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The Impact of Nonexertional Limitations on Loss of Earning Capacity Evaluation in the Litigated Case

David E. Stewart[1], George Cyphers[2], and Daniel V. Turner[1]

[1]Ascendant Consulting, Inc., [2]Independent Consultant

Vocational experts have appeared and testified in the courts in the United States for the better part of half a century. The systematic process used by vocational experts to arrive at their conclusions has been well-documented, and many are comfortable dealing with questions requiring them translate a disabled person's physical limitations into reduced labor market access or loss of earning capacity. The same is not true when it comes to nonexertional limitations. This article speaks to the need for addressing the manner in which a vocational expert may deal with nonexertional limitations in a logical and defensible way.

Keywords: Vocational rehabilitation; transferable skills; expert testimony; nonexertional limitations; earning capacity; labor market access; vocational methodology; clinical evidence; forensic evidence; individualized assessment.

This article speaks primarily to vocational rehabilitation experts who provide opinions for litigated cases. By litigated cases, we refer to matters in the Federal District Courts, Superior Court, and States' Circuit Court. The target audience also could involve those who practice state workers' compensation, but it does not involve those practicing in the area of Social Security Disability. A vocational rehabilitation expert whose practice includes case assignments in jurisdictions such as those listed above will undoubtedly be requested to do an analysis of a matter which pivots on a construct called nonexertional limitations. It is part of the vocational expert's territory, and it is a territory containing risks. The vocational expert whose testimony has been limited by a motion in limine, or whose testimony has been barred by a trial court, is liable to bear the burden of explaining that exclusion for the remainder of his or her career. This is a rather broad topic. Yet, we feel it has not been fully addressed up to this point. We do not presume to cover every aspect of nonexertional limitations which may be encountered by the vocational expert, but we feel it is an area which bears investigation.

Self-Preservation for the Vocational Expert

Nonexertional limitations were first defined by the Social Security Administration. Social Security is the largest disability determination agency in the world; as such, it is the source from which much of the vocational expert's process flows (Traver & Ferrari, 2020). Section (404.1569 a) of the Code of Federal Regulations (CFR) opens with a general statement addressed to disability applicants: "Your impairments and related symptoms such as pain, may cause limitations of function or restrictions which limit your ability to meet certain demands of jobs. These limitations may be exertional, nonexertional, or a combination of both" (CFR 404.1569). The document continues in subpart "b" by defining exertional limitations: "When the limitations and restrictions imposed by your impairment(s) . . . affect only the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing and pulling), we consider that you have only exertional limitations" (CFR 404.1569). Subsection C next speaks to nonexertional limitations (1) "When the limitations and restrictions imposed by

your impairment(s) and related symptoms, such as pain, affect your ability to meet the demands of jobs *other than the strength demands*, we consider that you have only nonexertional limitations or restrictions" (CFR 404.1569). The CFR goes on to delineate a nonexertional taxonomy:

> (i) difficulty functioning because you are nervous, anxious, or depressed; (ii) difficulty maintaining attention or concentrating; (iii) difficulty understanding or remembering detailed instructions; (iv) difficulty in seeing or hearing; (v) difficulty tolerating some physical features of certain work settings, for example dust/fumes . . ."(CFR 404.1569).

Interestingly, the CFR's taxonomy includes a sixth category: "(vi) difficulty performing manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching" (CFR 404.1569). This article is concerned with *the first five subcategories of the taxonomy* (Items i through v). However, since the activities delineated by Item (vi) are addressed by *The Revised Handbook for Analyzing Jobs (RHAJ)*, we feel it unnecessary to address them because they have objective numeric ratings/rankings (USDOL 1991). The main purpose of this article is to address the difficulties encountered by vocational rehabilitation experts tasked with analyzing a matter involving symptoms such as pain, which either have no objective measurement/ranking, or do not readily lend themselves to such.

