

Applying the Severity Ratings of the Mental Residual Functional Capacity Form to Sustained Remunerative Employment

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Individuals unable to work due to psychiatric or cognitive limitations may be entitled to disability benefits under the Social Security Administration. To determine the extent to which these types of disabling conditions impede employment, the Administration utilizes the Mental Residual Functional Capacity – containing 20 work-related activities – as a guide for considering employment options. Utilizing this checklist, the medical expert rates the degree to which an individual can perform each of 20 work-related activities. A vocational expert is then asked to consider how different activities, rated at different severity levels, impact the ability to engage in sustained gainful employment. Unfortunately, there appears to be little consensus among the courts on how to define each severity level. The result is that given the same hypothetical, two vocational experts may offer very different conclusions as to employability. By understanding the different ways these experts define the severity categories it may be possible to begin to establish uniform definitions, and in turn enhance the credibility of the methodology of the vocational expert community.

When applying for disability benefits through the Social Security Administration (SSA), an individual may cite the presence of mental-cognitive impairments which they allege prevents them from performing substantial gainful employment. In these cases, an Administrative Law Judge (ALJ) asks the Vocational Expert (VE) to consider the impact of such impairments on employability. In an attempt to attain some level of standardization, the ALJ utilizes the Mental Residual Functional Capacity Assessment (MRFCA) form to guide the formulation of a hypothetical scenario. This form contains a series of 20 work-related activities in the broad areas of understanding and memory; sustained concentration and persistence; social interaction; and adaptation. Johnston (2010) proposed that it may be possible to connect each of these 20 work-related activities to the temperaments category for each of the over 12,000 occupations found in the Dictionary of Occupational Titles, and which are defined in the Revised Handbook for Analyzing Jobs. He further hypothesized if each of the activities matched up to at least one temperament, the VE could systematically eliminate occupations that contained certain temperaments/work-related activities, in turn developing some consistency in testimony among the expert community.

Complicating this proposed procedure is that each mental activity is rated by degree of while the SSA offers only a general guideline for the interpretation of each severity category. The treating physician is directed to choose “Not Significantly Limited” when the effects of the mental disorder do not prevent the individual from consistently and usefully performing the activity; “Moderately Limited” when the evidence supports the conclusion that the individual’s capacity to perform the activity is impaired; and “Markedly Limited,” when the evidence supports the conclusion that the individual cannot usefully perform or sustain the activity (DI24510.063). The vagueness of these definitions, particularly the category of “Moderately Limited”, seems to be acknowledged by the SSA given the instructions to the physician to complete section III of the MRFCA form, requiring a detailed explanation on the degree of limitation for each category. The ALJ could be of assistance – and indeed at times are – by providing a more thorough explanation of the severity ratings as required of the treating physician (DI 24510.065). Yet clarification may not be passed on to the VE as the ALJ provides only a hypothetical client without further elucidation of the identified mental activities. The result is that not only is the ultimate opinion of the VE dependent upon their individual ex-

perience in placing individuals with disabilities, but further reliant on their unique interpretation of the various severity levels. The end result is that the decision by the ALJ may be subject to appeal based on questions regarding the reliability of the VEs testimony. By working towards a generally agreed upon definition of the various severity levels, VEs will be better equipped in identifying reasonable occupational alternatives for SSA claimants, while continuing to be valued for their knowledge of labor market conditions and claimant employability.

