The focus of this presentation will be to go over some very specific questions that you can ask a VE nearly verbatim in order to help win your case or build in appeal issues. We hope to provide you with some practical strategies that you may want to employ. However, what this section seeks to do more than anything is to provoke you into thinking about VE issues more seriously. Without any change in the law SSA has driven down historical ALJ allowance rates by nearly 20% in only a few years. You have to decide how you are going to fight back for your clients. Developing real VE strategies rather than just passively sitting at a hearing could be a good step in that direction.

It is with this context (using or attacking VE testimony to our clients’ advantage) that we turn to some specific strategies you may want to consider. None of these strategies are fool proof or guaranteed to work in every situation. We want to be provocative and to get you thinking about VE issues.

4 BASIC QUESTIONS EVERY TIME A VE IDENTIFIES JOBS:

There are 4 basic questions that you can (and probably should) ask at every hearing where an ALJ poses a hypothetical to a VE and the VE responds with jobs. It is recommended to get these less confrontational issues out of the way up front before you go into potentially more contested VE cross issues. In other words, get what you need up front from the VE before they potentially become adversarial.

Here are those 4 questions in order:

1. Ask the “magic question” in a VERY leading manner.

Here is the “magic question”:

“It is correct that in responding to the ALJ’s hypothetical questions you did not consider any factors or limitations beyond those identified by the ALJ, correct?”
I have never seen a VE say no to this question. Why is it important to ask? Because it helps build an appeal. For example, if the ALJ’s hypothetical questions left out a functional limitation or did not include the fact that the claimant is over 55, or illiterate, you have now established a clear factual record that these additional limitations or factors were not considered. Should an appeal to district court be necessary, it becomes much tougher for SSA to argue harmless error or that these missing factors or limitations were somehow considered. There is strong case law in most circuits holding that a denial of benefits premised upon a defective hypothetical question cannot be sustained. This question also undercuts harmful case law which tends to allow a presumption that a VE considered a limitation even if it was not included in the hypothetical question.

There is one further point which is noteworthy in this context. Many ALJs believe that the Psychiatric Review Technique assessment of the four broad functional categories of (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace, and (4) episodes of decompensation is actually an RFC finding. It is not, as SSR 96-8p explicitly states. Remember that at step five, consistent with the regulations, an ALJ may only consider RFC along with the vocational factors. See 404.1520(g)(1) and 404.1560(c)(2). Because a PRT is absolutely not an RFC as a matter of law, any hypothetical premised upon a PRT alone instead of a proper RFC is inherently flawed. By pinning the VE down that nothing was considered beyond what was specifically identified by the ALJ, you have again cut down any potential attempts by SSA to elide this fatal flaw.

It is important not to add on limitations to an ALJ’s hypothetical question thoughtlessly. Through your own experience or from that of more experienced colleagues, there should be very few instances in your entire career where you are unsure as to whether a certain set of limitations will preclude all work or not. It is a great folly to senselessly add on limitations that the ALJ missed. For example, assume the ALJ obviously just posed a hypo based on exhibit 5F and you know that exhibit 5F does not help you. Assume also that exhibit 5F contains limitations 1 through 7. However, the ALJ’s hypo includes only limitations 1 through 4. You should NOT pose an additional hypo to the ALJ including limits 5 through 7 because you know that those limitations will not eliminate all jobs. All you have done by asking this ill-considered follow up question is to help the ALJ write a better denial. While you and I and the ALJ and the VE may be aware that the missing limitations make no difference, the AC can surprise you on such issues and
federal courts will often find that the omission of any relevant limitation makes the entire hypothetical question defective. The point is do not fill in the missing limitations unless you are certain they will eliminate all jobs.

2. Get DOT numbers for every jobs discussed.

Demand DOT numbers for ALL jobs identified by the VE, even past relevant work. It becomes incredibly difficult after the fact to nail down what job the VE was referencing. Rather than engage in imprecise and very labor-intensive after-the-fact speculation, it is much better to get the specific jobs and their DOT numbers up front. It helps for any subsequent appeals and for post-hearing objection letters as well.

If you adopt a strategy of objecting more frequently to VE testimony in post-hearing memos (which we encourage), then you may also want to consider requesting the SOC numbers used by the Bureau of Labor and Statistics. The VE may claim that the SOC number is “the same job” as the DOT number. However, when you go back and compare the two jobs in terms of skill level, exertional requirements, and a myriad of other factors you may find the jobs are not at all the same. To further push you to study VE issues more, were you aware that for many years the Department of Labor has not believed that there existed any data source or methodology for reliably determining the number of jobs by DOT code? See Exhibit A attached hereto.

