Cross – Examining the Vocational Expert

It is the practice, by most administrative law judges (ALJ), to have a vocational “expert” (VE) testify at every hearing. At the hearing, it is the responsibility of the representative to question the VE about the basis and methodology that support his/her answers to determine if the testimony is accurate and responsive to the hypotheticals given by the ALJ and you, the representative. The purpose of cross-examination is to establish the basis for the opinions, the validity of the opinions, and the accuracy of the opinions. **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 of Occupational Titles.**

Rule 702 of the Federal Rules of Evidence provides that “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.” This substantially codifies the holdings of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), and its successors. *Rule 702, however, does not apply to disability adjudications, which are a hybrid between the adversarial and the inquisitorial models. But 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. The “substantial evidence” standard is one of the correct standards for federal court review of an ALJ’s decision. However, at the hearing do not argue “substantial evidence. The correct standard there is preponderance of the evidence.**

In practice, we see the same VE’s all the time and should have properly inquired about their qualifications when the particular VE testified for the first time at one of our hearings. (If you haven’t it is never too late to start.) When we are presented with a new VE (occurring frequently now with telephone testimony), it is crucial that we review the resume/curriculum vitae for accuracy prior to hearing. Then question the VE at the actual hearing regarding his/her experience and qualifications. It is virtually impossible to show that the VE does not meet SSA standards to be a VE since there aren’t any identifiable standards but it is important to inquire into the VE’s claimed expertise and even educational experience.

Attacking the VE’s credential should reasonably include questioning the VE about:
1. Recent and past placement experience

2. Recent and past experience performing job analysis for employers

3. Recent and past experience conducting personal job surveys for industry and commerce

4. And the expert’s knowledge of local, state, and regional industrial directories and other resource materials, including government publications listed in 404.1566 and 416.966 (2006). Those publications are:

   (1) *Dictionary of Occupational Titles*, published by the Department of Labor;
   (2) *County Business Patterns*, published by the Bureau of the Census;
   (3) *Census Reports*, also published by the Bureau of the Census;
   (4) *Occupational Analyses*, prepared for the Social Security Administration by various State employment agencies; and

Write the answers down and if necessary, request the VE provide examples of job analysis or job surveys he/she has done. If the VE refuses, or if the ALJ denies your request, that is at the very least a basis for appeal.

Attacking the VE’s credentials involves determining whether the VE is a placement specialist and a labor market specialist, and more importantly, how those experiences provide the necessary competencies to assist the ALJ in the adjudicative process. It is critical to ask what sources, specifically, the VE will use to support his testimony. If necessary, ask if he/she is using any software or electronic DOT. Without making an enemy of the VE, and without unnecessarily irritating the ALJ, go through the questions regarding his/her background.

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*
It should be noted that most of the VE’s we encounter are using Skiltran’ Job Browser Pro and Occubrowse to respond to hypotheticals. *Job Browser Pro* employs a purportedly scientific methodology to provide regional and national job numbers on a DOT level. In other words, it provides job numbers by individual DOT occupational title. *Job Browser Pro* also provides a breakdown of all DOT occupational titles by Census code classification with GED and SVP rating as well as strength level. 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.

Software products such as Job Browser Pro, OASYS and *OccuBrowse* will have limited application when it comes to the identification of occupations consistent with a given vocational-functional profile in view of the almost endless list of terms and descriptors routinely plugged into RFC assessments, many if not most of which fall beyond the standardized terminology and occupational descriptors found in SSA’s regulations and rulings or profiled in the DOT/SCO. Computer software simply cannot capture all of these unknown and ever-changing 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 cannot work in a 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.

This is where the attorney must question the VE on how he knows what he knows. A colleague has mentioned that he bought Skiltran and uses it to test the VE statements at the hearing. I think this is very useful and much more accurate and complete than doing an internet search during the hearing to determine if the VE has correctly identified the job number, strength requirements and description. I cannot count the number of times that the DOT number is wrong or the times the job description given by the VE does not match the DOT. I generally do this research after the hearing and submit my argument in a post hearing brief. In many cases, I don’t want to give the VE a chance to correct their mistake.

