piecework or fast-moving assembly line type work, and the flexibility to be off-task for up to 10% of the day. *Id.* The Court held that those limitations failed to account for Mischler's CPP limitations. *Id.* "A task can be simple, but a person with a poor attention span may still become distracted and stop working." *Id.*

The Commissioner argued that the ALJ reasonably relied on the state-agency psychologist's narrative assessment. *Id.* The Court responded that the state-agency psychologist's narrative assessment did not adequately address the limitations that the psychologist assessed before getting to the narrative. *Id.* "Because [the psychologist's] assessment fail[ed] to account for all of Mischler's limitations, the ALJ was required to account for them himself—in the hypothetical and RFC. But he did not." *Id.* at 376-77.

* * * *

***Burmester v. Berryhill*, 920 F.3d 507 (7th Cir. 2019)**
Aff'd 04/05/19

Burmester claimed that she was disabled because of degenerative disc disease, arthritis in both knees, a heart condition, and depression. *Id.* at 508. She worked part-time as an usher at the Bradley Center in Milwaukee. *Id.*

Burmester argued that the ALJ unduly relied on Burmester's activities as evidence that she could work. *Id.* at 510. The Court disagreed: "The ALJ did not equate Burmester's ability to perform certain activities of daily living with an ability to work full time. Instead, he used her reported activities to assess the credibility of her statements concerning the intensity, persistence, or limiting effects of her symptoms…." *Id.*

Also, the ALJ found that Burmester had moderate CPP limitations, *id.* at 511, then limited her to "simple, routine, repetitive tasks requiring only simple work-related decisions with few changes in the routine work setting and no more than occasional interaction with supervisors, coworkers, and the general public." *Id.* at 509. The Court found that the RFC was sufficient. *Id.* at 511-12.

The Court explained that the ALJ gave great weight to the opinion of a state-agency psychologist, Dr. Meyers, who wrote in the "Statement of Work Capacity" portion of his assessment that Burmester had the "ability to understand, remember and carry out simple instructions subject to physical limitations," that "maintaining concentration and attention should be manageable," and that Burmester "should be able to withstand routine work stress and adapt to typical job site changes. *Id.* at 511. The Court wrote that "[t]hese limitations were given to the VE," then immediately wrote, "The ALJ gave the VE the hypothetical of a person 'limited to simple, routine, repetitive tasks which would require only simple work-related decision making and would require few changes in the routine work setting with no more than occasional interaction with supervisors, coworkers, and the general public.'" *Id.*

Earlier in his assessment, Dr. Meyers had written that it was his opinion that Burmester "is able to devote an hour to an enjoyed activity such as reading before feeling a need to go on to something else." *Id.* Burmester argued that the ALJ improperly ignored this CPP limitation, but the Court disagreed. *Id.* "If Dr. Meyers had intended for this statement to be a conclusion that Burmester was unable to concentrate for more than an hour at work," wrote the Court, "Dr. Meyers would have included that limitations in his 'Statement of Work Capacity.' Instead, Dr. Meyers state[d] that maintaining concentration for Burmester should be 'manageable.'" *Id.*

The Court noted that, unlike in *DeCamp*, there was no other finding in Dr. Meyers's report that Burmester was unable to concentrate on work. *Id.* The Court also wrote that another psychologist who reviewed Dr. Meyers's opinion concluded that Burmester's concentration was not limited. *Id.* at 512. The Court added that Burmester's "mental health treatment notes showed mostly normal findings. Burmester herself stated she could finish what she started and follow instructions." *Id.*

* * * *

***L.D.R. v. Berryhill*, 920 F.3d 1146 (7th Cir. 2019)**
Aff'd 04/15/19

L.D.R. was a minor child whose mother applied for SSI on his behalf. *Id.* at 1149. After the claim was denied, L.D.R. claimed that (1) the denial was not based on substantial evidence and (2) the law barring SSI benefits until the month after the month of application was unconstitutional. *Id.*

The Court first affirmed the denial on the merits and wrote that L.D.R. was effectively asking the Court to reweigh the evidence. *Id.*

The Court then addressed the constitutional issue. *Id.* L.D.R. claimed that he was denied equal protection because the SSI statute "den[ied] benefits to otherwise eligible, i.e. poor and disabled, children for months from the onset of disability to the application filing date." *Id.* The Court wrote that rational basis scrutiny applied to equal protection discrimination claims on the basis of age and wealth, and noted that the district court had identified several rational bases for not providing disability benefits retroactively before applications. *Id.*

* * * *

***Jozefyk v. Berryhill*, 923 F.3d 492 (7th Cir. 2019)**
Aff'd 05/08/19

Jozefyk first argued that the ALJ did not obtain a valid waiver of Jozefyk's right to counsel before allowing him to proceed *pro se* at the hearing. *Id.* at 496. The Court pointed out that a claimant can waive his statutory right to counsel once advised of (1) how an attorney can help, (2) the possibility of free counsel or a contingency arrangement, and (3) the limitation on attorney fees to 25 percent of back pay and the required court approval of the fees. *Id.* Here, the agency mailed several written notices to Jozefyk explaining those things. *Id.* The Court held that "so long as it contains the required information, written notice adequately apprises a claimant of his right to counsel." *Id.* at 497. The Court then added, "That's especially true when the ALJ issues the claimant an oral reminder at the hearing." *Id.*

In addition, Jozefyk had not shown that he had been prejudiced by the lack of counsel because the ALJ adequately developed the record. *Id.* "To prove prejudice, the claimant must point to specific, relevant facts that the ALJ did not consider." *Id.*

Next, Jozefyk argued that the ALJ's RFC determination did not adequately account for his moderate CPP limitations. *Id.* The ALJ's RFC and relevant hypothetical question to the VE limited Jozefyk to simple, routine, repetitive tasks requiring no more than occasional contact with supervisors and co-workers; no contact with the public; and an assigned work area at least 10 to 15 feet away from co-workers. *Id.* at 495. The Court found no problem with the RFC and hypothetical because "according to the medical evidence, [Josefyk's] impairments surface only when he is with other people or in a crowd." *Id.* at 498. The Court cited *Johansen v. Barnhart*, 314 F.3d 283, 288-89 (7th Cir. 2002), and *O'Connor-Spinner v. Astrue*, 627 F.3d 614, 619 (7th Cir. 2010). *Jozefyk*, 923 F.3d at 498.

Finally, the Court held that any error on the CPP issue was harmless. *Id.* "It is unclear what kinds of work restrictions might address Jozefyk's limitations in concentration, persistence, or pace because he hypothesizes none." *Id.* The Court added, "Because Jozefyk did not testify about restrictions in his capabilities related to concentration, persistence, or pace deficits, and the medical record does not support any, there are no evidence-based restrictions that the ALJ could include in a revised RFC finding on remand." *Id.*

* * * *

***Dudley v. Berryhill*, 773 F. App'x 838 (7th Cir. 2019)**
Aff'd 05/16/19

The ALJ found that Dudley had moderate CPP limitations, and included multiple mental limitations in the RFC assessment and the relevant hypothetical question to the VE. *Id.* at 841. Dudley argued that the ALJ erred by not accounting for her moderate CPP limitations, but the Court disagreed. *Id.* at 842. The Court wrote that "the ALJ here specifically limited Dudley to 'work requiring the exercise of only simple judgment,'—a limitation that specifically accounts for Dudley's concentration difficulties." *Id.*

The Court also wrote, "Critically, Dudley did not identify any limitations that the ALJ omitted and should have included in the hypothetical question." *Id.*

* * * *

***Saunders v. Saul*, 777 F. App'x 821 (7th Cir. 2019)**
Aff'd 06/28/19

The ALJ found that Saunders had moderate CPP limitations. *Id*. at 824. The ALJ limited Saunders to "unskilled work involving simple, routine, and repetitive tasks; no fast-paced production line or tandem tasks; only occasional changes in his work setting; and GED levels of one or two." *Id.* Saunders argued that those limitations did not fully account for his moderate CPP limitations. *Id.*

The Court rejected the argument. *Id.* at 825. The Court noted that the ALJ relied on the testifying ME to assess Saunders's limitations and included in the RFC and hypothetical all of the ME's proposed limitations. *Id.* "Such reliance on a medical expert in crafting a hypothetical to a VE is permissible." *Id.*, *citing Johansen v. Barnhart*, 314 F.3d 283, 288-89 (7th Cir. 2002).
[Cf. *Mischler v. Berryhill*, 766 F. App'x 369, 376-77 (7th Cir. 2019) ("Because [the psychologist's] assessment fail[ed] to account for all of Mischler's limitations, the ALJ was required to account for them himself—in the hypothetical and RFC. But he did not.")]

