

Crisis of Confidence: The Inadequacies of Vocational Evidence Presented at Social Security Disability Hearings

Peter J. Lemoine
Lemoine Law Firm
Cottonport, Louisiana

This article examines the vocational resources commonly relied upon by vocational experts, explains the mechanics of the vocational expert's job identification process, and provides a critical analysis of both. Simply put, in this writer's opinion, vocational experts routinely muddle their way through Social Security hearings on the basis of occupational data and methodologies that are either outdated, hopelessly flawed, or simply nonexistent. I shall explain these findings in particularity as well as offer suggestions as to how the vocational expert's flawed occupational data and methodologies can be revealed at the hearing, Appeals Council, and federal court levels.

APPLICABLE LAW

We start, as we should, with pertinent United States Supreme Court jurisprudence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S.579, 113 S. Ct. 2786 (1993), makes clear that the testimony of an expert witness must be the product of reliable principles and methodology and such principles must be reliably applied to the facts of the case. It is important to note that in *Niam v. Ashcroft* 354 F.3d 652 (7th Cir 2004), the Court found that the spirit of *Daubert* applies to administrative proceedings as well. All vocational expert testimony must be weighed against this evidentiary standard.

§§ 404.1566(d)/416.966(d) provides that SSA will take administrative notice of **reliable** job information from various governmental and other sources to include: (1)*Dictionary of Occupational Titles* (DOT); (2) County Business Patterns; (3) Census Reports published by the

Bureau of Census; (4) Occupational Analyses prepared by various governmental agencies; and (5) *Occupational Outlook Handbook* published by the Bureau of Labor Statistics.

§§404.1566(d)/416.966(d) further provides that for transferability of skills or any “similarly complex issue” SSA may call upon the services of a vocational expert. **What is most important to note here is that any data source that is not administratively noticed as reliable by SSA must be proven reliable in keeping with *Daubert*, appellate court jurisprudence, as well as SSR 00-4p.**

SSR 00-4p has been largely underutilized by adjudicators as well as practitioners. A careful reading of this ruling reveals that it can be an effective tool for exposing the weaknesses of vocational expert testimony. It announces in the beginning that the administrative law judge **must** make a specific finding that occupational evidence is **reliable** before it can serve as a basis for a denial at either steps four or five of sequential evaluation. SSR 00-4p places on the adjudicator an affirmative duty to inquire about any **real or apparent** conflict between vocational expert (VE) or vocational specialist (VS) evidence and the DOT and its companion publication the *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* (SCO). In this regard, the adjudicator is charged with the responsibility of asking the VE or VS if the testimony he or she provides is consistent with the DOT/SCO and if a **real or apparent** conflict exists, the adjudicator must obtain a reasonable explanation for the conflict and must explain in the decision how this conflict was resolved.

A few key observations regarding the applicability of SSR 00-4p. **First, SSR 00-4p specifically provides that it applies not only when a direct conflict exists between vocational expert testimony and the DOT/SCO but as well where the vocational expert provides evidence or**

testimony that falls beyond the scope of information provided in the DOT/SCO. A prime example of the latter would be vocational expert testimony relative to the vocational effect of a sit-stand option. In either case, the administrative law judge is charged with the responsibility of assuring that vocational expert testimony is backed up by reliable evidentiary sources and is the product of reliable principles and methodology and the administrative law judge decision must explain the administrative law judge's findings in this regard. If the vocational expert, as so many do, seeks to "bail out" of the SSR 00-4p mandated inquiry by simply stating that his/her testimony is based on "twenty-five years of experience as a vocational expert", remember that, without more, this is simply not enough. Substance must be added to the word "experience"—but more about this later. **The point to be made at this juncture is that the vocational expert's mere recitation of the magic word "experience" is not an adjudicatory panacea and so does not satisfy the requirements of *Daubert* or SSR 00-4p.**

Circuit and district court decisions have shed much light on the sufficiency of evidence issue as it relates to vocational expert testimony. Evidence from an expert witness at a social security disability hearing representing an "insightful even inspired hunch" cannot be found to be substantial unless based on valid scientific methodology. *Rosen v. Cyba—Geigi Corp.* 78 F. 3d 316 (7th Circuit, 1996). Similarly in *Donahue v. Barhardt*, 279 F. 3d 441 (7th Circuit 2002), the Court found that a vocational expert's testimony providing job numbers must be based on "reliable methods." This necessarily requires, the Court noted, that the vocational expert's opinion/s be the product of "reliable principles and methods" that are reliably applied to the facts of the case. The starting part of the inquiry is for the vocational expert to produce, at the hearing, the basis of his or her opinion/s. *Elliot v. Commodity Futures Trading Commission*, 202 F.2d 926 (7th Circuit 2000). In *McKinnie v. Barnhardt*, 368 F. ed 907 (7th Circuit, 2004), the