There are three fundamental areas in which a vocational expert must be conversant: vocational theory; process or methodology; and, the requirements of the courts in which the vocational expert will be appearing. The area focused on in this paper is methodology and where it applies to matters with nonexertional limitations. According to Beveridge et al. (2020), a significant percentage of vocational experts indicated they are aware of the need to train themselves to use proper methodology to avoid having their testimony stricken. Shahnasarian (2011) asserts that the entire reason for having a vocational expert testify is to help the court understand technical information beyond the comprehension of lay people, and, this cannot be accomplished without the proper use of accepted methodology. For years, vocational experts have utilized a method for systematically analyzing exertional limitations – see below. However, the same is not true for nonexertional limitations. The following are three examples of situations which may confront a vocational expert in relation to nonexertional limitations. This not an exhaustive set; however, these are three examples of nonexertional case scenarios frequently encountered by vocational experts.

Areas of Risk for the Vocational Expert

Below we address three common categories of nonexertional difficulty for the vocational expert. The three selected categories are concentration, pain, and prescription medications.

Attention and Concentration

Even though the CFR acknowledges that inability to concentrate may hamper an evaluee's ability to work and hold a job, it presents a dilemma for vocational experts (CFR 404.1569). Numerous factors including pain may interfere with an evaluee's ability to attend to or concentrate on a task. While an evaluee's report of poor concentration may sound plausible, most forensic vocational experts do not possess the qualifications to use standardized tests powerful enough to scientifically measure the evaluee's attention or concentration span. No matter how tempting it may be in a particular litigated matter, a vocational expert who merely assumes that these impairments are barring the evaluee from employment without substantiation by a properly qualified clinician, such as neuropsychologist, assumes the risk to be excluded either on the basis of lack of foundation or for testifying outside of one's scope of practice.

Chronic Pain

Certainly, chronic pain can be a terrible experience for the evaluee. Its presence also constitutes a dilemma for many forensic vocational experts. First, pain has its own sort of compelling logic; that is, if

an individual was severely injured through a catastrophic event, it is not surprising to hear there is residual pain. However, the vocational expert must be informed by function rather than diagnosis. The effect of residual pain frequently is described as mentally fatiguing, dominating the thought life, and sapping the person's energy. A key distinction which the vocational expert in a litigated case must realize is no one is there to fulfill the function of a Social Security Administrative Law Judge. The Social Security administrative judge bears the responsibility to "carefully consider the individual's statements about (pain) symptoms . . . ," (SSR 16-3P superseding SSR 96-7P); but, the vocational expert in a litigated case must operate on the assumption that it is his/her responsibility alone to give clear justification when making the evaluee's pain a factor in the vocational analysis.

Pain is relatable to the triers of fact because everyone has experienced pain to one degree or another. However, pain is subjective and sometimes elusive and is especially difficult to measure. Further, the vocational expert has no means of discerning how long and to what degree an evaluee's pain is going to endure. For that reason, litigated matters in which the evaluee's pain was a salient feature have proved a trap for more than one vocational expert. Appropriate methods for the forensic vocational expert to address chronic residual pain are discussed later.

Prescription Medications

Prescription medication is technically not a nonexertional limitation. Yet, it is closely related, and it has proven challenging for more than one vocational expert. It is routine during the initial interview for the vocational expert to inquire about medications, and it is not unusual to learn that the evaluee is taking one or more prescription medications. Some prescription medications have side effects such as drowsiness which could conceivably interfere with the performance of work activities. [These can be found within the categories of sedatives, muscle relaxants, and opioid pain medications]. It may be very tempting for the vocational expert to assume that the prescription medicine causes the evaluee to experience side-effects that preclude working, but this poses significant risk. Making this assumption exposes the vocational expert to the criticism of practicing medicine or pharmacology without a license. Worse, it can lead to an effort by opposing counsel to exclude the vocational expert's testimony entirely.

