

HOW TO MAKE YOUR GOOD CASE BETTER <i>PRIOR TO THE ALJ HEARING</i> –	Prepared by Attorney Carol Avard, Avard Law Offices, P.A. P. O. Box 101110, Cape Coral, FL 33910 239.945.0808 T 239.945.3332 F	<a href="http://www.avardlaw.com">www.avardlaw.com</a>
VOCATIONAL FACTORS	PART I	STEP 4 AND STEP 5
TOOLS	LINKS	DETAILS
<ul style="list-style-type: none"> <li>1991 Rev 4<sup>th</sup> Ed., Dictionary of Occupational Titles (DOT)</li> </ul>	<a href="http://www.occupationalinfo.org/contents.html">http://www.occupationalinfo.org/contents.html</a>  <a href="http://www.oalj.dol.gov/libdot.htm">http://www.oalj.dol.gov/libdot.htm</a>	<ul style="list-style-type: none"> <li>Contains approximately 12,741 occupations. Most occupations last updated in 1977. SSA endorsed only the last 1991 update. 22 occupations added to DOT in 1998 as part of the ONET development. These 22 are included in Job Browser, OASYS, &amp; OccuBrowse. (Re DOT: see Critical Review, National Academies Press, <a href="http://www.nap.edu/catalog/92.html">www.nap.edu/catalog/92.html</a>)</li> </ul>
<ul style="list-style-type: none"> <li>Selected Characteristics of Occupations (SCO), last revised 1993</li> </ul>	<a href="http://www.nosscr.org/sco/sco.pdf">http://www.nosscr.org/sco/sco.pdf</a>	<ul style="list-style-type: none"> <li>Contains Worker Characteristics. Used to supplement the DOT with details about strength, 19 different physical demands, including reaching, handling, fingering and feeling, and 14 environmental conditions, including atmospheric conditions, e.g., exposure to dust, fumes, and gases</li> </ul>
<ul style="list-style-type: none"> <li>Revised Handbook for Analyzing Jobs (RHAJ)</li> </ul>	<a href="http://www.skilltran.com/rhaj/">http://www.skilltran.com/rhaj/</a> (EXCERPTS ONLY)  Handbook: <a href="http://www.elliottfitzpatrick.com/">http://www.elliottfitzpatrick.com/</a>	<ul style="list-style-type: none"> <li>Elliott &amp; Fitzpatrick, 800 843 4977, 1125 Cedar Shoals Dr., Athens, GA 30605. \$18.95</li> <li>RHAJ was used by job analysts to write job and occupational descriptions and to rate worker characteristic values in the 1991 DOT</li> </ul>
<ul style="list-style-type: none"> <li>The Transitional Classification of Jobs (COJ)(6<sup>th</sup> Ed), Field, J. &amp; Field, T</li> </ul>	<a href="http://www.elliottfitzpatrick.com/">http://www.elliottfitzpatrick.com/</a>	<ul style="list-style-type: none"> <li>Elliott &amp; Fitzpatrick, 800 843 4977, 1125 Cedar Shoals Dr., Athens, GA 30605. \$79.95</li> <li>Step by Step guide on how to do a transferable skills analysis.</li> </ul>
<ul style="list-style-type: none"> <li>Occupational Information Network (ONET)</li> </ul>	<a href="http://www.onetonline.org/">http://www.onetonline.org/</a>	<ul style="list-style-type: none"> <li>The DOL/ETA O*NET database relies on the SOC &amp; identifies, defines, describes and classifies occupations. The Content Model is organized into six major domains. Worker Characteristics, Worker Requirements, Experience Requirements, Occupation Requirements, Occupational Characteristics, and Occupation-Specific Information. Has several crosswalks to the DOT, numbers of jobs in the Nat'l, Reg'l, and local economy. Provides numbers of DOTs comprising a SOC group.</li> </ul>
<ul style="list-style-type: none"> <li>Standard Occupational Classification (SOC)</li> </ul>	<a href="http://www.bls.gov/soc/major_groups.htm">http://www.bls.gov/soc/major_groups.htm</a>	<ul style="list-style-type: none"> <li>Over 12,000 DOT occupations compressed into 840 Group SOC Occupations</li> <li>For SOC Questions call 202-691-6444</li> </ul>
<ul style="list-style-type: none"> <li>Occupational Outlook Handbook (OOH), Bureau of Labor Statistics</li> </ul>	<a href="http://www.bls.gov/oco/home.htm">http://www.bls.gov/oco/home.htm</a>	<ul style="list-style-type: none"> <li>Includes information about the nature of work, working conditions, training and education, earnings, and job outlook for hundreds of different occupations. The DOL/BLS <i>Handbook</i> is released biennially. ALJs may take administrative notice of it. (§§404.1566(d),416.966(d))</li> </ul>

<ul style="list-style-type: none"> <li>Occupational Employment Statistics (OES)</li> </ul>	<a href="http://www.bls.gov/oes/">http://www.bls.gov/oes/</a>	<ul style="list-style-type: none"> <li>Employer surveys. National, State and Metropolitan area stats. Full and part-time occupational information.</li> </ul>