vocational expert testified that job numbers for each identified occupation were determined by use of “regular market studies” from the Department of Labor and Census Bureau, “in combination, to include my personal labor market surveys in extrapolating the numbers.” The vocational expert testified that he did not bring any reference materials with him. When questioned further as to how he extrapolated the identified job numbers, the vocational expert added the following: “Based on knowledge of the vocational expert and everyday labor market surveys that we do.” The administrative law judge informed the claimant’s attorney that he could request the VE to supplement his testimony with the data and references relied upon, but only if the claimant agreed to compensate the VE for her efforts. The record was left open, but the claimant’s representative did not request further report from the vocational expert. On appeal to the Seventh Circuit, it was argued that the administrative law judge erred in relying upon the vocational expert’s responses without first determining whether or not an adequate foundation for such testimony exists. The Seventh Circuit agreed with this argument and remanded the case. Relying on prior case law out of the same circuit, the Court found that the administrative law judge may rely upon expert testimony but only if it is proven to be reliable, stating that “[e]vidence is not ‘substantial’ if vital testimony has been conjured out of whole cloth.” **The Court found that the vocational expert is “free to give a bottom line, but the data and reasoning underlying that bottom line must be ‘available on demand’ if the claimant challenges the foundation of the vocational expert’s opinions.”** Other Courts, in various settings, have adopted similar findings. In *Duke v. Astrue*, 134 Soc. Sec. Rep. Serv. 156, 2008 WL 3992251 (N.D. Ind. 2008), the court found, not surprisingly, that the vocational expert’s testimony that the basis of his opinion was his “experience” as a vocational expert was not enough and thus, on remand, the vocational expert was instructed to produce supporting data and

reasoning. In *Holtz v. Astrue*, 136 Soc. Sec. Rep. Serv. 1, 2008 WL 4704187 (W.D. Wis. 2008), the Court, in ruling on an EAJA petition, found that the Commissioner was not substantially justified in his position where the vocational expert only offered her experience in the field to support her conclusions.

The Appeals Council has no doubt, on multiple occasions, addressed the need for substantial, credible evidence as a basis for a denial at either steps four or five of sequential evaluation. In one such Appeals Council decision (names deleted for privacy purposes), the Council, in its remand order, noted that “the vocational expert was unable to provide reliable job information as to the existence of these jobs.” The Appeals Council further noted:

The Administrative Law Judge will obtain additional vocational expert testimony and will ask the vocational expert to identify examples of jobs the claimant can perform and to state the incidence of such jobs in the national economy. **The vocational expert will provide reliable job information such as onsite reviews, governmental and other publications as the basis of such jobs to exist.** (emphasis added.)

In a May 6, 2009 Remand Order, the Appeals Council rejected as inadequate the testimony of a vocational expert with similar rationale:

In compliance with the above, the Administrative Law Judge will insure that the vocational expert adequately supports the basis of his/her testimony, if testimony is required. If the vocational expert relies on a documentary source [that] is not deemed reliable administratively, he/she should explain the underlying methodology. If the

vocational expert relies on his/her own research, he/she should be prepared to produce any directly applicable documents.

I commend for your review two excellent secondary sources addressing the sufficiency of evidence issue. The first is David Traver's *Social Security Disability Advocate's Handbook*. It provides at §19.02.1:

The essence of an attack on the VE's testimony at the hearing is the insistence on understanding how the VE knows what the VE says he or she knows. Don't settle for the allegation that 'twenty-five years of experience' gives the VE an intuitive grasp that there are 12,432 unskilled, one-armed, illiterate, sedentary inspector jobs locally or nationally.

Work in your crossexamination to determine if the VE actually has reliable data and methodology, and that the VE has properly applied established vocational principles and methods to the facts of the case.

As Traver points out at §19.02.2, "[t]he mantra of some VE's in response to persistent questions about methodology used to produce the numbers and jobs given at a hearing is 'my twenty-five years of experience'...." Traver further observes:

Twenty-five years of experience by the VE is not a methodology--it is a work history, which may support the VE's qualifications to testify. However, once that expert is accepted as 'qualified' the next issue is tested not by the VE's qualifications but by the scientific evidence standard set forth in *Daubert*. (emphasis added)

David Traver, *Social Security Disability Advocate's Handbook* at § 1902.2.

Barbara Samuels' treatise, *Social Security Disability Claims Practice and Procedure (2nd Edition)* at §27:61 emphasizes that the substance of vocational expert testimony can only be revealed through a particularized inquiry:

Many questions might be raised by a vocational expert's testimony based on his or her own personal experience. The following list is just a sampling: Is the VE's experience recent or remote? Is it based on actual placement of individuals with disabilities? How many placements does it involve? Does it involve placement of people with the kind of impairments from which the particular claimant suffers or a different population? Has the VE actually placed impaired individuals in the same occupations the VE now testifies the claimant can perform? What personal knowledge does the VE have of those particular placements? What is the personal knowledge based on (site visits, reports from other sources, etc.)?

VOCATIONAL RESOURCES

Job Numbers: It is important to note at the outset that job numbers are collected by both Census Code and Standard Occupational Classification (SOC) Code number. While job statistics are tracked as often as monthly, the government generally releases information on an annual basis.

It is a common misconception amongst practitioners and administrative law judges alike that job numbers are collected by individual DOT occupational title. This misconception has been likely perpetuated by the fact that vocational experts frequently cite only one DOT occupational title in response to a hypothet but provide job numbers for an entire

Census or SOC Code number usually inclusive of several DOT occupational titles. I shall elaborate on the significance of this later.

The subtle difference between the Census and SOC Code methodologies for collecting job numbers in the regional and national economy is worthy of explanation. Census Code data is, as the term suggests, derived through direct contact with individuals, families, and homes. Major census taking, as we all know, occurs every ten years, but the government tracks the incidence of jobs more frequently than this. Periodically, even monthly, phone contact is made into a selected sampling of individuals, families, and homes through which information is obtained as to the occupational and employment status of those in residence. The SOC methodology for collecting raw job numbers approaches the world of work from a slightly different perspective. Survey information is gained through contact with employers and businesses and is believed, by this writer, to be inherently more reliable than the alternative.

