Cross-Examination of Experts

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Introduction

The most fun cases are those that require no cross-examination. ME says your client is disabled. VE says “no jobs” based on the hypo asked by the ALJ. Your job is done, and the client thinks you’re a genius.

Those that aren’t so readily won are exactly the hearings which require your expertise.

There are two general reasons to cross-examine an expert:
1) to prove to the ALJ that s/he should find your client disabled
2) to make a record for appeal.

You may know that an ALJ will be accepting the expert’s testimony. You still need to cross-examine to set the case up for a favorable appeal.

Or, the ALJ may be undecided as to how to rule. Your cross may sway him or her to your side.

Some ALJs will intentionally ask a VE questions which lead to a finding of not disabled, leaving the attorney rep to ask the questions leading to a finding of disability. (I don’t know why they do this, but you need to be prepared for this.)

Use your ME to set up the hypothetical question for the VE.

Some experts misunderstood what an ALJ asked, or misread evidence (or didn’t see evidence). Our job is to clarify to ensure expert’s opinion is based on a proper understanding of the evidence.

Being an expert does not mean the witnesses testimony is infallible, or that every opinion they give has a reasonable basis, or is reliable1.

1 DONAHUE V. BARNHART 279 F.3d 441 (7th Cir. 2002)
Rule 702 does not apply to disability adjudications, a hybrid between the adversarial and the inquisitorial models. See Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). But the idea that experts should use reliable methods does not depend on Rule 702 alone, and it plays a role in the administrative process because every decision must be supported.
Remember - the practice of law is an art, and cross-examination of witnesses is definitely an art. What works for one expert, or ALJ, may not work for another. This requires counsel to exercise judgment.

The ideas in this outline are meant as a guideline, to provide food for thought and not as an instruction manual such that “when an ME says x, you ask y.” Also, you will find your own way of phrasing some of the sample questions I have provided below.

Medical Experts

The ME’s Qualifications

- Establish the ME’s expertise, where helpful.
  a) for the record ask the ME if ever examined the claimant.
  b) where helpful, ask the ME for his or her expertise.
**As 20 C.F.R. 404.1527, and 416.927 state that the specialty of a doctor is one factor to be weighed when determining the weight to which an opinion is entitled, if you have a treating specialist, be sure to bring out that the ME is not a specialist (if that’s the case)

  - Establish whether or not the doctor ever treated a patient with your client’s impairment.

**Most helpful with unusual impairments.
  Eg. Claimant has post polio syndrome. Ask the ME if s/he ever treated a patient with polio, or with post polio syndrome. If yes, ask how many and how recently.
  If “no” - you may want to ask ME whether s/he read any medical treatises in preparation for this hearing. (I might ask a question like this only if the ME gave a strong opinion that was detrimental to the claim.)

by substantial evidence. Evidence is not "substantial" if vital testimony has been conjured out of whole cloth. See Peabody Coal Co. v. McCandless, 255 F.3d 465 (7th Cir.2001); Elliott v. CFTC, 202 F.3d 926 (7th Cir.2000). Even in court, however, an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand.
Know your Impairments

There are some Social Security Rulings on specific impairments:
- SSR 06-1p - Tremolite Asbestos-related Impairments
- SSR 03-2p - Reflex Sympathetic Dystrophy Syndrome/Complex Regional Pain Syndrome
- SSR 03-1p - Disability Claims Involving Postpolio Sequelae
- SSR 02-2p - Evaluation of Interstitial Cystitis
- SSR 02-1p - Evaluation of Obesity
- SSR 99-2p - Chronic fatigue syndrome
- SSR 98-1p - Determining Medical Equivalence in Childhood Disability Claims When A Child Has Marked Limitations in Cognition and Speech

Question MEs using SSR

-Example - Degenerative Disc Disease + Obesity
Client complains of problems both sitting and standing

ME: Based on this record this claimant can perform sedentary work

Rep: Are you familiar with SSR 02-1p on Obesity

Whether ME says yes or no:

Rep: SSR 02-1p states obesity in combo with musculoskeletal impairments can cause limits in sitting, as well as in standing/walking. Do you agree with that statement?

**If ME doesn’t agree, his testimony inappropriately conflicts with a holding by the Commissioner. If agrees, then ALJ cannot blindly accept ME testimony of no limits in sitting.

** If ME agrees, 2 options:

1) stop that line of questioning
First, the adjudicator must consider whether there is an underlying medically determinable physical or mental impairment(s)—i.e., an impairment(s) that can be shown by medically acceptable clinical and laboratory diagnostic techniques—that could reasonably be expected to produce the individual's pain or other symptoms. (FN3) The finding that an individual's impairment(s) could reasonably be expected to produce the individual's pain or other symptoms does not involve

Example 2:
ME: This claimant suffers from Raynaud’s syndrome and she can work as long as she does not have to work in temperatures below 20 degrees.

Rep: (who should know in advance what precipitates symptoms in Raynaud’s patients): Dr., isn’t it true that some people with Raynaud’s syndrome experience symptoms in temperatures as warm as 50 degrees, or even in air-conditioning?