**Simple, Routine, Repetitive, Low-stress Work in Hypothetical Questions**

The most commonly used words in hypothetical questions by ALJs to VEs are “simple, routine, repetitive, work.” The use of these terms is so common that “simple, routine, repetitive tasks” is often abbreviated on the SSA-4734 (Mental RFC Assessment Form)
as “SRRT.” A few of these words are used by the Social Security Administration Regulations and Rulings, but close analysis shows they usually convey nothing at all.

Ruling 96-8p requires that “the RFC assessment must first identify the individual’s functional limitations or restrictions and assess his or her work-related abilities on a function-by-function basis.” Ruling 96-8p requires that “RFC represents the most that an individual can do despite his or her limitations or restrictions.”

Additionally, Ruling 96-8p requires that the Commissioner’s RFC be framed as an accurate assessment of the most a claimant can do in each functional area. “RFC does not represent the least an individual can do despite his or her limitations or restrictions, but the most.” SSR 83-10 states: “(T)he RFC determines a work capability that is exertionally sufficient to allow performance of at least substantially all of the activities of work at a particular level (e.g., sedentary, light, or medium), but is also insufficient to allow substantial performance of work at greater exertional levels.”

An effective method for cross examination in the case where “simple work” is undefined is to take the Mental RFC Assessment completed by the State agency psychologist and ask the VE how each limitation identified in the RFC affects the ability to perform the jobs he/she has identified.

“Simple Work”

Implicit in the “function-by-function” assessment of “the most” a claimant can do is the idea that any particular job will involve a number of different functions. SSR 96-8p requires that the RFC include a function-by-function assessment. These functions are work-related activities. Some are physical. Some are mental. For the mental activities of work, SSR 96-9p gives a list of those that are “generally required by competitive, remunerative, unskilled work.”

- Understanding, remembering, and carrying out simple instructions.
- Making judgments that are commensurate with the functions of unskilled work — i.e., simple work-related decisions.
- Responding appropriately to supervision, coworkers and usual work situations.
- Dealing with changes in a routine work setting.

Even for unskilled work there are multiple work-related activities. “Simple” appears twice in this list of multiple activities, as a qualifier for instructions and work-related decisions for almost all jobs.
Perhaps an ALJ who includes “simple” in a hypothetical question reasons that under SSR 96-9p “simple” is related to “activities” rather than “mental process.” However, nothing in the word “simple” informs the VE that it is aimed at mental processes or activities. Typically when an ALJ says “simple” neither the VE nor the attorney can tell if the ALJ meant simple mental tasks or simple activities. **Do not allow this implicit definition to go unchallenged. ASK the VE whether he/she is referring to mental tasks or activities.**

SSR 96-9p also speaks of “simple” in terms of communication. Did the ALJ mean the capacity to understand, recall and carry out short simple instructions? If the ALJ meant “simple” communication, then the hypothetical individual retained the basic communication abilities and the unskilled sedentary occupational base would not be significantly eroded in these areas because all work requires those abilities. SSR 96-9p.

**Sample Brief Language “Simple Work”**

Here is an example from a brief to the Appeals Council objecting to the vagueness intrinsic to a “simple work” hypothetical question:

    The RFC and hypothetical questions call for simple unskilled work plus other limitations. There is nothing about simple work or unskilled work that compensates for the claimant’s GAF of 50. Neither the ALJ nor the VE defined what was simple about the “simple work.” Did the ALJ mean simple work rules, simple tasks, simple work settings, simple intellectual concepts, or simple parts to assemble? How would such simplicities be related to the claimant’s mental impairments? Did the ALJ even intend that the “simple” part of the RFC and hypothetical questions be aimed at mental impairments or was the ALJ addressing the limited use of the dominant hand, and discussing simple mechanical tasks?

You may hear hypotheticals from the ALJ that simple means “one- or two-step jobs.” This is problematic for several reasons.

    **First,** nothing in SSA or the Department of Labor literature gives this definition.

    **Second,** nobody knows what a “one- or two-steps” job might be. Consider an on-the-job instruction to “empty the wastebaskets.” To accomplish this task, a person would have to comprehend the instructions, differentiate a particular wastebasket from other objects, know how to empty it in the correct receptacle, and remember to return it to its original location. Then the worker has to move to the next office or work station and repeat the process, progressing until the entire task is recognized as completed. How many steps is that?
At the hearing, continue this to its logical extreme for each job given by the VE, until you make your point.