The SOC job classification system is a system that provides for periodic updating. It classifies or categorizes **all** occupations performed for pay or profit in the national economy, public, private, as well as military. It is important to note that the year 2000 SOC classification system was recently updated with significant changes. The complete and updated 2010 SOC classification structure can be found on the Bureau of Labor Statistics website at <http://www.bls.gov/soc/home.htm>. Finally, it is important to note that there is no one-to-one correlation between the census and SOC occupational classification systems as there are approximately 500 census code occupational categories and 800 occupational categories under the SOC classification system. It should be noted that there is a government website that provides annual occupational employment statistics including regional and national job numbers

by SOC Code number: <http://www.bls.gov/oes/>. Curiously, however, the website does not include statistical data for some employment sectors, to include self-employed individuals, military personnel, as well as logging and fishing industries.

DOT/SCO: The Department of Labor no longer updates the DOT. This hasn't been done since 1991. **Bear in mind also that the DOT, as we know it, is in large part based on occupational analyses performed in the year 1977.** The designation "DLU" contained at the conclusion of the occupational definition for each DOT occupational title tells you the date the occupation was last updated. Nevertheless, SSA continues to marry itself to the DOT/SCO, notwithstanding the fact that it is long out of date and not reflective of the current service-based U.S. economy. If this is not enough, both the DOT and the SOC are based on flawed occupational data and poor analyses to begin with. This said, as each remains authoritative in Social Security disability proceedings, at least for now, practitioners must become proficient in their use.

Before proceeding into an analysis of the DOT and the SOC, it is important that one understand the difference between the terms "occupations" and "jobs". As SSR 00-4p reminds us, the term "occupation" as used in the DOT refers to a collective description of jobs and thus, each occupation represents numerous jobs. The term "jobs" refers to sheer incidence; that is, the frequency at which occupations exist in the regional or national economy. The DOT, in combination with the SCO, provides a multifaceted analysis of the requirements or elements of 12,741 public, private, and military occupations existing (or once existing) in the U.S. economy. For each such occupation, the DOT assigns: (1) a nine-digit occupational code number; (2) occupational title; (3) Industry designation; (4) alternate title/s; (5) Job description; (6) strength level; (7) GED requirements for reading, math, and language; (8) SVP (skill) requirements, and;

(9) date last updated. It is important to note, as SSR 00-4p observes, that the DOT lists the **maximum** requirements of occupations as they are generally performed in the U.S. Economy.

The SCO is a particularly useful tool for vocational experts and practitioners alike. Part A divides DOT occupational titles by GOE Code Classification¹. For each DOT occupational title, the SCO provides the corresponding SVP and strength level. Included among the nonexertional task elements profiled in terms of frequency are fingering, handling, reaching, stooping, and crouching, among others. Environmental conditions analyzed include weather exposure, heat exposure, proximity to moving mechanical parts, high, exposed places as well as exposure to toxic or caustic chemicals. The SCO profiles for DOT occupational code numbers 772.687-014 through 784.687-042 are provided below:

PART A
06.03

Quality Control

| DOI Code | DOI Title/DOI Industry Designation(s) | S | Physical Demands | | Environmental Conditions |
|-------------|---------------------------------------|---|--------------------------------------|--|-----------------------------|
| | | | Y S CBSKCCRHF P l a t r o w e a i | F T H I N F D A C F c a e S A A P e V V | |
| 772.687-014 | SPOTTER (glass mfg.) | 2 | L N N O N N N F F N | N N N N F N N N N N | N N N N 3 N N N N N N N N N |
| 781.667-010 | ASSEMBLER (glove & mit.) | 2 | L N N N N N N F F F | N O O N F N N N F N | N N N N 4 N N N N N N N N N |
| 782.687-050 | SECONDS HANDLER (knitting) | 2 | L N N N N N N C C F | N N N N N N N N F N | N N N N 3 N N N N N N N N N |
| 784.587-010 | HAT-BODY SORTER (hat & cap) | 2 | L N N N N N N F F N | N N N N F N N N F N | N N N N 4 N N N N N N N N N |
| 784.687-034 | GLOVE PAIRER (glove & mit.) | 2 | L N N N N N N F F F | N N N N F N N N F N | N N N N 4 N N N N N N N N N |
| 784.687-042 | INSPECTOR-PACKER (hat & cap) | 2 | L N N N N N N C C C | O N O N C N N F F N | N N N N 3 N N N N N N N N N |

¹ The GOE structure is inclusive of sixty-six Work Groups and 348 subgroups. Work Groups, represented by the first four digits of the GOE code, contain occupations which involve the same general type of work and require the same adaptabilities and capabilities of the worker.

It is important to note that a properly worded hypothet speaks the language of the DOT/SCO and so the hypothetical claimant's limitations are expressed in terms of the work related functions profiled therein. But bear in mind that the range of work related functions that may be included in a hypothet is almost limitless and many are not profiled in the DOT/SCO. Nonetheless, by comparing the parameters of the hypothet with the occupational profiles contained in the DOT/SCO, the practitioner is able to test the validity of the vocational expert's testimony and often discredit the vocational expert's response as in inconsistent with the DOT/SCO.

Specific Occupational Selector Manual ("SOS"): The SOS, published by a private concern, U.S. Publishing, is now in its fifth edition. It, too, provides a multifaceted breakdown of each DOT occupation, similar to the SCO. For each DOT occupational title, the SOS provides, in tabular form, the Census and SOC Code number under which it falls (although this has not been updated by U.S. Publishing since the 2010 SOC revisions). It also provides a listing of the physical demands (exertional and nonexertional), working (environmental) conditions, GED and SVP requirements as well as aptitudes required. Section I lists all DOT occupational titles by Census and SOC Code number complete with the multifaceted job profile noted above while Section II provides the same multifaceted job analysis but is arranged numerically by DOT Occupational Code number. The SOS, however, unlike the SCO, is not an official governmental source and has not been deemed reliable administratively by SSA. Nonetheless, it can be a useful tool for testing the validity of vocational expert responses.