**Rep should be prepared with copy of relevant treatise or authoritative website to support position (eg, Mayo Clinic, University of Chicago websites; Harrison’s on Internal Medicine, Merck Manual)

Set Case Up So it Depends on Credibility Determination

If the ME gives an RFC which allows for work, and would require ALJ to find your client not disabled, one thing to do is set ME up so decision hinges not on her testimony but on credibility determination.

Use SSR 96-7p language:

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2) Rep: There’s nothing in this record that indicates that claimant’s ability to sit is not impacted by the combination of his degenerative disc disease and obesity?

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SAMPLE Rep: Can the claimant’s impairment [diabetes, depression, etc.] reasonably be expected to produce some level of pain [crying spells/fatigue, etc.]? In answering I would ask that you consider only the symptom itself, without consideration of the intensity, persistence or limiting effects of the symptoms?

**As long as the ME says “yes” the ALJ will need a specific reason for rejecting the alleged degree of limitation even though it contradicts the ME’s opinion.

Some experts will say the impairment can cause the symptom “but not the level of pain alleged.” But the Commissioner, through SSR 96-7p, recognizes that people experience varying intensity of symptoms from the same impairment - and that medically all the claimant needs is an impairment that can cause the symptom.

This idea is equally important for claimants with mental impairments. Establish on cross that the record shows the claimant is suffering from symptoms of, eg., anxiety, panic, crying spells, isolation. The evidence does not have to establish the intensity of these symptoms for the ALJ to find them to be disabling.

**MEs should not be talking about the average claimant.**

- Some, or many, MEs testify about the average claimant, or how they believe most claimant’s with this particular impairment will function.

- But ALJ has to decide what this particular claimant is capable of doing, not what most claimants with this impairment, or combo of impairments, could do.

_Hawkins v. First Union Corporation Long-Term Disability_

326 F.3d 914
C.A.7 (Ill.),2003.

“[In] Dr. Chou’s report: “Although Ms. [ sic ] Hawkins has been diagnosed with _______________________

a determination as to the intensity, persistence, or functionally limiting effects of the individual’s symptoms

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fibromyalgia, the majority of individuals with fibromyalgia are able to work. . . The fact that the majority of individuals suffering from fibromyalgia can work is the weakest possible evidence that Hawkins can . . .”\(^3\)

- One ME who frequently testifies in Chicago SSA hearing offices, will say “well, my patients with [fill in the blank impairment] can stand for 6 hours per day?” (Said this at a hearing for my client with peripheral vascular disease (PVD).

SAMPLE: Rep.: “Dr., does the fact that your patients suffering from PVD were able to stand for 6 hours per day, establish, based on a reasonable degree of medical certainty, that Mr. My Client can stand for 6 hours per day?”

SAMPLE: Rep: “Dr., when you said that Ms. My Client could perform light work, were you basing your opinion on the activities the average person with these impairments could perform?”

“Does every person suffering from pain/fatigue/dizziness, etc., suffer from the same degree of limitation from these symptoms?”

\(If \text{ the ME says “yes” - see below for cross on this type of response.}\)

**Why do MEs talk in terms of light work, sedentary work?**

- The exertional categories in the regulations are legal, not medical, categories.

- Yet, MEs never (well, I haven’t heard one) state that a claimant could lift, at most, 12 lbs., or 18 lbs? Why always 10 lbs., or 20 lbs?

SAMPLE: Rep: “Why do you say this claimant can lift 20 lbs. on an occasional basis? How do you know she can lift 20 lbs., versus, for example, 18 lbs, or 15 lbs.?”

- “Similarly, how do you know she can stand for 6 hours in an 8 hour work day, versus, for instance, 5 hours?”

- The ME may respond, “well, it could be 18 lbs., but it could also be 25 lbs.” But then you’ve made your point. The ME is giving a definite limit, when really

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\(^3\) Court goes on to mention that this is especially true given that the size of the majority is not indicated in this case.

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there’s a range of possible limits for this claimant.

**Make Certain MEs Testimony Is Reliable.**

*See footnote 1 above on reliability of expert testimony. DONAHUE V. BARNHART 279 F.3d 441 (7th Cir. 2002)*

In some parts of the country, ALJs do not routinely ask MEs to provide functional assessments. In our region it seems that ALJs routinely ask MEs to provide an opinion as to the claimant’s limitations.

What’s the basis for these opinions? We should ask.

SAMPLE: Rep.: “What medical studies or treatises are you relying on which establish that all people suffering from moderate arthritis in their knees, with bulging discs at L4-L5, can stand and/or walk for 6 hours in a work day without experiencing severe or extreme pain, stiffness and discomfort?”

SAMPLE (more generic) Rep: “What medical studies or treatises are you relying on which establish that all people suffering from the same combination of impairments which this claimant suffers from, can stand and/or walk for 6 hours in a work day without experiencing severe or extreme pain, stiffness and discomfort?”

- Some ME might respond: “Well there’s no study showing they cannot stand for 8 hours either.”