<ul style="list-style-type: none"> <li>National Employment Matrix (BLS)</li> </ul>	<a href="http://www.bls.gov/emp/nioem/empioan.htm">http://www.bls.gov/emp/nioem/empioan.htm</a>	<ul style="list-style-type: none"> <li>Provides the Codes for the Industries Sector found in the NAICS. Displays employment in occupations by industries</li> </ul>
<ul style="list-style-type: none"> <li>North American Industry Classification System (NAICS), United States Census Bureau County Business Patterns</li> </ul>	<a href="https://www.census.gov/eos/www/naics/">https://www.census.gov/eos/www/naics/</a>  <a href="http://censtats.census.gov/cbpnaic/cbpnaic.shtml">http://censtats.census.gov/cbpnaic/cbpnaic.shtml</a>	<ul style="list-style-type: none"> <li>Used by Federal Agencies to classify business establishments for purpose of collecting statistical data. Data from over 450 industry classifications. Contains data at National, State, &amp; Metropolitan Statistical Areas.</li> <li>Provides data on the total number of establishments, and number of establishments by nine employment-size classes by detailed industry for all counties in the United States, District of Columbia, &amp; Puerto Rico</li> </ul>
<ul style="list-style-type: none"> <li>Current Population Survey (CPS)</li> </ul>	<a href="http://www.bls.gov/cps/">http://www.bls.gov/cps/</a>	<ul style="list-style-type: none"> <li>A monthly BLS survey of <b>households</b>. Contains hours of work (full vs. part-time work); demography, unemployment, employment, labor force.</li> </ul>
<ul style="list-style-type: none"> <li>Current Employment Statistics (CES)</li> </ul>	<a href="http://www.bls.gov/ces/">http://www.bls.gov/ces/</a>	<ul style="list-style-type: none"> <li>Surveys approximately 144,000 business &amp; government agencies representing approx. 554,000 individual worksites to provide detailed industry data on hours, p/t &amp; f/t employment</li> </ul>
<ul style="list-style-type: none"> <li>SkillTRAN, Job Browser Pro</li> </ul>	<a href="http://www.skilltran.com/jbp_screens.htm">http://www.skilltran.com/jbp_screens.htm</a>	<ul style="list-style-type: none"> <li>SSA Digital Library, Acceptable Electronic Occupational Resources for use by SSA staff. 30 Day Free Trial. Most of the above resources are contained in Job Browser Pro, includes Census and SOC #s. \$549.00 plus \$149 for update service.</li> </ul>
<ul style="list-style-type: none"> <li>OccuBrowse &amp; OASYS</li> </ul>	<a href="http://www.skilltran.com/">http://www.skilltran.com/</a>	<ul style="list-style-type: none"> <li>SSA Digital Library, Acceptable Electronic Occupational Resources for use by SSA staff. OccuBrowse has a 30-day Free Trial</li> <li>OASYS provides transferability analysis based on work field and MPSMS. OccuBrowse does not do transferability of skills analysis.</li> </ul>
<ul style="list-style-type: none"> <li>David Traver, SS Disability Advocate's Handbook, James Publishing, Inc.</li> </ul>	<a href="http://jamespublishing.com/shop/social-security-disability-advocates-handbook/">http://jamespublishing.com/shop/social-security-disability-advocates-handbook/</a>	<ul style="list-style-type: none"> <li>Provides advice on how to challenge vocational testimony; deal with problems with the DOT; how to attack other data sources used by vocational experts. Explains transferability of skills analysis. \$179.00</li> </ul>
<ul style="list-style-type: none"> <li>Occupational Employment Quarterly II (OEQ)</li> </ul>	<a href="http://www.uspublishing.net/oeqii_page.html">http://www.uspublishing.net/oeqii_page.html</a>	<ul style="list-style-type: none"> <li>U.S. Publishing. Released quarterly. Regional and National job numbers in exertional/skill categories, arranged by both Census and SOC code numbers. Does not provide numbers for individual DOT Jobs. Uses total SOC group numbers. Uses arbitrary pro rata science to find numbers of jobs. Eg. Assume a SOC group of 800,000 jobs for Receipt/Info Clerks. If 10 DOTs comprise the SOC Group, 1/2 are sedentary, semi-skilled and 1/2 skilled, OEQ puts</li> </ul>

		400,000 jobs in each category. Or, 10 DOTS divided into 800,000=80,000 per DOT & 5 DOTS are semi-skilled sedentary so 400,000 are assigned to that category. \$157.00.