Severity of Impairment Ratings

The definitions of the severity categories by the SSA are rather broad. The categories of “no evidence of limitation” and “not ratable” appear self-explanatory, but these are seldom of interest to the VE. The categories of “Not Significantly Limited”, “Moderately Limited”, and “Markedly Limited”, however are of issue. The SSA guidelines indicates that a marked limitation may arise when several activities or functions are impaired, or even when only one is impaired, as long as the degree of limitation is such as to interfere seriously with the ability to function independently, appropriately, effectively, and on a sustained basis. (See §§ 404.1520a and 416.920a). According to Morton (2008), any one area considered to be “Markedly Limited” precludes the performance of even unskilled work. This assumes that an individual would need to possess the ability to engage in all 20 work-related activities, and that any one of these activities that was “Markedly Limited” would result in an unemployable claimant. Yet this would appear to be contradicted by the activities themselves. For example, while “the ability to carry out very short and simple instructions” would seem to speak to unskilled work, “the ability to carry out detailed instructions” would seem to rather speak to more skilled activities. Ruling out unskilled work because of a “Markedly Limited” ability to carry out detailed instructions would appear to lack merit. Further, the SSA does not indicate a “magic” number of tasks that the claimant has to be unable to perform in the other categories, but rather the ALJ is to look at the nature and overall degree of interference with function. While an individual may be able to perform simple tasks but requires special supervision or additional rest periods, they may still be found disabled. When impairments are found to be severe as to preclude a return to past or alternative work, an individual is determined to be unable to perform employment.

Challenge to the VE

As an example, if an individual is rated as having “no evidence of limitation in this category” in their ability to maintain attention and concentration for extended periods, then it would be expected that the VE would

in turn opine no limitation on work in regards to this specific mental activity. The challenge presents itself when the claimant has some degree of impairment (“Not Significantly Limited”, “Moderately Limited”, or the most severe, “Markedly Limited”) in this or any other work activity. The VE would presumably first need to identify which of the over 12,000 occupations in the DOT require the specific work-related mental activity (presence or absence of the factor), then determine to what *extent* these occupational titles require the mental activity (degree of presence or absence of the factor). At the same time, they would need to then deduce a functional definition of each of the severity categories on the MRFCA form, and finally conclude whether this severity rating, as they defined it, precludes the claimant from performing any of the occupational titles requiring said work activity. With the likelihood of two VEs drawing the same conclusion through these four steps being minimal, it would be beneficial to understand how other VEs follow this process.

If the 20 work-related activities truly can be connected to work temperaments as identified in the DOT (through the Revised Handbook of Analyzing Jobs) and proposed by Johnston (2010), then the first step can be achieved: the VE could identify which of the over 12,000 occupations require the specific work-related activity. Issues arise at the second step – determining the extent to which each occupation requires the specific work-related activity. Temperaments are not rated in the same manner physical capacities and environmental conditions are. There is no rating of “occasional” working alone, “frequent” attainment of precise set tolerances, or “constant” working under stressful conditions. Temperaments are rated as either present or not present. Yet some ALJs have attempted to define mental activity limitations in the same way physical capacities or environmental conditions are, that is, by time spent performing certain functions with one of four ratings: no ability (none), occasional ability (1/3rd of the day), frequent ability (2/3rd of the day), and constant ability (more than 2/3rd of the day). In *Morale v. Apfel*, (U.S. Court of Appeals No. 99-1938) the non-examining state psychologist found the claimant to be “Moderately Limited” on a variety of work-activities, including but not limited to; the ability to understand and remember detailed instructions, maintain attention and concentration, complete a normal work week or work day without interruption, interact with the general public, and respond appropriately to changes in the work setting. Additionally, the linepsychologist found the claimant to be “Markedly Limited” in his ability to carry out detailed instructions. At the administrative hearing the vocational expert defined “Moderately Limited” to mean the claimant is unable to perform the task up to a third of the time. In *Lembke v. Barnhart* (No. 06-C-306 Western District WI 2007) a