The Court was also troubled that "Saunders never once has told this court what other restrictions the ALJ should have included in her hypothetical, nor even at oral argument could he suggest a better way to capture the idea behind limitations in

concentration, persistence, and pace and apply those problems to job requirements." *Saunders*, 777 F. App'x at 825. [Tim suggests that ALJs should at least (1) quantify the amount of time they believe the claimant will be off task, (2) quantify the claimant's work pace compared to the average worker, and (3) explain how the ALJ determined the numbers in (1) and (2), per *Lanigan v. Berryhill*, 865 F.3d 558, 561-62, 563 (7th Cir. 2017).]

* * * *

***Krell v. Saul*, 931 F.3d 582 (7th Cir. 2019)**
SSA won. 07/24/19

This was a rare appeal by SSA. The issue was whether an ALJ can decline to issue a subpoena requiring a VE to produce his underlying data sources. *Id.* at 583. Given the U.S. Supreme Court's decision in *Biestek v. Berryhill*, the Court of Appeals held that in this case, the ALJ did not abuse his discretion by denying a request to issue such a subpoena. "While this case was pending," wrote the Court of Appeals, "the Supreme Court held in *Biestek* that a vocational expert is not categorically required to produce his supporting data. 139 S. Ct. at 1156-57. Instead, the factfinder should evaluate the vocational expert's testimony, including his failure to produce the data, and determine whether the testimony is reliable." *Krell*, 931 F.3d at 586.

The Court of Appeals acknowledged that it would be *helpful* to have the VE's underlying sources at a hearing. *Id.* at 587. But, wrote the Court, "beyond arguing for a categorical rule, which, like in *Biestek*, cannot be imposed here, Krell has advanced no reason why it was *necessary* for the expert to produce his underlying sources." *Id.* (emphasis in the original).

The Court then made it clear that its holding and that of *Biestek* did not give VEs carte blanche to testify without providing underlying sources. *Id.* "It is certainly best practice for [VEs] to provide underlying sources at hearings, and we encourage them to do so." *Id. citing Biestek* (noting that a VE's testimony would be "more reliable and probative" and "a best practice for the SSA and its experts" if VEs produced supporting data) and SSA's *Vocational Expert Handbook* (instructing VEs to have available relied-upon resource materials at the hearing and be ready to explain what resource materials the VE relied on and how the VE arrived at their opinions). *Krell*, 931 F.3d at 587. The Court said that it would review

> on a case-by-case basis situations where a [VE] does not produce his sources and the ALJ declines to require him to do so. In some cases, the [VE's] testimony may prove to be unreliable without underlying sources, and in those cases the testimony may neither constitute substantial evidence nor be used as the basis for an ALJ's determination.

Id.

Finally, the Court reiterated its recommendation that if the underlying data was not available at the hearing, the claimant should have the chance after the hearing to make additional argument about the data. *Id.*

* * * *

***Crump v. Saul*, 932 F.3d 567 (7th Cir. 2019)**
Rev'd 07/31/19

The ALJ did not adequately account for Crump's moderate CPP limitations by finding that Crump was capable of performing "simple, routine, repetitive tasks with few workplace changes." *Id.* at 569-70. "When the ALJ supplies a deficient basis for the VE to evaluate the claimant's impairments, this error necessarily calls into doubt the VE's ensuing assessment of available jobs." *Id.* at 570.

The Court distinguished *Jozefyk*. "In *Jozefyk*," wrote the Court, "we determined that any error in formulating the RFC was harmless because the claimant had not testified about any restrictions in his capabilities related to concentration, persistence, or pace, and the medical evidence did not otherwise support any such limitations." *Id*. at 571. Unlike in *Jozefyk*, Crump "testified consistently with the medical treatment notes about how her bipolar disorder impairs her ability to concentrate well enough to work for a sustained period." *Id.*

* * * *

***Rockwell v. Saul*, 781 F. App'x 532 (7th Cir. 2019)**
Rev'd 08/08/19

This was a rare win for a *pro se* claimant. According to the decision, Rockwell's initial brief was written by his mother, a non-lawyer. *Id.* at 537.

The issue was whether the ALJ properly discounted the opinions of a treating physician. The ALJ wrote that treating physicians "have an ethical obligation to be supportive of their patients" and concluded that the doctor had simply written down what Rockwell told him. *Id.* The Court wrote that "the ALJ's notion that treating physicians such as Dr. Smith lie about their patients' capabilities is based on nothing but speculation and a general suspicion of treating physicians. Nothing in the record backs this up." *Id.*

The ALJ also misstated Dr. Smith's report. *Id.* And, without support in the record, the ALJ concluded that only certain types of seizures (but not the type of seizures Rockwell had) lead to the type of limitations that Dr. Smith described. *Id.* at 538. "ALJs must rely on expert opinions instead of determining the significance of particular medical findings themselves." *Id.*, *quoting Lambert v. Berryhill*, 896 F.3d 768, 774 (7th Cir. 2018).

* * * *

***Williams v. Saul*, 782 F. App'x 488 (7th Cir. 2019)**
Rev'd 09/06/19

Williams was a 25-year-old adult who had been receiving benefits since age 9 due to learning and phonological disorders and a Full-Scale IQ of 59. *Id.* at 489. At 18, he was evaluated to determine whether he was qualified to receive benefits as an adult. *Id.* Williams was diagnosed with a learning disability, phonological disorder, borderline intellectual functioning, an IQ of 64, and assessed math skills at a second-grade level. *Id.* at 489-90.

Williams proceeded *pro se* at the hearing. An expert testified that Williams's records "clearly support" that he had cognitive limitations and fell into the intellectual disability range; however, she opined that he had adequate attention and concentration and could handle "one and two-step tasks" with "end-of-day [production] goals." *Id.* The Vocational Expert (VE) testified that someone who was limited to "simple, routine, repetitive . . . one to two-step tasks" with "relaxed or flexible production rate requirements and no sustained verbal contact with the public" could work as a hand packer, assembler, or sorter. *Id.* at 490-91.

The ALJ concluded that Williams could perform "work consisting of simple, routine, and repetitive, one to two step tasks" with "flexible production rate requirements" and no "sustained verbal contact with the public," and that he was not disabled because he could perform the representative occupations identified by the VE. *Id.* at 491.

The Court of Appeals vacated and remanded, finding that (1) the ALJ erred by failing to ask the VE whether her testimony was consistent with the Dictionary of Occupational Titles (DOT) and (2) the Level 1 math proficiency required by the jobs the VE identified was potentially inconsistent with Williams's abilities. *Id.* at 492. Specifically, his second-grade level math skills, inability to consistently add or multiply single-digit numbers or perform serial 3s or any division, and the fact that he had been turned down for a job because he could not pass the math test all suggested that "he also may struggle to perform jobs that the [DOT] designates as requiring level-one math skills." *Id.* In light of this evidence and the ALJ's failure to ask the VE whether the DOT's listed math skills were "real-world requirements," the Step Five finding was not supported by substantial evidence. *Id.* at 492-93.

Separately, the Court concluded that Williams had validly waived his right to counsel. *Id.* at 491-92.

* * * *

***Burgos v. Saul*, 788 F. App'x 1027 (7th Cir. 2019)**
Rev'd 10/17/19

Burgos appealed on the ground that the ALJ did not properly weigh the opinion of his treating physician. *Id.* at 1030. The Court agreed, finding that the record did not support the ALJ's reasons for rejecting the treating physician's opinion.

In particular, the Court noted that although the physician completed a "checkbox form" without a narrative explanation, "the mere absence of detailed treatment notes, without more, is 'insufficient grounds for disbelieving the evidence of a qualified professional'" in light of the physician's long history of treating Burgos. *Id.* at 1031 (quoting *Brown v. Colvin*, 845 F.3d 247, 253 (7th Cir. 2016)).

Further, the Court "underscored the necessity of the ALJ articulating why a claimant's daily activities undermine a physician's opinion," and noted that ALJ's must "avoid inferring an ability to do full-time work from a claimant's occasional activities." *Id.*

The decision was not supported by substantial evidence, especially because the treating physician's opinion, if properly weighed, would have supported a finding of disability under Medical-Vocational Grid § 201.12. *Id.* at 1032.

* * * *

***Pytlewski v. Saul*, 791 F. App'x 611 (7th Cir. 2019)**
Aff'd 11/12/19

The Court found that substantial evidence supported the ALJ's rejection of a treating physician's opinion where the opinion was an "extreme" assessment of Pytlewski's "total occupational and social impairment" and was entirely inconsistent with the physician's opinion just two months prior, a discrepancy that was not explained. *Id.* at 615.