<ul style="list-style-type: none"> <li>• Vocational Expert Handbook</li> </ul>	<a href="http://www.socialsecurity.gov/appeals/public_experts/Vocational_Experts_(V E)_Handbook-508.pdf">http://www.socialsecurity.gov/appeals/public_experts/Vocational_Experts_(V E)_Handbook-508.pdf</a>	<ul style="list-style-type: none"> <li>• VE Handbook states that a VE provides factual and expert opinion based knowledge of skills, physical and mental demands of occupations, characteristics of work settings, existence and incidence of jobs within occupations, transferrable skills, and regulatory requirements for transferability.</li> <li>• VE Handbook requires that VEs have up-to-date knowledge, experience, re industrial and occupational trends and local labor market conditions; knowledge of steps 4 &amp; 5 regulations; current &amp; extensive experience in counseling &amp; job placement of people with disabilities; knowledge &amp; experience using DOT, SCO, County Bus. Patterns (Bur. of Census); OOH (BLS).</li> </ul>
<ul style="list-style-type: none"> <li>• Dr. Kenneth N. Anchor. “Disability Analysis Handbook”, American Board of Disability Analysts, (contains a disability profiling scale).</li> </ul>	<a href="http://www.americandisability.org/publications2.html">http://www.americandisability.org/publications2.html</a>	<ul style="list-style-type: none"> <li>• VERY EXTREME: Limited 65% or more of the time (Catastrophic and Very Severe)</li> <li>• EXTREME: Limited 49 – 64% of the time (Severe)</li> <li>• MARKED: Limited 33 – 48% of the time</li> <li>• MODERATE: Limited 17 – 32% of the time</li> <li>• MILD: Limited less than 16% of the time</li> </ul>
<ul style="list-style-type: none"> <li>• OIDAP (Occupational Information Development Advisory Panel) Established 12/9/08 by Commissioner M. J. Astrue, Federal Advisory Committee Act.</li> </ul>	<a href="http://www.ssa.gov/OIDAP/documents/appendixB.pdf">http://www.ssa.gov/OIDAP/documents/appendixB.pdf</a>  <a href="http://ssa.gov/oidap/Documents/FINAL%20-%20OIDAP%20Fact%20Sheet%201%20-%20APRIL%2027%202010.pdf">http://ssa.gov/oidap/Documents/FINAL%20-%20OIDAP%20Fact%20Sheet%201%20-%20APRIL%2027%202010.pdf</a>	<ul style="list-style-type: none"> <li>• See Recommendations for SSA Occupational Information System &amp; conclusions that DOT is insufficient and does not provide data re above &amp; below-waist lifting, reaching in various directions, keyboarding, use of mouse/touchpad, forceful gripping/pinching, uni &amp; bi-lateral requirements, truck rotation/twisting/lateral bending, neck rotation/twisting, bending/extension, forward bending from sitting, specificity for climbing, running, balance various surfaces, sit, stand, walk should be classified separately, sit/stand options, assistive devices, foot controls, wrist twisting, &amp; handwriting.</li> </ul>

VOCATIONAL FACTORS	PART I	STEP 4 AND STEP 5
STEP FOUR PRIOR TO HEARING	LAW	RECOMMENDATIONS
<ul style="list-style-type: none"> <li>• Meet client to determine physical and mental functional capacity</li> <li>• With assistance from client, dissect past work in 15 years prior to DLI or date adjudicated to determine if it is “relevant”</li> </ul> <p>§404.1565(a), §416.965(a)</p>	<ul style="list-style-type: none"> <li>• Burden on claimant to prove cannot return to past relevant work (PRW).</li> <li>• First compare RFC w/physical and mental demands of PRW (§§404.1520(4)(iv), 416.920(4)(iv))</li> <li>• <b>SR 82-62.</b> PRW includes work “actually” performed and “generally” performed under the DOT. <i>Dudley v. Apfel</i>, 75 F.Supp.2d 1381 (N.D. Ga.1999)</li> <li>• Work done under special conditions or in sheltered environment may not be PRW <i>Roberts v. Apfel</i>, 27 F.Supp.2d 1295 (N.D. Ala.1998)</li> <li>• §§404.1565,416.965. Work performed more than 15 years before adjudication may not be relevant past work</li> <li>• <i>Roberts v. Apfel</i>, 27 F. Supp.2d 1295 (N.D. Ala. 1998) holding must evaluate whether the work was substantial, gainful activity before ability to do the work will sustain a finding of not disabled, and it must be real work for profit. SGA means “substantial services with reasonable regularity in some competitive environment (<i>De Rienzis v. Heckler</i>, 748 F.2d 352 (2d Cir. 1984).</li> <li>• <b>SSR 82-61</b> broad generic occupational classifications of a job such as ‘delivery job’ or ‘packaging job’ are insufficient to test whether claimant can perform PRW. <b>Composite/hybrid</b> jobs contain significant elements of two or more occupations and have no counterpart in the DOT. It is not proper to bifurcate the job and find claimant can return to the least demanding component (SSR 82-61)</li> <li>• Self-Employed individuals are governed by SSR 83-34, §§404.1571-1576,416.971-976. For SGA it must meet 3 tests: (1) significant service &amp; substantial income; (2)&amp;(3) comparability of work and worth of work.