The Revised Handbook for Analyzing Jobs: A product of the Department of Labor, Employment and Training Administration, ***The Revised Handbook for Analyzing Jobs*** is in large part an effort to describe the occupational components set forth in the DOT/SCO. It

defines and discusses: (1) the GED and SVP scales; (2) physical demands and environmental conditions; (3) aptitudes; (4) temperaments² and; (5) the work field classification systems for grouping similar occupations.

Standard Occupational Classification Manual: Interestingly, this is a product of the Executive Office of the President, Office of Management and Budget. As its title suggests, it lists and discusses the entire 2010 SOC classification and coding structure. It also provides a helpful discussion of the methodologies employed by the Bureau of Labor Statistics and Census Bureau in collecting occupational employment data.

The Transitional Classification of Jobs (6th Edition) (“COJ”): The COJ is published by Elliot and Fitzpatrick, Inc. It lists all DOT occupational titles in numeric order, in tabular form, much like the SCO, providing: (a) SVP classification; (b) GED requirements; (c) Aptitudes required; (d) Physical demands; (e) Environmental conditions; (f) Temperaments required; (g) Work Field classification. The COJ also contains a useful table listing all DOT occupational titles grouped numerically by work field classification with attendant SVP, GED, and physical demand requirements.

² *The Revised Handbook for Analyzing Jobs* defines “temperaments” as the adaptability requirements made on the worker by a given occupation and assigns eleven temperament factors. All DOT Occupational Titles are assigned applicable temperament factors. These are: (1) D-directing, controlling, or planning activities of others; (2) R-performing repetitive or short-cycle work; (3) I-influencing people in their opinions, attitudes, and judgments; (4) V-performing a variety of duties; (5) E-expression of personal opinions; (6) A-working alone or apart in physical isolation from others; (7) S-performing effectively under stress ; (8) T-attaining precise set limits, tolerances, and standards; (9) U-working under specific instructions; (10) P-dealing with people; (11) J-making judgments and decisions. In an October 16, 2008 memorandum, then Chief Judge Frank Cristaudo takes the position that temperaments may not be considered in SSA’s adjudicatory process because temperaments reflect “personal interests, natural abilities, and personality characteristics” rather than limitations attributable to medically determinable impairments. This, however, is clearly not correct. Temperaments are, in fact, work-related functions which may be limited or precluded by medically determinable impairments.

The COJ, in its introductory section, briefly explains the anatomy of the DOT. It as well discusses SSR 00-4p and Social Security's continuing commitment to the DOT. What is particularly instructive is the easy to read, step-by-step explanation of how a transferable skills analysis should be conducted utilizing the DOT approach. Briefly, under this method, the user is first directed to the COJ's table listing light and sedentary occupations by work field classification contained in Section II. All occupations which share the same work field classification as the claimant's past relevant work are identified. Next, identify all DOT occupational titles within that work field classification that have the same first digit (broad industry grouping) of the nine-digit DOT occupational code number as the claimant's past relevant work. Finally, identify all occupations that fall within the individual's RFC. This procedure, as the COJ explains, "quickly permits the user to move from 12,741 jobs listed in the DOT to those few which meet the parameters of the worker's profile in terms of residual functional capacity and past relevant work performed." This writer supports this approach to conducting a transferability of skills analysis because it is substantially similar to if not identical to the criteria for determining transferability of skills contained at §§ 404.1568(d)/416.968(d). The COJ also contains a crosswalk listing the DOT occupational titles falling under each respective SOC Code number. However, as is the case with the SOS, this table is of limited evidentiary import as it was published prior to the recent changes to the SOC Classification System.

Occupational Employment Quarterly II ("OEQ"): U.S. Publishing also publishes, in tabular form, the OEQ. Released quarterly, it provides what vocational experts need most in Social Security disability proceedings—a ready reference table providing regional and national job numbers broken down by exertional and skill level and arranged numerically by both Census and

SOC Code number. The OEQ also provides the total number (but does not list) of DOT occupational titles falling under each respective Census and SOC Code number. But all is not as well as it seems. The problem with the OEQ is that its methodology for breaking down state and national job numbers into exertional and skill categories is, in this writer's opinion, based upon flawed methodology. Please allow me to elaborate. The OEQ divides state and national job numbers into the following skill/exertional categories: sedentary unskilled; sedentary semi-skilled; sedentary skilled; light unskilled; light semi-skilled; light skilled; medium unskilled; medium semi-skilled; medium skilled; heavy plus unskilled; heavy plus semi-skilled; heavy plus skilled. The OEQ determines the job numbers falling into each of its respective exertional-skill categories on a simple *pro rata* basis; that is, by dividing the total number of jobs assigned to each Census or SOC Code number by the total number of DOT occupational titles contained thereunder and multiplying this figure by the number of DOT occupational titles falling into each of its skill-exertional categories. To illustrate, let's say SOC Code Number 43-4170 (Receptionists and Information Clerks) contains, per Bureau of Labor Statistics Data, 800,000 jobs in the national economy and is inclusive of 10 DOT occupational titles. Let's further assume that one-half of these occupational titles (five) are sedentary, semi-skilled occupations and one-half are sedentary, skilled positions. The OEQ would place 400,000 jobs into the sedentary semi-skilled category and 400,000 jobs into the sedentary skilled category computed as follows: 800,000 (total number of jobs under SOC Code Number) divided by 10 (number of DOT Titles under SOC Code number) equals 80,000 (number of jobs per DOT occupational title). Five DOT occupational titles fall into the sedentary semi-skilled category so 400,000 job numbers are allotted thereto and five DOT occupational titles fall into the sedentary skilled category so 400,000 jobs are placed therein.