Then, Rep: “So, Dr., you would say there’s a range of possible limitations resulting from this claimant’s impairments, from, say, standing/walking 2 hours in an 8 hour work day, to standing/walking for 8 hours?”

**ME Relies on Experience.**

ME might state they are relying on their experience. But, experience does not automatically translate into reliability of an opinion based on that experience.

SAMPLE: ME: The claimant can do light work, lift 20 lbs occasionally, 10 frequently, occasional posturals, stand/walk 6 of 8 and sit 6 of 8. He may need to sit down every hour for 5 minutes.
Rep.: “Dr did you base your opinion on any medical studies on individuals with this claimant’s impairment/combo of impairments?”

ME: No, I based it on my experience of having treated patients for 30 years.

Rep.: “Dr., do you routinely observe your arthritic patients lifting weights? Do you keep 20 lb. weights in your office so you can ask your patients to lift that amount?”

“How long does a typical appointment take with a client coming in due to arthritic pain? So, you never observe your patients for 8 hours, to determine how long they can stand or walk, or sit? In fact, you never observe your clients standing for 1 hour, or probably even a half hour, is that correct?” (I suppose a doctor might observe some patients sitting for half an hour, so be careful if you’re asking questions about sitting.)

- This same type of question can be used for almost any physical limitation. Eg. Does the dr. routinely observe his patients using their hands for fine or gross manipulation for an hour, 6 hours? Did the doctor routinely ask his patients to bend or stoop repeatedly in the office, so they could observe the impact of repetitive bending on their clients?

- If the ME states that in fact he has observed his patients in this manner, or he has asked his patients what their functional abilities are:

SAMPLE: Rep: “Dr. over how many years did these observations take place?

ME: I’ve been practicing medicine for 30 years.

Rep: “Dr. did you keep a written record of your observations, recording the patient’s diagnoses, objective evidence supporting the diagnoses, along with your observations? Did you purport to perform a scientifically and statistically reliable and valid study of the functional limitations of patients with this claimant’s specific impairments?”

- One ME said to me after I asked about studies, “Counsel, you would need a study of
this individual claimant to discern his abilities.” Exactly the answer I hoped for.

**Make sure MEs understand the exertional categories, and definitions within these categories.**

- For example, ME states claimant can lift 10 lbs. occasionally. Where important/material to case, make sure ME understands that this means could lift or lift and carry, 10 lbs for 2/3 of work day, perhaps for 40 minutes every hour.

  - Example: ME opined my client could stoop occasionally.

VE said claimant could work as parking lot attendant. When questioned again later the ME stated claimant could stoop 6 times during a work day. While that’s how ME interpreted “occasional stooping,” that’s not “occasional” as defined in the regulations.

SAMPLE: Rep.: “Dr., when you say that the claimant can lift 20 lbs., occasionally, you understand that this means he can lift 20 lbs. for up to one-third of the work day, 20 minutes out of every hour?”

You might want to inquire as to whether there are any specific limitations within the general limitations.

SAMPLE: Rep.: “Could this claimant lift and carry 20 lbs. continuously for 20 minutes every hour?”

Rep: “Could this claimant handle a job that required lifting and carrying 20 lbs. for an hour continuously, even if the job only required a total of 2.66 hours in a workday?”

- This could be particularly important if past work required the claimant to, at times, lift a certain weight continuously for an hour, etc.

**Non exertional limitations**

- Examples: ME states claimant can bend/stoop occasionally.
TP or CE report establishes limited range of motion in lumbar spine to 45 degrees. This actually would mean claimant can *never* bend past 45 degrees, not that s/he could occasionally bend/stoop. *Golembiewski v. Barnhart*, 322 F.3d 912 (7th Cir. 2003) (holding a conflict between ALJ finding occasional stooping, and findings of a limited range of motion to 45 degrees flexion of spine.)

- Shoulder abduction limited to 90 degrees (or shoulder level). ME testifies to claimant being able to reach overhead occasionally. But with this ROM, claimant can *never* reach overhead. *Hill v. Astrue*, 295 Fed.Appx. 77 (7th Cir. 2008) (non-precedential opinion)

**ME relies on Consultative Examiner’s Report**

If an ME relies on a consultative examiner’s observations that a claimant had no difficulty with fine or gross manipulation:

a) hopefully you have already asked your client about the consultative exam and any deficiencies. For example, if the claimant alleges problems using the hands, yet the CE report says no problems, have your client explain that during the exam the doctor asked her to pick up 2 paper clips and a pencil, and asked her to turn a door knob, etc. (these are examples of fairly typical “testing” at a CE exam).

SAMPLE: Rep.: “Can you really tell whether or not a claimant will have no problems using their hands for 20 or 40 minutes each hour, based upon their ability to pick up 3 small items one time, and turn a door knob?” [20 or 40 minutes, depending on whether you’re wondering if claimant can do task occasionally or frequently]

“Does repetitive activity ever result in increased pain and weakness in an impaired joint, muscle, ligament?”