3. Make sure you get clean VE testimony indicating that favorable opinions in the record do indeed preclude any full-time competitive work.

Why important: We might know and the ALJ might know that certain functional limitations are obviously work-preclusive, but most courts will NOT. Get a clean record. Even better if the VE notes that certain limitations are work-preclusive, they might be included in the opinion of a medical source that the ALJ later tries to rely on and you have a built in appeal issue. It is amazing how often reps work so hard to get a medical opinion and then never ask the VE if that opinion precludes work.
4. Ask what sections of the record the VE reviewed before testifying.

SSA used to provide the entire record to the VE and now they provide only some parts of the record. Why does that matter? First, it helps you get around adverse case law where courts have given extra credence to the VE testimony because the VE had reviewed the entire record. You have now established that they didn’t. Second, it helps with step 4 issues if some of the identified jobs did not reach an SGA level. At that point, SSA cannot rely upon the VE’s testimony to show it was past relevant work (PRW) because the VE would have no idea whether the job was performed as an SGA level. It is often good to ask this additional question where PRW and whether it was SGA might be an issue: You do not know whether that prior job was performed at an SGA level, correct?

ADDITIONAL VE CROSS EXAMINATION TECHNIQUES

1. The “Reasoning Level” Cross

This is an extremely useful tool to have on hand. This cross-examination is to be used in mental cases where the ALJ has thrown around the words “simple” or “one to two step tasks.” First, we will set forth how the DOT describes the 3 relevant reasoning levels. Then we will give you specific questions to ask the VE. Finally, we will provide you with a short post-hearing objection letter based on the VE cross on reasoning level.

Below are the text of the bottom 3 reasoning levels in DOT:

1-Apply common sense understanding to carry out simple 1 or 2 step instructions. Deal with standardized situations with occasional or no variables in or from these situations encountered on the job.

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

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.
Here are the “reasoning level” VE cross questions to ask:

A) **It would be correct to say that the ALJ’s limitation to simple X, simple Y, and simple Z would preclude the ability to carry out DETAILED written and oral instructions, correct?**

(There needs to be emphasis in your voice when saying DETAILED. If so, the VE will rarely fight your premise. Ask a few meaningless questions in between about numbers or whatever, then circle back to the following):

B) **Reasoning level & SVP are independent and distinct aspects of the DOT, correct?**

If you get any push back here, be very aggressive. “Well they are listed separately for every single job in the entire DOT aren’t they?” “They are defined differently in the DOT aren’t they?”

C) **According to Appendix C of the DOT and consistent with the Revised Handbook for Analyzing Jobs, it is true that SVP refers strictly to the amount of time it takes to learn a job?**

If you go without these citations, the VEs may fight you. But when you invoke these citations and appear to be reading, they presume you are giving a verbatim recitation and they will not fight you.

D) **According to those same 2 sources I just cited, the GED reasoning scale reflects the aspects of education (both formal and informal) which are required for satisfactory job performance and which contribute to the person’s reasoning development and ability to follow instructions, correct?**

You must not leave out the invocation of the 2 sources here. If you do, the VEs will fight this question. However, if you keep it in (or even better recite the 2 sources again) and appear to be reading again, the VE will again tend to presume you are reading a verbatim recitation and they will not fight you.
E) Optional additional question: it is correct that some jobs are high skill and low reasoning and vice versa, correct?

This question can be used to if you run into any problems with question B.

THE ENTIRE POINT OF THIS LINE OF QUESTIONING IS TO SUBMIT A POST-HEARING LETTER STATING THAT VE TESTIMONY IN ITS ENTIRETY PRECLUDED ALL JOBS. At the very least a conflict has arisen which must be resolved under 00-4p. This reasoning level cross knocks out a lot of the commons jobs we hear about from VEs including the dreaded “surveillance system monitor.” Immediately below is text from a post-hearing objection letter based on this reasoning level cross:

As to the VE, testimony we have the following objections. The VE testified that the limitations to simple and repetitive tasks identified by your Honor would preclude the ability to carry out DETAILED written and oral instructions. All of the jobs identified by the VE (509.686-018; 920.587-018; 361.684-014) were reasoning level 2 jobs which require the ability to carry out DETAILED written or oral instructions. The normal Agency response is to then discuss SVP. But in this case there is not just the text of Appendix C of the DOT to contradict any such argument. Rather, there is the testimony of SSA’s own VE that reasoning level and SVP are independent and distinct aspects of the DOT. The VE also noted that SVP refers strictly to the amount of time it takes to learn a job whereas the GED reasoning scale reflects the mental prerequisites for performing jobs. SVP and reasoning are distinct components of the DOT, as the Agency’s own expert testified. Thus, the Agency cannot attempt to blur SVP and reasoning level (as it so often does) because the testimony of its own expert will not permit that blurring.

