CROSS-EXAMINING THE VOCATIONAL & MEDICAL EXPERT WITNESS IN A POST-DAUBERT & KUMHO WORLD

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Cross-examination is a complex topic which is impossible to fully cover in a single presentation. Even if limited to cross-examination of one type of witness it is too vast a topic. So this paper focuses on two ideas:

- The Vocational Expert's (VE) testimony regarding the number of jobs that exist that claimant is capable of performing is vulnerable to attack on cross examination because many of the numbers have no firm basis.

- The Medical Expert's (ME) testimony may be discredited because the witness has neither the experience nor sound science behind prognostications of residual functional capacity (REF).

Our focus, then, will be on techniques of handling these specific problems with the goal of attempting to convince the administrative law judge to disregard the testimony or at least create an effective record for the District Court. There is no way to produce a comprehensive list of questions to ask, and we will not attempt anything like that. But we do attempt to show you

some areas where this kind of testimony is vulnerable, and give you a few ideas about where to start in challenging it.

When cross-examining experts, the lawyer should always remember that there is a time to shut up and sit down. Cross examination is not a sport or a hobby. Only engage in it if you have a specific purpose. Never do so if it cannot help. If the VE has identified no jobs, or the ME has given favorable testimony, you may have no reason to cross-examine. Cross-examination is not about playing tricks to get evidence disregarded on technicalities. It is about assuring that unreliable testimony is shown to be so, and about using

I. The role of *Daubert* and the Federal Rules of Evidence in administrative hearings.

A. Daubert and Federal Rule of Evidence 702.

Rule 702 of the Federal Rules of Evidence provides that

> "If scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The federal rule encompasses three requirements for the admissibility of expert witnesses; 1) the expert's testimony must be

necessary to assist the trier of fact, 2) the expert must be qualified and 3) the methods used by the expert must be reliable. The current federal rule was amended in 2000 to substantially codify the holdings of *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999).

Prior to *Daubert* in 1993, the courts had applied the *Frye* test to determine the admissibility of expert evidence. The *Frye* test required the courts to determine whether a scientific principle had been "sufficiently established to have gained general acceptance in the particular field to which it belongs." *Frye v. United States,* 293 F. 1013, 1014, D. C. Cir. 1923). In *Daubert,* the court rejected the *Frye* test holding that the test had not been included in the newly codified Federal Rules of Evidence. In the *Dubert* case, minors sued drug manufacturers under a product liability theory, alleging that their mothers had taken morning sickness medication that had caused the plaintiff's birth defects. The plaintiff's experts had relied on animal studies to testify that the drugs had caused the injuries. The Court addressed whether those studies were reliable evidence. The *Daubert* court set out a non-exhaustive list of factors that trial courts should

consider in determining whether scientific evidence should be admitted. The list included: 1) Can the theory or technique be tested and, if so, has it been? 2) Has the theory or technique been published and subjected to peer review? 3) What is the known or potential rate of error when using the theory or technique? 4) Do standards exist that can serve as controls on a technique's operation and, if so, were such standards employed in the matter in dispute? and 5) has the theory or technique been generally accepted? The *Daubert* court established the trial court as the "gatekeeper" in determining the admissibility of evidence. Although the evidence in *Daubert* was purely scientific, the Supreme Court subsequently clarified that the trial court must access all expert evidence to determine its relevancy and reliability. *Kumho Tire Co. v. Carmichael,* 526 U. S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); *General Electric Co. v. Joiner,* 522 U.S. 136, 118 S. Ct. 512, 136 L. Ed. 2d 508 (1997).

B. Applying the standard to Administrative hearings

1. First came Love. I mean *Donahue.*

In *Donahue v. Barnhart*, 279 F.3d 441 (7th Cir. 2002), the Seven Circuit introduced the role of the *Daubert* standard in an administrative hearing. The *Donahue* case reaffirmed that Rule 702

does not apply to social security hearings, because the adjudication is "a hybrid between the adversarial and the inquisitorial models." However, the court continued:

> "the idea that experts should use reliable methods does not depend on Rule 702 alone, and it plays a role in the administrative process because every decision must be supported by substantial evidence. Evidence is not "substantial" if vital testimony has been conjured out of whole cloth. See Peabody Coal Co. v. McCandless, 255 F.3d 465 (7th Cir. 2001); Elliott v. CFTC, 202 F.3d 926 (7th Cir. 2000).

The *Donahue* court emphasized the responsibility of the attorney to thoroughly cross examine the VE in order to establish his lack of reliability. The court pointed out that the VE is permitted to give a bottom line, and that in this case the VE had merely given some numbers and job descriptions. The court went on to address the need for the attorney to cross examine the VE on the basis of his testimony. The court noted that

> "at this point the expert could have been cross-examined (Donahue was represented by counsel) about where these numbers came from, and why the expert's conclusion did not match the Dictionary's. Holding out this opportunity is an approach deemed adequate in *Richardson v. Perales*. Yet counsel did not ask the vocational expert about the genesis of the numbers or the reason for the discrepancy."