If the ME says something like: “If the person can turn the door knob and pick up the items, s/he is not precluded from doing those activities”:

SAMPLE: Rep: “Yet, you testified, doctor, that the claimant was limited to lifting 20 lbs. occasionally. Isn’t that because repetitive lifting of 20 lbs., more than “occasional,” would be expected to cause

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an increase of symptoms such as pain, fatigue or weakness?
Isn’t it the same with a person suffering from nerve damage in the fingers - that repetitive use could increase symptoms, such that lifting 3 small items might not cause symptoms, but picking up those same 3 items for 20 minutes might cause symptoms?”

**Know the Record Better than the ME**

- Know the record better than the ME.

- Example: If an ME states your client is not taking narcotic pain medication, thus their pain must not be too great, but you know the record shows either, a) they are taking such medication, or, b) they suffer severe allergic reactions to such medication, ask:

  SAMPLE: Rep.: “Dr. would you look at Ex. 5 p. 3, where it states Dr. Abrams prescribed Oxycontin for this claimant. Given your testimony, and the fact that claimant has in fact been prescribed Oxycontin, you would agree then that this establishes that the claimant does experience great pain?”

    ME: I only saw one complaint of fatigue in the record.

  SAMPLE: Rep: “Dr., would your opinion, as to the degree of the claimant’s pain, change if you knew that in fact the record shows that Mr. x complained of to his treating physician at least 6 times concerning fatigue?”

**ME relies on belief that treating sources are not providing appropriate care.**

  SAMPLE: Rep: “Dr., are you stating that Dr. Brown committed malpractice in treating the claimant?”

**I have never had an ME answer “yes” to this question.

    ME: No, I am not saying that.

    Rep: “Then this means Dr. Brown was acting within the generally accepted

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medical guidelines for treatment, even if he did not treat the claimant in the same manner you would have?”

**ME relies on lack of treatment, or lack of change in treatment, to discredit the claimant’s alleged limitations.**

**SAMPLE: ME:** If Dr. Rose believed his patient’s depression was not controlled she would have tried different medications rather than leaving her on Zoloft.

**Rep:** Dr., you’re speculating here, aren’t you?

**ME:** There are many anti-depressants, Dr. Rose surely would have tried others if she thought the claimant’s depression was as severe as alleged.

**Rep:** Are there any medical reasons why a doctor would not prescribe some of the other anti-depressant medications? (“Are there any side effects associated with any of these other anti-depressant medications you refer to?”)

**ME:** Yes.

**Rep:** And you do not know Dr. Rose’s reasons for not prescribing different medications, isn’t that correct?

*White ex rel. Smith v. Apfel*, 167 F.3d 369, (7th Cir. 1999) “Speculation is, of course, no substitute for evidence, and a decision based on speculation is not supported by substantial evidence.”

**Objective v. Subjective**

Some MEs will testify as to the limits they believe the objective evidence supports, without consideration of subjective symptoms such as pain, fatigue, etc.

**ME:** The claimant can lift 20 lbs. occasionally and 10 lbs. frequently, standing and walking 6 of 8.

**SAMPLE: Rep:** “Dr., did you consider the claimant’s pain when providing the limitations?”

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ME: Pain is subjective, I only can consider the objective evidence.

**If you enter into this realm with an ME, once the ME admits that pain/fatigue, etc. is subjective, use the cross-examination technique discussed above in Set Case Up So it Depends on Credibility Determination**

**Also, you could ask the ME if therefore, a consideration of the claimant’s symptoms of pain, fatigue, etc., could lead to finding greater limitations. But you could also leave that for closing argument to the ALJ.**

**Make Sure the ME understands the difference between meeting a Listing and having a medically determinable impairment**

See Exhibit 1.

Some MEs think it’s all about the Listings and will state “no medically determinable impairment” if the impairments do not meet a listing. Exhibit 1 includes some cross examination which addresses this type of ME testimony.

**Musculoskeletal Listings and Ineffective Ambulation**

**Many MEs will testify that a claimant does not meet a listing because they do not meet the definition of ineffective ambulation, which, they say, requires the use of two hand held assistive devices, or the equivalent, as an aid to walking.**

However, see Moss v. Astrue, 555 F.3d 556 (7th Cir. 2009)

“The regulations state that “ineffective ambulation” is “defined generally” as requiring the use of a hand-held assistive device that limits the functioning of both upper extremities. See 20 C.F.R. pt. 404P, app. 1, § 1.00(B)(2)(a). But the regulations further provide a nonexclusive list of examples of ineffective ambulation, such as the inability to walk without the use of a walker or two crutches or two canes; the inability to walk a block at a reasonable pace on rough or uneven surfaces; the inability to carry out routine ambulatory activities, like shopping and banking; and the inability to climb a few steps at a reasonable pace with the use of a single handrail. Id. . . .

the ALJ failed to adequately consider whether Moss in fact meets the listing based on the provided examples such as an inability to walk a block at a reasonable pace on rough or uneven surfaces, or the inability to carry out routine activities, like shopping and banking. See 20 C.F.R. pt. 404P, app. 1, § 1.00(B)(2)(a).
VOCATIONAL EXPERTS AT SOCIAL SECURITY DISABILITY HEARINGS

Intro.