**Simple Work Is Not SVP**

The Department of Labor reports job training time in the *Dictionary of Occupational Titles* definition trailers using Specific Vocational Preparation (SVP) ratings. Jobs with an SVP of “1” or “2” are unskilled. SSR 00-4p; POMS DI 25001.001(B)(52). SVP “1” jobs can be learned with a short demonstration, but SVP “2” jobs are more complex and may require up to 30 days of training. Occupations with an SVP rating of “3” or “4” are considered semi-skilled. This has nothing to do with an evaluation of how many steps are in the job. The steps are always incremental, there is no blurring of distinction or “overlap” between SVP levels.

The *Dictionary of Occupational Titles*, Appendix — C “Components of the Definition Trailer” explains SVP as follows:

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully-qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);

b. Apprenticeship training (for apprenticeable jobs only);

c. In-plant training (organized classroom study provided by an employer);

d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);

e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:
NOTE: The levels of this scale are mutually exclusive and do not overlap.

When the ALJ includes “simple” work in a hypothetical question, ask the VE if “simple” is related to SVP. If the VE believes the hypothetical includes SVP 1 and 2 jobs, the VE has simply responded with all unskilled jobs.

SVP 1 jobs are somewhat of a rarity in the DOT. If the VE says the jobs given included only SVP 1 jobs, ask the VE to show you the job on the list of SVP jobs. See Appendix — Instant Exhibits. Of the 137 sedentary jobs in the DOT, only six have SVP 1 job definitions, only 107 are light, 50 are medium, 25 are heavy, and 3 are very heavy. There are a total of only 192 SVP-1 occupations in the entire DOT.

Sample brief language “simple work”

Given the ALJ’s finding that the claimant is limited to “simple, routine tasks”, the VE testimony that the claimant can perform jobs as a gate guard (DOT 372.667-030), furniture rental worker (DOT 295.357-018) and school bus monitor (DOT 372.667-042) conflicts with the DOT because, according to the DOT, an individual who “is limited to simple, unskilled tasks” could not perform any of these three jobs.

According to the DOT, work as a gate guard, furniture rental clerk and school bus monitor all entail a reasoning at a level of “2” and “3”, and gate guard is a semi-skilled job with an SVP of “3”. The VE in this case testified erroneously that the gate guard has an SVP of “2”. These functions are part of the General Educational Development (GED) of the job, which “embraces those aspects of education (formal and informal) which are required for satisfactory job performance.” The reasoning scales range from a low of “1” to a high of “6”, which are defined, in part, as follows:
Level 1 - Apply common sense understanding to carry out simple, one or two step instructions. Deal with standardized situations with occasional or no variables in or from these situations encountered on the job.

Level 2 - Apply commonsense understanding to carry out detailed but uninvolved written or oral instructions. Deal with problems involving a few concrete variables in or from standardized situations.

Level 3 - Apply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form. Deal with problems involving several concrete variables in or from standardized situations.

According to the DOT, reasoning level “1” jobs can be performed by an individual who can understand and carry out simple instructions. Thus, jobs at a reasoning level of “2” or “3”, like those of the furniture rental consultant, gate guard and school bus monitor entail more complex abilities than could be performed by the claimant who is limited to simple, routine tasks.

Social Security Ruling 00-4p provides:

Occupational evidence provided by a VE or VS generally should be consistent with the occupational information supplied by the DOT. When there is an apparent, unresolved conflict between VE or VS evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to support a determination or decision about whether the claimant is disabled. At the hearings level, as part of the adjudicator’s duty to fully develop the record, the adjudicator will inquire, on the record, as to whether or not there is such consistency.

Neither the DOT not the VE or VS evidence automatically “trumps” when there is a conflict. The adjudicator must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on the VE or VS testimony.

When vocational evidence provided by a VE or VS is not consistent with information in the DOT, the adjudicator must resolve the conflict before finding that the individual is or is not disabled. The adjudicator will explain in the determination or decision how he or she resolved the conflict irrespective of how the conflict was identified.