Methodology

The vocational expert dealing with nonexertional impairments has a far better chance of surviving when using established methodology. While there are various approaches that have been published, Field and Dunn (2014) recognize there is one prevalent vocational rehabilitation component common to the majority, the Transferability of Skills Analysis (TSA). The TSA originated from the early work of Sidney Fine in 1955 and was extensively developed in the work done at the University of Minnesota in the 1960's giving rise to the Minnesota Theory of Work Adjustment (Dawis & Lofquis, 1984). It is the one essential cog which the well-prepared vocational expert should not ignore. Most loss-of-earning-capacity analyses in the past 40 years have the TSA as a component. The TSA is based upon the foundation of quantitative data from the U.S. Department of Labor's *Dictionary of Occupational Titles* (1991) (*DOT*) and the *RHAJ*. These resources contain the only operational definitions of the traits of workers performing occupations in the national economy. These definitions provide a lexicon for communication between clinicians and are the basis for the conduct of a transferable analysis. TSA is well recognized in both Social Security practice and non-Social Security practice, and it has direct application in the practice of vocational rehabilitation. TSA extends beyond the fundamental question of whether an evaluee has any transferable skills; it is a systematic means to compare the evaluee's characteristics as a worker to the characteristics of occupations as defined in the *DOT* and the *RHAJ*. And the TSA provides a crosswalk for considering occupations related to the evaluee's prior relevant work. By permitting the expert to isolate on an occupation, TSA also provides a logical path to post-event earning capacity.

If anything is the traditional generally accepted methodology for vocational experts, it is the TSA. And nowhere is this more essential than in the context of nonexertional limitations. While the vocational expert may utilize a combination of practice models for a litigated case (Barros-Bailey, 2018), he/she should have a clear basis if they are electing to omit the TSA from their analysis. Stated in another way, the nonexertional case is a poor place for the vocational expert to try using an obscure methodology. The temptation to forgo methodology considerations in a litigated matter can be considerable for the vocational expert. Referral sources often have a vested interest and may place some pressure on the expert to generate an all-or-nothing work product. Instead of yielding to direct or indirect pressure to eschew the accepted peer-reviewed methodology, we offer some thoughts for the vocational expert's consideration when tasked with analyzing a case which has nonexertional limitations.

Court Decisions

A now well-known federal court ruling cited in previous studies of admissible vocational expert testimony is Kinnaman v. Ford Motor Company, 2000 (Field & Choppa, 2006). This case involved a forensic vocational expert who used a computerized job matching software program in performing the TSA. The vocational expert, when questioned, was unable to explain the reliability of the computerized job matching software program, or to articulate that the method was generally used by other experts in her field. Today we understand there is nothing out of the ordinary about a vocational expert using a computerized job matching software program. But it was the vocational expert's inability to explain the methodology that proved disastrous. Her expert testimony was excluded by the court.

Recent rulings have shown a similar trend. In the 2017 case of Smith v. Union Pacific (Case No. 11-cv-986), United States District Court for the Northern District of Illinois, Eastern division, a vocational expert was retained by plaintiffs to testify to an injured railroad worker's fitness to return to work and regarding medical expenses. The court, in its opinion, cited the case of *Kumho Tire*, arguing that an expert's testimony may not be based upon "subjective belief or unsupported speculation" (p.3). The vocational expert's testimony was excluded because he offered opinions outside of his scope of expertise. The court ruled that he failed to "substantiate his opinion" electing rather to "simply provide the ultimate conclusion without analysis." The opinion eliminating this vocational expert's testimony further stated that he erred by speculating as to "his subjective and uninvestigated beliefs regarding plaintiff's stress levels and tolerance." In addition, the Vocational Expert's mathematical calculations were excluded because he "did not involve the application of specialized knowledge to the facts of the case."

In the case of Henry Luwisch vs. American Marine Corporation (2018), defendants challenged the vocational expert's ability to testify regarding Luwisch's need for medical treatment, his earning capacity, and his work life expectancy. The vocational expert had made inferences in his narrative report that went beyond a simple description of the plaintiff's medical treatment. The court agreed with the defendants. The vocational expert was prevented from testifying as to Luwisch's medical condition, medical causation, prognosis, or history of treatment. Further, he was not allowed to testify concerning diminished work life expectancy because he had done no more than assign the plaintiff to a catch-all category of a "disabled individual." In this case the VE failed to apply specialized knowledge to the facts.

