ValpoScholar Valparaiso University Law Review

Volume 43
Number 1

pp.353-406

Fall 2008

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Recommended Citation
Nathaniel O. Hubley, *The Untouchables: Why a Vocational Expert's Testimony in Social Security Disability Hearings Cannot Be Touched*, 43 Val. U. L. Rev. 353 (2008).
Available at: http://scholar.valpo.edu/vulr/vol43/iss1/8

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Valparaiso University

THE UNTOUCHABLES: WHY A VOCATIONAL EXPERT'S TESTIMONY IN SOCIAL SECURITY DISABILITY HEARINGS CANNOT BE TOUCHED

The validity and moral authority of a conclusion largely depend on the mode by which it was reached.[1]

I. INTRODUCTION

Without vocational expert ("VE") testimony and reliance on the *Dictionary of Occupational Titles* ("*DOT*"), the Social Security Administration ("SSA") disability determination process would crumble, similar to building blocks collapsing when a foundational block is removed.[2] This is because VE testimony is a building block upon which

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[1] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring) (stating that "[s]ecrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. . . . Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done[]"). Although alarming, this analogy is meant to demonstrate the seemingly controversial deference afforded to vocational experts within disability hearings. *See infra* note 63 and accompanying text (discussing the deference granted to vocational experts within SSA disability hearings). Because of the deference granted to these experts, the disability claimant faces an uphill battle in discrediting the VE's testimony. *See infra* note 68 and accompanying text (discussing the difficultly in challenging the VE's testimony). A balancing-act between the fairness afforded to claimants and the need for efficiency mandates that the Agency's superficial safeguards should not generate a feeling in the government that justice has been done. *See* LINDA G. MILLS, A PENCHANT FOR PREJUDICE: UNRAVELING BIAS IN JUDICIAL DECISION MAKING 2 (2002) (discussing that with the large monetary award implications and the SSA's burden of deciding so many disability cases, pressure exists to deny claims and decide the claims quickly); *see also* Michael C. Mason, Comment, *The Scientific Evidence Problem: A Philosophical Approach*, 33 ARIZ. ST. L.J. 887, 906 (2001) (discussing how the moral authority upon which scientific evidence is based must include the implications of justice and truth seeking). Thus, with the SSA disability adjudication process, "[j]ustice cannot be achieved without the presumption that the legal process is 'finding' truth[.]" Mason, *supra*, at 906.

[2] DAVID F. TRAVER, SOCIAL SECURITY DISABILITY ADVOCATE'S HANDBOOK § 1400 (2006). The "SSA's reliance upon the underlying assumption and the data of the *DOT* . . . is the keystone in the arch which holds up . . . the entire vocational framework at the Social Security Administration." *Id.* (emphasis added). Interestingly, "the *DOT* has never been reliable" and is merely "a job placement tool that, at its margins, has masqueraded as reliable vocational evidence." *Id*. (emphasis added). Thus, shockingly, "the *DOT* and its underlying assumptions [remain] . . . fundamental to the determination of the outcome in millions of disability claims annually." *Id.* (emphasis added). *See also* Richardson v. Perales, 402 U.S. 389, 413 (1971) (Douglas, J., dissenting) (stating that "when a grave injustice is wreaked on an individual by the presently powerful federal bureaucracy, it is a matter of concern to everyone[]"); TRAVER, *supra,* § 1700 (stating that "[t]he end-point of most disability claims that are adjudicated at the SSA are resolved for better or worse at

Produced by The Berkeley Electronic Press, 2008

the whole SSA system is built.[3] When the integrity of the foundation is compromised, the entire system becomes unstable.[4] Thus, it follows that because the validity of VE testimony has been compromised, the entire SSA disability determination process is susceptible to collapse.[5]

As the largest system of administrative adjudication in the western world, the SSA has drastically experienced an increase in the number of claims filed each year.[6] Consequently, with an adjudication system this large, it is only natural that Congress requires the federal judiciary to ensure the SSA affords disability claimants a certain level of fairness and decide cases correctly.[7] Yet, multiple aspects of federal judicial disability

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step five of the sequential evaluation process[]"); MILLS, *supra* note 1, at 111 (explaining that a VE's presence at a hearing can make or break the case for a claimant).

[3] MILLS, *supra* note 1, at 111. The VE relies upon *The Dictionary of Occupational Titles* ("*DOT*") to reach conclusions because the disability adjudication process's reliance upon the VE and the *DOT* are firmly embedded in the SSA's Regulations and Rulings. *See* Social Security Ruling 82–61 (Aug. 20, 1980), *available at* http://www.ssa.gov/OP_Home/rulings/di/02/SSR82-61-di-02.html (discussing the authority of the *DOT* and the necessity of calling a VE to testify); *see also* S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (discussing the use of a VE and other occupational information in disability decisions).