“Simple” is an undefined variable at the vast majority of hearings where it makes an appearance. It may mean one- or two-step instructions, but that means nothing because there is no standard for counting steps. It may relate to an impairment that is severe, but
it also may mean there is no severe impairment. It may be a modifier for mental functioning or communication. At times it might be intended to address “activities.” Sometimes, perhaps, it could be aimed at some undefined level of seeing, manipulation, understanding, remembering, and carrying out instructions. It may simply mean nothing at all. Ask the ALJ to clarify what he/she means and ask the VE specifically how this interpretation will affect the performance of the jobs he/she has identified for the claimant.

THE MEDICAL VOCATIONAL GUIDELINES AND TRANSFERABILITY OF SKILLS

The Code of Federal Regulations CFR 20-404.1568) definition of skills transfer reads, in part:

(A person is considered) to have skills that can be used in other jobs, when the skilled or semiskilled work activities (that person) did in past work can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work. This depends largely on the similarity of occupational significant work activities among different jobs.

The transferability of a person's skills is most probable and meaningful among jobs in which:

- The same or a lesser degree of skill is required (Specific Vocational Preparation),
- The same or similar tools and machines are used (work fields), and the
- same or similar raw materials, products, processes or services are involved (Materials, Products, Subject Matter, and Services).

In order to find that a claimant who cannot return to his past relevant work can perform other work of a skilled or semi-skilled nature, an administrative law judge must find that the claimant has skills developed in his past work that can be transferred to the specific other work identified as available for him. 20 C.F.R. § 404.1568(d); Social Security Ruling 83-10. Don't let the VE testify about traits instead of transferable skills. Object to that testimony, and say that those traits are not "transferable skills," as that term is defined by the Social Security Administration. In many cases, I just get the VE to testify that these traits are actually transferable skills and then argue my case in a post hearing brief.

SAMPLE QUESTIONS
• What is a skill?
• What is the difference between a skill and a worker trait?
• Can skills be developed from unskilled work?
• What is the difference between acquired skills and transferable skills?
• You would agree, wouldn’t you, that a person’s RFC may prevent the transferability of skills?
• Explain how residual functional capacity affects transferability.
• Would you agree that a house painter’s painting skills are not transferable if he has severe allergic reactions to paint fumes? That a watchmaker’s skills would not be transferable if he has hand tremors? That a construction machine operator’s skills would not be transferable if he has a back impairment that will not permit jolting? That a craftsman’s skills would not be transferable if his impairment has caused him to lose eye-hand coordination? That a business executive’s skills would not be transferable if he has suffered brain damage which notably lowers his IQ? [All examples appear in SSR 82-41.]
• List the claimant’s transferable skills.
• Isn’t transferability of the claimant’s skill of [identify skill] prevented by [describe aspect of claimant’s RFC that prevents transferability]?
• [A particular skill identified by the VE] doesn’t give the claimant a special advantage over an unskilled worker in the labor market, does it?
• Is it your opinion that this skill can be transferred to unskilled work?
• What are the DOT and GOE numbers of each job you have identified to which the claimant’s skills are transferable?
• According to the DOT, what is the “specific vocational preparation” (SVP) of the claimant’s past relevant work?
• What is the SVP of each job you have identified to which the claimant’s skills are transferable? [These SVPs must be equal to or lower than those of the claimant’s past relevant work.]
• How did you go about researching what occupations to which the claimant’s skills might be transferable?
• Did you use Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles in your research?
• Can I see your research notes?
• When you were doing this research, what medical restrictions did you assume that the claimant had?
• Identify the following used in the claimant’s past relevant work and for each job to which you have concluded the claimant’s skills are transferable:

  — tools
  — machines
  — raw materials
For the jobs you have identified to which the claimant’s skills may be transferred, how much vocational adjustment is required in terms of tools, work processes, work settings or the industry?

- How long do you think that it will take for the claimant to establish a high degree of proficiency in each of the jobs you have identified to which the claimant’s skills are transferable?