Further, the State Agency consultants' narrative and checklist opinions, on which the ALJ relied, were consistent with each other. *Id.* at 616. Finally, the ALJ's RFC restrictions on "simple, routine and repetitive tasks," "no fast-paced work," "only simple, work-related decisions," "occasional workplace changes," and "occasional interaction with the public, coworkers, or supervisors" adequately accommodated Pytlewski's anxiety, depression, and anger issues. *Id.*

Moreover, Pytlewski did not cite any evidence that his moderate limitations in concentration, persistence, and pace prevented him from completing "simple, routine and repetitive tasks" or from occasional interaction with others. *Id.*

* * * *

***Primm v. Saul*, 789 F. App'x 539 (7th Cir. 2019)**
Aff'd 11/21/19

Primm challenged the decision on numerous grounds, none of which persuaded the Court of Appeals. *Id.* at 543-44. *First*, the Court held that the ALJ properly rejected the opinion of a treating source whose treatment notes were not in the record (despite opportunity to submit additional record) and where the opinion was not supported by other medical evidence. *Id.* at 544.

Second, the ALJ was not required to do more than "explain the weight given to nonmedical sources." *Id.* at 545 (citing 20 C.F.R. § 404.1527(f)(2)). Third, although one of the ALJ's reasons for discrediting Primm (i.e., that he had applied to 200 jobs in a short period of time) was "weak," his overall credibility determination was supported by substantial evidence. *Id.*

Finally, Primm's argument regarding the jobs identified at Step Five was rejected because he failed to raise it below. *Id.* at 546.

* * * *

***Dunn v. Saul*, 794 F. App'x 519 (7th Cir. 2019)**
Rev'd 11/26/19

The Court held that the ALJ's finding that Dunn's cognitive impairment was not "severe" was not supported by substantial evidence because (1) the ALJ impermissible disregarded Dunn's employment records showing chronic tardiness, absenteeism, and inadequate work performance and (2) the ALJ erred in assessing the "B Criteria" by ignoring evidence that contradicted his assessment. *Id.* at 522-23.

Further, the ALJ "did not explain which aspects of Dunn's testimony he rejected and why," and his rejection of Dunn's daughter's testimony because she was not a medical professional did not "adequately explain his decision to give little weight to her testimony." *Id.* at 523.

Finally, the ALJ failed to explain how a medical opinion finding that Dunn had "mild" cognitive impairment, in the context of the DSM-V, connected to the agency's definitions regarding functional limitations.

* * * *

***Olivas v. Saul*, 799 F. App'x 389 (7th Cir. 2019)**
Aff'd 12/16/19

Olivas argued that the ALJ gave too little weight to the opinions of two of her treating physicians. *Id.* at 391. The Court disagreed, finding that the ALJ properly determined that the first treating source's opinion was inconsistent with the record evidence and her own progress notes, and both treating source opinions were based on Olivas's subjective symptoms. *Id.* at 391-92.

* * * *

***Urbanek v. Saul*, 796 F. App'x 910 (7th Cir. 2019)**
Aff'd 12/16/19

Urbanek appealed, arguing that the ALJ did not adequately account for his moderate limitations in concentration, persistence, or pace in either the RFC or in the hypothetical to the VE. *Id.* at 913-14. Specifically, he argued that the restriction to

"simple, routine tasks" was unrelated to concentration, persistence, or pace (CPP). *Id.* at 914.

The Court disagreed, finding that "[e]ven generic limitations, such as limiting a claimant to simple, repetitive tasks, may properly account for moderate limitations in concentration, persistence, and pace, so long as they 'adequately account for the claimant's demonstrated psychological symptoms' found in the record. *Id.* (quoting *Jozefyk v. Berryhill*, 923 F.3d 492, 498 (7th Cir. 2019)).

In this case, although the ALJ did not explicitly mention Urbanek's moderate CPP limitations, she appropriately relied on expert testimony that Urbanek's attention and concentration "should be sufficient" to complete "tasks of a simple, routine nature." *Id.* at 912, 914. The expert's opinion was based on her review of "the totality of [Urbanek's] medical records" and she acknowledged his moderate CPP limitations. *Id.* at 914. Thus, her opinion supported the RFC limitations. *Id.*

Further, the additional restrictions proposed by Urbanek to account for his "self-reported symptoms" of fatigue, problems with concentration, memory loss, and inability to complete a normal workday were not supported by the record. *Id.* at 915. Finally, the ALJ appropriately relied on the State Agency consultants' opinions because their narrative conclusions "translate[d] their [RFC] recommendations" and were consistent with the expert's testimony regarding Urbanek's limitations in CPP. *Id.*

* * * *

***Felts v. Saul*, 797 F. App'x 266 (7th Cir. 2019)**
Aff'd 12/18/19

Felts's principal argument was that the ALJ erred in failing to find him limited to simple instructions because the consultative examiner concluded that Felts "should be able to understand, remember, and carry out simple instructions." *Id.* at 268. The Court held that the ALJ reasonably interpreted the opinion to not limit Felts to only simple instructions given the additional narrative in the examiner's opinion that Felts was "unimpaired" in his ability to concentrate and withstand routine work stress and "no psychological factors . . . would significantly interfere with work pace." *Id.* at 269.

* * * *

***Hinds v. Saul*, 799 F. App'x 396 (7th Cir. 2020)**
Aff'd 01/09/20

Hinds argued that the ALJ erred in weighing medical opinion evidence, failed to evaluate his migraines as an impairment, and improperly weighed his and his fiancée's statements regarding his symptoms. *Id.* at 399.

The Court found that the ALJ's bases for discounting Hinds's treating physician's opinion were supported because the physician's opinion was inconsistent with her recent examination notes, her functional capacity assessment was largely

based on Hinds's self-reported limitations, and the ALJ was entitled to consider the short duration of the treatment relationship. *Id.* at 399-400.

And, although the ALJ erred in finding the State Agency consultants' findings "uncontroverted," the error was harmless because the ALJ properly gave the treating physician's opinion "little weight." *Id.* at 400.

The Court also rejected all of Hinds's arguments regarding the ALJ's rejection of his subjective complaints. The ALJ questioned Hinds about his reasons for not pursuing treatment and did not base his credibility determination solely on Hinds's daily activities. *Id.* at 400-01. Further, Hinds did not present evidence to controvert the ALJ's conclusion that Hinds's fiancée's testimony was not "indicative of a complete inability to perform basic work activities." *Id.* at 401.

Finally, although the Court agreed that the ALJ's failure to consider Hinds's migraines was erroneous, the error was harmless because "the record would not support a finding that the migraines impeded Hinds's ability to work." *Id.*

* * * *

***Brown v. Saul*, 799 F. App'x 915 (7th Cir. 2020)**
Rev'd 01/10/20

The Court held that substantial evidence did not support the ALJ's finding that Brown's hand tremors had improved. *Id.* at 919. There was no affirmative evidence that Brown was not experiencing hand tremors from July 2016 to April 2016, thus, the fact that Brown did not complain of hand tremors during that time period did not support the ALJ's conclusions. *Id.* Further, the ALJ's finding that there was "no good explanation for the delay" between Brown's neurology visits was unsupported given that the gap between visits coincided with his loss of union health insurance. *Id.*

The Court also noted that "the ALJ could not determine how [a physician's] observation of tremors in June 2016 affected the persistence of the tremor condition without obtaining an updated medical review of the evidence by a state-agency doctor." *Id.* at 920. As in *Moreno v. Berryhill*, 882 F.3d 722, 729 (7th Cir. 2018), "the ALJ [in this case] independently decided that [the physician's] diagnosis was not evidence that the condition persisted after July 2015." *Id.*

Finally, the ALJ erred in determining that the opinion that Brown could only occasionally handle and finger from his former primary care physician was merely a temporary restriction. *Id.* The ALJ accepted the physician's contemporaneous assessment and, as already addressed, the gap in treatment was not inconsistent with the physician's restrictions. *Id.* at 920-21.

* * * *

***Prater v. Saul*, 947 F.3d 479 (7th Cir. 2020)**
Aff'd 01/15/20

Prater made only one argument: that the RFC was too vague as to her need to alternate between sitting and standing. *Id.* at 479. She testified that, due to pain, she could only sit or stand for 20 minutes at a time. *Id.* at 480. The VE testified that a person who "could remain in place for at least thirty minutes," but "would need to change positions in the course of the day" would not be able to do Prater's past relevant work, but could perform other jobs. *Id.* However, it would not be "acceptable in competitive employment" if there was a need to change positions every 20 minutes. *Id.* Prater's attorney did not object to the ALJ's questions nor question the VE. *Id.* The RFC stated that Prater "require[d] the ability to change positions as needed, while remaining in each position at least 30 minutes." *Id.* at 481.