</li> </ul>	<ul style="list-style-type: none"> <li>• Review RFC &amp; MRFC performed by State agency doctors or Single Decision Maker(SDM) and object to SDM opinion as well as opinions from non-qualified State agency Doctors; object to RFC if provided before all the evidence was in.</li> <li>• In addition to treating source opinions, consider obtaining independent medical opinions on functional capacity</li> <li>• Review Third Party statements for inconsistencies requiring testimonial clarification.</li> <li>• Obtain detailed earnings query &amp; New Hire, Quarter Wage, Unemployment Query (NDNH)</li> <li>• Match employer to quarterly earnings to determine if it was not SGA, was Unsuccessful Work Attempt, sheltered or special environment, performed in short periods of time, irregular hours, took frequent rest periods, was accommodated, worked at lower standard of productivity, family relationship &amp; not PRW</li> <li>• Review Work History (WHR) report SSA-3369-BK (amend if needed) – shows how work was “actually” performed.</li> <li>• Clarify the extent the claimant performed the elements in the WHR re use of machines, tools, equipment, technical knowledge or skills, writing, completing reports, hours walking, standing, sitting, climbing, stooping, kneeling, crouching, crawling, handling, grabbing, grasping, reaching, lifting, carrying. Ask client what was the heaviest item lifted/carried, was supervision a hands-on task or not, did supervision take less than 1/3<sup>rd</sup> of work day and therefore was not significant.</li> <li>• Determine if past work was unskilled, semi-skilled, skilled (SSR 82-60; 83-10)</li> <li>• Print out the closest DOT for the job as “generally” performed, examine the demands of the job with client to determine extent to which demands were met and cannot be met since onset. Eg., ask about performance of “functions”; SVP, GOE, Reasoning, Math, language levels, physical demands, worker functions (data, people, things), aptitudes, temperaments, physical demands, environmental conditions.</li> <li>• Examine the DOT Worker Fields and MPSMS for purpose of determining if there are transferable skills</li> </ul>

	<ul style="list-style-type: none"> <li>• POMS DI 10505.025(C)(2) foreign work requires converting foreign currency to US dollars (see <a href="http://www.oanda.com/converter/classic">www.oanda.com/converter/classic</a>)</li> <li>• SSR 84-25 Unsuccessful Work Attempts; §§404.1575,416.975(d) – past work may be disregarded if discontinued/reduced to non-SGA after short time due to impairment or removal of special conditions</li> </ul>	<ul style="list-style-type: none"> <li>• Was past work a composite job</li> <li>• Detailed RFC/MSS</li> <li>• Do function-by-function analysis</li> <li>• Obtain 3<sup>rd</sup> party observations, treating source assessments w/re to performance of past work as actually and generally performed. See employer verification.</li> </ul>
<b>STEP FIVE PRIOR TO HEARING</b>	<b>LAW</b>	<b>RECOMMENDATIONS</b>
<ul style="list-style-type: none"> <li>• Develop evidence on age</li> </ul>	<ul style="list-style-type: none"> <li>• Borderline-age: age categories should not be applied “mechanically”. §§404.1563(a),416.963(a). SSR 83-10. For the Medical-Vocational factors, 6 months prior to a numbered grid rule was acceptable in <i>Crook v. Barnhart</i>, 244 F. Supp.2d 1281, 1284 (N.D. Ala. 2003).</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Broz v. Heckler</i>, 711 F.2d 957 (11<sup>th</sup> Cir., 7/25/83), the grids were only held valid on 3 out of the 4 factors, i.e., physical ability, education, and work experience. The age factor was not validated in the 11<sup>th</sup> Circuit.</li> </ul>
<ul style="list-style-type: none"> <li>• Develop evidence on education, literacy, &amp; ability to communicate in English.</li> </ul>	<ul style="list-style-type: none"> <li>• SSR 83-10: numerical grade level completed in school does not always determine the functional grade level. The present level of reasoning, communication and arithmetical ability may be higher or lower than the formal education.</li> <li>• Illiteracy is defined in §§404.1564(b)(1),416.964(b)(1): means inability to read or write simple messages such as instructions/inventory lists even though claimant can sign his name. Illiterate claimants have had little or no formal schooling.