similar approach was referenced, with the courts postulating the term “moderate” to equate to between one-third and two-thirds of the workday, and concluding that a “moderate” limitation on socially appropriate behavior would preclude the performance of even “rote, relatively non-stressful jobs identified by the vocational expert”. While the court did not address the method for defining the severity of limitations, the nature of mental activities do not appear to allow for this type of interpretation – the percentage of the workday criteria. Individuals with physical impairments may be found able to stoop on occasion. This is typically interpreted to mean that this person could stoop up to 1/3 of the day, or in obvious terms “occasionally stoop”. In turn, this would be interpreted by the VE that if a job – hand packager for example – required the person to package materials the individual could successfully stoop to pick up materials off the floor on occasion. If however someone was Markedly Limited in their ability to “ask simple questions or request assistance”, it would not be sensible to conclude that the individual could ask simple questions for a few hours then suddenly lose that ability later in the day as they experienced mental fatigue. Nor would it be logical to assume they would sometimes be capable of asking simple questions but more frequently not be able to perform this activity. It would seem instead to imply that the person would have some degree of difficulty at all times requesting assistance. They might be able to ask for help throughout the day, but not without confusion of when it was appropriate to ask for help, what type of question would clarify their confusion, how to state their question, or perhaps muster the courage to approach someone qualified to provide an answer. As a result, some questions would never go asked. Thus the challenge in the third step is to accurately define each degree of impairment while in the fourth step it would be to assess how this would impact the claimant’s ability to obtain and perform gainful employment.

Having the medical expert complete the narrative portion of the MRFCA to further clarify the checklist may assist both the ALJ and VE. This is often absent however, and the ALJ is left to either render their own interpretation or ask the VE to do the same. An incorrect or incomplete interpretation of a claimant’s psychological or cognitive limitations may lead to appeal (*Steele v. Barnhart* 290 F.3d 936, 942 (7th Cir. 2004)). Recently, ALJs have been instructed to interpret the meaning behind the severity ratings by placing each limitation in context of functional limitations. This absolves the VE and places the onus on the ALJ to correctly make this interpretation. Yet despite this directive, ALJs are still apt to rely on the VE to provide this interpretation. To this end, some general agreement among the expert community would be helpful.

Although consensus does not by itself satisfy the *Daubert* standards, some level of inter-rater reliabil-

ity would serve, at minimum, as a point of reference for the VE testifying in court. This would help guide the expert to conclude whether the level of severity is such to preclude the claimant from performing an individual occupation, as defined by the DOT. A survey of VEs practicing in SSA adjudication is valued as it can help identify the extent to which VEs are aware of definitions offered by the SSA in regards to the severity categories, the clarity of such definitions, the interpretation of these severity categories, and whether there is a “magic number” of work-activities that are perceived to be needed to preclude work. Results can assist VEs in understanding how their opinions differ from their peers, and call attention to the ALJ’s need for increased clarity when outlining mental-cognitive restrictions in hypothetical scenarios.

Current Study

A web-based survey was conducted utilizing subjects drawn from the International Association of Rehabilitation Professionals (IARP) subsection of Social Security Vocational Experts, which at the time contained 242 names, of which five were struck due to providing assistance with the current study, and another 9 were eliminated due to insufficient contact information. The result was 228 potential respondents, all of whom hold contracts with the SSA to provide vocational testimony. Participants who requested a hard copy were mailed one. A total of 46 responses were received, representing 20% of the accessible population. Of these, over half (54%) have performed as a VE for the SSA for more than 9 years, with 80% having served in this role for more than five years. Participants reported their primary source of knowledge of the employability of individuals with mental or cognitive impairments came from coursework at the Masters level (89%), job placement of individuals with such impairments (78%), and vocational evaluation of individuals with such impairments (65%). Past experience in placing individuals with such impairments into gainful employment was cited as the primary basis (91%) for an expert’s opinion of employability, with the Social Security guidelines (46%) as the only other source of guidance to receive significant response. Respondents engaged in a variety of other expert witness settings, including workers compensation, personal injury, divorce, and medical malpractice. Each of the 10 regions defined by the SSA was represented providing external validity across the United States.

Results

Results of the survey are described in Table 1, with a few trends emerging. Approximately half (48%) of respondents were of the opinion that the SSA provides definitions for each of the severity categories, but only 15% of individual respondents found these definitions

to be clear. For unspecified reasons, several experts did not respond.