The Court reiterated that when a claimant's impairments require her to alternate positions during a workday, "[t]he RFC assessment must be specific as to the frequency of the individuals need to alternate sitting and standing." *Id.* (quoting SSR 96-9p, 1996 WL 374185, at *7 (July 2, 1996)).

However, unlike in *Arnett v. Astrue*, 676 F.3d 586, 593 (7th Cir. 2012) where the RFC failed to specify a particular frequency for alternating positions, here, the RFC permitted Prater to alternate "as needed." *Id.* at 481-82. The Court stated that the RFC essentially placed an "outer limit" on Prater's need to change positions, and the time limit did not "introduce ambiguity." *Id.* at 482. Further, Prater failed to argue that the RFC's "outer limit" of 30 minutes was not supported by the evidence, that the ALJ improperly discredited her testimony that she could remain in a position for only 20 minutes, or that a more restrictive RFC was required. *Id.*

* * * *

***Gebauer v. Saul*, 801 F. App'x 404 (7th Cir. 2020)**
Aff'd 01/17/20

Decedent's widower argued that the ALJ impermissibly retained a medical expert for the purpose of determining an RFC, afforded too little weight to a medical opinion, misevaluated decedent's subjective symptoms, and relied on unreliable testimony from the VE. *Id.* at 408.

The Court disagreed. First, "[a]n ALJ may obtain a medical expert's opinion for several reasons including, in relevant part, 'to clarify and explain the evidence or help resolve a conflict because the medical evidence is contradictory, inconsistent, or confusing' and to determine the claimant's [RFC]." *Id.* (quoting HALLEX 1-2-5-34(A)(2) (2016)). Further, retention of an expert was "prudent" and helped the ALJ "resist the temptation to 'play doctor.'" *Id.* The Court noted that a medical expert can be "especially helpful" when evaluating the severity of a condition (like fibromyalgia) that involves subjective and fluctuating symptoms. *Id.* at 409.

Second, although the Court agreed that the ALJ wrongly discounted a treating source's opinion as not being supported by medically acceptable tests, the ALJ's

assessment of the treating source's opinion was proper given that it was inconsistent with his own treatment notes, the decedent's daily activities, a cardiac stress test, and lack of symptoms typically associated with pain. *Id.* at 409-10.

Third, the ALJ's evaluation of the severity of the decedent's fibromyalgia was appropriate. *Id.* at 410. The ALJ considered the decedent's daily activities "in balance with the rest of her record" which did not suggest that she had pain that would prevent her from performing sedentary work. *Id.*

Finally, although the decedent's widower objected to the VE's reliance on "Job Browser Pro" software, he did not bring an expert to testify about its supposed unreliability and, in this case, it was immaterial given that the ALJ had determined that the decedent could have performed her past relevant work and the Step Five determination was not determinative. *Id.* at 410-11.

* * * *

***Overton v. Saul*, 802 F. App'x 190 (7th Cir. 2020)**
Aff'd 01/22/20

Overton argued only that the ALJ failed to properly consider the limiting effects of her migraines, both when she had insurance for Botox treatments and when she did not. *Id.* at 192.

The Court disagreed, stating that (1) there were no opinions that identified any migraine-related symptoms and (2) the ALJ's credibility determination was proper given that there were discrepancies in Overton's statements about the effectiveness of Botox treatments and her statement that she was "not capable of doing much of anything" conflicted with reports to her medical provider that she "walked three miles a day for exercise." *Id.* at 192-93.

Further, Overton did not present any evidence that her migraines were worse when she lacked insurance for Botox than they were before she was first prescribed Botox when she was performing "substantial work" in spite of her longstanding migraine condition. *Id.* at 193.

* * * *

***Gibbons v. Saul*, 801 F. App'x 411 (7th Cir. 2020)**
Rev'd 01/23/20

The Court found that the ALJ articulated several proper reasons for giving a treating physician's opinion limited weight: the limitation on Gibbons's ability to walk even short distances was contradicted by evidence of his consistently normal gait and ability to walk with an assistive device; the physician "opined on subjects outside his expertise"; and the physician gave inconsistent opinions on Gibbons's ability to lift 10 pounds. *Id.* at 415-16.

However, it was problematic for the ALJ to rely on the opinion of a non-examining physician over the opinions of numerous examining sources where it appeared the non-examining physician did not take a "careful review of the medical records" and may have written his opinion with a denial of benefits in mind. *Id.*

Further, by rejecting overhead reaching restrictions imposed by one treating source, the ALJ impermissible played doctor. *Id.* 417. The ALJ rejected the restriction on the ground that there was no evidence of a long thoracic nerve injury and an electromyogram was the only test that revealed abnormal findings related to Gibbons's left arm. *Id.* However, a thoracic nerve injury was not the basis for the physician's restriction and, thus, the ALJ analyzed "the significance of medical findings without input from an expert." *Id.*

* * * *

***Lay v. Saul*, 791 F. App'x 624 (7th Cir. 2020)**
Aff'd 01/29/20

In what is likely the shortest Seventh Circuit affirmance order ever, the Court affirmed, holding that the ALJ's decision was supported by substantial evidence.

* * * *

***Martin v. Saul*, 950 F.3d 369 (7th Cir. 2020)**
Rev'd with instruction to award benefits 02/07/20

Martin's claim went before two different ALJs to determine whether her back pain and psychiatric conditions made her unable to work. *Id.* at 371. The first ALJ found that she was capable of a limited range of sedentary work due to her physical and mental impairments. *Id.* at 372. The second ALJ found that she had no physical impairments at all and could perform a full range of work at all exertional levels, with restrictions to account for her mental impairments. *Id.* at 372-73.

Martin first challenged the sufficiency of the RFC's limitations to account for her mental impairments. *Id.* at 374. The Court "reinforced" that an ALJ does not need to use "certain words" in crafting CPP restrictions. *Id.* (citing *Crump v. Saul*, 932 F.3d 567, 570 (7th Cir. 2019)). However, the Court noted that "[w]hat we do require—and our recent precedent makes plain—is that the ALJ must account for the 'totality of a claimant's limitations' in determining the proper RFC." *Id.* (quoting *Moreno v. Berryhill*, 882 F.3d 722, 730 (7th Cir. 2018)).

In this case, the second ALJ specifically tied the RFC restrictions to his findings regarding Martin's CPP limitations. *Id.* The Court noted that, ideally, the ALJ would have made it explicit that pace-based goals must be "*reasonable*," however, "the jobs the [VE] suggested inherently reflected such a reasonable limitation." *Id.* Thus, the RFC restrictions to account for Martin's mental impairments were sufficiently specific. *Id.*

Martin also argued that the law of the case doctrine "bound the second ALJ to the first ALJ's conclusion limiting her to sedentary work." *Id.* The Court noted that

Seventh Circuit case law "instructs that an administrative agency must 'conform its further proceedings in the case to the principles set forth in the [appellate] decision,' *id.* at 375 (quoting *Wilder v. Apfel*, 153 799, 803 (7th Cir. 1998), "[b]ut [the Court] ha[s] not explained how that directive applies to previous findings not reviewed on appeal—here to findings made by one ALJ that implicated issues reexamined by a second ALJ," *id.*

In any event, the Court declined to decide the issue under the law of the case doctrine, as "the second ALJ's determination that Martin could perform physical work 'at all exertional levels' [found] nowhere close to substantial support in the record." *Id.* at 374-75. The ALJ rejected all medical opinions except one of a non-examining doctor, and also cherry-picked findings from that opinion that supported his conclusions. *Id.* at 375.

The Court was most concerned that the second ALJ "did not grapple with the first ALJ's findings that Martin could perform only sedentary work" even though the second hearing did not involve any new evidence bearing on her physical limitations. *Id.* at 376. The Court concluded that "[w]hile the law may not compel a comparative analysis, we would have expected the second ALJ to explain the basis for reaching such a vastly different conclusion about whether Martin's physical condition affected the jobs she could perform." *Id.*

Finally, due to Martin's age, education, and previous work experience, the Court held that "remand here would be futile because the Grids compel[led] a finding that Martin is disabled." *Id.*

* * * *

***Kuykendoll v. Saul*, 801 F. App'x 433 (7th Cir. 2020)**
Aff'd 02/20/20

Kuykendoll challenged the sufficiency of the RFC with respect to his mental limitations. *Id.* at 437. The Court held that the ALJ adequately accounted for and explained how each limitation was accounted for in the RFC. *Id.* at 438. In particular, the ALJ noted Kuykendoll's moderate limitation in understanding, remembering, and carrying out detailed instructions and explained that he must "therefore" be limited to "simple, routine, and repetitive work tasks." *Id.*

Also, due to Kuykendoll's stress, anger, and irritability, the ALJ limited him to "simple work-related decisions in dealing with changes in the work setting." *Id.* Because the ALJ "found these specific deficits in concentration, persistence, or pace and then connected them to the assigned limitations," *Yurt v. Colvin*, 758 F.3d 850, 857-59 (7th Cir. 2014) was distinguishable. *Id.*

Further, Kuykendoll did not posit any "relevant limitations in [CPP] that the ALJ should have included in his RFC assessment." *Id.* (citing *Jozefyk v. Berryhill*, 923 F.3d 492, 498 (7th Cir. 2019) (any error in RFC was harmless because plaintiff hypothesized no additional restrictions)).