- Use of VEs at Step 4 of the Sequential Evaluation Process

Considerations of past relevant work

Physical and mental demands of past work

Did claimant perform past relevant work differently than it is generally performed in the national economy

Whether a hypothetical claimant can perform past relevant work

- Use of VEs at Step 5 of the Sequential Evaluation Process

Whether there are other jobs which exist in significant numbers in the national economy which claimant can perform.

Includes consideration of transferable skills.

Consideration of hypothetical questions.

- Use of VEs at Step 4 of the Sequential Evaluation Process.

General Regulation on past relevant work 20 CFR Sec. 404.1520(f); 416.920(f)

What Is Past Relevant Work?

Past relevant work is work that you have done within the past 15 years, that was substantial gainful activity, and that lasted long enough for you to learn to do it. 20 CFR Sec. 404.1560 (and 416.960)

Work Done Within the Past 15 years.

1. The 15 years counts backwards from the date of the ALJ’s decision. 20 C.F.R. Sec. 404.1565(a) (416.965(a))

   Eg.: ALJ hearing is Aug 15, 2008:

       Work as secretary last done in Aug 1994. Past relevant work.

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2. In DIB cases, if DLI has expired, 15 years counts backwards from date insured status expired.

   Eg.: ALJ hearing is Aug 15, 2008; DLI is 12/31/06

   All work from 1/1/92 counts as past relevant work.

   Possible to have a job count as past relevant work for DIB purposes but not count for SSI purposes.

   Eg.: ALJ hearing is Aug 15, 2008; DLI is 12/31/06

   A job was performed last in December 1992. This job is past relevant work for DIB purposes, but not for SSI purposes.

3. If only worked “off and on” during the 15 year period, considered to have no past relevant work.

   “Off and on” not defined in regulations. So can argue in appropriate cases.

4. 15 year rule is a guideline. ALJ could use a job done more than 15 years prior under limited circumstances.

   Eg.: Claimant performed sedentary clerical job 16 years ago, and had performed it for 5 years at that level. Then performed light level clerical job for 5 years after that. ALJ could find that claimant still could perform sedentary clerical job, if continuity of skills.

To Be Past Relevant Work Must have Been Performed at SGA Level.

20 CFR Sec. 404.1560; 404.1565

Representative Should Know Earnings Levels for All Work Done in Previous 15 Years

If VE starts to testify about work not done at less than SGA levels, rep should inform ALJ of this fact.

Even better, in opening statement rep could point out that the work was under SGA earnings.
Past Relevant Work As Actually Performed versus Generally Performed

From 20 C.F.R. Sec. 404.1565(b)(2):

“A vocational expert or specialist may offer relevant evidence within his or her expertise or knowledge concerning the physical and mental demands of a claimant's past relevant work, either as the claimant actually performed it or as generally performed in the national economy.”

Watch for: Hybrid jobs.

Eg: Person answers phone at bowling alley, and puts bowling balls away at end of day.

VE should not say that this person’s past relevant work was as a receptionist and they can return to it, if limited, for example, to sedentary work.

If can’t do all parts of a hybrid job can’t return to work as actually or generally performed.

But a claimant’s past relevant work does not have to exist in significant nos.- in fact does not have to exist at all - to be relied upon.


Elevator Operator - Since claimant could perform job, fact that it existed nowhere in U.S. didn’t matter - ineligible for DIB or SSI.

**Transferable Skills**

“A person does not gain work skills by doing unskilled jobs”

20 C.F.R. Sec. 404.1568 (416.968)

“... an individual cannot transfer skills to unskilled work or to work involving a greater level of skill than the work from which the individual acquired those skills. See SSR 82-41.”

SSR 00-4p
Eg.: Past relevant work is at SVP 4. VE cannot properly state that claimant has transferable skills to a job that has an SVP 5 or above.

Transferability is most probable and meaningful among jobs in which—

(i) The same or a lesser degree of skill is required;

(ii) The same or similar tools and machines are used; and

(iii) The same or similar raw materials, products, processes, or services are involved.

However, A complete similarity of all three factors is not necessary for transferability

20 C.F.R. Sec. 404.1565(d)(2) (416.965)

Watch For: A claimant has one transferable skill, but the job to which it transfers requires 2 or 3 other skills as well. If claimant did not acquire those skills, cannot perform those jobs.

SAMPLE: Rep: “What are the products involved in the flower shop where the claimant worked? And what are the products involved in the book store you have mentioned? So, the products in these two jobs are not similar, is that correct?”

SSR 82-41

A skill is knowledge of a work activity which requires the exercise of significant judgment that goes beyond the carrying out of simple job duties and is acquired through performance of an occupation which is above the unskilled level (requires more than 30 days to learn). It is practical and familiar knowledge of the principles and processes of an art, science or trade, combined with the ability to apply them in practice in a proper and approved manner. This includes activities like making precise measurements, reading blueprints, and setting up and operating complex machinery. A skill gives a person a special advantage over unskilled workers in the labor market.