Next, respondents were asked, in their own words, to define the rating categories of "Not Significantly Limited", "Moderately Limited", and "Markedly Limited". Table 2 reveals that there is a strong consensus that "Not Significantly Limited" allows an individual to continue to perform the work activity unimpeded. A total 26 (56%) of respondents felt that these rating indicating either no limitation (e.g., "no limitation", "does not influence the claimant's abilities") or a minor limitation that would allow continued performance of the work activity (e.g. "slight limitations meaning the person is able to function no less than the general population", "the individual may have problems but they have little to no functional impact"). Another 31% responded that that the person was able to perform the task, without indicating whether there was any limitation at all (e.g., "does not interfere with performance", "person is able to perform task within acceptable terms"). It is noted that a few responses deferred to the frequency definition ("more than 2/3 of the day", "mild or occasional", "not able to do the work on a consistent basis throughout a normal work day").

Responses to the severity rating of "Moderately Limited" were grouped into three broad categories that were equivalent to the descriptors of "poses difficulty but does not prevent task", "difficulty that prevents task but not all work", and the "frequency" category (equal to the rating scale used for physical capacities). There were no responses indicating an absence of limitations as a result of an individual being "Moderately Limited." Approximately half (49%) of the responses reflected the opinion that while the individual may have difficulty with the particular work activity, they would still be able to perform the occupation (e.g., "able to do those tasks...with minimal difficulty", "somewhat limited but the activity would not necessarily be precluded based solely on that limitation",

Table 1
VE Opinion on MRFCA Work-Related Activity Severity Ratings

The SSA provides definitions for each of the severity categories

Yes	22 (48%)
No	14 (30%)
No response	10 (22%)

The SSA definitions for each of the severity categories is clear

Yes	7 (15%)
No	23 (50%)
No response	16 (35%)

"difficult but possible"). Another 16% opined the claimant would not be capable of engaging in employment that would involve the MRFCA work activity in question, but would be capable of performing other gainful employment (e.g. "precludes skilled work and many semiskilled occupations", "may have an impact on competitive work but does not necessarily preclude", "has difficulty with consistent performance of specified cognitive/mental functional task"). The frequency definition becomes much more prevalent at this rating level, with 10 responses speaking to the frequency to which the task can be performed (e.g., "1/3 to 2/3 of the day", "prevents the performance of competitive ability some 50% of the time", "occasionally 1/3 of the time", "only can do this 2/3 of the time"). Additionally, 6 responses fell into a miscellaneous range of responses, which primarily revolved around the VE's inability to find clarity in the category (e.g., "I always ask for the definition from the judge or attorney asking the question. It varies with each person", "no idea what this means vocationally", "too broad to define").

Finally, in regards to the "Markedly Limited" rating category, responses become more varied, or at least more imprecise. For organization, responses were grouped into 4 categories, including "total inability to work", "significant limitations but overall ability to work not identified", "cannot function in this task alone", and "frequency". Results reflect a fairly even spread across these categories. The category of "Markedly Limited" introduced the first appearance of opinions denoting a total inability to work, with a 29% response rate (e.g., "limits that preclude working", "eliminate work activity in gainful employment"). An additional 27% of respondents indicated that this results in significant limitations, but they did not specify to what extent employment would be impaired (e.g., "significantly limited", "severe problem", "significant limitation which could affect the ability to perform work"). Others (20%) found that this limitation would preclude only performance of the particular work activity (e.g., "a severe limitation that would preclude useful functioning in that area", "unable to perform the task on a competitive basis"). Finally, the frequency definition was selected by 16% (e.g., "able to perform the activity only on an occasional basis", "1/3-1/2 of the day").

Discussion

When asked to assess an individuals' employability in light of mental or cognitive limitations, VE's are typically offered a hypothetical utilizing the Mental Residual Functional Capacity Form. This form, containing 20 work-related activities, helps guide the ALJ in identifying which mental-cognitive work activities an individual can perform, and to what extent the individual can perform it. Each category is rated on a Likert scale

Table 2

VE interpretation of How Each Severity Level Impacts on Particular Cognitive or Mental Ability to do Work

How do you define “Not Significantly Limited” as it pertains to limitations on a particular cognitive or mental activity to do work?

No limitations	16 (36%)
Minor limitation but able to perform work activity	10 (22%)
Person is able to perform task (degree of limitation not stated)	14 (31%)
Other	3 (6%)
No response	3 (6%)

How do you define “Moderately Limited” as it pertains to limitations on a particular cognitive or mental activity to do work?