The Court was unpersuaded by Kuykendoll's argument that the RFC did not account for his pulmonary conditions and use of a cane. *Id.* at 438-39. Kuykendoll did not argue or establish that the jobs identified involved exposure to irritants or triggers, and he testified that he used his cane only "occasional" and the evidence showed that he did not have a cane at exams. *Id.* at 439.

* * * *

***Vang v. Saul*, 805 F. App'x 398 (7th Cir. 2020),** *petition for cert. filed*, (U.S. July 27, 2020) (No. 20-5181)
Aff'd 02/21/20

ALJ properly afforded partial weight to a treating source opinion that was conclusory and unsupported. *Id.* at 401. Although ALJ did not "point" to evidence that Vang could perform light work, he did weigh the evidence and conclude that the record did not support a determination that Vang could not work. *Id.*

Vang raised three challenges to the RFC that he did not raise below and were, thus, forfeited. *Id.* at 402. Nevertheless, the Court found the challenges "meritless." *Id.* The ALJ posed a hypothetical to the VE regarding Vang's cane use that was *more* restrictive than what was supported by the record. *Id.* Vang's remaining challenges boiled down to semantics. *Id.* at 402-03.

* * * *

***Underwood v. Saul*, 805 F. App'x 403 (7th Cir. 2020)**
Aff'd 03/03/20

Underwood was *Pro Se*. Underwood's argument that a third-party report should not have been considered in assessing his credibility was meritless. *Id.* at 405-06. He also waived any argument that the ALJ mischaracterized the record by failing to raise it below. *Id.* at 406. And, this claim was also meritless because the ALJ referenced the single report Underwood cited to numerous times in the decision. *Id.*

* * * *

***Massaglia v. Saul*, 805 F. App'x 406 (7th Cir. 2020)**
Aff'd 03/04/20

Massaglia argued that the ALJ did not properly assess whether she met or equaled a listing because (1) the State Agency opinions were outdated and (2) the ALJ did not support the decision with sufficient rationale. *Id.* at 409. The Court disagreed, finding that the new evidence related to Massaglia's back injury was "not so significant that it was potentially decisive" and, thus, the ALJ properly relied on the State Agency opinions. *Id.* at 410. Further, the ALJ thoroughly discussed the evidence with respect to whether Listing 1.04 was met or equaled. *Id.*

* * * *

***Morrison v. Saul*, 806 F. App'x 469 (7th Cir. 2020)**
Aff'd 03/10/20

The Court again rejected the notion that "specific phrasing" is required for CPP restrictions. *Id.* 474 (citing *Crump v. Saul*, 932 F.3d 567, 570 (7th Cir. 2019)). The ALJ's restriction to "simple and detailed, one-to-five step instructions only," according to the Court, adequately accounted for Morrison's CPP limitations. *Id.*

Also, the ALJ asked Morrison why he did not follow up on referrals, pain management, and neurosurgery, and ultimately rejected his reasons for not seeking treatment (i.e., cost/lack of insurance) in part because he was able to follow up on referrals necessary to complete his disability application. *Id.* And, the ALJ did not equate Morrison's activities of daily living with an ability to work full time. Finally, although "a good work record ordinarily weighs in favor of a positive credibility finding," in this case, the ALJ adequately explained that Morrison's history of returning to work after three back surgeries and looking for work after being laid off "strongly" suggested that his impairments were not disabling. *Id.* at 475. Thus, the ALJ's credibility assessment was not improper. *Id.* at 474-75.

* * * *

***Reinaas v. Saul*, 953 F.3d 461 (7th Cir. 2020)**
Rev'd 03/16/20

The Court remanded on two grounds. *First*, the ALJ erred in weighing a treating source's opinion by (1) ignoring his treatment relationship with Reinaas and his area of specialty, (2) failing to specify what weight the opinion deserved, (3) asserting that the source's opinion was based on subjective complaints when it was supported by an examination, (4) cherry-picking notes in other physicians' opinions that Reinaas was doing "well," and (4) rejecting the opinion because Reinaas only saw the physician in connection with his disability application. *Id.* at 465-66. Notably, "the mere fact that a medical opinion has been solicited to support a disability application is not a sufficient reason to ignore it." *Id.* at 466.

Second, the ALJ did not properly assess the intensity and limiting effects of Reinaas's subjective symptoms. *Id.* at 467. The ALJ ignored the connection between his migraines and spinal problems, ignored evidence that the daily activities cited by the ALJ caused Reinaas pain and fatigue, and Reinaas's ability to "do limited work to maintain his small farm [did] not adequately support the ALJ's conclusion that he would be able to work full time." *Id.*

* * * *

***Marquardt v. Saul*, 798 F. App'x 34 (7th Cir. 2020)**
Rev'd 03/17/20

Marquardt, who was *Pro Se*, argued, and the Court agreed, that the ALJ improperly ignored two neurology reports that were created after his date last insured. *Id.* at 37. The Court noted that "[a]n [ALJ] should consider retrospective medical opinions . . . that are consistent with past symptoms." *Id.*

In this case, the rejected reports opined that for several years prior to date of last insured, Marquardt had "feeble concentration, weak 'mental flexibility,' and frequent fatigue" and would need to avoid multitasking, receive breaks, and have a quiet place. *Id.*

Further, the Court cautioned against "reading too much into a claimant's activities of daily living because people have more flexibility in scheduling and executing them than they do for the activities of a full-time job." *Id.*

* * * *

***Jeske v. Saul*, 955 F.3d 583 (7th Cir. 2020)**
Aff'd 04/02/20

Jeske made five claims of error. *Id.* at 587-88. The Court rejected each. *First*, although the ALJ's discussion of whether Jeske met or equaled Listing 1.04 was "brief," at Step Three, the ALJ went on to discuss specific evidence relevant to the Listing in the RFC analysis. *Id.* at 589. "[W]hen an ALJ explains how the evidence reveals a claimant's functional capacity, that discussion may doubly explain how the evidence shows the claimant's impairment is not presumptively disabling under the pertinent listing." *Id.* at 590. Further, the evidence did not demonstrate that she met or equaled the Listing in any event. *Id.* at 591-92.

Second, the ALJ did not misrepresent (and appropriately considered) Jeske's activities of daily living where her own statements regarding her abilities were inconsistent. *Id.* at 592.

Third, the ALJ did not need to address a treating source's comment about possibly reducing Jeske's work hours where it was obvious from the source's treatment notes that the source was not opining on a restriction on Jeske's ability to work an 8-hour day. *Id.* at 594-95.

Fourth, "so long as the ALJ's discussion shows that the ALJ considered all strength-demand functional limitations in arriving at a conclusion supported by substantial evidence," the Court need not remand for failure to include a function-by-function assessment. *Id.* at 596.

Finally, Jeske's argument that the ALJ failed to account for her CPP limitations was waived because it was not raised below. *Id.* at 597.

* * * *

***Atkins v. Saul*, — F. App'x —, 2020 WL 2554397 (7th Cir. 2020)**
Aff'd 05/20/20

Atkins, who was *Pro Se*, did not point to any medical evidence that the ALJ overlooked in concluding that his environmental allergies or hypersensitivities were not severe impairments. *Id.* at *4. No doctor had ever diagnosed, or even observed, the severe symptoms Atkins complained of; thus, the ALJ's credibility determination was supported. *Id.*

The ALJ was also not required to obtain an expert opinion on Atkins's allergies because the record already contained adequate evidence, including records from an immunologist/allergist. *Id.*

* * * *

***Simons v. Saul*, — F. App'x —, 2020 WL 3124238 (7th Cir. 2020)**
Aff'd 06/12/20

Simons raised a number of challenges, none of which persuaded the Court. *First*, the Court found that the hypotheticals posed to the VE reflected the "light work" the Stage Agency consultants believed Simons could perform and were consistent with the psychological consultant's conclusion that she could manage simple tasks with limited pressure and complexity. *Id.* at *4.

