Vocational Expert Testimony at Social Security Disability Hearings – Information for Claimants

In a previous article, I drafted a very brief primer on what a Claimant should expect on the day of his Social Security Disability Hearing. One aspect of many hearings that I did not develop to a great degree was the interaction with the Vocational Expert (VE). The purpose of this article is not only to explain the presence of the VE, but also perhaps to provide some direction to Claimants who will be encountering a VE at hearing. As a practitioner, it is important for me to note that this is a very sophisticated area of the Social Security Hearing process, and this note should not be viewed as a definitive explanation. It is a superficial overview with some background about what happens at hearing, and some general wisdom about how to interact with the ALJ and VE in ways that are appropriate and helpful. Simply put, this is written with a mentality of "something is better than nothing", as opposed to being an exhaustive treatise on the subject of vocational testimony.

First off, the VE should not be viewed as an enemy. They may not be providing testimony that will be helpful to a Claimant's case, but they are not automatically there to "put you back to work". In fact, by asking well-targeted questions of the VE, a Claimant can improve his chances at success. The purpose of the VE at hearings is to assist the Administrative Law Judge (ALJ) in determining whether or not there are a "significant number" of jobs that a Claimant can perform, given that Claimant's Age, Education, Previous Work Experience, and Residual Functional Capacity. They also opine on whether the Claimant cannot return to his past relevant work as he performed it, or return to the job as it is regularly performed. VEs may be called to discuss transferability of skills from past relevant work to future work as well.

The ALJ most often will open discussion with the VE once the Claimant has been questioned and given an opportunity to testify. Often the discussion that occurs first will be the ALJ questioning the VE about traits of the Claimant's past relevant work, both from a perspective of how the work is generally performed, and how the work was performed as the Claimant described.

The framework used when providing testimony about jobs is The Dictionary of Occupational Titles (DOT), Fourth Edition, last revised in 1991. An online version of this text may be found at http://www.oalj.dol.gov/libdot.htm. It would be this attorney's recommendation that a Claimant facing hearing view his case file and see if any of the Vocational Reports that were submitted prior to hearing include assessments of his past relevant work. If so, it would be advisable to find this job title and have the scores and descriptions readily available. A job title in this text includes the name of the job and it's assigned ID, a description of the duties that they worker would be expected to perform, and then a series of values that look like this: *GOE: 02.04.01 STRENGTH: L GED: R4 M4 L3 SVP: 5 DLU: 77*. Explanations of each of these may be found at the website above, but pay particular note to SVP or Specific Vocational Preparation, which classifies the level of skill it takes to perform a job, as well as the training needed to work independently.

The VE will provide information about the Claimant's past relevant work as the job is generally performed (straight from the DOT as applicable), and then will modify the DOT specific

definition based on testimony given by the Claimant that might cause the ratings to change. Additional information is usually sought regarding what specific abilities and demands are made by a particular job, including demands like kneeling, stooping, fingering, lifting, walking scaffolds, being hot, cold, etc. By asking these questions, the ALJ is creating a baseline from which to analyze the Claimant's ability to further work. It is important that once the Claimant has the ability to ask question of the VE that, unless the information is already volunteered, that the VE be expected to produce the descriptor values (SVP etc.) as shown above. This forces accountability on the part of the VE, and also can be used to verify the level of experience of the VE at making such determinations. For cases where the VE modifies the ratings of a job from what are shown in the DOT, a number of questions are appropriate. Some questions to ask might include (but certainly should not be limited to):

1. What changes exist between your description and the DOT definition?

2. What evidence led you to change the ratings?

3. What experience do you have that provides this knowledge?

4. When did this experience take place? For how long?

It is important here to note that taking an argumentative tone with the VE will not likely be helpful to ones case. These questions are relevant, but should never be asked from a position of arrogance or with an eye toward creating a Perry Mason "Aha!" moment. Please know that most evidence can be reasonable viewed in lights both favorable and unfavorable to the Claimant, and a sympathetic VE is a powerful ally in the hearing room.

The next set of questions between the ALJ and VE typically center on a hypothetical claimant with various health restrictions. Judges will often pose 2-3 hypothetical cases to VEs, which often range from a Claimant who is barely affected to a Claimant who is profoundly affected with health issues. The hypothetical cases will bear features of the Claimant's illness including symptoms, physician imposed restrictions, diminished physical and mental capacity, and will even consider breaks that are required.

It is with these hypothetical cases that a motivated Claimant can provide strong evidence in support of their case. When the judge asks the VE about the various scenarios, it is important to write down all of the restrictions separately, so that one can refer back to "Scenario 1, 2 or 3" as the case may require. Usually one or two of the scenarios will establish that the hypothetical Claimant would not be capable of work. Those sample cases do not require as much scrutiny.

The hypothetical cases that require the most attention are those hypothetical scenarios that have the sufferer of the described symptoms and limitations returning to work. To create a scenario where the last hypothetical Claimant could not return to work in any job should then be the goal. As such, the questions that should be asked should play with this hypothetical scenario, rather than the Claimant's own case. Here are some examples of questions, both good and bad.

LESS HELPFUL QUESTIONS –

1. If I am on painkillers how can I get to work?
2. If I have anxiety attacks whenever I encounter someone, how would I be able to work?
3. I can't sit for more the 10 minutes without a break? Do you think that the factory would let me move?
4. I have to go to the Doctor at least two times a month, often unscheduled, what employer would deal with that?

HELPFUL QUESTIONS –

1. If you add the effects of narcotic painkillers, which include sleepiness and dizziness to Scenario 1, would the hypothetical Claimant be able to return to his past relevant work or would there be other work that he could do?
2. If the hypothetical Claimant in scenario 1 was on the heart medicine Lasix, which causes the need for bathroom breaks once per hour, would he be able to return to his past relevant work or would there be other work that he could do?
3. You stated earlier that the hypothetical Claimant in Scenario 1 would be able to alternate sitting and standing. Would this alternating be at the discretion of the hypothetical Claimant? Would the Claimant's need to make this determination affect his ability to work?
4. Would a hypothetical employee who is reasonably expected to require 2-3 days off from work per month for physician appointments be able to maintain employment?

As one can see from the sample questions, there is no "master set" of questions that will automatically unlock favorable testimony from the VE. The best advice that a Claimant should follow is to be readily able to quickly identify features of their illness and symptoms of their medicine that might impact their ability to work or maintain employment. They should further be able to craft constructive questions around these features that will draw hypothetical scenarios which feature a Claimant that is unable to work. Issues such as absences, incontinence, short attention span, effects from prescriptions all will bear on employability, and it is the job of the Claimant to bring these to light.

It is important for readers of this note to know that this subject is significantly more sophisticated than the highlights struck herein. Erosion of the occupational base, skill transferability, and residual functional capacity's effect on the ability to work are but a few of the additional issues that may impact a Claimant's case when dealing with the testimony of the VE. This note is a superficial view and was not designed to be an exhaustive exploration of these issues, but rather a small note on how to properly interact with the VE and ALJ regarding extremely important elements of a case.

For more information about this article, or to discuss your case with an attorney, contact Thomas O'Brien at Feiler & Associates.