In short, the jobs the VE had originally believed were possible are actually impossible based upon the ENTIRETY of the VE’s testimony at the hearing. At the very least, the claimant has established an affirmative and specific record here to show a reasoning level inconsistency. In this respect it is particularly
noteworthy that the VE claimed that she had identified only jobs that require 1-2 step tasks. However, her testimony is inaccurate as all of the jobs require reasoning level 2 abilities and it is only reasoning level 1 jobs that involve 1-2 step tasks. To the extent that the court would attempt to rely upon the VE’s testimony as to the 3 jobs mentioned, we explicitly object and request a ruling on the issue in the ALJ decision, as the HALLEX makes absolutely mandatory.

OR AN ALTERNATIVE:

As to the VW testimony, we object to it and state that it cannot be used to satisfy SSA’s step 5 burden here. Reasoning level 2 jobs, by definition, require the ability to carry out detailed written and oral instructions. The VW admitted that the limitations to routine and routine tasks identified by your Honor would preclude the ability to carry out DETAILED written and oral instructions. Thus, reasoning level 2 jobs here are eliminated. The call out operator (237.367-014) job and the order clerk job (209.567-014) identified by the VW are actually reasoning level 3 positions. Thus, they require a level of reasoning far beyond even reasoning level 2, and therefore must be eliminated here. As a result, all of the jobs the VW had originally testified were possible were actually not when one listens to the entirety of the VW testimony.

The normal Agency response is often to then discuss SVP. But in this case there is not just the text of Appendix C of the DOT to contradict any such argument. Rather, there is the testimony of SSA’s own VW that reasoning level and SVP are independent and distinct aspects of the DOT. The VW also noted that SVP refers strictly to the amount of time it takes to learn a job, whereas the GED reasoning scale reflects the mental prerequisites for performing jobs. SVP and reasoning are distinct components of the DOT, as the Agency’s own expert testified. Thus, the Agency cannot attempt to blur SVP and reasoning level because the testimony of its own expert will not permit that blurring. In short, the jobs the VW had originally believed were possible are not all actually possible based upon the ENTIRETY of the VW’s testimony at the hearing. At the very least, we have established an
affirmative and specific record here to show a reasoning level inconsistency between the VW’s testimony and the contents of the DOT. To the extent that the Court would attempt to rely upon the VW’s testimony as to these two jobs to meet SSA’s step 5 burden, we explicitly object and request a ruling on the issue in the ALJ decision, consistent with HALLEX I-2-5-55.

In addition, SSA’s own policy statement (see attached Exhibit B) on this issue indicates that reasoning level 3 jobs are inappropriate where there is a limitation to **EITHER** simple, routine, **OR** unskilled work. Given that Your Honor limited the claimant to unskilled, routine work, these two jobs must be eliminated from consideration under SSA policy.

2. Cross on Transferability

If you have a case that comes down to the issue of transferability of skills, there are several questions you can ask a VE in an attempt to knock those jobs out. We will set forth those questions and then discuss the purpose of each question one by one.

A) **What other skills are required to perform the jobs you just identified?**

The idea here is that you are establishing that the jobs at issue require additional skills beyond those which your client possesses from PRW. This question alone wins many transferability cases because the VEs often want to appear as experts and cannot help but name additional skills.

B) **In offering your testimony on transferability, what consideration had you given to the fact that the claimant has not worked since X date?**

Under SSA rules, a gap in working may affect the possibility of transferability. This is generally a valid consideration for all jobs, but particularly important for jobs where the relevant technology may have changed significantly since this claimant last performed such work.
C) THIS IS ACTUALLY A CLUSTER OF QUESTIONS ON THE SAME TOPIC: **You just testified that you are familiar with SSA's rules and procedures in general, correct? What are SSA's rules with regard to the transferability of skills? What are SSA's special rules for transferability at 55+? What are SSA's special rules for transferability when 60+?**

VEs are very rarely able to effectively answer these questions. (You do NOT need to know the answers, nor do you need to answer the VE’s questions. They are there to answer your questions, not the other way around). Why is this important? Because you have now effectively undermined the VE’s supposed expertise on the issue of transferability.