Second, Simons did not explain how the ALJ's ignoring evidence of the duration of her mental health treatment and medication regimen would have affected the outcome given that neither affected her ability to work. *Id. Third*, any failure to list an additional back-related diagnosis was harmless error where the ALJ found other significant back issues. *Id.*

Fourth, the ALJ properly assessed the weight to give to conflicting medical opinions. *Id.* at *5. A newer opinion from a treating physician is generally given more weight. *Id. Finally*, it was not erroneous to list Simons's activities of daily living, along with medical opinions, to evaluate her statements regarding the debilitating effect of her pain. *Id.*

* * * *

***Trottier v. Saul*, 809 F. App'x 326 (7th Cir. 2020)**
Aff'd 06/15/20

ALJ's reasons, though few, were sufficient to justify the weight given to a treating physician's opinion. *Id.* at 327. The Court concluded, "ALJ's analyses always could be longer and more detailed. They would not necessarily be better for being fulsome." *Id.*

* * * *

***Bruno v. Saul*, 817 F. App'x 238, 2020 WL 3497633 (7th Cir. 2020)**
Aff'd 06/26/20

The Court confirmed that "a restriction to simple tasks is 'generally' not enough to account for moderate CPP limitations." *Id.* at *3 (citing *Crump v. Saul*, 932 F.3d 567, 570 (7th Cir. 2019)). Here, however, the ALJ tied the restriction to simple tasks to evidence of Bruno's "decreased concentration when handling more complex tasks . . . ." *Id.*

Further, the Court found that it was "not patently wrong for the ALJ to take from Bruno's part-time bakery work, along with the other record evidence, that he had the ability to work full-time." *Id.*

Finally, the VE provided a "reasoned and principled explanation" about the number of available jobs by explaining that he used the "SkillTRAN approach," which uses the categorical data from the DOT's Occupational Employment Survey, but "also the other part of the OES survey which provides employment numbers by industry." *Id.* at *4.

* * * *

***Greenwell v. Saul*, 811 F. App'x 368 (7th Cir. 2020)**
Aff'd 06/30/20, *rehearing denied 07/14/20*

Greenwell was *Pro Se*. Although the Court will "construe *pro se* filings liberally," litigants must still comply with Fed. R. App. P. 28(a)(8), which requires cogent legal arguments with citations to authority and the record to be provided. *Id.* at 370. Because Greenwell failed to develop his argument or address the ALJ's reasoning at all, his challenges were waived. *Id.*

* * * *

***Sosinski v. Saul*, 811 F. App'x 380 (7th Cir. 2020)**
Aff'd 07/01/20

The Court agreed with the District Court's holding, but added that in keeping with the holding of *Jeske v. Saul*, 955 F.3d 583 (7th Cir. 2020), which was decided on the eve of oral argument in this case, reversal is not required where an ALJ does not mention a listing by name and offers a perfunctory analysis when the claimant does not show that he meets the criteria for the listing. *Id.* at 380-81.

Further, the ALJ did not err in failing to include an explicit function-by-function analysis where it is clear from the analysis that the ALJ considered the areas of functioning. *Id.* at 381.

* * * *

***Sosh v. Saul*, — F. App'x —, 2020 WL 3969624 (7th Cir. 2020)**
Aff'd 07/14/20

The Court was not persuaded by Sosh's argument that because he was prescribed nebulizer treatments every six hours as needed, the ALJ should have explained why he would not need to use it at work. *Id.* at *3. "A claimant who does not 'identify medical evidence that would justify further restrictions' is not entitled to remand." *Id.* (quoting *Lovelace v. Colvin*, 810 F.3d 502, 508 (7th Cir. 2016)).

Further, although the ALJ did not "explicitly consider every factor" under 20 C.F.R. § 404.1527(c) in weighing a nurse practitioner's opinions, she adequately explained that the opinion was contradicted by multiple sources and objective testing. *Id.* at *3-4.

* * * *

***Apke v. Saul*, 817 F. App'x 252, 2020 WL 4018988 (7th Cir. 2020)**
Aff'd 07/16/20

Apke argued that the ALJ did not give sufficient weight to her treating physicians' opinions and erred in considering the severity of her subjective fibromyalgia limitations. *Id.* at *3.

The Court found that the ALJ did not err in weighing the treating physicians' opinions. *Id.* at *3-4. The ALJ found that they were provided on forms that "ask open-ended questions about Apke's limitations, relied on Apke's reported allegations, assumed Apke would be limited to only sedentary work, and did not include an area for the physicians to describe the type of work Apke was capable of performing." *Id.* at *3.

And, the ALJ relied on the opinion of an expert rheumatologist the ALJ sought after the hearing who found that Apke could perform Light work. *Id.* The Court noted that "[t]he ALJ's reasoning and decision here favoring [the rheumatologist expert's] descriptive evaluation over the 'checkbox' approach of Apke's treating physicians was within the ALJ's discretion . . . and appropriate." *Id.* at *4.

And, the Court rejected Apke's argument that the ALJ failed to fully consider her fibromyalgia. *Id.* at *5. "Moderate limitations" in ability to perform activities within a schedule, maintain regular attendance, and be reasonably punctual, on their own, do not mean a claimant is disabled. *Id.*

* * * *

***Hapner v. Saul*, — F. App'x —, 2020 WL 4284324 (7th Cir. 2020)**
Aff'd 07/27/20

The Appeals Council granted Hapner's request for review, and found the ALJ erred, harmlessly, in failing to consider Hapner's obesity and also failed to properly consider the opinion of a treating source. *Id.* at *2-3. The Appeals Council found the

treating source opinion deserved less weight than that given by the ALJ and, after correcting the opinion, upheld the decision to deny benefits. *Id.* at *3.

The Court held that, with the supplemental opinion of the Appeals Council, there was no error in the weight given the treating source opinion. *Id.* When there are "qualified medical opinions on both sides of an issue, it is the agency's job to decide which ones to credit." *Id.* at *4.

Further, although neither the ALJ nor the Appeals Council considered it, it was "plain" that the ALJ would not have found Listing 11.14 applicable given the evidence. *Id.*

* * * *

***Surprise v. Saul*, 968 F.3d 658, 2020 WL 4345158 (7th Cir. 2020)**
Aff'd 07/29/20

Surprise argued that if the ALJ had considered the expert's testimony that Surprise could complete "one- to three-step instructions," the GED levels of the jobs cited by the ALJ would exceed Surprise's capabilities, as "one- to three-step instructions would fall somewhere between Level 1 and Level 2, and the jobs all involved Level 2 reasoning. *Id.* at *662.

The Court disagreed, stating that Surprise cited no authority saying that one- to three-step instructions limitation was incompatible with reasoning Level 2, and the Court had previously held that there was no apparent conflict between a simple tasks limitation and Level 3 reasoning. *Id.* at *663 (citing *Sawyer v. Colvin*, 512 F. App'x 603, 610-11 (7th Cir. 2013)).

Further, the law of the case doctrine did not apply because, although the case was remanded twice, the first remand was for an incomplete record of the VE's testimony, and the second remand was simply an entry of remand. *Id.* at *664. Neither made any findings regarding Surprise's RFC, nor preserved the first ALJ's reasoning. *Id.* Thus, the second ALJ was not required to adopt the first ALJ's findings. *Id.*

* * * *

***Mitze v. Saul*, 968 F.3d 689, 2020 WL 4380642 (7th Cir. 2020)**
Aff'd 07/31/20

Mitze appealed *Pro Se*. The District Court did not abuse its discretion in denying Mitze's motion to seal its order affirming the ALJ's Decision because (1) there were no substantial privacy interests in favor of sealing the order, (2) Mitze's motion was untimely, and (3) discussions of Mitze's medical history did not violate HIPAA. *Id.* at 692-93.

* * * *

***Plainse v. Saul*, 816 F. App'x 24, 2020 WL 4660255 (7th Cir. 2020)**
Aff'd 08/12/20

The Court found that "the decision satisfied federal regulations and was logically sound." *Id.* at *25. While Plaintiff claimed the decision failed to perform a function-by-function, "[i]n reality, it discussed various aspects of her physical abilities before concluding she could perform sedentary work." *Id.* The ALJ also adequately weighed her physician's opinion and properly relied on the vocational expert. *Id*.

* * * *

***Brace v. Saul*, --- F.3d ---, 2020 WL 4727345 (7th Cir. 2020)**
Rev'd 08/14/20

The ALJ denied Brace's application after crediting testimony from a vocational expert that jobs are available in significant numbers in the national economy for a person with Brace's limitations. Brace's lawyer had asked the vocational expert to explain how he arrived at his job estimates. The expert's answer was "inscrutable." *Id*. at *1.

The database does not list the number of jobs associated with each job title, so the vocational expert must perform an estimate. *Id*. at *2. Because the database of job titles is so outdated, an expert's methodology for connecting job titles to reliable estimates of the number of jobs for each title is especially important. *Id*. at *2.

As applied to an expert's estimate of available jobs in the national economy, "the substantial evidence standard requires the ALJ to ensure that the approximation is the product of a reliable method." *Id*. at *3 (citing Chavez, 895 F.3d at 968).