The court went on to note the consequences to the claimant if his attorney does not question the VE's conclusions.

> "When no one questions the vocational expert's foundation or reasoning, an ALJ is entitled to accept the

> vocational expert's conclusion, even if that conclusion differs from the Dictionary's--for the Dictionary, after all, just records other unexplained conclusions and is not even subject to cross-examination."

If on the other hand, the attorney questions the expert's conclusions "then the ALJ should make an inquiry (similar though not necessarily identical to that of Rule 702) to find out whether the purported expert's conclusions are reliable." However the court pointed out that the ALJ inquiry is only necessary if the issue is identified. The court held that:

> "Raising a discrepancy only after the hearing, as Donahue's lawyer did, is too late. An ALJ is not obliged to reopen the record. On the record as it stands--that is, with no questions asked that reveal any shortcomings in the vocational expert's data or reasoning--the ALJ was entitled to reach the conclusion she did."

Donahue v. Barnhart, 279 F.3d 441, 446–47 (7th Cir. 2002). *Donahue* makes it clear that the reliability of the expert can and should be questioned and using the factors in rule 702 and *Daubert* can be helpful because even though the ALJ may not be familiar with the analysis the Federal District Court Judge will be.

2. Then came Marriage. Well, *McKinnie*.

In *McKinnie v. Barnhart*, 368 F.3d 907 (7th Cir. 2003), the court recognized that cross examination of the VE could in fact show that the

expert lacks reliability and therefore the ALJ lacked sufficient evidence to suppport the finding. In *McKinnie,* a VE testified that several jobs satisfied an ALJ's hypothetical question. On cross examination, McKinnie's attorney challenged the foundation of the VE's testimony, by asking her to "show us how you arrived at [your] figures." The VE testified that she based her numbers of jobs available for each occupation by referring to "regular market studies, Department of Labor Statistics, and Census Bureaus . . . in combination, to include my personal labor market surveys in extrapolating the numbers." The VE had neither a written report nor any reference materials with her. When asked how she performed this extrapolation, the VE responded, "Based on our knowledge of the vocational expert and every day labor market surveys that we do," but she could provide no data or references that she relied upon in forming her opinion. The ALJ left the record open at the close of the hearing and told McKinnie's attorney that he could ask the VE to supplement the record with the data and references that she had relied upon, but only if McKinnie compensated her. McKinnie never requested a written report from the VE. *McKinnie v. Barnhart*, 368 F.3d 907, 909 (7th Cir. 2003). The Court found that the ALJ erred in relying on the VE's testimony without determining whether the testimony had an adequate foundation. The court found that although the expert's reliability is

measured by a less stringent standard at an administrative hearing than under the Federal Rules of Evidence. "Nevertheless, because an ALJ's findings must be supported by substantial evidence, an ALJ may depend upon expert testimony only if the testimony is reliable. Evidence is not 'substantial' if vital testimony has been conjured out of whole cloth." *McKinnie* made it clear that an ALJ can not accept the disputed testimony of a VE without question.

Additional the *McKinnie* court noted that the claimant was not required to compensate the VE for doing her job. The court indicted that

> The claimant should not have to pay to substantiate the expert testimony relied upon by the Commissioner in seeking to meet the Step 5 burden. Presumably a vocational expert establishes the foundation for her opinions before she expresses them at a hearing. It is not apparent why a claimant should pay a vocational expert to do the preparatory research that she should have completed prior to testifying.

McKinnie v. Barnhart, 368 F.3d 907, 910–11 (7th Cir. 2003).

C. The ALJ must act as the gatekeeper for the evidence.

In *Peabody Coal Co. v. McCandless,* 254 F.3d 465, 469 (7th Cir. 2001), the court made it clear that because the Federal Rules of Evidence do not apply the ALJ must act as the gatekeeper for evidence. The ALJ is required to determine whether the witness is qualified as an expert. Unfortunately the regulations do not explain what is necessary for a VE to be qualified as

an expert. However is seems clear that the same issues raised in court to qualify an expert are helpful. In Federal Rule of Evidence 702 an expert is qualified by way of education, training, knowledge, skill, and experience. So for example a VE may be questioned as to her placement experience, experience in performing job analysis for employers, experience conducting personal job surveys for commerce and industry and her knowledge of the industrial resources.