**SAMPLE POST HEARING ARGUMENT RE: TRANSFERABILITY**

“This is especially relevant in this case as the VE identified three transferable “skills”: hand eye coordination, color discrimination and meeting precise standards. It is our contention that these are worker traits, aptitudes and abilities and not “skills”, which have no effect on the question of whether an applicant has transferable work skills. For the case at hand, the identified “skills” are not distinguishable from those of a lawyer, a secretary or a nuclear physicist. Therefore, they should be rejected as a basis for the vocational expert’s identification of three semi-skilled jobs that the plaintiff could perform, given the RFC assigned by the administrative law judge.

In the context of Social Security disability, the touchstone for job skills is Social Security Ruling 82-41. That Ruling states: A skill is knowledge of a work activity which requires the exercise of significant judgment that goes beyond the carrying out of simple job duties and is acquired through performance of an occupation which is above the unskilled level (requires more than 30 days to learn)…. A skill gives a person a special advantage over unskilled workers in the labor market. In fact, the content of the work activities of the jobs the VE listed are little more than unskilled, entry level jobs for which the claimant would have no special advantage as required by SSR 82-41. The three jobs listed by the VE as a representative sample belong in different industries than the claimant’s past work as they belong in the clerical and business industries and the claimant’s past work is in the automotive industry.

Social Security Ruling 00-4p provides:

*Occupational evidence provided by a VE or VS generally should be consistent with the occupational information supplied by the DOT. When there is an apparent, unresolved conflict between VE or VS evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to support a determination or decision about whether the claimant is disabled. At the hearings level, as part of the adjudicator’s duty to*
fully develop the record, the adjudicator will inquire, on the record, as to whether or not there is such consistency.

Neither the DOT nor the VE or VS evidence automatically “trumps” when there is a conflict. The adjudicator must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on the VE or VS testimony.

When vocational evidence provided by a VE or VS is not consistent with information in the DOT, the adjudicator must resolve the conflict before finding that the individual is or is not disabled. The adjudicator will explain in the determination or decision how he or she resolved the conflict irrespective of how the conflict was identified.”

In a recent case, the ALJ gave the VE a hypothetical for light work with occasional limits on all posturals and requiring occasional task reminders. During my questioning of the VE, judge agreed that occasional means up to one third of the day and that he envisioned some direction from a supervisor and a cheat sheet of some sort for reminders.

Based on that hypothetical, the VE said she could not perform past relevant work (PRW). PRW was described as office clerk and administrative clerk which are low skilled jobs with SVP 3 and 4. As transferable skills, the VE identified the ability to utilize office equipment, interpersonal skills and service orientation. Of the three “skills” the VE identified, only the ability to utilize office equipment can arguably give the claimant an advantage over other applicants, and could possibly be something she learned on her job. He identified “case aid” and “gatekeeper” as possible representative jobs. I got him to identify that the PRW was not in the same industry as case aid and gatekeeper. His explanation was that case aid is in an office setting and gatekeeper is an “any industry” type job. The VE at first would not admit that the codes for gatekeeper and case aid are within specific industries that are not clerical. The ALJ finally interrupted and said he agreed they were not in the same industry. The VE was forced to agree that the jobs of case aid and gatekeeper are low skilled and generally entry level jobs and he further agreed that these jobs are more lateral moves since the claimant’s PRW is so low skilled as to give her very little advantage over other applicants.

Once I clarified to the VE that 1/3 of the day required reminders, he said no jobs. The ALJ also gave a hypothetical for sedentary work and the VE gave 2 unskilled jobs, nut sorter and dowel inspector. He then withdrew both because of the transferable skills issue.

I argued that 82-41 is very specific that a transferable skill is more than an aptitude and requires the skill give the claimant an advantage over other applicants, that 202.06 directs disability if she can’t perform work within her own industry which is clerical and with the tools of her past jobs. Her past work was so low skilled as to give little or no advantage in employment.
THE SIT STAND OPTION AND THE VE

The following is a possible list of questions I have asked previously. In some cases I have asked all of them. In others, I have asked only some of them depending on the answer.