Interestingly, the question was specifically asked at the hearing. Yet, "[t]he VE's jargon about his weighting methodology was neither cogent nor thorough—indeed, it was unintelligible. And he never claimed that his method for estimating job numbers is a well-accepted one, much less explained why that is so." *Id*. at *4. The Commissioner and Plaintiff's counsel disagree on whether the expert impermissibly relied on the "equal distribution method," the flawed job-estimate methodology at issue in both *Alaura v. Colvin*, 797 F.3d 503 (7th Cir. 2015), and *Chavez v. Berryhill*, 895 F.3d 962, 968–70 (7th Cir. 2018). The Court held that "[t]he very existence of this debate confirms our conclusion that the VE's testimony does not satisfy the substantial-evidence standard." *Id*. at *4.

* * * *

***Barrett v. Saul*, --- F. App'x ---, 2020 WL 4783556 (7th Cir. 2020)**
Aff'd 08/18/20

Barrett argues that the ALJ overstated his residual functional capacity by improperly discounting his testimony and subjective complaints about the intensity and persistence of his ankle pain. *Id*. at * 3.

Unfortunately, the Court found that "Barrett's treatment records were spotty: He failed to produce any records—or explain their omission—between 2013 (despite having alleged an onset date that March) and early 2015. His latest records from his primary doctor (whom he began seeing only in 2016) indicated that his pain was being controlled ("stable") with medication and that he had normal range of motion with no tenderness or swelling in his ankle. And two reviewing doctors—albeit with no elaboration—determined that Barrett was capable of light work, with limitations." *Id*.

With regards to credibility, it was not "patently wrong." Barrett makes no effort to challenge the evidence relied upon by the ALJ and instead refers only to other, less-persuasive evidence. *Id*. at *3.

* * * *

***Rennaker v. Saul*, --- F. App'x ---, 2020 WL 4814120 (7th Cir. 2020)**
Rev'd 08/19/20

Rennaker first argues that the ALJ did not develop a full and fair record because his examination of the VE was deficient—specifically, the ALJ did not inquire into the reliability of the nationwide job numbers posited, where the numbers came from, or the methodology used to determine them.

Rennaker was unrepresented at the administrative hearing. When faced with a pro se claimant, the ALJ must "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Nelms v. Astrue*, 553 F.3d 1093, 1098 (7th Cir. 2009) (citations and internal quotation marks omitted). Thus, both the substantial evidence standard and Rennaker's pro se status demanded more from the ALJ.

Although a VE may draw from his expertise to provide a reasoned basis for his job-number estimates, Chavez, 895 F.3d at 969, the VE in this case did not bring any aspect of his experience to bear on the reliability of those numbers. He did not say *why* he thought his numbers were reliable.

With regards to credibility, "the ALJ possibly misrepresented Rennaker's daily activities with respect to caregiving." But the ALJ's mistake was harmless because the ALJ did not rely on Rennaker's daily activities to the exclusion of other evidence; nor did he equate these activities with competitive work.

The Court also found the "ALJ's oversight" with regards to Rennaker's obesity harmless.

* * * *

***Jones v. Saul*, --- F. App'x ---, 2020 WL 5105694 (7th Cir. 2020)**
Rev'd 08/31/20

The ALJ rejected the "opinions of her own agency's physicians, who concluded that Jones's limitations were potentially disabling." *Id*. at *1. There were three opinions in the record (treating physician Bales and the agency's two consulting physicians, Montoya and Whitley) who all concurred with the more restrictive set of limitations that the VE testified would preclude Jones's past work. *Id*. at *3.

We agree with Jones that the ALJ failed to provide adequate reasons for discounting these doctors' assessments. The Commissioner relied on *Kapusta v. Sullivan*, 900 F.2d 94, 96 (7th Cir. 1989), asserting that a claimant's "own testimony [can] provide[ ] substantial evidence to support [an] ALJ's conclusion." Id. at *5. In *Kapusta*, however, "none of the medical reports [were] inconsistent with the ALJ's determination." Id. Here, by contrast, all the medical reports contradict the ALJ's findings. *Id*. Jones's testimony might support a less restrictive RFC, but an ALJ must "provide a valid explanation for preferring" one view over another. *Id*.

The Court found that the error cannot be deemed harmless. "We cannot be sure that any error was harmless if the evidence does not 'conclusively' establish a material fact in a case (here, the availability of work for Jones)." *Id*. at *5.

* * * *

CASES LISTED BY SUBJECT MATTER
07/31/18 – 08/31/20

Alcoholism
Barrett 08/14/18

Bad behavior by ALJ
Spicher 08/03/18

Cane use
Hardy 11/08/18
Kuykendoll 02/20/20
Vang 02/21/20

Cherry-picking
Plessinger 08/20/18
Baldwin 08/21/18
Kelham 10/31/18 (by counsel)
Hardy 11/08/18
Mischler 03/20/19
Martin 02/07/20
Reinaas 03/16/20

Composite job
Ray 02/12/19

Concentration, persistence, or pace
Radosevich 01/22/19
Winsted 02/08/19
Paul 02/15/19
DeCamp 02/26/19
Mischler 03/20/19
Burmester 04/05/19
Jozefyk 05/08/19
Dudley 05/16/19
Saunders 06/28/19
Crump 07/31/19
Williams 09/06/19
Pytlewski 11/12/19
Urbanek 12/16/19
Felts 12/18/19
Martin 02/07/20
Kuykendoll 02/20/20
Bruno 06/26/20

Conditions can change over time
Walker 08/15/18

Credibility and a good work history
Weaver 08/20/18
Morrison 03/10/20

Credibility and daily activities
Burgos 10/17/19
Gebauer 01/17/20
Rennaker 08/19/20

Duty (of the ALJ) to fully and fairly develop the record
Collins 08/09/18 (even if claimant is represented)
Rennaker 08/19/20

Employment records
Dunn 11/26/19

Evidence contrary to the ALJ's conclusion must be considered
Spicher 08/03/18
Hardy 11/08/18
Martin 02/07/20
Marquardt 03/17/20

Fast-paced/strict production
DeCamp 02/26/19
Pytlewski 11/12/19

"Flexible pace"
Paul 02/15/19

GED Levels per DOT
Williams 09/06/19
Surprise 07/29/20

Harmless error
Collins 08/09/18
Weaver 08/20/18
Jozefyk 05/08/19
Hinds 01/09/20
Simons 06/12/20
Hapner 07/27/20
Rennaker 08/19/20
Jones 08/31/20 (not harmless)

Lip service doesn't cut it
Plessinger 08/20/18

Listing analysis
Massaglia 03/04/20

Logical bridge
Hardy 11/08/18
Ray 02/12/19
Fisher 02/15/19
Paul 02/15/19
Rockwell 08/08/19

Misstated the facts
Kelham 10/31/18 (by counsel)
Mischler 03/20/19
Rockwell 08/08/19

Need to describe limitations that the ALJ should have imposed
Truelove 11/28/18
Jozefyk 05/08/19
Dudley 05/16/19
Saunders 06/28/19
Kuykendoll 02/20/20

Non-severe impairments must be considered in the RFC
Spicher 08/03/18
Dunn 11/26/19

"Not entirely credible" is not, by itself, reversible error
Hammerslough 01/09/19

Obesity
Hapner 07/27/20
Rennaker 08/19/20

Playing doctor
McHenry 12/26/18
Rockwell 08/08/19
Brown 01/10/20
Gibbons 01/23/20
Jones 08/31/20

Relying on a state-agency consultant's or ME's narrative
DeCamp 02/26/19
Mischler 03/20/19
Saunders 06/28/19

Remand for an award of benefits
Martin 02/07/20

RFC by an ALJ for a previous period need not be honored
Penrod 08/15/18
Martin 02/07/20

Significant evidence since the last state-agency opinion
McHenry 12/26/18

Sit/stand
Prater 01/15/20

Spotty evidence
Barrett 01/18/20
Overton 01/22/20

Subpoena for VE materials
Krell 07/24/19

Surgery not being recommended doesn't mean the claimant doesn't have pain
Plessinger 08/20/18

Third party opinions
Primm 11/21/19
Dunn 11/26/19
Hinds 01/09/20

Treating Opinion
Burgos 10/17/19
Pytlewski 11/12/19
Primm 11/21/19
Brown 01/10/20
Gebauer 01/17/20
Gibbons 01/23/20
Vang 02/21/20
Reinaas 03/16/20
Apke 07/16/20
Hapner 07/27/20
Jones 08/31/20