Below is text from a post-hearing objection letter that was formulated on the basis of some of the above VE cross on transferability questions:

The VE’s testimony should not be accepted because he did not actually understand SSA’s transferability rules. His testimony that he was familiar with and understood these rules is simply not accurate. In addressing the transferability issue, the VE testified that under Agency policy there is no difference between a 55 year old individual and an individual who is 60 years old or older. The only exception he noted was that there is some distinction with respect to sedentary versus light work for individuals of such ages. The VE is wrong. Rules 202.00(c) and 202.00(f) show that the VE is wrong. Both of those regulations show that transferability of skills is more difficult for an individual over 60 than for an individual over 55. The distinction is not between light and sedentary exertions, as the VE wrongly maintained, because both rules address individuals with a light exertional capacity. The key difference is the age difference. That the VE was unaware of this absolutely crucial age distinction under SSA transferability policy for individuals who are 60+ versus 55+ calls into question the entirety of the VE’s transferability testimony. Quite simply, the VE did not have an accurate understanding of the rules with regard to transferability.
D) SSA’s rules consider being over 55 to be an extremely adverse vocational factor and an important adverse factor in determining transferability of skills. What specific consideration have you given to this SSA rule when you offered your testimony on transferability?

VEs will generally answer this question by saying that they gave it no specific consideration at all. At this point you have potentially set up a good issue to contest the VE’s testimony in a post-hearing letter if they are old enough to take advantage of these SSA rules.

E) What do you believe “readily transferable” means?

Generally, VEs cannot answer this question. They fumble and usually define the words by repeating the words. Once again, you have undermined the VE’s purported expertise.

Why does this matter? Because mere transferability is not sufficient to support a denial when you are dealing with someone 55 and over. Nor, arguably, is transferability to a single job enough to show a “significant range.” Instead, the Commissioner must present evidence that the claimant has skills that can be “readily transferred to a significant range of other skilled or semi-skilled work.” 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rules 202.00(c). You can attack in a post-hearing objection letter the absence of competent VE testimony on the issue of ready transferability and on the lack of a significant range. Here is an example of a lack of a significant range attack:

Even if one were to accept the VE’s testimony despite all of the foregoing, an award of benefits would still be required. The existence of only one or two positions and a seriously decreased number of jobs even within those two limited positions does not evince “readily transferable skills” to a “significant range” of other skilled or semi-skilled work. Instead, it represents a tremendous diminution of the skilled and semi-skilled occupational bases. Thus, even if one credited the VE’s testimony an award would still be required by Rule 202.00(c).
Finally, if you are in the Ninth Circuit, you should read *Lounsburry v. Barnhart*, 468 F.3d 1111, 1116-17 (9th Cir. 2006), which held that a single occupation (no matter how many individual jobs it encompasses) is insufficient to show a significant range of skilled or semi-skilled work for purposes of Rule 202.00(c). Even if you are not in the Ninth, that case is worth a read.

3. **Surveillance System Monitor Cross**

The reasoning level cross above should help you eliminate the SSM position. But in case you need some additional ammo, some of the questions below might present additional ways to eliminate this pesky job.

1) **When was the job of SSM in the DOT last updated?**

Just so you know the DLU (date last updated) is 1986. This is an important fact to establish that any information the VE gives on this job is presumptively out of date. We make this point through some of our additional cross below. In addition, this question subtly pushes the VE to rely on more current information, which is the EXACT trap we want them to wander into, as discussed more fully below.

2) **The DOT actually refers to that position of surveillance system monitor 379.367-010 as “surveillance system-monitor GOVERNMENT SERVICE,” correct?**

This fits in perfectly with the next question, as you will see. If the VE starts on a tangent about casinos and monitoring at malls, we will get to that. But do not allow any testimony like that to deter you from asking the next question. In any event, read the DOT description of this SSM job. It is a government position without question.

3) **More specifically, the DOT lists this as a governmental occupation involving monitoring mass public transportation sites. Didn’t these jobs convert to the TSA or DHS after the tragedy of September 11th?**

The VE is in an awkward position at this point. They will now, if they have not already done so, launch into discussions about casinos and malls. That is what we wanted and we will undermine that with the following series of questions. If
instead they try to play games and stick to the DOT, the SOC question you ask below will nail them because the SOC descriptions have no resemblance at all to the occupation described as a SSM in the DOT.

4) The SOC number for the surveillance system monitor job is 33-9031, correct?

There are a few reasons why we ask this question in exactly this way. First, VEs will often thoughtlessly assent to this leading question. Why is this helpful? Because the SOC lists that job as an SVP 4-6 job. You can find the ONET description at: http://www.onetonline.org/link/summary/33-9031.00 and submit it as an exhibit post-hearing with your objection brief. Your client cannot perform such semi-skilled or skilled work even under the ALJ’s hypo. Remember, since the VE has tried to eliminate the problem you have raised about the DOT description no longer reflecting current reality, the VE will want to make the job they are talking about sound current. That fits in nicely with an ONET attack. Second, it avoids the VE claiming that the SOC code is in the 33-9099.00 family.