- For the jobs that are classified as light, can’t we assume that they require standing and walking for approximately six hours out of an eight-hour working day?
- If you contend that the DOT is wrong in classifying these jobs as light, how many of these jobs have you personally observed? When? Where? Did you observe these jobs in different parts of the country? How long did you observe them?
- The DOT doesn’t address the question of opportunity to alternately sit or stand, does it?
- So, the only evidence we have about the existence of jobs which allow alternate sitting and standing is your observations of jobs?
- The opportunity to sit on a light job depends on the availability of chairs or stools provided by employers, doesn’t it?
- Employees usually cannot provide their own chairs, can they?
- You’re not contending, are you, that all employers provide chairs for the jobs you’ve identified but which the DOT classifies as light?
- Thus, we’re dealing with some percentage of these jobs where stools or chairs are provided, aren’t we?
- Tell us for what percentage of these jobs the employers provide stools or chairs; and tell us how you know this.
- Isn’t it a fact that some of these jobs that we’ve been talking about are performed at desk height? If so, tell us what percentage of these jobs are performed at desk height versus bench height; and tell us how you know this.
- And isn’t it also true that if the work station is at desk height, approximately 29 inches, most people are going to find it very uncomfortable to stand and work while bent over the desk?
- It is true, isn’t it, that one normally has more opportunity to stand up when doing a job which is classified as sedentary than one has to sit down when doing a light job?
- But if one is doing a job which is classified as sedentary, it is most likely done at a work station which is at desk height, isn’t it?
- If one is doing a job at bench height, what kind of chair is usually provided?
- Do most of these chairs have lumbar support? Is the lumbar support adjustable? Are the chairs adjustable in height? If not, how high is the seat from the floor? Do most of these chairs have hard seats or cushioned seats? Do these chairs have arm rests?
What height is a bench placed at? Are benches at standard height?
The height of most benches is not adjustable, is it?
The benches are set at a height for an average person, aren't they?
To work while standing at a bench of standard height, a person taller than average must bend over more, musn't he? A person shorter than average must reach more?
For the job where there is an opportunity to sit or stand, that opportunity is for the most part dictated by the work process, isn't it?
Don't you agree with Social Security Ruling 83-12 that “most jobs have ongoing work processes which demand that a worker be in a certain . . . posture for a certain length of time to accomplish a certain task”? 
Reading SSR 83-12 is part of a vocational expert’s training, isn’t it?
Aren’t you told as part of your training to be a vocational expert that you are “expected to testify only on vocational issues and only on those vocational issues which are relevant to the requirements of the statute, regulations and rulings”?
Do you agree with the statement in Social Security Ruling 83-12 that “unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will”?
You do agree, don’t you, with the statement from SSR 83-12 that “most jobs have ongoing work processes that require a worker to be in a certain place . . . for at least a certain length of time to accomplish a certain task”?
This means simply that a worker has to spend a certain length of time at the work station in order to do his work, doesn’t it?
The jobs you have identified as allowing alternate sitting and standing don’t allow a worker to walk around whenever he feels the need, do they?
For the jobs you have identified, what is the maximum amount of time out of every hour that a worker could be away from the work station that would be acceptable and would still allow a worker to meet normal production standards?
Some jobs do, in fact, require walking, don’t they? This is also dictated by the work process, isn’t it? If the worker is required by the work process to walk but his impairment dictates that he must sit, he won’t be fulfilling his job duties, will he?
If the work process requires that a worker either stand or sit, but his impairment requires that he do the opposite, he won’t be able to fulfill his job duties, will he?
From your work with impaired workers, you understand, don’t you, that shifting positions isn’t dictated by the clock?
It is dictated by the way the person feels, isn’t it?
You interpreted the ALJ’s question literally as involving x number of minutes sitting followed by x number of minutes standing, etc., didn’t you?
So if we change the hypothetical question to emphasize the unpredictable nature of the length of time the claimant may sit or stand, does that change your answer?

What is the minimum amount of time a worker must remain in a certain posture (either standing or sitting) to accomplish the job tasks?

If we change the hypothetical question to include the requirement for significant walking at unpredictable intervals during a working day, how would that affect your opinion about the number of jobs the claimant can do?

From your experience dealing with impaired workers, it is most common, isn’t it, that the requirement to shift positions comes unpredictably?

In fact, it is unusual that someone’s impairment would allow a shift of position by the clock, isn’t it?