</li> <li>• <i>Wolfe v. S Chater</i>, 86 F. 3d 1072 (11<sup>th</sup> Cir. 1996) Held remand to determine facts regarding illiteracy as there was no substantial evidence that a claimant functioning at below 3<sup>rd</sup> grade level had a marginal education</li> <li>• SSR 86-8: Communication in English. Inability to speak, read &amp; understand English is an educational factor and it erodes the occupational base, and can be a favorable grid rule factor at age 45-49 at sedentary and light levels</li> <li>• HALLEX I-2-6-10: If a claimant has difficulty understanding or communicating in English, the ALJ will</li> </ul>	<p style="text-align: center;"><b>Education Levels &amp; Literacy</b></p> <ul style="list-style-type: none"> <li>• Obtain school records</li> <li>• Obtain grade level testing, e.g., WAIS III, WRAT 4, WIAT II &amp; III, Woodcock Johnson III</li> <li>• Obtain testing to determine inability to communicate in English; obtain birth certificate; where education was obtained; level of education; determine what is preferred language spoken at home/community; whether interpreter is needed; obtain third party statements as to what language is spoken from day-to-day; determine capacity to speak in English in full sentences</li> <li>• TESTS for English as a foreign language - <a href="http://www.cal.org/caela/tools/program_development/elltoolkit/Part4-31EnglishLanguageAssessmentInstruments.pdf">http://www.cal.org/caela/tools/program_development/elltoolkit/Part4-31EnglishLanguageAssessmentInstruments.pdf</a></li> <li>• Request translator for hearing</li> </ul>

	<p>ensure that an interpreter, fluent in both English and a language in which the claimant is proficient, is present throughout the hearing</p>	
<ul style="list-style-type: none"> <li>• Develop limitation evidence on any factors that may preclude transferring any skills from any past skilled, semi-skilled work performed in the last 15 years.</li> <li>• Obtain opinion evidence on capacity for performing the basic requirements of unskilled work</li> </ul>	<ul style="list-style-type: none"> <li>• §§404.1565, 404.1568&amp; §416.965,416.968</li> <li>• skills learned at the semi-skilled level can only be transferred to semi-skilled work with SVP 3-4</li> <li>• semi-skilled work has more variables, more judgment than unskilled.</li> <li>• skilled work is SVP 5-9, more complex, varied</li> <li>• cannot have a skill level higher than prior employment</li> <li>• must match the exertional level claimant is able to perform, or lower levels</li> <li>• SSR 82-41 (Transferability); SSR 83-14 (Capability for other work, Grids as a framework); SSR 85-15 (Framework for non-exertionals); SSR 96-9p (Capability for other work, less than full range of Sedentary work); SSR 00-4p (VE Evidence &amp; Reliable Occupational Info).</li> </ul>	<ul style="list-style-type: none"> <li>• Obtain RFC/MRFC</li> <li>• Review DOTs'</li> <li>• worker traits, industry designations, physical demands, work conditions, GED and SVP training time;</li> <li>• DATA, PEOPLE, THINGS &amp; GED/SVP codes</li> <li>• Transferability is distinct from skills recently learned in school, it is skills learned in PRW</li> <li>• obtain declarations from third parties describing PRW</li> <li>• the ALJ determines transferable skills but when not apparent, with help from VS</li> <li>• for transferability look for similar tools, machines, raw materials, products, processes, services (MPSMS code) in a similar work field code</li> <li>• ALJ must make findings of fact re transferable skills</li> </ul>

THE BEST WAY OF PRESENTING YOUR CASE AT THE ADMINISTRATIVE HEARING	Prepared by Attorney Carol Avard, Avard Law Offices, P.A. P. O. Box 101110, Cape Coral, FL 33910	
VOCATIONAL FACTORS	PART II	STEP 4 AND STEP 5
STEP FOUR AT HEARING	LAW	Recommendations
<ul style="list-style-type: none"> <li>• How to prove claimant cannot return to past relevant work (PRW).</li> </ul>	<ul style="list-style-type: none"> <li>• SSR 82-61 PRW Actual/General</li> <li>• SSR 82-62</li> <li>• §§404.1565, 416,965</li> <li>• §§404.1520(e),416.920(e) functional demands</li> </ul>	<ul style="list-style-type: none"> <li>• Prepare Pre-hearing Memorandum (Ex.A); Set up face-to-face claimant pre-hearing conference</li> </ul>
<ul style="list-style-type: none"> <li>• Establish mental and physical RFC</li> <li>• Eliminate past work in 15 years before DLI or before adjudication that is not relevant (composite, brief, on-and-off, sheltered, seasonal, part-time, not SGA, etc)</li> <li>• Chart demands of PRW actually and generally performed.