IF THE VE DENIES WHAT YOU SAY:

If the VE will not go along with 33-9031 and instead says 33-9099.02, then just walk them through some of the tasks that ONET lists for that occupation. So this job involves X. And it involves Y. And it involves Z. At that point, you should have enough ammunition through a series of admissions to point out in your post-hearing brief that this job is NOT unskilled.

If the VE instead cites to a generic SOC code like 33-9099.00, you have several points to make. First, you can ask the VE the following: Isn’t 33-9099.00 akin to the DOT’s “any industry” designation in that it does not correspond to any specific occupation at all? If you get a yes here then you have effectively defeated that “job” because they just admitted that they did not identify a specific job. If you get a no, then your next question is the same no matter what. That second question is: OK, well the only job in that family that I see spelled out with any specificity is 33-9099.02, so I am going to ask you about tasks pertaining to that occupation because it is the only one in this family which the ONET discusses with any specificity. After saying that, you then go into what we first discussed above about what 33-9099.02 involves.
If you have a VE who is really not qualified at all, they may say they do not know the corresponding SOC code. At that point you object that this purported “expert” is unqualified as they do not know even very basic information that is required of anybody who performs their job. At the very least, they should be required by the Court to research that matter and report back as to the appropriate SOC code for that job.

4. How Many Steps?

When you are in a situation where the ALJ has limited the claimant to 1 to 2 step tasks and the VE has identified jobs, you can often effectively attack the VE testimony. Here is the question to ask:

Please explain in detail the entirety of what an individual performing that job has to do in order to complete all of their job duties.

VEs often love showing themselves to be experts. You can often get a very long explanation from them when you ask a question like this, even for the most simple of jobs. This allows you to make an argument in a post-hearing brief akin to the one offered based on the reasoning level cross. Either the entirety of the VE’s testimony shows that these jobs are actually precluded, or there is a conflict in the VE’s testimony that was not resolved.

5. Max RFC Questions

This cross is for physical and combination mental/physical cases. The concept behind it is to get the VE to accidentally admit that the identified jobs would sometimes require more physical activity than the ALJ’s RFC/hypo actually permitted. In the end, you will have effectively knocked out all of the jobs when this cross works. Here are the questions:

1) As a general proposition, the demands of a job can vary from day to day depending on the employer’s needs or the circumstances of the day correct?

(IF NO, then rub their faces in it with the extra question below):
IF NO:

So it is your testimony that these jobs require exactly the same functions day in and day out and never change? If still NO: Never, EVER change?

2) Some days the job would be LESS physically demanding than generally performed correct?

3) And some days the job would be MORE physically demanding than generally performed correct?

When this cross goes well, you have effectively established that all of the jobs identified by the ALJ would in fact require more than the ALJ’s RFC permits.

**BEING MORE PREPARED ON PRW ISSUES & USING THE COMPOSITE JOBS RULE.**

1. Be More Prepared on PRW Issues

We are seeing an increasing number of denials at step 4 and so you need to be more prepared on these issues than in the past. The first part of being ready on PRW issues is to go through the claimant’s earnings history and SSA 3369. In fact, if no SSA 3369 has been completed, it may be helpful to you to get one done (or corrected) prior to the hearing. Remember that all prior work is not PRW. Work must have been done at an SGA level and within the past 15 years before it can be considered PRW. Many times you will have VE’s erroneously testifying that prior work is PRW even though it was not at an SGA level. This is because SSA is increasingly not providing the entire file to the VE for review. It may be necessary if a VE testifies that something is PRW to cross-examine the VE to confirm that they are unaware if the job was performed at an SGA level. Whatever you do, never refer to prior work as PRW unless you are absolutely certain that the prior work actually meets the legal definition of SGA.

The other crucial pre-hearing PRW issue is to make sure your client is ready to testify accurately. Hopefully you already prepared an accurate SSA 3369 that you can go over with the claimant again right before the hearing. Do not be afraid to
tell them what they said previously. Be fully prepared if you are going to be explaining away any inconsistencies with any prior SSA 3369 that got into the record earlier. One crucial thing to remind claimants of is the heaviest weight lifted issue. This needs to be made extremely clear in witness preparation. This is not the heaviest weight they usually lifted. Rather it is the heaviest weight they ever had to lift at that job even if it was on only a single occasion in their 30 year career. The most avoidable loses are cases where you would have won had the claimant testified that the job they did as actually performed is the same as it is generally performed. However, due to confusion they testify about an inaccurate maximum lifting or stand/walk requirement and what was a solid grid out is now a step 4 loss. That should never happen if you prepare properly.