The notion that for each census and SOC Code number **all** DOT occupational titles exist in the same frequency in the regional and national economy has no reasonable statistical or scientific basis. Not surprisingly, the Appeals Council agrees. In a May 6, 2009 Remand Order, the Appeals Council, acknowledging the *pro rata* distribution of job numbers provided in the OEQ held:

After several attempts of clarification, the vocational expert agreed that the premise of such methodology might suggest a ‘lack of validity.’ Then, the vocational expert concurred that if U.S. Publishing assumed that the breakdown within each broad Census Code was equal for each DOT Code, then the results would not be accurate.

In his respected treatise, Dave Traver writes:

Implicit in U.S. Publishing’s methodology is the unsupported assumption that jobs would be distributed on a *pro rata* basis amongst the distribution of DOT Occupations under a specific Census Code. **This is an untenable suggestion. There is no empirical research that would support this assertion. It is just a convenient methodology that generates the desirable result of purporting to report actual jobs by skill and exertional demand.** (emphasis added.)

David Traver, *Social Security Disability Advocates Handbook*, §15.10

RECOMMENDED SOFTWARE PRODUCTS INCLUDING ELECTRONIC VERSIONS OF THE DOT

Two things should be noted at the outset of this discussion. First, there is no electronic version of the DOT/SCO produced or sanctioned by the Department of Labor. Secondly, SSA has only

endorsed the last updated, 1991 version of the DOT. So while there are various electronic versions of the DOT on the market maintained by private sources, some of which provide updated occupational information, these do not have the seal of approval of SSA and should not be relied upon in social security disability proceedings. This said, there are software products out there that merit favorable discussion and a few have received at least a qualified endorsement by SSA. In a memorandum dated October 6, 2008 entitled “Occupational References to Administrative Law Judge and Senior Attorney Adjudicator Decision Writers”, SSA authorizes three electronic versions of the DOT: (a) **OccuBrowse**; (b) **OASYS**; (c) **WestLaw’s Social Security CD Library**. The memorandum observes that these electronic versions of the DOT are consistent with the requirements of SSR 00-4p but cautions that they cannot always be relied upon to produce results that conform with SSA’s guidelines. The memorandum further notes that these software products are endorsed for internal use only, such as to determine whether a favorable on the record decision can be rendered and so in all other cases “ALJ’s should continue to use VE’s as appropriate....”

OccuBrowse, **OASYS**, and **Job Browser Pro**, all products of *SkillTRAN* contain many of the same features with some notable differences. **Job Browser Pro** will be discussed first because I believe it can be particularly useful to social security practitioners. **Job Browser Pro** provides the Census and SOC Code numbers for all DOT occupational titles and will also list all DOT occupational titles falling under each respective SOC Code number. Importantly, it does so based on the 2010 revisions to the SOC classification system. **Job Browser Pro** also provides a breakdown of all DOT occupational titles by Census Code classification.³ This information, as

³ After diligent search, or so it would seem, I have been unable to locate any governmental source **currently** providing or listing DOT occupational titles falling under each respective Census or SOC Code number.

shall be discussed later, enables the practitioner to test the accuracy of vocational expert testimony. Set forth below is **Job Browser Pro's** listing of all DOT occupational titles under SOC Code number 51-6011.

| <u>DOT CODE</u> | <u>DOT TITLE</u> | <u>STRENGTH</u> | <u>SVP</u> | <u>GED-RML</u> | <u>O*NET</u> |
|-----------------|--|-----------------|------------|----------------|--------------|
| 361.684-014 | Laundry Worker I (any industry) | M | 2 | 211 | 51-6011.03 |
| 361.685-018 | Laundry Worker II (any industry) | M | 2 | 211 | 51-6011.03 |
| 369.685-014 | Fur Cleaner, Machine (fur goods) | L | 3 | 212 | 51-6011.03 |
| 780.687-058 | Upholstery Cleaner (furniture) | M | 2 | 211 | 51.6011.01 |
| 582.684-014 | Spot Cleaner (garment) | L | 3 | 212 | 51-6011.01 |
| 589.685-038 | Dry Cleaner (knitting) | L | 2 | 211 | 51-6011.03 |
| 361.685-014 | Continuous-Towel Roller (laundry & related) | L | 2 | 211 | 51-6011.03 |
| 362.685-010 | Feather Renovator (laundry & related) | L | 2 | 111 | 51-6011.03 |
| 362.684-014 | Fur Cleaner (laundry & related) | L | 5 | 322 | 51-6011.03 |
| 369.685-022 | Fur-Glazing-And-Polishing-Machine Operator (laundry & related) | L | 3 | 211 | 51-6011.03 |
| 362.684-026 | Leather Cleaner (laundry & related) | L | 3 | 322 | 51-6011.03 |