Poses difficulty but does not prevent task	22 (49%)
Difficulty that prevents task but not all work	7 (16%)
Frequency	10 (22%)
Other	7 (16%)

How do you define “Markedly Limited” as it pertains to limitations on a particular cognitive or mental activity to do work?

Total inability to work	13(29%)
Significant limitations/ overall ability to work not identified	12 (27%)
Cannot function in this task alone	9 (20%)
Frequency	7 (16%)
Other	5 (12%)

Note. Due to rounding not all totals add up to 100%

of severity, including the categories of “Not Significantly Limited”, “Moderately Limited”, and “Markedly Limited” (two additional categories are of little concern to the VE). Results of a previous study by Johnston (2010) attempted to connect each of the 20 work-related activities to temperaments as identified in the Revised Handbook for Analyzing Jobs (RHAI). This connection would allow the VE to more empirically eliminate or defend proposed DOT codes. The challenge then becomes what to do when a gradation of restriction is assigned. Temperaments differ from physical capacities and environmental conditions in that they are not rated by frequency or level of restriction. Instead, temperaments are rated as either present or not present, seemingly resulting in the MRFCA and RHAI being incompatible in this regard. Further, there does not appear to be any vocationally applicable definitions of these severity ratings to be found in the Social Security Administration regulations. This leaves the VE to first attempt to connect the work-activity to a temperament, identify which jobs in the DOT contain these temperaments, offer an interpretation of the level of severity, and then determine whether the claimant could perform a particular work-activity and

subsequently perform the job itself, all with less than objective criteria to do so.

The current study surveyed practicing VEs to ascertain how they perceive severity ratings impact employability. Problematic is that a low response rate was obtained (20% of accessible population, for a total of 46 respondents). Still, this provides a starting point from which further exploration of the topic can proceed. Respondents were first asked whether the SSA actually provides definitions for each of the severity categories. Just under half of the respondents believe the SSA provides these definitions, with fewer believing that these definitions are clearly stated. Indeed, the SSA does provide some direction, although whether these can be considered true definitions or instead loose guidelines is questionable. The treating physician is directed to choose “Not Significantly Limited” when the effects of the mental disorder do not prevent the individual from consistently and usefully performing the activity; “Moderately Limited” when the evidence supports the conclusion that the individual’s capacity to perform the activity is impaired; and “Markedly Limited,” when the evidence supports the conclusion that the individual cannot usefully perform or sustain the activity (DI24510.063). The defini-

tion for "Moderately Limited" is particularly vexing, given that the degree of impairment is not specified, whereas the other two categories seem fairly straightforward (rarely does an ALJ even include a hypothetical where the VE is directed to consider a particular work-related activity "Not Significantly Limited"). Only 15% of respondents found clarity in the definitions for severity ratings. Therefore, the VE may be left to their own to define and interpret degree of limitation. Inconsistency in this regard is apparent based on responses to defining severity levels.

Three severity levels were examined in the current study. For the category of "Not Significantly Limited" there appears to be relative agreement among VEs. Approximately 90% of respondents defined this as indicating either no limitations, minor limitations not impacting work activity, or simply stating the person could perform the task without specifying any degree of limitation. A hypothetical identifying a particular work-related activity as being "Not Significantly Limited" would therefore appear to have no impact, or in vocational terms, no reduction, in the claimant's overall employability. Interestingly, a small minority (6%) indicated that this category resulted in some limitation, and did so by employing the frequency definition (e.g., up to 1/3 of the day, occasional) which would become a more frequent response choice in ensuing severity categories.

The "Moderately Limited" and "Markedly Limited" categories produced the most varied responses among VEs. The "Moderately Limited" category saw splits in opinions ranging from those asserting the claimant could continue with that particular work-related activity, those that found difficulty preventing performance of the task but not other work, and those that found the claimant would be able to perform the task for a particular time period (the frequency definition). The "Markedly Limited" category found the introduction of opinions that the individual would be totally incapacitated from work, while others indicated an elimination of those work activities requiring the particular work activity. In these categories, there is much inconsistency among VEs, suggesting that the same case, presented in front of the same ALJ but with two different VEs, may result in two very different outcomes. Within this study alone there is no way to tell which response is "most correct", but it does highlight the difficulty VEs have in assigning impact to employability.