In cases where you have a strong chance at a grid out, the entire case may come down to the PRW determination. Prior to the hearing you should have specific DOT codes identified for all of the PRW the claimant performed. You should be prepared to contest any VE testimony that is harmfully inconsistent with what you believe the PRW to be. You should also have several theories as to why PRW cannot be performed as actually performed and as generally performed. Do not put all of your eggs in one basket.

2. **Know & Use the Composite Jobs Rule**

Did you know that an ALJ cannot properly issue a PRW step 4 denial on an “as generally performed” basis when a composite job is involved? It is probably one of the most important and yet under-utilized Agency rules. Why does this rule matter so much? First, it matters because if you can eliminate “as generally performed” then the only issue you have left at step 4 is “as actually performed.” “As actually performed” can usually be defeated by some quirky, specific thing your client used to do at their PRW (e.g., one time in their career at that job they moved a filing cabinet weighing 100 pounds). Again, if you are paying attention and have prepared on the PRW issue, the quirky, specific thing should be fairly obvious to you. Accordingly, being able to eliminate “as generally performed” is highly strategically beneficial to you. In individuals over 50, eliminating “as generally performed” can be an outcome-determinative issue. Even for individuals under 50, your ALJ may issue a sloppy step 4 denial that you can then effectively be challenged to the AC or federal court. But that is usually only true if you had previously executed on a plan to establish that PRW was actually a composite job.
So how do you establish that PRW was actually a composite job? Again, this goes back to speaking to your client in detail about prior work and nailing down what they specifically did. Your goal is to establish that significant elements of their prior job actually involved the performance of tasks associated with a different DOT job title. This is extremely common, especially because the DOT is now so terribly outdated. If you push hard enough, it is rare that you will not be able to create a record showing that all PRW actually involved the performance of a composite job.

We include below an excerpt from a winning federal court brief on this issue. The excerpt will explain the rule in more detail and give you a more complete context to understand what you need to do in order to build this issue into your cases.

The composite jobs issue is a real winner. However, if you have not gone out of your way ahead of time to establish that the PRW involves a composite job, and then follow through at the hearing with a specific plan to show that, the issue may not be available to you after the hearing. A simple post-hearing letter stating that the PRW was a composite job because it involved A & B (one DOT job title) but also required X & Y (a second DOT job title) can be the difference between winning and losing. If you merely include a citation to the POMS in that letter and assert that a step 4 “as generally performed” denial is impossible in this case, then you have likely established an excellent record to pursue this issue down the road, if necessary. In many cases, this effective objection may also be the last straw that convinces the ALJ to simply pay the case (especially for those over 50).

Here is the federal court brief excerpt on the issue:

A. The ALJ Was Legally Barred from Making a PRW “as Generally Performed” Determination Because Mr. XXXXXXX’s PRW Was a Composite Job.

“Composite jobs,” are jobs that require the performance of significant elements of two or more jobs, and such composite jobs “have no counterpart in the DOT.” SSR 82-61, 1982 WL 31387 * 2. SSA’s precise policy on composite jobs was somewhat ambiguous for a rather long period. Still, this Court has issued a published decision finding that a PRW determination involving a composite job was defective and required remand. Armstrong v. Sullivan, 814 F.Supp. 1364,
In October 2011, SSA issued a very significant official statement to its adjudicators in order to clarify the Agency’s policy with respect to composite jobs. In POMS DI 25005.020(B), 2011 WL 4753471, SSA clarified that because composite jobs have no counterpart in the DOT, Agency adjudicators must not evaluate such jobs “at the part of the step 4 considering work ‘as generally performed in the national economy.’” In other words, an adjudicator can deny a claim at step 4 where the claimant remains capable of performing a composite job “as actually performed,” but an ALJ is not permitted to make an adverse step 4 finding that the claimant remains capable of performing a composite job “as generally performed.” POMS DI 25005.020(B), 2011 WL 4753471. The POMS also notes that a “composite job” is one that involves “significant elements of two or more occupations.” Id. Finally, it notes that if “the main duties of PRW” cannot be captured by a single DOT occupation, then the claimant may have performed a composite job. Id. Given this crucial POMS provision, a further recent Agency policy clarification must be emphasized. Specifically, in SSR 13-2p, 2013 WL 621536, *7 SSA affirmatively stated its policy that “[w]e require adjudicators at all levels of administrative review to follow agency policy, as set out in the Commissioner's regulations, SSRs, Social Security Acquiescence Rulings (ARs), and other instructions, such as the Program Operations Manual System (POMS), Emergency Messages, and the Hearings, Appeals and Litigation Law manual (HALLEX).”