Unemployment benefits
Fisher 02/15/19

Unrep'd at hearing
Rennaker 08/19/20

Vague comments/report/opinion by a consultative examiner
Paul 02/15/19

VE testimony
Krell 07/24/19
Gebauer 01/17/20
Bruno 06/26/20
Brace 08/14/20
Rennaker 08/19/20

Waiver
Horr 07/31/18
Richards 08/13/18
West 08/16/18
Truelove 11/28/18
Primm 11/21/19
Olivas 12/16/19
Overton 01/22/20
Vang 02/21/20
Jeske 04/02/20

Section Six

How OHO Works and Tips for Practitioners

Katie E. Brinkmeyer
STEWART|PHELPS|WOOD
Indianapolis, Indiana

Section Six

How OHO Works and Tips for Practitioners…………………………………………….. Katie E. Brinkmeyer

1.What happens to a case when it reaches OHO? 1

2.What do ALJs do to get ready for a hearing? 1

3. How much time do ALJs have to review each case before the hearing? 1

4. When do ALJs first look at a case? 3

5. Are pre-hearing briefs helpful? 3

6. Do requests for OTRs get read and considered? 3

7. Is there a reason we don't get a response when the request is denied? 3

8. Who decides whether to schedule an ME? When is that decision made? What kind of analysis goes into that / how is that decision made? Who decides who the ME will be? Is it random? 3

9. Do you think all ALJs remember that when making decisions? 3

10. What happens after the hearing is over? Who does what? 3

11. How extensive are the ALJ's comments to the decision-writer? What topics do the ALJ's comments cover? 4

12. Is there a form ALJs use to write their instructions? If so, can we see it? See Miller v. Saul (7th Cir. 2020) 4

13. Is there typically/ever any discussion written or verbal between the decision- writer and the ALJ (like between district court judges and their clerks)? 4

14. Do the ALJs/decision-writers have any type of checklist to make sure the decision is free of mistakes? If so, can we see that? 4

15. What kind of training is given to ALJs and decision-writers? 4

16. Do the ALJs read the decision-writer drafts before signing it? 4

17. Do ALJs pay any attention to case law? How much do ALJs and decision-writers care about 7th Circuit case law? How aware are ALJs and decision-writers of S.D. Ind. and N.D. Ind. district court decisions on various issues? 5

17. After you've issued a decision, do you know if it's subsequently appealed? If it is appealed, do you know the outcome on appeal? Does SSA keep stats by ALJ on Federal Court outcomes? If so, how do we get those? 5

HOW OHO WORKS AND TIPS FOR PRACTITIONERS

1. What happens to a case when it reaches OHO?

When a case arrives at OHO from the claimant's local office, it is assigned to a group.
That group will follow the case the entire time the case is at OHO.
The case technicians, are the folks at OHO who work up the file into a nice, tidy, organized little packages and prepare it for the hearing/ALJ.
Download/import the file from the local office.
Obtain any outstanding documents.
Update the medical records and earnings history.
Organize the documents into A, B, D, E, and F section.
Remove any duplicate submissions.
Then Exhibit the file with page numbers.
Ensure the file is complete.
Ready for hearing.

2. What do ALJs do to get ready for a hearing?

They basically familiarize themselves with the file and identify what information they need to ascertain during the hearing to make decision in the case.

Tips
(1) PLEASE, do not show up to a hearing without having met or talked to your client.
(2) Don't go into a hearing knowing less than the Judge.
(3) Sketch out the RFC that gets the claimant to disability. Be able to identify what evidence supports your RFC.
(4) Likewise, have a thorough understanding of your client's work history.

3. How much time do ALJs have to review each case before the hearing?

Good Question. No magic formula. Depends on the case.

While I am generally refraining from using any examples or discussing a particular judge, the following slide is public information on the internet. But you can open an excel spreadsheet and do the math.

Judge	Office	Total Dispositions	Decisions	Awards	Denials	Fully Fav	Partially Fav
Brown, Belinda J	INDIANAPOLIS	341	305	144	161	135	9
Jordan, Ronald T	INDIANAPOLIS	105	94	57	37	54	3
Kroenecke, Teresa A	INDIANAPOLIS	451	381	189	192	168	21
LaPolt, Monica	INDIANAPOLIS	430	378	248	130	230	18
Mages, Daniel J	INDIANAPOLIS	410	356	251	105	212	39
Morales, Livia	INDIANAPOLIS	286	248	102	146	64	38
Odell, Jody H	INDIANAPOLIS	418	349	257	92	237	20
Roberson, Fredric	INDIANAPOLIS	406	366	213	153	181	32
Turner, Timothy	INDIANAPOLIS	281	244	152	92	144	8
Veal, Shelette	INDIANAPOLIS	445	392	256	136	245	11
Velasquez, Albert J	INDIANAPOLIS	318	280	210	70	197	13
Walker, Kevin	INDIANAPOLIS	402	352	186	166	168	18
Whitaker, T.	INDIANAPOLIS	367	312	191	121	176	15
Whitfield, Gladys	INDIANAPOLIS	371	332	168	164	140	28

4. When do ALJs first look at a case?

Unless there is a unique issue pulling the case out of order, I would say ALJs spend most of their time looking at the case in preparation for the hearing.

5. Are pre-hearing briefs helpful?

It depends if it is:
(1) Concisely written;
(2) Highlights the information that arguably proves why your client should be found disabled; and
(3) Correctly cites to the exhibits and page numbers.

Tip: Don't have your paralegal write your brief. If you want their summary, have them do a medical chronology. You need to do the brief so you are prepared for the hearing.

6. Do requests for OTRs get read and considered?

Yes.

7. Is there a reason we don't get a response when the request is denied?

Think logically.

**8. Who decides whether to schedule an ME? When is that decision made? What kind of analysis goes into that / how is that decision made? Who decides who the ME will be?
Is it random?**

The Judge usually decides if he or she needs an ME. The MEs are assigned at Random.

9. Do you think all ALJs remember that when making decisions?

No. That would be impossible. But they take copious notes; and all hearings are recorded.

10. What happens after the hearing is over? Who does what?

After the hearing is over, the case is put into a Post Hearing Status with the Judge.
The judge reviews the case again and prepares the instructions.
Additional documents/exhibits added.
"Ready to assign for writing". the case is ready to be written.
The group supervisors then pull the cases and assign them to decision writers.

11. How extensive are the ALJ's comments to the decision-writer? What topics do the ALJ's comments cover?

The extensiveness of the comments generally coincides with the complexity of the case.

12. Is there a form ALJs use to write their instructions? If so, can we see it? See *Miller v. Saul* (7th Cir. 2020).

The administration has worked very hard to streamline the instructions process such that it is much different today than how it was even 5 years ago.

There is now software that assists (and I emphasize ASSISTS) the judge in drafting their instructions. No, you cannot see it, but you can imagine it.

13. Is there typically/ever any discussion written or verbal between the decision- writer and the ALJ (like between district court judges and their clerks)?

It depends on the writer and the Judge. Judges have an "open door policy" and will happily talk with writers to address their questions, concerns, etc.

14. Do the ALJs/decision-writers have any type of checklist to make sure the decision is free of mistakes? If so, can we see that?

In late 2018 and 2019, a decision writer too called INSIGHT was launched to help find errors or deficiencies in the case.

15. What kind of training is given to ALJs and decision-writers?

There is a massive amount of training. You must learn all about OHO, Agency policies, such as protecting and preventing loss of PII. Writers go to a two-week boot camp at HQ and Judges go to a couple of Boot Camps at HQ, which I believe are longer than two weeks each, and maybe closer to a month. Then you are assigned a mentor, Judges to Judge and Writer to Writer. They review and go over each draft with you before it is transferred. In addition, everyone must attend quarterly OCEP broadcasts, which are put on by the Office of the Chief ALJ Continuing Education Programs. These trainings really drill down on the details—like trial work periods; extended periods of eligibility; and all updates to the rules and regulations.

16. Do the ALJs read the decision-writer drafts before signing it?

Yes, the ALJ always read the decision-writer drafts before signing it. If there are issues, whether substantive or grammatical in nature, the Judges will return to the writer and instruct them to correct.

17. Do ALJs pay any attention to case law? How much do ALJs and decision-writers care about 7th Circuit case law? How aware are ALJs and decision-writers of S.D. Ind. and N.D. Ind. district court decisions on various issues?

Yes, The Agency produces quarterly OCEP (writers and Judges must attend). In addition, OGC visits the OHOs and gives training sessions and case law updates from time to time.

18. After you've issued a decision, do you know if it's subsequently appealed? If it is appealed, do you know the outcome on appeal? Does SSA keep stats by ALJ on Federal Court outcomes? If so, how do we get those?

Internal tracking systems keep track of the ALJs stats. You'll have to consult Google as to whether SSA publishes stats by ALJs on Federal Court outcomes