Here is a sample exchange from a recent hearing

ALJ hypo 1: stand and walk for 6 of 8 hours, sit 6 of 8 hours, lift 20 pounds with a sit/stand option at will.

VE: A sit/stand option would allow the claimant to perform the light jobs of cashier and ticket taker

ATTY: Does a ticket taker lift 20 lbs occasionally on the job, or is it a light job because of the standing and walking the job requires?

VE: the standing and walking

ATTY: so if a claimant must have the option of sitting or standing whenever they need to, this hypothetical claimant might have to sit for 6 hours in a work day, and could never stand for 6 hours, could they perform the job of ticket taker?

VE: That’s not how I understood the judge’s question, plus, the cashier and ticket taker can sit down during the slow periods.

ATTY: But what if the claimant needs to sit due to pain during the busy periods on the job? Could the claimant perform these jobs given that fact?

VE: No

In another exchange, the VE included machine operator

ATTY: While you said that the machine operator can sit at times to rest, and even to perform part of the job, is there any part of the job that requires standing or walking?
VE: yes, if the machine shuts down, they will have to stand up to get it started; and at times they may have to walk to get the parts or equipment to get it started again.

ATTY: So if during those periods, when the machine stops, or when they need to get parts or equipment, the claimant could not stand up and walk, but needed to remain seated, could they perform those jobs?

VE: Not if they could not stand when they need to keep the work going.

CONCLUSION

Here is a brief summary of the lines of cross-examination:

- The VE’s testimony was defective on its face. If the testimony is not making sense to you, it is probably not making sense to the ALJ. Object.
- The ALJ did not explain the basis of the VE’s qualifications as an “expert.” This is not your witness, do not accept the person as an “expert” until proven to be an “expert.” Object.
- The ALJ failed to resolve an obvious inconsistency in the record. If you see an inconsistency, explore it and object. (This is the one that I would do in a post hearing brief)
- The ALJ did not discuss whether the numbers of jobs cited by the VE contained part-time jobs. Point out the failure of the Commissioner to establish the existence of sustained full-time jobs (see SSR 96-8p, chapter 11) and object.
- The VE’s credentials suggest dishonesty. On the face of the record, the credentials included bogus elements. Object.
- Comparison of testimony by the same expert in different hearings demonstrated errors and dishonesty. Object.

Always keep in mind that at step five, the burden of going forward with the evidence of reliable job information rests with SSA. In light of this, ask the VE to assume there are no jobs and ask that he show reliable evidence that the hypothesis is false. This is the “null hypothesis” suggested by David Traver in his Social Security Disability Advocates Handbook. Know SSR 82-41(Work Skills and their Transferability as Intended by the Expanded Vocational Factors Regulations); SSR 83-10 (Determining Capability to do Other Work); SSR 83-14 (Capability to Do Other Work – the Medical-Vocational Rules as a Framework For Evaluating a Combination of Exertional and Nonexertional Impairments); SSR 85-15 (Capability to Do Other Work – the Medical-Vocational Rules as a Framework For Evaluating Solely Nonexertional Impairments); SSR 96-9p (Determining Capability to do Other Work—Implications of a Residual Functional Capacity for Less Than a Full Range of Sedentary Work); SSR 00-4p (Use of...
Vocational Expert and Vocational Specialist Evidence, and Other Reliable Occupational Information in Disability Decisions). Listen carefully for undefined variables in the hypothetical by the ALJ; there is no way to know if the ALJ and the VE have the same meaning in mind. Words like limited, moderate, simple, low stress and low production must be defined. Question the VE on the work fields and tools to test the validity of the transferability of skills analysis. Cross examine the VE on his/her knowledge of the software on which they are relying, including the data source and the methodology upon which it is based noting that the proper foundation on which it is based has not been established.

Attorneys and representatives respond to VE testimony at SSA’s disability hearings by working to drive down the quantity of jobs given. They ask the VE about additional conditions in hypothetical questions after the ALJ has finished his/her questions. While this certainly is something that the good attorney will strive to do, it is only a small part of the job. The other part of the attorney’s job includes asking the VE “how do you know?” Show us how that company got to that number, show us that it is reliable, and tell us how you used that number to answer the ALJ’s questions and arrive at those conclusions regarding the ability to perform work.