D. A Framework for Attacking the Reliability of Experts using the Principles Found in the Federal Rules of Evidence.

1. What are the Expert's qualifications?

- Education, Training, Knowledge, Skill, Experience

2. What is the factual basis of his knowledge?

- First hand knowledge,
- Information discovered by the expert before the hearing,
- Information made known to him during the hearing (hypothetical questions or actual testimony)

3. Are the methods or principles he relied on to form his opinion reliable?

- Has the theory or technique been tested?
- Has the methodology been published and subjected to peer review?
- What is the known or potential rate of error?
- Do standards exist that can serve as controls on a technique's operation?

- Has the theory or technique been generally accepted?

4. Did the expert apply the methods and principles accurately to the facts in this case?

II. Cross Examination of a VE

A. Why cross-examine the VE?

Not every case demands a vigorous cross-examination of the VE. If the RFC is for a full range of work at a level which doesn't Grid-out, of a slightly reduced range, don't waste your time. But when you are down to a few questionable jobs, you should consider challenging the foundation of the VE testimony.

Many ALJs will be very protective of the VE, and many VEs will be very hostile. Don't let that intimidate you; waiver can result if you fail to press your points.

Don't feel you need to do everything in your next hearing. Become comfortable with the technique by starting small, asking just a few of the questions set out here.

I cannot overstress that you should not over-use these techniques. It will damage your credibility if you engage in fights which are irrelevant. And you must accept that the whole system rests on obtaining estimates from experts. You cannot win by attacking the practice of getting estimates, but

you can win by challenging the basis of specific testimony in an individual case.

B. Basic four corners questions

1. Always get DOT numbers of past and "other" jobs.

One of the chief goals of cross-examination in general is to pin down the expert, to identify exactly what he is, or is not, saying. I always ask VEs "Is there a DOT code which describes that job?" for each job. Always do this unless you are absolutely certain it could never be relevant to have this information.

If the VE has split any of the claimant's past jobs into individual components, it is essential that you establish that the claimant did not perform the individual component jobs, but only a job which includes all demands of every component. This is especially important if the VE says they can return to one component of a past job.

2. Incidence of job(s)

VE testimony that occupations exist in stated numbers, often despite specific characteristics/requirements not classified in the DOT, is never valid for three reasons.

- There is no published data identifying the numbers of positions by occupation, but only by census codes.

- The DOT is SSA's official principle resource for job data. It classifies jobs by a large, but finite, number of characteristics. Hypothetical questions rarely, if ever, include only characteristics classified in the DOT.

- VEs have rarely, if ever, performed a labor-market study of a specific job to cure the defects of the DOT, and if they have done any study at all, it is virtually certain to have no scientific or statistical validity.

C. How to cross-examine on incidence of jobs

Assuming a VE has testified that numbers of positions exist for one or more occupations, and that the testimony is both harmful to your case and non-obvious, your cross-examination should focus on showing that there is no foundation for that testimony.

D. Qualifications

1. Education

    - What training was included in your graduate school curriculum in determining:

        - ✓ The numbers of people employed in a DOT occupation, nationally and locally?

        - ✓ The number of positions available which can accommodate conditions and restrictions not discussed in the DOT?

        - ✓ The numbers of positions in a given DOT occupation which are full-time?

    - What training have you had since graduate school in these topics?

2. Experience

    - How many hearings have you testified in where you gave

an opinion of the number of positions which exist in specific occupations? Over how many years?

- How many clients with disabilities are you personally working with now to help them return to work despite injuries? How many have you worked with in the last year? The last five years?
- In the last year, how many of the people you helped return to work the year before were still doing the job you helped them return to?
- Has your primary experience in the last ten years been in helping individuals with disabilities return to work, or in testifying at Social Security hearings?
- When you are working with a client to help the client find, obtain, and perform a specific position, do you need to know how many positions of that occupation exist? So isn't your primary experience with finding individual positions, not with determining numbers of positions in the nation or region?

3. Bias

- What percentage of your income came from the Social Security Administration last year?

E. Validation

Your first questions should be to establish the source of the data the VE used. You have a right to know what the VE relied upon, which includes the right to see and have copies of the exact document(s) that were consulted. If the VE did not bring them to the hearing, insist on receiving a copy post-hearing.

You may also want to ask the VE if he is aware of any limitations on the

use of the data advised by the publisher of the data. For example, does he know how many of the jobs he identified, or included in the source he cited, are full-time jobs? How does he know that a one-armed man can do the job?

1. Please identify each data source you consulted in arriving at your answer, and give me a copy of the specific page(s) you consulted. I'll wait/accept copies after the hearing.

- Are you aware of the limitations the publisher places on the accuracy of this data?
- What percentage of the numbers you gave represent full-time jobs? One-armed? Sit/stand? Low-stress? Etc. How do you know?
- What percentage of the jobs your source lists are SVP 1 & 2?
- Show me.