The regulations definition of semiskilled work in regulations sections 404.1568(b) and 416.968(b) states that semiskilled jobs “may require alertness and close attention ... coordination and dexterity ... as when hands or feet must be moved quickly to do
repetitive tasks.” These descriptive terms are not intended, however, to illustrate types of skills, in and of themselves. The terms describe worker traits (aptitudes or abilities) rather than acquired work skills.

Worker traits to be relevant must have been used in connection with a work activity. Thus, in the regulations, the trait of alertness is connected with the work activities of close attention to watching machine processes, inspecting, testing, tending or guarding; and the traits of coordination and dexterity with the use of hands or feet for the rapid performance of repetitive work tasks. It is the acquired capacity to perform the work activities with facility (rather than the traits themselves) that gives rise to potentially transferable skills.

See Villano v. Astrue, 556 F.3d 558 (7th Cir. 2009)
“This circuit has not addressed whether “judgment” is a skill, but at least two other circuits have determined that it is not, explaining that a skill as defined in S.S.R. 82-41 and 20 C.F.R. § 404.1565(a) is a particular learned ability,*564 and “judgment” is too vague to constitute such a skill. . . . Thus, the ALJ erred in concluding that Villano had a generalized skill of “judgment” that was somehow transferable to new jobs in a different field. (internal citations omitted.)

Cross Examination of VE at Step 5

Most Basic Way to Cross Examine a VE

Add restrictions to the Hypothetical Question

Eg.: ALJ says hypothetical claimant can lift 20 lbs. occasionally and 10 lbs frequently; stand and walk for 6 hours in a work day; limited to detailed but not complex work.

VE names several jobs such a hypothetical claimant can perform.

Representative can add restrictions based on: Claimant’s testimony; treating physician’s opinion; CE or State Agency non-examining doctor’s opinion.

SAMPLE: Rep: “If, in addition to the limitations set forth in hypo 1, the claimant could not stand without using a cane for support, could they perform the jobs you have mentioned?”

Add one restriction at a time.

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Eg: ALJ says hypothetical claimant can lift 20 lbs. occasionally and 10 lbs frequently; stand and walk for 6 hours in a work day; limited to detailed but not complex work.

Rep wants to ask about 4 additional limitations; limitation to simple work; lifting 10 lbs occasionally; minimal contact with co-workers; would be tardy to work 5 days per month.

SAMPLE: Rep.:

- “Adding to hypo 1 a limitation to simple work, would this impact the claimant’s ability to perform the jobs you mentioned?”
- “Adding to hypo 1 a limitation to lifting 10 lbs. occasionally, would this impact the claimant’s ability to perform the jobs you mentioned?”
- “Adding to hypo 1 a limitation to only minimal contact with co-workers, would this impact the claimant’s ability to perform the jobs you mentioned?”

etc.

**If you do not get the answers you hope for, then you can add 2 of these limitations at a time, or give the VE all 4 restrictions and ask which, if any, of them would impact the jobs VE has already given.

**WHY DO IT THIS WAY?

**If you add all of the limitations you think might apply at once, and the ALJ rejects one or more of them you do not have a clear response from the VE that given the other limitations the claimant still cannot perform any jobs. By finding out which ones would restrict the jobs mentioned, the ALJ then must (should) specifically address that limitation in his decision.


The fundamental problem with the ALJ's determination is that both in the body of her ruling (R. 19) and in her findings (R. 20), she addressed the VE's opinion in response to only one of the hypotheticals—the first one—and disregarded the others. Case law in the Seventh Circuit holds that “[a]n ALJ may not simply select and discuss only that evidence which favors his [or her] ultimate conclusion. Rather, an ALJ's decision must be based upon consideration of all the relevant evidence.” See, e.g., Smith v. Apfel, 231 F.3d 433, 438 (7th Cir.2000) (citations omitted). We believe that this general rule has special force in cases where the ALJ solicits the testimony and opinions of a vocational expert at Step 5, but then proceeds to disregard this testimony without explanation. See, e.g., Griffin v. Massanari, No. 00 C 7109, 2001 WL 1064476, * 10 (N.D.Ill., Sept. 13, 2001) (“[h]aving elicited the testimony of a vocational expert, the ALJ was not entitled to simply ignore significant portions of it”)

**Make sure the VE heard the Hypothetical Question Correctly**

ALJ: Hypo 1 - limitation to light work with a sit/stand option, not even moderate
exposure to respiratory irritants, occasional stooping, no reaching overhead with right dominant hand.

VE: Can do jobs of light stocker, and messenger.

SAMPLE: Rep.: “Did you understand that the ALJ’s hypothetical included a sit/stand option? Can a messenger sit whenever they need to?”

VE: Oh, I’m sorry counselor, I didn’t catch the sit/stand option.

**Alternate Method of Cross-Examining VE**

Ask VE if there are competitive standards in a given area.

Eg.: There is evidence claimant would miss work 5 days per month, but perhaps ALJ will find fewer absences likely to occur.

SAMPLE: Rep.: “Is there a standard in the types of jobs you just mentioned, in terms of allowable absenteeism?”