Plaintiff agrees that the occupation of Heavy Equipment Operator (DOT, 859.683-010, 1991 WL 681950) does accurately describe a portion of his duties working for XXXXX County. However, Mr. XXXXXXX’s work for the county for over 23 years also involved significant duties that are not captured by that job title in the DOT. Those additional duties included: a) supervising a crew of 6 other workers (Tr. 167); b) cutting trees along streets that could affect traffic (Tr. 55); c) chopping wood (Tr. 55); d) carrying 80 pound bags of cement (Tr. 55, 167, 173); e) removing rocks from drainage ditches (Tr. 55); f) discarding dead animals (Tr. 167, 173); and g) moving guard rails (Tr. 173). The crucial task of supervising a team of 6 workers is not in any way a part of the job of Heavy Equipment Operator as that job is described in the DOT. See DOT, 859.683-010, 1991 WL 681950. The remaining tasks of b) through g) above are also not part of the job of Heavy Equipment Operator. Id. These two facts cannot be seriously disputed. In addition, it appears that those additional tasks are more akin to a Municipal Maintenance Worker (DOT, 899.684-046, 1991 WL 687689). In any
event, the key point is that these tasks were significant elements of Mr. XXXXX’s work and they have nothing whatsoever to do with the DOT description of a Heavy Equipment Operator. Accordingly, Mr. XXXXXXX’s work for XXXXX County was a composite job under SSA policy.

In this case, the ALJ denied Mr. XXXXXXX’s application st step 4, finding that the claimant could return to his PRW as a Heavy Equipment Operator (Tr. 23-24). However, the ALJ explicitly stated that this step 4 finding was “only as this job is generally performed” (Tr. 24). The ALJ likely stated this because the vocational expert (VE) had explicitly testified that an individual with the limitations identified by the ALJ could not possibly have performed Mr. XXXXXXX’s job as the claimant had actually performed it (Tr. 56-57). The ALJ made no alternative step finding of any kind (Tr. 24). Thus, the ALJ’s decision must stand or fall solely on the determination that Plaintiff can return to his PRW as that job is “generally performed.” Because that job was actually a composite job, as explained above, the ALJ was prohibited by Agency policy from finding that Mr. XXXXX was capable of that job as it is generally performed. POMS DI 25005.020(B), 2011 WL 4753471. As a result, the ALJ’s step 4 denial here is defective as a matter of law and remand is thus required.
November 19, 2007

Mr. David B. Lowry
Attorney at Law
9900 S.W. Greenburg Road
Columbia Business Center, Suite 235
Portland, Oregon 97223

Dear Mr. Lowry:

I am responding to your letter dated November 1 addressed to Acting Commissioner Philip Rones, regarding jobs classified by the Dictionary of Occupational Titles (DOT).

The DOT is no longer in use by the Bureau of Labor Statistics, and we do regard it as obsolete since much of the information contained in the most recent version is based on research conducted at least two decades ago.

The DOT has been replaced by the Occupational Information Network (O*NET), which is developed by the Employment and Training Administration. O*NET includes information on job duties, knowledge and skills, worker abilities, education and training, and other occupational characteristics. Information on O*NET is available online at http://www.onetcenter.org/. The Content Model section of this web site describes the detailed characteristics information provided in O*NET.

The structure of O*NET reflects the 2000 Standard Occupational Classification (SOC) system. With more than 800 detailed occupations, the SOC describes the occupational structure in the United States and provides a national occupational classification system. For some SOC occupations, O*NET provides additional detail. Information on the SOC is available online at http://www.bls.gov/soc; information on how O*NET uses the SOC is available at the O*NET web site shown above.

We are not aware of any data source or methodology for reliably determining the number of jobs by DOT code. Our Occupational Employment Statistics (OES) Survey collects data on employment and wages by detailed occupation as defined in the 2000 SOC.
Information on OES is available online at http://www.bls.gov/oes.

If you have any further questions, you may contact me or a member of my staff at 202-691-5701.

Sincerely yours,

[Signature]

DIXIE SOMMERS
Assistant Commissioner
Office of Occupational Statistics
and Employment Projections
MEMORANDUM

Date: December 28, 2009

To: Regional Management Officers

From: Susan Swansiger /s/
      Director, Division of Field Procedures

Subject: Use of Electronic Occupational References for Administrative Law Judge and Senior Attorney Adjudicator Decisions - UPDATE

This memorandum is an update of the memorandum of the same name issued on October 10, 2008. It reflects the policy guidance revisions stated in the Office Disability Programs (ODP) Question and Answer (Q & A) Number 09-026, "What acceptable electronic occupational resources are currently available for use?" dated June 9, 2009. This memorandum supersedes all previous guidance regarding the use of electronic occupational references by ODAR adjudicators, and should be shared with all Administrative Law Judges (ALJs), Senior Attorney Adjudicators (SAAs), and Hearing Office Management Teams (HOMTs). These tools are not intended to replace reliance on the regulations, rulings and vocational expert testimony.