2. Please give me a copy of all notes you made in preparing for your testimony.

- When did you make those notes?
- Before or after you reviewed the file?
- Before the claimant's testimony?

3. Given your extensive experience, isn't it impossible for you to remember every detail of every job you have observed, the conditions under which it was observed, and the purpose of the observation? If you do remember every detail, then please write it down and give it to me, so I can know the full basis of your testimony.

F. Methodology

Once you have testimony on the sources the VE consulted, you should ask what methodology he used to evaluate the data, assuming he evaluated it

rather than just reporting raw data.

1. What methodology did you use to get from the published data you consulted to the numbers you gave here today? Give me the specific mathematical formula you used, and show me your calculations. What is the reason for using this formula, and not a different one?

2. How do you know that your method of deriving the numbers of XXX occupation from your data source is accurate?

3. Before you testified that the XXX occupation can be done with limitations not classified in the DOT, did you perform a full job analysis using the method set out in the Revised Handbook for Analyzing Jobs, 4th Ed.? Has the Social Security Administration ever paid you to perform the job analysis described in the Handbook? [If he claims he has done one: Please give me a copy of your job analysis.]

G. Reliability

1. What degree of statistical certainty do you assign to your testimony of the numbers in which the occupations you identified exist?

2. How do you know?

III. Cross Examination of the ME

A. Why cross-examine an ME?

Before talking about what questions to ask, you need to decide whether to ask questions at all. If the ME has given very helpful testimony, such as saying your client meets a listing, don't take a chance and cross-examine him. Similarly, if the ME gives an RFC which agrees with treating sources, keep quiet. But where the ME gives testimony which is markedly different from treating or reliable consulting sources, or which contradicts credible testimony of the claimant, you must demonstrate the limitations of the

doctor's expertise to show that most of the testimony is not scientifically valid.

Remember that an expert may be used by an ALJ for multiple reasons, only some of which are within their area of expertise. Doctors have been trained to diagnose and treat illnesses and injuries, but no doctor I have ever encountered as an ME has been trained to predict the physical or mental capacity of a person for sustained activity by reading medical records alone. Nor is the doctor likely to have any experience that would permit him/her to make these predictions. While the doctor may have extensive experience in testifying about these facts, I have never encountered one who has ever done any research to analyze the accuracy of his predictions, or has had anyone else attempt to evaluate the accuracy it. In short, they are guessing based on the thinnest gossamer of support. It is sheer guesswork. That is the focus here.

B. Using the ME to help your case.

Despite that focus, there are a few points which can be helpful with dealing with an ME. You have to know your ME, but even when an ME has given testimony that your client can work despite disabling limitations assigned by a treating doctor, you can often get the ME to agree with the

following as there few controversies:

1. The claimant does have medically-determinable impairments.

2. The symptoms the claimant describes can be produced by the diagnosed impairments.

3. There is no scientific basis for determining the degree of pain the claimant experiences.

4. That physicians are trained to observe closely, and to obtain large amounts of information even in brief visits.

5. That a treating doctor obtains large amounts of information in each encounter with a patient, and that it would be impractical to record it all at each visit.

6. The treating doctor has more familiarity with the claimant than any non-examining doctor.

7. The kind of treatment prescribed by the treating physician is appropriate for some people with the diagnosis of this claimant.

C. How to cross-examine on predictions of RFC

1. Qualifications

- Education--What training was included in your medical school curriculum in determining functional capacity from reviewing only paper?

- Training--What training have you had since medical school in determining functional capacity from reviewing only paper?

- Experience--How many hearings have you testified in where you gave an opinion of functional capacity from reviewing paper alone? Over how many years?

2. Methodology--What methodology have you used, if any, to evaluate the accuracy or scientific validity of your previous testimony?

3. Validation

- What medical studies have you read which investigated the functional limitations produced by this claimant's impairments? Please cite the specific article, and provide me with a copy of the page(s) you consulted in giving your testimony today.
- Please list all medical factors which could demonstrate limitations of the kind the claimant's alleges.
- What data do you have to demonstrate that the testimony you have given here today is accurate?
- What follow-up have you done to compare your predictions with the actual activities of the claimants whose cases you have testified in?
- Have you ever made any effort to validate your testimony with actual examination and testing?
- Are you aware of any published studies which support or challenge the scientific validity of predictions of functional capacity from reviewing only paper? Please give me a copy. I'll accept them after the hearing, Judge. Can you summarize the substance of the medical literature on this topic?

4. Reliability--What degree of scientific medical certainty do you assign to your prediction of this person's functional capacity, sustained over a 40-hour work week for a year?

5. Bias

- What percentage of your income last year came from the Social Security Administration?
- What percentage of your income last year came from treating patients?
- How long has it been since the majority of your income came from treating patients?