**This gets right to the heart of the matter. Rather than the rep. having to ask whether a claimant could sustain these jobs if they missed work 5 days per month, 4 days, 3 days, etc., s/he can just ask the VE for the standard in these industries.**

**If a VE says more than one day of month absence is allowed, ask if considering vacation time along with sick time. Ask if this amount of absence is allowed during the probationary period, and how long is that period.**

See Ex. 3, attached, for a sample of cross examination on this issue.

**OTHER EXAMPLES OF INDUSTRY STANDARDS**

**Concentration**

Eg.: Your claimant suffers pain which will cause inability to concentrate from time to time.

SAMPLE: Rep.: “Is there a standard in the industry for the jobs you mentioned of allowable time off task, for any reason, whether it be lack of concentration due to pain, fatigue, attention problems?”

-VE may say 10% or 5 minutes per hour, etc., or they may say a worker needs to be on...
task a percentage of time, such as, 85% of the time.

SAMPLE: Rep.: “Does this mean a worker is allowed to take a 5 minute or 10 minute (depending on VE’s prior answer) break every hour?”

**What’s the difference between the 2 ways of asking the question? Some VEs will say that while a person is expected to be on task 85% of the time, that does not mean they are allowed a 9 minute break each hour, but that the standard considers that a workers attention may wonder slightly from time to time.

Unscheduled or Extra Long Work Breaks

Cause: Headaches; Fatigue; Need to walk around for 10 minutes; Frequent washroom breaks.

SAMPLE: Rep.: “How many unscheduled work breaks would typically allowed in the types of jobs you have mentioned?”

“What if the breaks were for 10 minutes at a time?”

- Most VEs will say 2 or 3 scheduled breaks are allowed, depending on type of job.

15 minute morning (and maybe afternoon) break; 30-60 mins for lunch

SAMPLE: Rep.: “What if the individual took one extra 30 minute unscheduled break one day per week?” (If, that would be tolerated, then, “what about twice per week?” etc.

** Similar questions can be asked if the claimant must often take extra time on break (eg., washroom use due to colitis; to use nebulizer, to elevate leg due to edema)

Sit and Stand Options

**We get this limitation all of the time in hypos from ALJs.

**If the sit/stand option is “at will” and VE finds jobs, explore this.

ALJ: Hypo 1 - stand and walk 6 of 8 hours, sit 6 of 8 hrs, lift 20 lbs,
with a sit and stand option at will.

VE: A sit/stand option would allow this claimant to perform the light jobs of cashier and ticket taker.

SAMPLE: Rep.: “Does a ticket taker lift 20 lbs. occasionally on that job, or is it a light job because of the standing and walking required?”

VE: The standing and walking.

Rep.: So, if a claimant must have the option of sitting or standing whenever they need to, this hypothetical claimant might have to sit for 6 hours in a work day, and could never stand for 6 hours. In that case, could they perform the job of ticket taker?

VE: That’s not how I understood the ALJ’s question, plus, the cashier and ticket taker can sit down during the slow periods.

Rep.: “But what if they need to sit due to pain during the busy periods on the job, could they perform these jobs given that fact?”

Another way to approach this would be to ask:

SAMPLE: Rep.: “While you said that the machine operator can sit at times to rest, and even to perform part of their job, is there any part of the job which requires standing or walking?”

VE: Well, at times if the machine stops down they will have to stand to get it started; and, at times, they have to walk to the warehouse for parts.

Rep.: “So, if during those periods, when the machine stops, or when they need to get parts, the claimant could not stand up or walk, but needed to remain seated, could they perform, or sustain, those jobs?”

**In my mind, a sit/stand option at will is incompatible with an RFC which also includes the ability to stand and walk for 6 hours, or, for that matter, to sit for 6 hours. “At will” means that the claimant might have to sit for 6 hours one day and stand for 6 hours another day, depending on how they’re feeling.

Mental Impairments and “Moderate Limitations”
**Because the State Agency RFC forms include a box for “moderate limits” in various areas of mental health functioning, your only medical opinion on the limitations for your client might be “moderate” limitations.

However, some ALJs will not allow you to ask a VE a hypo which includes “moderate” limits, but they want you to “quantify” that moderate into something more tangible.

How do you do that?

Use the claimant’s testimony as to their limitations.

EXAMPLE: Claimant testifies that she experiences crying spells several times per day, and anxiety every hour lasting 10 minutes. State Agency doctor opined that claimant has moderate limits in attention and concentration.

SAMPLE: Rep.: “What if you added to the ALJ’s hypothetical a moderate limitation in attention and concentration?”

ALJ: Counsel, I am not going to allow that question. You need to quantify what you mean by moderate.

Rep.: “Your honor, the State Agency doctor opined that my client suffers from moderate limitations.”

ALJ: Still you have to quantify that.

Rep.: “Please assume that the claimant would be unable to concentrate on their job for 10 minutes every hour, would that impact their ability to perform the jobs you mentioned?”