| | | | | | |
|-------------|--|---|---|-----|------------|
| 364.684-010 | Rug Dyer II (laundry & related) | L | 5 | 322 | 51-6011.02 |
| 361.684-018 | Spotter I (laundry & related) | L | 3 | 311 | 51-6011.01 |
| 362.381-010 | Spotter II (laundry & related) | L | 4 | 322 | 51-6011.01 |
| 362.382-014 | Dry Cleaner (laundry & related) | M | 5 | 322 | 51-6011.03 |
| 362.382-010 | Dry Cleaner Apprentice (laundry & related) | M | 5 | 322 | 51-6011.03 |
| 364.361-010 | Dyer (laundry & related) | M | 7 | 432 | 51-6011.02 |
| 361.684-010 | Launderer, Hand (laundry & related) | M | 2 | 212 | 51-6011.03 |
| 369.684-014 | Laundry Operator (laundry & related) | M | 3 | 212 | 51-6011.03 |
| 361.682-010 | Rug Cleaner, Machine (laundry & related) | M | 4 | 311 | 51-6011.03 |
| 364.361-014 | Rug Dyer I (laundry & related) | M | 8 | 433 | 51-6011.02 |
| 361.665-010 | Washer, Machine (laundry & related) | M | 4 | 322 | 51-6011.03 |
| 369.685-010 | Fur Blower (retail trade) | L | 2 | 211 | 51-6011.03 |

Other features of **Job Browser Pro** include quick reference to occupational profiles for all DOT occupational titles in terms of GED level, SVP level, exertional and nonexertional demands.

Finally, **Job Browser Pro** applies what this writer believes to be a reasonably scientific

methodology to breakdown regional and national job numbers at the DOT level. Stated another way, it provides job numbers by individual DOT occupational title. **OASYS** and **OccuBrowse**, unlike **Job Browser Pro**, include a feature that provides DOT occupational titles which are ostensibly consistent with a given medical-vocational profile including residual functional capacity. They do not, however, provide regional and national job numbers at the DOT level—only at the SOC code level. Finally, because each of the above described *SkillTRAN* products are based upon the last 1991 revisions to the DOT, they can serve as valuable tools for testing the validity and perhaps undermining flawed vocational expert testimony.

WestLaw's 'Social Security CD Library' is a DOT/SCO oriented product. It as well is based upon the last, 1991 revisions to the DOT and so of use to social security practitioners. This product, however, limits its scope of information to that which is provided in the DOT/SCO. It therefore does not provide regional or national job numbers nor does it provide Census or SOC Code data.

Other software products include the so called eDOT developed by the Economic Research Institute and now managed by PAQ Services. But beware of any software product that purports to be an updated, electronic version of the DOT. These so called updated DOT's are often based, at least in part, on reports from individuals in the private sector, individuals whose training, motivation, and, indeed, credibility are in many cases largely unknown. Remember also that any updated version of the DOT has no evidentiary value in Social Security disability proceedings.

To conclude, remember that software products used by vocational experts and practitioners are only as good as the data and methodology upon which they are based. So be prepared to object anytime a vocational expert reaches for his or her laptop before responding to a question at a hearing. If the software product relied upon is not one of those endorsed at least for internal use by SSA, you should object to its use unless (1) it is based only on the 1991, last updated version of the DOT and; (2) the vocational expert is able to explain and validate its underlying data and methodology. Moreover, any software product that purports to be able to identify DOT occupational titles which are consistent with a given hypothet or RFC should be viewed with caution. Even reliable software products such as **OASYS** and **OccuBrowse** will have limited application when it comes to the identification of alternative employment based upon a hypothet/RFC in view of the almost endless list of terms and descriptors routinely plugged into RFC assessments, many if not most of which go beyond the standardized terminology and descriptors utilized in the DOT/SCO. A computer software simply cannot account for these unknown and often undefined variables. Examples would include: the need to avoid fast-paced production requirements; the stipulation that the claimant has to elevate one or both lower extremities in an angled upward position for thirty minutes out of every hour; the stipulation that the claimant can not work in the neck-flexed position (looking down); the existence of a moderately limited ability to respond to criticism from coworkers and supervisors, to name just a few.

SWISS CHEESE ON DELIVERY—THE INADEQUACIES OF VOCATIONAL EVIDENCE CURRENTLY USED TO SUPPORT THE EXISTENCE OF JOBS IN THE REGIONAL AND NATIONAL ECONOMY

Before proceeding to a more in-depth discussion of the deficiencies of vocational evidence used at social security disability hearings, it important for the reader to become familiar with the

“mechanics” of the vocational expert’s job identification process. When presented with a hypothet at a hearing, vocational experts, almost universally, respond by identifying a singular DOT occupational title which they are reasonably certain is consistent with the parameters of the hypothet in terms of GED level, skill level, exertional and nonexertional requirements. This is generally done, at least should be, through comparison of the parameters of the hypothet with the occupational profiles provided in the DOT/SCO. They then provide state and national job numbers published by the Bureau of Labor Statistics but the job numbers are usually associated with an entire Census or SOC Code number. If you are lucky, the vocational expert will provide relevant Census or SOC Code numbers as well—but this will likely not be provided unless requested by the administrative law judge or representative. What the vocational expert seldom does is inform the administrative law judge that the job numbers provided are not for the singular DOT occupational title identified but for an entire census or SOC Code number both of which are almost always inclusive of multiple DOT occupational titles.

So why do vocational experts resorted to such a practice? Consider that the essence of the vocational expert’s function in social security disability hearings is to provide occupations and job numbers consistent with a hypothetical question which embodies skill (SVP) requirements as well as exertional and (usually) nonexertional limitations. But vocational experts, in the limited amount of time provided, simply don’t have the time, in responding to most hypothets, to identify more than one or a few occupations believed to be consistent with the hypothet. Why, owing to the fact that as of this writing there is no technology or methodology enabling them to do much more. So what many vocational experts do is resort to testimony by way of half-truth identifying a singular DOT occupational title which the vocational expert has determined fits the

hypothet with providing job numbers associated with an entire Census or SOC Code numbers, both of which are almost always conclusive of multiple DOT occupational titles.