</li> <li>• PRW may be work that no longer exists</li> </ul>	<ul style="list-style-type: none"> <li>• §§404.1545, 416.945(RFC), §§404.1571-75, 416.971-75(SGA): RFC/MRFC</li> <li>• SSR 82-51, 82-61 (RFC)</li> <li>• <b>SSR 96-9p</b> RFC Less than Sedentary: there will be a significant effect on ability to work if capacity for standing/walking is less than 2 hrs, limited sitting does not mean you cannot do light work; depending on frequency, alternating sitting/standing/walking may significantly affect work (outside regular breaks); using hand-held assistive device for balancing due to both lower extremity impairments will significantly affect work, limitations on balancing when standing/walking on level terrain will impact work; inability to stoop impacts work; reduced capacity to use both hands/fingers significantly affects sedentary work; visual limitations affecting ability to avoid hazards at work is a significant factor; reduced ability to hear/understand simple instructions affects work; any substantial loss in ability to understand, remember, carry out simple instructions, make judgments, i.e., simple work-related decisions, respond to supervision, co-workers, usual work situations, deal with changes in routine work settings will affect work capacity</li> <li>• <b>SSR 96-8p</b> RFC on regular &amp; continuing basis. RFC must be based</li> </ul>	<ul style="list-style-type: none"> <li>• Claimant's burden at Step 4 to prove cannot return to PRW</li> <li>• Obtain MSS/RFC for sitting, standing, walking, lifting, carrying, pushing, pulling, manipulative, postural functions, e.g., reach, handle, stoop, crouch, environmental, visual, hearing</li> <li>• Obtain MRFC for understanding, remembering, carrying out instructions, responding to supervision, co-workers, work pressures</li> <li>• Chart the <i>demand</i>s of past relevant work generally and actually performed &amp; compare with MRFC/RFC opinions.</li> <li>• Use Voc'l Tools (e.g., DOT/SCO, OOH,ONET)</li> <li>• Question claimant re ability to do sustained work on regular &amp; continuing basis, 8 hours a day, 5 days a week, with normal breaks, as well as the demands of work actually and generally performed.</li> <li>• Question claimant re what tools, machines were used, knowledge required, extent of supervision &amp; independent judgment, describe tasks, responsibilities, what duties produce tension, anxiety (e.g., speed, precision, complexity of tasks, working with other people)</li> <li>• Question claimant about composite jobs within one job, i.e., significant elements of other jobs, and question claimant about the percent of time each significant element was performed</li> <li>• Use detailed earnings records, work history report (WHR) &amp; New Hire, Quarter Wage, Unemployment Query (NDNH) to confirm PRW; amend WHR if incomplete or contains errors</li> <li>• Obtain 3<sup>rd</sup> party declarations or testimony from co-workers, family, friends, etc.</li> </ul>

	<p>on signs, lab findings, tx effects (including duration, disruption to routine, side effects of medication), ADLs, lay evidence, MSS, pain effects, evidence from attempts to work, need for structured living environment, work evaluations).</p> <ul style="list-style-type: none"> <li>• <b>SSR 82-62</b> Work must be in the 15 years prior to adjudication or 15 years prior to DLI. ALJ must develop and make findings regarding the physical and mental demands of PRW</li> </ul>	
STEP FIVE AT HEARING	LAW	Recommendations
<ul style="list-style-type: none"> <li>• Vocational evidence must be based on “reliable” principles and methods.</li> </ul>	<ul style="list-style-type: none"> <li>• Burden on Commissioner to come up with reliable job data.</li> <li>• <i>Brault v. SSA</i>, 683 F.3d 443 (2d Cir.2012): if you don’t object to the VE qualifications, the VE’s testimony comes in as reliable because the VE has been determined by the Attorney as an expert even if the testimony is not reliable. Brault’s attorney stipulated to the expertise of the VE, &amp; when VE reduced the SOC numbers w/o using a reliable method, the ALJ was entitled to rely on them since the Attorney said the VE was an expert.</li> <li>• SSR 00-4p &amp; <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> 509 U.S. 579 (1993) – Not applicable in SSA hearings</li> <li>• SSR 00-4p: ALJ must ask VE to explain conflict of testimony with DOT/SCO; if so, ALJ must obtain “reasonable explanation”. This is an affirmative duty imposed on ALJ.</li> <li>• HALLEX I-2-5-52(D)&amp;(E) VEs must be rotated from the roster. Determine violation of roster through FOIA request at <a href="http://www.ssa.gov/foia/html/foia_guide.htm">http://www.ssa.gov/foia/html/foia_guide.htm</a>, or write SSA, Privacy &amp; Disclosing Office, 617 Altmeyer Bldg, 6401 Security Blvd., Baltimore 21235, FAX (410)966-0869.</li> <li>• VE testimony should not be based on “experience” but must be based on “reliable” principals &amp; methods and be reliably applied to the facts. <i>Niam v. Ashcroft</i>, 354 F.3d 652 (7<sup>th</sup> Cir.</li> </ul>	<ul style="list-style-type: none"> <li>• Investigate the VE’s CV, background, and case law re hearings that VE testified at</li> <li>• Do not stipulate to the qualifications and experience of the VE (see Checklist of Objections to VEs in materials at Ex.B). Address the VE as merely a witness.