See Olson v. Astrue, Slip Copy, 2009 WL 2365511, (N.D.Ill., 2009)

“On cross-examination, plaintiff’s attorney asked if the jobs the VE suggested could be performed if the individual also had moderate limitations in concentration, persistence or pace and in social function (R. 391). The ALJ directed plaintiff's attorney to frame the question as “hours during the day” it would take her off task ( Id.). The VE testified that if the plaintiff were off task more than five or ten minutes per hour, then she would have difficulty maintaining production requirements in the production jobs he had proposed (R. 392-93), The VE testified that it would not necessarily be a problem if a supervisor had to repeat instructions one time per day, but if the supervisor had to repeat instructions more than two times each day, then it would be a problem (R. 394).”
Court held that ALJ was required to address the VE’s testimony to counsel’s question which quantified, as the ALJ required, a “moderate” limitation in concentration.

**Dictionary of Occupational Titles**

**Always ask the VE for the DOT numbers associated with the jobs the VE mentions.**

**If possible, during the hearing look at the DOT to determine whether the VE’s reliance on those jobs is accurate.**

EXAMPLE: Hypo 1 limits claimant to sedentary work. DOT no. provided by VE actually is for a light level job.

Or, hypo 1 limits claimant to unskilled work, but DOT job is an SVP 3 job.

See SSR 00-4p - SVP 3 and 4 jobs are semi-skilled.

**Some VEs will say that SVP 3 jobs are considered unskilled. But according to the Commissioner via the SSR they are unskilled and the VE cannot change that fact.**

**VES can testify contrary to the DOT if the explain why they believe the DOT is wrong. They cannot testify in conflict with a reg. or SSR however.**

**Use Fact that DOT is Outdated to Your Advantage.**

**For each occupation the DOT states the year it was last revised.**

**Ask the VE what year the DOT description for the jobs mentioned were revised. Ask if anything has changed in terms of the technology used to perform the jobs. Many jobs in 1977 were performed using typewriters but now require computers. Can your client use a computer competently?**

SAMPLE: Rep.: “The job of bookkeeper in today’s economy requires the use of a computer and software applications, isn’t that true? The DOT description for that job is outdated, correct? Tell us what technology a bookkeeper must use today?”

**Some jobs that the DOT says are unskilled might actually require skills in today’s work world.**
A Significant Number of Jobs

**The Commissioner has the burden of proving, at step 5, that there are a significant number of jobs that a claimant can perform.**

**Where do the VEs get the numbers they provide at hearings?**

And, how reliable are those numbers?

See Ex. 7, attached, starting at AR. 432 last line, for sample of cross-of a VE on how he reduced the numbers of jobs available.

**VEs will rely on the Bureau of Labor Statistics, Occupational Employment Quarterly, labor market surveys, their experience.**

*Experience* - like with MEs, how does experience translate into knowing there are 2000 unskilled cashier jobs in Winnebago County which allow for sit/stand option? Did the VE actually do a survey and count jobs? (No, s/he didn’t).

Is there *any* source that has done a reliable study to determine the no. of unskilled cashier jobs that allow for a sit/stand option? (No, there isn’t.)

*Bureau of Labor Statistics* - They base their stats on the census. The census does not ask how long it took the person to learn their job, thus it does not distinguish skilled, semi-skilled, and unskilled jobs. The census does not ask how much weight a person had to lift on their job, or how long they had to sit, stand, etc. Thus, it does not provide numbers of skilled, unskilled or semi skilled jobs.

The BLS stats might show there are 20000 assemblers in the CMA and collar counties. But, it does not, and cannot, establish how many, if any, of those jobs are skilled or unskilled, or how many are sedentary, light, medium or heavy.

*Occupational Employment Quarterly* - a private publication. They extrapolate with no statistical reliability or validity. For example, take those 20000 assembler jobs. US Publishing, which publishes Occupational Employment Quarterly, looks at all of the DOT codes that make up the job of assembler. Assume there are 20. Then assume of the 20, 2 are unskilled sedentary DOT codes. Occupational Employment Quarterly assumes that 10% of all assembly jobs in the region are unskilled and sedentary.

But, there may be no unskilled sedentary assembly jobs in the region....US Publishing just assumes jobs are evenly distributed among all DOT codes. There’s no basis for that

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4 For a detailed discussion of this issue on where VEs get their numbers, and the reliability of their sources, see James Publishing’s, Social Security Disability Advocate’s Handbook, by David Traver.

Cross-Examining MEs and VEs, p. 25
assumption.

*Labor Market Surveys* - I have had only one VE actually provide me with labor market surveys. They in no way supported his testimony. ALJ actually found the Commissioner could not meet his burden at step 5, because VE’s surveys did not provide reliable support for his testimony on how he reduced the no. of jobs for a sit/stand option.

**Ask The VE for a Copy of the Sources S/he used to determine the no. of jobs available, especially if the VE reduced the total numbers for some reason.**

VEs must turn over their underlying data on demand, without charge to claimant.

*McKinnie v. Barnhart, 368 F.3d 907 (7th Cir. 2004)*

**Ask to see any reports the VE states they relied on.**

**Ask to see the pages of the Occupational Employment Quarterly for the jobs the VE found.**

**If VE says relied on labor market surveys, ask to see them. If he says they’re confidential and he cannot show them to you, object to any testimony based upon those surveys if you’re not allowed to see them.**