Many vocational experts respond to this quandary by relying upon U.S. Publishing's OEQ II, likely because it provides vocational experts with critically needed information in a format that can be easily referenced at the hearing. But U.S. Publishing's methodology for breaking down job numbers into exertional—skill categories is, as noted previously, flawed.

Another problematic area of vocational expert testimony concerns the vocational expert's all too frequent and ill advised practice of providing "estimates" of job numbers thought to be consistent with the hypothet that in fact amount to little more than a semi-educated guess that is, testimony by way of "guesstimation" rather than "estimation." An example of this would be the vocational expert's testimony that 50% of the job numbers of the regional and national job numbers cited are believed to be consistent with the hypothet. In virtually every case where the vocational expert throws out a percentage reduction SOC or Census Code job numbers, the vocational expert has nothing to fall back on and the testimony is little more than an "inspired hunch."

TIPS, TACTICS, AND STRATEGIES FOR ATTACKING FLAWED VOCATIONAL EXPERT TESTIMONY

1. Do not loose sight of the fact that the burden of persuasion or going forward with the evidence rests with the Commissioner. You therefore do not have to prove that job numbers are "insignificant." Focus on arguments that demonstrate the weaknesses or flaws in vocational expert testimony.

2. Request the issuance of a subpoena duces tecum prehearing pursuant to §§ 404.950(d)/416.1450(d), requesting the administrative law judge to order the vocational expert to produce all statistics, research, and other data upon which he or she intends to rely at the hearing. I have forwarded a letter requesting such evidence in hundreds of cases over the past few years and have yet to have an Administrative Law Judge act upon my request. The advantage, however, of making the request is that HALLEX I-2-5-78 provides that the administrative law judge **must** rule upon the request and provide the reasons for his or her ruling in the decision—something administrative law judges seldom do. This gives you at least one plausible argument to the Appeals Council in the event the decision is not favorable.
3. Remember again, that job numbers are published by Census and/or SOC Code numbers and that there are almost always multiple DOT titles contained under each. So be sure to ask the vocational expert for the Census or SOC numbers for the regional and national job numbers identified. Then ask the vocational expert to provide the total number (not list) of DOT occupational titles contained under the Census or SOC Code numbers provided. If he doesn't know, you can easily access this information through sources such as **Job Browser Pro**. If, for example, there are eleven DOT occupational titles under the SOC Code number provided, ask the vocational expert if he/she has checked all eleven for consistency with the hypothet. In almost every case if the vocational expert is being truthful he/she will acknowledge that the DOT occupational title number identified in response to the hypothet is the only one that the vocational expert has checked for consistency therewith. If, however, the vocational expert does state that she or she has verified that all underlying DOT occupational titles are consistent with the

hypothet, then ask the vocational expert to list the remaining DOT occupational titles so that you can independently verify that this is in fact the case. You can do this either at the hearing or ask the judge for permission to submit a short post-hearing brief to construct your argument and attach supporting documentation. Let's say the vocational expert identifies, in response to a hypothet which includes an unskilled past work history and light RFC, the position of Feather Renovator, DOT Number 362.685-010, light, SVP-2, and states that there are 9,221 jobs regionally and 452,681 in the national economy. You then ask the vocational expert to provide the SOC Code number (51-6011) for the job numbers cited as well as the remaining DOT occupational titles contained thereunder. You then discern, by reference to **Job Browser Pro**, which incorporates the occupational profiles contained in the DOT/SCO, that of the 23 occupational titles contained under this SOC Code number, 15 are listed as SVP 3 or above (semiskilled or above) and 11 have an exertional level of medium or above. So this leaves a total of only 4 DOT occupational titles that are in fact consistent with the hypothet, but the regional and national job numbers are for the entire SOC Code number inclusive of 23 occupational titles. The vocational expert's testimony has been thusly discredited as the occupational titles that are in fact consistent with the hypothet and the job numbers provided do not match. In all likelihood, if you pursue this argument at the hearing, the vocational expert's fallback response will be based on his/her "experience" as a vocational expert, a percentage of the previously stated job numbers, say thirty percent, would continue to fit the hypothet. But "experience" in and of itself, without more, is simply not enough and so the vocational expert's testimony will not and cannot serve as a basis for denial given the Supreme Court's standard in *Daubert* as well as SSR 00-4p. The one drawback to

this approach is that it can be both tedious and time consuming and perhaps a source of aggravation to the administrative law judge. So consider as an alternative a second approach which is much like the first except the practitioner will only ask the vocational expert to provide the SOC Code or Census Code Number for the regional and/or national job numbers provided. The representative then will ask the administrative law judge to leave the record open to submit a short post-hearing memorandum to address the issues arising from the vocational expert's testimony. This will provide the representative with more time to structure his/her arguments, and with supporting documentation. Again, the DOT occupational titles under each Census and SOC Code number can be readily accessed through *SkillTRAN's Job Browser Pro*. Unless your argument turns out to be relatively simple, I recommend that the practitioner proceed by way of post-hearing submission. In any event, regardless of the approach taken, it is time for practitioners to better familiarize themselves with the mechanics of vocational expert testimony. Until more practitioners begin to construct intelligent arguments exposing the weaknesses of flawed vocational expert testimony, questionable vocational expert practices will not decline.