</li> <li>• VE does not become expert by testifying at hearings. (See <i>In re Air Crash Disaster</i>, 795 F.2d at 1234)</li> <li>• Ask VE about percentage of income from SSA; ask if VE was a voc rehab expert; what % of time spent reviewing SS files, testifying at SS hearings, workers comp claims, personal injury, divorce, other legal matters, conducting labor market surveys that count jobs, work in recruitment, retention, training; placement of clients in competitive employment, placements in sheltered employment; educational pursuits, non-forensic practice, etc.; ask VE if she agrees that DOT is outdated; agrees with recommendations in OIDAP; ask what statistical sources VE relies on (e.g., OEQ, OES, NAICS, County Bus. Patterns (U.S. Census); computer programs; SOC numbers as a group, whether they are extrapolated down, how many DOTS in the SOC group; request exact method of extrapolation; ask what documents were provided to the VE by ODAR, what other documents VE relied on and request their production.</li> <li>• Ask VE if experience is recent or remote. Is it based on actual placement of individuals with disabilities; how many placements; do the placements include people with your client’s impairments; has the VE placed</li> </ul>



	<p>2004) held the spirit of Daubert applies to administrative proceedings as well. All VE testimony must be weighed against this evidentiary standard.</p> <ul style="list-style-type: none"> <li>• §§404.1566(d), 416.966(d) states SSA will take admin. notice of “reliable” job information (DOT, County Bus. Patterns, Census, OOH); 404.1566(d); 404.966(d) further states for transferability of skills or similarly complex issues, SSA may call a VE, implying that data not administratively noticed as reliable must be proven reliable to justify a denial.</li> <li>• SSR 00-4p requires ALJs to make specific findings that VE evidence is <i>reliable</i>; must inquire about real or apparent conflicts between VE testimony and the DOT/SCO; obtain from VE a reasonable explanation for a conflict. SSR 00-4p infers the ALJ should evaluate the credibility of data which VEs relied on.</li> <li>• <i>Donahue v. Barnhardt</i>, 279 F.3d 441 (7<sup>th</sup> Cir. 2002) held VE testimony must be based on “reliable methods”, product of “reliable principles”; VE must produce the basis for her opinions. Evidence is not “substantial” if vital testimony has been conjured out of whole cloth. In <i>McKinnie v. Barnhardt</i>, 368 F.2d 907 (7<sup>th</sup> Cir. 2004), VE testified opinion based on personal labor market surveys in extrapolated numbers, but VE did not bring the reference materials. Court held VE is free to give a bottom line, but data and reasoning underlying that must be available on demand. In <i>Duke v. Astrue</i>, 134 Soc.Sec.Rep.Serv.156, 2008 WL 3992251 (N.D. Ind. 2008), the court held, that testimony based on his “experience” as VE was not enough, and VE had to produce supporting data and reasoning. (Note: “experience” is not a method).</li> <li>• §404.950(d); 416.1450(d) Subpoena the VE’s statistics, research, data</li> </ul>	<p>people in the same occupations the VE claims the client can perform; what personal knowledge does VE have of the placements and what is it based on, e.g., site visits, reports from other sources, etc.</p> <ul style="list-style-type: none"> <li>• Ask VE to produce any personal surveys or other surveys relied upon.</li> <li>• If necessary request the ALJ to issue a subpoena to have the VE produce the materials relied on</li> <li>• Object each time VE testimony is unreliable</li> <li>• Prepare post-hearing memorandum with further objections to VE testimony.</li> </ul>
--	--	--

	<p>upon which she relies. HALLEX I-2-5-78 states the ALJ must rule upon the request and provide the reasons for the ruling in the decision</p>	
<ul style="list-style-type: none"> <li>• Job Numbers must be available for the <b>individual</b> DOT occupations.</li> </ul>	<p>VEs generally use the SOC code number systems along with the Census codes.  <a href="http://www.bls.gov/soc/major_groups.htm">http://www.bls.gov/soc/major_groups.htm</a>  <a href="https://www.census.gov/eos/www/naics/">https://www.census.gov/eos/www/naics/</a>  <a href="http://censtats.census.gov/cbpnaic/cbpnaic.shtml">http://censtats.census.gov/cbpnaic/cbpnaic.shtml</a></p> <p>These numbers are not broken down for individual DOTs. 12,741 DOTs were clustered into 800 SOC Group Occupations</p> <ul style="list-style-type: none"> <li>• Census and SOC systems are not compatible. Census taken from less reliable household surveys every 10 yrs. SOC taken from employer surveys more frequently. No one-to-one correlation between SOC &amp; Census</li> </ul>	<ul style="list-style-type: none"> <li>• Ask VE if numbers of jobs came from the SOC total group number and, if so, how many DOTs comprised the SOC group;</li> <li>• Ask VE for the actual SOC # and Census #</li> <li>• Ask VE if she checked the number of DOTs that were reflected in the hypothetical RFC provided by the ALJ and, if so, request VE to identify each DOT &amp; list the exertional level, reasoning, language and math levels, as well as SVP</li> <li>• If VE numbers are less than the total SOC group, ask VE how she extrapolated down, and what method of extrapolation did she use, and did she take a statistics course.