Also pertinent is a recent Tennessee Supreme Court ruling in Thompson vs. UPS (2016). It originated as a Tennessee Worker's Compensation case in which the plaintiff underwent spinal surgery as the result of an on-job-injury. Following his spinal surgery, the plaintiff complained of chronic residual pain. Mr. Thompson began taking OxyContin, reporting it took the edge off his pain. (Tennessee is a vocational disability rating state for Workers' Compensation). A vocational expert retained by the plaintiff gave an opinion in which Mr. Thompson had a 41% reduction of access to the labor market and a 70 percent loss of earning capacity. However, the plaintiff's vocational expert testified further that he had also added consideration for the fact Mr. Thompson was taking narcotic medication, and he had assigned weight to Mr. Thompson's pain. Further, he considered Mr. Thompson's four-year absence from the labor market, and he considered Mr. Thompson's appearance. Based upon weight-

ing the pain and assigning weight to the other three variables, the plaintiff's expert decided it tipped the scales and yielded a 100 percent vocational disability rating. At trial the defendants elicited testimony from a second vocational expert, who explained why she did not feel it appropriate to assign weight to Mr. Thompson's pain, choosing instead a more conservative approach. The trial court found no evidentiary basis for the testimony of the plaintiff's vocational expert, and ruled Mr. Thompson had only a 44 percent disability. Plaintiffs appealed the decision to the Tennessee Supreme Court which affirmed the decision of the trial court.

Recommendations for Minimizing Risk

Attention and Concentration

The first dilemma posited above had an evaluee reporting diminished ability to concentrate. It is important to remember this is a hypothetical concern, unless the vocational expert already possesses clear evidence in the records to supporting it. The vocational expert's first step should be a careful study of the report of the clinical psychologist or the neuropsychologist. A second step would be getting the psychologist involved to help translate the evaluee's diminished concentration into a framework where vocational analytical tools can be employed. The vocational expert must be prepared to take the added step of seeking input from the medical professional or clinical psychologist because it is function, not diagnosis, that informs the vocational expert's analysis. In this particular matter, if the vocational expert learns from the psychologist that the evaluee cannot concentrate on a task more than 20 minutes, he or she has a finite unit of time from which to start. The vocational expert may then wish to conduct a labor market sample. He or she may wish to eliminate occupations where a worker is required to meet precise limits and tolerances. Another step might be eliminating occupations higher than specific vocational preparation four, but, the point is that by taking the additional step of seeking input from the appropriate clinician, the vocational expert has gained access to a quantified piece of data and is thus able to operate within the standard accepted methodology.

Chronic Pain

What can the expert do if the evaluee reports to be significantly impaired by chronic pain? First, it is important to complete a systematic interview with the evaluee. Listen carefully and ask follow-up questions to get clarification about the effects of the evaluee's pain. The expert should inquire about the manner in which the chronic pain has changed the evaluee's ability to engage in necessary and discretionary activities such as personal care, participation in social activities, and how it has changed the evaluee's ability to participate in pastimes they enjoy such as hobbies. Of course, if the evaluee is still working, he should be asked about difficulties in work functions, difficulties in sustaining work activities over a full day and on successive days as well as the impact of needing to call in sick. Then the vocational expert can begin to form a hypothesis about how Physical Demands, Environments, and Temperaments might be affected by the evaluee's post-event condition. Again, everything must relate back to *DOT* and the *RHAJ* if the vocational expert wishes to strongly defend his or her conclusions. Armed with this information, the forensic vocational expert can talk with the treating physician, or with a therapist who performed the functional capacity evaluation, or with a neuropsychologist who has administered a test battery. But, again, the forensic vocational expert must orient that conversation around the authoritative sources: either inquire about physical functioning (e.g., standing) with the medical doctor; or inquire about *RHAJ* criteria related to mental functioning (e.g., precise tolerances, dealing with people, performing under stress, and making judgments) with the neuropsychologist.

If the treating physician advises that the evaluee cannot engage in prolonged standing, you have a starting point. This could indicate the evaluee is limited to sedentary work. If the neuropsychologist tells you the person is no longer capable of attaining precise set limits, tolerances, and standards, you again have a starting point. This may indicate the need to eliminate that temperament from the

evaluee's post-event worker profile. The well-prepared forensic vocational expert, when afforded the opportunity, should elicit as much detail from the medical expert as possible to solidify the basis for the vocational opinion. It is quite an accomplishment when well executed. To use a baseball analogy, the forensic vocational expert must frequently be prepared to play "small ball," rather than swing for a homerun every time. This will help achieve credibility and generate a report product which can be respected.