4. Utilize the work-field approach described in the COJ to test the validity of vocational expert testimony as to the existence of transferable work skills.
5. Inquire as to how recent the data is relied upon by the vocational expert. I frequently have hearings with one vocational expert who routinely relies upon the OEQ, but the latest edition in his possession is the third quarter of 2005 even though the OEQ is updated quarterly.

SUMMARY AND CONCLUSIONS

1. *Daubert*, circuit court jurisprudence, and SSR 00-4p all make clear that the vocational expert's vague reference to his or her "experience" does not and cannot serve as a basis for a step five denial. Substance in the way of reliable data backed up by sound principles and methodology must be produced.
2. Vocational experts are placed in the unenviable position of being pressed for a near immediate response to a hypothetical question, the subject matter of which has not been heretofore revealed. Hypothetical questions are often lengthy and fraught with subjective terminology. Once presented with the hypothetical, the vocational expert is asked to provide a response backed up by credible evidence sufficient to withstand a *Daubert* challenge, be complicit with relevant circuit court jurisprudence as well as SSR 00-4p. Is it any wonder that many vocational experts have resorted to the rather questionable practices described above?
3. No doubt, the present state of affairs represents a huge window of opportunity for the practitioner. But practitioners must view the vocational expert's quandary with caution and good judgment and only exploit the weaknesses of the system, as it were, when the vocational expert has clearly gone out on the limb by providing testimony that, at least on its face, conflicts with the decisional framework embodied in the Act, regulations, and rulings. In cases where the practitioner has made an intelligent assessment that the hypothetical presented should, in any event, yield occupations in the regional or national economy, attacking the vocational expert's testimony amounts to little more than rearranging the furniture on the deck of the **Titanic**, as it were, and, what's more, will likely compromise the practitioner's credibility with the administrative law judge. This

said, vocational experts **must** know that when they do go out on the limb that you will be waiting with the saw!

4. Vocational experts, for their part, must stop relying upon flawed and/or outdated vocational data or, in many cases, none at all. They must as well not succumb to the temptation to provide “estimated” reductions of SOC Code or Census Code generates job numbers which are believed to be consistent with a hypothet in the absence of credible evidence to support these so called “estimates”. This ill-advised practice is testimony by way of “guesstimation” rather than an informed, fact-based assessment. Finally, vocational experts must discontinue the practice of testifying by way of half-truth; that is, citing a singular DOT occupational title—the one that the vocational expert is convinced is consistent with the hypothet—while providing job numbers associated with an entire Census or SOC Code number. This is both fundamentally wrong and legally indefensible. My recommendation to vocational experts is and has been simply this: make every effort to support your testimony by reliable data, principles and methodology and be prepared to produce same at the hearing. The vocational expert must perform a diligent and efficient occupational search citing as many but only those DOT occupational titles that the vocational expert reasonably and credibly believes are consistent with a hypothet. Moreover, the vocational expert must cite regional and national job numbers for these occupational titles only. The starting point for this assessment must, of necessity, be the DOT/SCO. Once the appropriate occupational titles are identified, software products such as *SkillTRAN’s Job Browser Pro*, will allow the vocational expert to credibly produce only those regional and national job numbers associated with the identified occupational titles. Owing to the limited amount of time

allowed for a response, the vocational expert may not be able to identify **all** occupations and associate job numbers that are consistent with the hypothet but, more importantly, the testimony provided will be credible rather than illusory and sufficient to withstand, in this writer's opinion, a *Daubert* challenge, meet the requirements of pertinent circuit court jurisprudence as well as SSR 00-4p. While this approach is not without its shortcomings, it will yield more consistent and more accurate results than those currently employed by vocational experts throughout the country, many of which represent little more than inspired hunches. One final point: this is not to say the vocational expert must be prepared to produce vocational data to support everything that comes out of his or her mouth. This is an issue that will simply have to be resolved on a case-by-case basis and in accordance with guidelines and parameters discussed above.

WHAT LIES AHEAD?

SSA's newly created Office of Vocational Resources, in conjunction with an outside panel referred to as the Occupational Information Development Advisory Panel, is charged with the responsibility of analyzing occupational information used by SSA in its disability programs and providing guidance in the development of an occupational information system tailored to SSA's needs. But it will be years, not months, before a new occupational information system will be implemented by SSA.

CONCLUSION

The Social Security Act and regulations, with its Byzantine structure, is perhaps the most particularized, elaborate body of statutes and regulations on the books. It is both sad and ironic then that hundreds of thousands of people from all walks of life, men and women who have lost

their livelihood, their health, and in many instances, means of obtaining adequate medical care, end up having their pleas for assistance adjudicated on the basis of evidence that can only be described as flimsy. SSA's adjudicatory framework is largely dependent upon occupational profiles (DOT/SCO) that are long out of date and vocational expert testimony is more times than not based on fiction rather than fact—the product of skewed science and oftentimes no science at all. Add to this a flexible standard for determining whether significant numbers exist in the regional or national economy to which the Social Security Administration has curiously failed to add any substantive guidance by way of statute, regulation, or ruling, thus leaving to the Courts the daunting task of developing a governing criteria, (with predictable results) and you are left with a decisional framework that is woefully inadequate. Individuals whose livelihoods and lives often lie in the balance deserve more. It is hoped that the Office of Vocational Resources and through its standing panel will recognize the nature and sheer magnitude of the deficiencies that exist in the current system and so come up with a framework that fairly addresses the needs of claimants as well as the Administration's commitment to an expedient yet sound adjudicatory process.