Consistent with Q&A 09-026 and the reminders listed below, four acceptable electronic versions of the Dictionary of Occupational Titles (DOT) are currently available at http://ssahost.ba.ssa.gov/digitallibrary:

- **OccuBrowse**: This program is searchable through a series of tabs along the top. The "Browse" tab allows users to search for occupations in multiple ways. Through the "Trait" button, users can search for occupations at any skill level that are within a claimant’s residual functional capacity (RFC). On the "Browse" page, they can perform searches based on keywords within the job title, within the task description, or within both. This program also allows searches by a variety of other lists such as industry, Guide for Occupational Exploration (GOE), or occupational group, all of which can be useful when performing a transferability of skills analysis. After locating an occupation, users can find all DOT and Selected Characteristics of Occupations (SCO) information on the "Description," "Requirements," and "Codes" tabs. The "Requirements" tab also provides definitions of terms.
- **SkillTRAN, Job Browser Pro**: This program provides a searchable copy of the DOT. Users can search by job title, DOT code or keyword(s) within the title, and task description. After selecting an occupation and clicking “Details”, users can find all DOT/SCO information on the “Quick View – Codes” button. Through the advanced search, it also allows searches by a variety of other lists, such as GOE or occupational group, all of which can be useful when performing transferability of skills analysis.

- **OASYS**: This program contains much the same functionality as OccuBrowse but with a different user interface. It can perform a wide variety of searches.

- **Westlaw Direct, SSA Excellence**: This program is a web-based version of the DOT. Formally known as LawDesk, this program provides a searchable copy of the DOT through the “SSA Excellence” tab on the main page of Westlaw Direct. The search is based on keywords within job titles and task descriptions. This results in a list of occupations containing the keywords and descriptions of the individual occupations. The descriptions look like a printed copy of the DOT and keywords are highlighted. SSA Excellence also provides a searchable version of the SCO.

**REMINDERS**

All of the above references contain DOT occupational information developed by the Department of Labor (DOL), meet the requirements of Social Security Ruling 00-4p, and are acceptable sources of occupational information for adjudicating disability cases. However, users are reminded that the references also contain information that we do not use in our disability adjudications, including:

- Access to web crawlers that provide listings of job vacancies for an occupation. Medical-vocational evaluation guidelines are based on the existence of jobs, not job openings.

- DOT ratings for General Education Development (GED). We do not rely on these ratings to conclude whether a claimant can perform a particular occupation when we cite occupations that demonstrate the ability to do other work. However, adjudicators should consider GED ratings that may appear to conflict with the claimant’s RFC and the cited occupation(s); for example, an occupation with a GED reasoning level of 3 or higher for a claimant who is limited to performing simple, routine, or unskilled tasks. (See POMS DI 25015.030)

- DOT ratings for Temperaments and Aptitudes. These ratings are not to be used because they reflect the personal interests, natural abilities, and personality characteristics of job incumbents rather than limitations or restrictions resulting from a medically determinable impairment(s), as are required for SSA’s disability programs.
- DOT ratings for Guide for Occupational Exploration (GOE) codes and DOL’s O*NET. These ratings and rating systems are not to be used in the medical-vocational evaluation process to identify the demands of work (e.g., walking, lifting, stooping, handling, etc.), but may be used to find similar DOT occupations for a transferability of skills decision.

- The SkillTRAN, Job Browser Pro available through commercial means contains occupational groups created by SkillTRAN to enable access to OES data for specialized teaching occupations and other Occupational Employment Statistics (OES) occupations to which no DOT occupations have been linked; however, this data has been removed from SSA’s version of the program.

While OccuBrowse, SkillTRAN, OASYS, Job Browser Pro, Westlaw Direct, SSA Excellence, and “Social Security CD Library” are useful electronic occupational references tools, they cannot be relied upon to produce results that always conform to SSA medical and vocational policy, nor do they replace reliance on SSA regulations and rulings, VE testimony, and adjudicative judgment and decisionmaking.

Nevertheless, the use of the above-referenced tools provide quick access to DOT occupational information and to employment data that ALJs and SAAs may use to support fully favorable decisions without having to obtain testimony from Vocational Experts in every case. However, ALJs must continue to use VEAs as appropriate in partially favorable and unfavorable cases.

If you would like to discuss this matter with me, please let me know. My staff contact is Attorney-Advisor Richard Ciaramello, who may be reached at 703-605-7957.

cc: Regional Chief Administrative Law Judges
    Regional Office Management Teams