</li> <li>• Ask VE how many p/t &amp; seasonal jobs were included in the numbers</li> <li>• Ask VE to delineate the decrease in the job numbers based on how many of the 60 items contained in the DOTs apply to the claimant</li> <li>• Ask VE what the job numbers are for the region and for several regions of the country, identifying where the other regions are located and noting how she defined the region at the local level.</li> <li>• Request ALJ define variables in hypothetical to VE, e.g., define limited, simple (is it one –two steps), routine, repetitive, low stress, sit/stand, marked, medium, mild, etc. Use frequency descriptors in SSR 83-10.</li> <li>• (Adopt the Disability Profiling Scale, used by the American Board of Disability Analysts, Dr. Kenneth N. Anchor. “Disability Analysis Handbook”, the scale is as follows: <ul style="list-style-type: none"> <li>VERY EXTREME: Limited 65% or more of the time (Catastrophic and Very Severe)</li> <li>EXTREME: Limited 49 – 64% of the time (Severe)</li> <li>MARKED: Limited 33 – 48% of the time</li> <li>MODERATE: Limited 17 – 32% of the time</li> <li>MILD: Limited less than 16% of the time</li> </ul> </li> <li>• If VE uses a computer program (e.g. Job Browser Pro by SkillTran) ask VE to explain the methods employed by the company</li> </ul>
<ul style="list-style-type: none"> <li>• Significant numbers of jobs</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Hall v. Bowen</i>, 837 F.2d 272(6<sup>th</sup> Cir. 1988) held 1,350 jobs were significant.</li> <li>• <i>Barker v. Sec. HHS</i>, 882 F.2d 1474 (9<sup>th</sup> Cir. 1989) found 1,266 jobs significant.</li> <li>• <i>Trimiar v. Sullivan</i>, 966 F.2d 1326</li> </ul>	

	<p>(10<sup>th</sup> Cir. 1992) found 850-1,000 jobs significant;</p> <ul style="list-style-type: none"> <li>• <i>Jenkins v. Bowen</i>, 861 F.2d 1083 (8<sup>th</sup> Cir. 1988) found 500 jobs significant</li> <li>• <i>Allen v. Bowen</i>, 816 F.2d 600 (11<sup>th</sup> Cir. 1987) found 174 positions significant)</li> </ul>	
<ul style="list-style-type: none"> <li>• <b>USING THE “GRIDS”</b>: 20 C.F.R. Pt.404, Subpt.P, App.2 §§200.00(c)-(e) <i>Medical-Vocational Guidelines</i></li> </ul>	<ul style="list-style-type: none"> <li>• <b>SSR 83-5a.</b> ALJ cannot rely on VE to rebut “Grids”, and ALJ cannot circumvent the “Grids”.</li> <li>• <b>SSR 83-11</b> “Grids”</li> <li>• <b>SSR 83-12</b> “Grids” as framework.</li> <li>• <b>SSR 83-14</b> “Grids” as framework for claimants with severe exertional and nonexertional restrictions</li> <li>• <b>SSR 83-15</b> “Grids” for solely nonexertional limitations</li> <li>• <b>SSR 96-9p</b> erosion of Sedentary Occupational Unskilled base</li> <li>• <b>§§404.1566(b),416.966(b);</b></li> <li>• <b>42 U.S.C.423(d)(2)(A).</b> Commissioner may not substitute a definition of disability applicable generally for one narrowly tailored by the grids (<i>Lounsbury v. Barnhart</i>, 468 F.3d 1111 (9<sup>th</sup> Cir. 2006))</li> <li>• <b>Two Step Process:</b> (1) is remaining physical/mental capacity consistent with demands of significant number of jobs; (2) is there a vocational capability (age, education, past work experience) to make an adjustment to work different from that performed in the past</li> <li>• <i>Jones v. Heckler</i>, 760 F.2d 993 (9<sup>th</sup> Cir. 1985) when grids accurately described the abilities &amp; limitations, they direct findings. Otherwise, they are a <i>reference point</i>.</li> <li>• <i>No court has decided in published opinions if an ALJ must use the “grids” as a framework when a VE testifies.</i></li> <li>• <i>ALJ not allowed to find based on VE testimony that there are substantial numbers of jobs when the “grids” direct a finding of disabled. (20 C.F.R. Part 404, Subpart P, App.2, 200.00(d),(e))</i></li> </ul>	<ul style="list-style-type: none"> <li>• <b>SVP 1</b> has 6 Sed; 107 light; 50 medium, 25 heavy, 3 VH occupations totaling 191 occupations.</li> <li>• <b>SVP 2</b> has 131 Sed., 1464 Light; 917 Medium; 400 Heavy; 22 VH, total occupations of 2934.</li> <li>• ALJ must take administrative notice of them as they determine if jobs exist in significant numbers.</li> <li>• Use them w/o a VE to direct a finding of disabled;</li> <li>• Use them w/ a VE to direct finding of disabled;</li> <li>• Use them w/o a VE as a framework;</li> <li>• Use them with a VE as a framework.</li> </ul>