Prescription Medication

The third dilemma was prescription medications. Once again, the vocational expert must have a medical foundation. The vocational expert should query the physician because he or she recognizes that a vocational expert cannot make a medical decision/conclusion. The expert should inquire specifically about the medication side effects whether the physician feels it would be safe for the evaluee to operate power tools such as presses or saws, to be involved working in an environment with moving machinery, to safely drive a motor vehicle, or to engage in higher order cognitive activities involving making calculations or forming judgments. It is important to learn of the projected duration of the prescription and the physician's expectation of its effectiveness. If the evaluee is going to be taking the prescription pain medication less than 30 days, it is not wise for the vocational expert to attempt to draw any conclusion about its long-term effect. Armed with documented feedback from the physician, the vocational expert may choose to eliminate categories of jobs post-event that would require identified functional impairments connected to the side effects of medication.

Conclusion

We have given examples of the manner in which a vocational expert should identify gaps and missing information. We have also offered an illustration of ways the vocational expert may resolve these gaps by seeking appropriate guidance from clinical professionals. By doing so, the vocational expert is operating squarely within his scope of practice and using proper methodology. This helps to arrive at a defensible conclusion, and ultimately can contribute to a resolution of the litigated matter. Addressing a matter in which the evaluee's limitations are nonexertional has historically been a risky area as seen by the court cases cited. It is a challenging area of practice for the vocational expert. The scenarios presented are representative but not exhaustive. Our suggestions of actions the vocational expert could take are just a starting point. Much will vary according to the individual case. There are a variety of steps that can be taken to factor nonexertional impairments into a vocational assessment. Our objective is to counsel vocational experts against assuming too broadly, and to seek as much clinical corroboration for their professional judgments as possible. Some recommendations are made; however, this is an area that needs additional research and publication. We strongly feel this area must be further addressed with our colleagues. Additional research should be directed into means to represent various nonexertional impairments within the framework of the *RHAJ* operational definitions of Worker Traits. As this article is being written, we recognize the U.S. Department of Labor is in the process of gathering and reporting information for the Occupational Requirements Survey (ORS) which is in line to replace the ratings of the *DOT* and *RHAJ* (https://www.bls.gov/ors/). Nevertheless, it is virtually certain the vocational expert's challenge of dealing with nonexertional limitations is going to endure.

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Author Notes

David E. Stewart is the founder and president of Ascendant Consulting, Inc. He holds a MA degree in rehabilitation counseling from the University of Alabama. Mr. Stewart has more than 30 years' experience serving as a vocational expert in matters of lost earning capacity. He has been accepted and has testified as a vocational expert in multiple Federal and state jurisdictions. He has served two terms as president of the Mississippi chapter of the International Association of Rehabilitation Professionals (IARP). Mr. Stewart is also a Certified Life Care Planner (CLCP).

George Cyphers is an independent case consultant. He holds a MEd in Rehabilitation Counseling from Kent State University. He is now retired from 46-years' practice. He formerly was a Licensed Professional Counselor (Ohio), a CRC, CDMS and a member of IARP, NRA/NRCA, and ARCA. As a forensic expert, he prepared opinion reports in 14 states, multiple Federal and state jurisdictions in matters involving lost earning capacity, and cost of future care. Mr. Cyphers' experience includes working in the public, private non-profit, and proprietary rehabilitation sectors as well as teaching in the Kent State Rehabilitation Counselor Education program. He frequently presented at local, state, and national chapters of rehabilitation and allied professional organizations with subjects ranging from clinical practice and professional ethics to medical/legal applications of rehabilitation philosophy and principals.

Daniel V. Turner has been employed as a forensic vocational rehabilitation counselor at Ascendant Consulting, Inc, since 2011. Mr. Turner provides vocational expert testimony in Social Security Office of Hearing Operations (OHO) hearings and performs contract work for the U. S. Department of Labor's Office of Worker's Compensation. Mr. Turner also provides vocational rehabilitation assessments for workers compensation cases in Mississippi, Tennessee, and Alabama.