To clarify the impact of limitations, it would be helpful for the SSA to provide clearer definitions of the severity levels. In the absence of this, the ALJ or VE is left to provide clarity on what "Not Significantly", "Moderately", and "Markedly" limited translates to in terms of vocationally functional limitations. Previously, a wide range of interpretations were provided by ALJ's, ranging from attempts to translate into functional

limitations, down to retorts along the lines of "you are the vocational expert, you tell me what it means". Likewise, the current study demonstrates discrepancies among VEs in providing these definitions.

Finally, defining mental-cognitive impairments by use of the frequency standard does not appear viable. Firstly, whether or not the MRFCA work activities can be connected to the RHAJ temperaments, it does not seem to logically follow that an individual can perform a mental-cognitive work activity "occasionally" in the same manner in which someone can bend "occasionally". Secondly, the variation among those utilizing this method of definition is extreme. Between severity levels there was overlap on the frequency definition. Those responding in this manner defined "Not Significantly Limited" as equating to an "occasional" ability to perform the activity. Yet "occasional" was also cited as the definition for the category "Moderately Limited". This would then appear to indicate that the two severity categories had the exact same impact on employability. Even within severity categories there was inconsistency among those using the frequency definition. In the "Moderately Limited" category, responses included limitations from "1/3 to 2/3 of the day", "some 50% of the time", "1/3 of the time", and "2/3 of the time". With such little consensus among VEs, the method of defining severity levels by frequency should be eliminated all together.

According to Social Security Rulings (DI 25020.010), "The basic mental demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting. A substantial loss of ability to meet any of these basic work-related activities would severely limit the potential occupational base. This, in turn, would justify a finding of disability because even favorable age, education, or work experience will not offset such a severely limited occupational base." Responses to this survey however indicate that some VEs, even if presented with a hypothetical which includes a "Markedly Limited" restriction on any of these work-activities, may still find a claimant to be employable.

The problem may be alleviated in the future based on the decision reached in *Stewart vs. Astrue* (561F3rd679), in which the court ruled that the "ALJ must articulate in a rational manner the reasons for his assessment of a claimant's residual functional capacity . . . therefore the ALJ himself must connect the evidence to the conclusion through an 'accurate and logical bridge'". Indeed, some ALJ's have been noted to identify severity of limitations and in turn translate their interpretation of what these limitations mean. However this still may not be enough. In *Craft v. Astrue* (539 F.3d 668, 677-78. 7th Cir. 2008) the court

ruled that limiting the hypothetical to simple, unskilled work based on a claimant's difficulty with memory, concentration, or mood swings was not by itself sufficient.

On the part of the VE, these mental-cognitive limitations do not stand alone. Rather, a consideration of age, education, and work skills influence how each work-activity factors into overall ability. Still, absent clarity on how to functionally define the limitation, inconsistencies are certain to continue. If ALJs are directed to now provide an explanation of how restrictions translate to vocational functionality, future research will need to determine how well standardized these interpretations are among the different triers of fact. Future research should also focus on the "Moderately Limited" category, which seems to have the most discrepancy among response. Finally, real world application, possibly achievable through job analysis of commonly provided DOT codes in SSA hearings, should be undertaken to determine to what extent limitations on the 20 work-related activities actually have on employment.

If some consensus can be established in the courts, consistency might be achieved among VE opinion and disability determination. This may be in part achieved by drawing a connection between the work-activities as found on the MRFCA form and the temperaments identified in the RHAI (Johnston 2010), and by subsequently establishing standardized definitions for the severity ratings that can be attached to DOT codes. The VEs will be better able to provide reliable opinions and continue to be a necessary part of the hearing process given their understanding of labor market trends and opinions of the validity of the DOT.

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