[4] TRAVER, *supra* note 2, § 1302. Before the use of VEs may be permitted in SSA hearings, the SSA must have a "rational decision" regarding vocational issues. *Id*. (citing Kerner v. Flemming, 283 F.2d 916, 921 (2d Cir. 1960)). Although the SSA attempted to address this issue by relying upon "selected government and industrial studies[,]" the courts eventually rejected that approach because the reports were "speculative and theoretical in determining whether there were employment opportunities available to disability claimants . . . ." *Id*. To address this issue that put the system on the brink of collapse, the SSA "decided to employ vocational experts . . . [who] would address their testimony to the claimant's particular and highly individual situation in an effort to satisfy the *Kerner* criteria." *Id*. (citing SSA History of SSA During the Johnson Administration 1963–1968, *available at* http://www.ssa.gov/history/ssa/lbjoper5.html (discussing the history leading up to the implementation of VEs within SSA disability hearings and why there is a need for reliable vocational evidence)).

[5] TRAVER, *supra* note 2, § 1900 (stating that "[a]fter all of those years and all of those hearings, such an attorney has no way of knowing if the VEs gave honest and accurate answers, or if the testimony was made up out of whole cloth[]"); *see also* Richardson v. Perales, 402 U.S. 389, 413 (1971) (Douglas, J. dissenting) (stating that the "[r]eview of the evidence is of no value to us[] [because] [t]he vice is in the procedure which allows it in without testing it . . . . ").

[6] *See* MARGARET C. JASPER, SOCIAL SECURITY LAW 7 (2004) (stating that "[a]s of 2003, approximately 7,595,452 disabled workers and their dependents were receiving benefits[]"); Jianting Hu et al., *A Structural Model of Social Security's Disability Determination Process* 1 (Office of Research, Evaluation, and Statistics, Working Paper No. 72, 1997), *available at* http://www.ssa.gov/policy/docs/workingpapers/wp72.pdf (stating that with the SSA accepting 2.5 million applications a year, "its budgetary and welfare implications are undeniable[]").

[7] *See* TRAVER, *supra* note 2, § 1302 (discussing how in *Kerner v. Flemming*, 283 F.2d 916, 921 (2d Cir. 1960), the issue of why the SSA needed substantial vocational evidence was addressed for the first time); Larry M. Gropman, *Social Security*, 1996 DET. C.L. REV. 517,

proceedings are flawed; specifically, the way in which VE testimony is evaluated is problematic.[8]

The integrity of VE testimony has been compromised for several reasons, including the fact that "[t]here presently are no standards to become a vocational expert, no training, no supervision, and no credential requirements."[9] Additionally, the vocational field is a relatively new discipline and the methodology invoked by VEs in analyzing *DOT* data and vocational information of a disability claimant is not an exact science.[10] In fact, the point at which a scientific principle crosses the line from experimental to demonstrable is often debated.[11] Still, the SSA "figures [that] the *DOT* and its related data are 'better than nothing.' But 'better than nothing' is not a reliable basis [from which] to award and deny critical life-sustaining benefits to the disabled and

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518 (1996) (discussing the importance of providing a judicial check on an unavoidably bureaucratic and budget conscious system). *But see* Moyer v. Peabody, 212 U.S. 78, 84 (1909) ("[W]hat is due process of law depends on [the] circumstances. It varies with the subject-matter and the necessities of the situation.").

[8] *See* JEFFREY SCOTT WOLFE & LISA B. POSZEK, SOCIAL SECURITY DISABILITY AND THE LEGAL PROFESSIONAL 260 (2003) (discussing specific issues that warrant review including: the ALJ erred; the record as a whole did not support the ALJ's decision; the ALJ was biased; the ALJ disregarded applicable Social Security rulings; or due process was not followed). *See also* MILLS, *supra* note 1, at 57. "In general, when abuse of discretion was detected, . . . [one of the] primary explanations[] . . . [was that] vocational testimony was either inadequate or misrepresented" during the course of the hearing. *Id.* Other reversible errors occurred when the ALJ's questioning of VEs during the hearing was flawed. *Id.* at 58.

[9] TRAVER, *supra* note 2, § 1302. *But see* Daniel F. Solomon, *Vocational Testimony in Social Security Hearings*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES, 197, 209 (1998) (explaining that under the SSA's guidelines found in HALLEX, the ALJ is required to administer an oath; qualify the VE by ensuring impartiality, expertise, and professional qualifications; ask the claimant if there are any objections to the VE testifying; and finally, rule on any objections). In addition to the lack of standards for VEs, the VE testimony lacks validity because it is based on the outdated *DOT*, and thus the system fails because the real world changes and the *DOT* data does not keep pace. TRAVER, *supra* note 2, § 1403.1; *see also* WOLFE & POSZEK, *supra* note 8, at 7 (discussing the *Hearings, Appeals and Litigation law Manual* (HALLEX), which is a two-volume manual that provides procedures for carrying out administration policies, and guidance for processing and adjudicating claims at the SSA).

[10] *See* "The American Board of Vocational Experts' Overview Page," http://www.abve.net/overview.htm (stating that the American Board of Vocational Experts, which represents both the private and the public sectors, was founded in 1980 to preserve the integrity, standards, ethics, and uniqueness of vocational experts); *see also* TRAVER, *supra* note 2, § 1403.1 (stating that comprehending the vastness of employment data requires a taxonomy, i.e., a classification system, but this system is insufficient because of the inability of VEs to accurately base the claimant's vocational history with outdated data from the *DOT*).

[11] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (discussing the important role that expert testimony plays in the judicial process); *see infra* note 109 and accompanying text (discussing in detail the implications of the *Frye* holding).

disadvantaged."[12] It is someplace within "this twilight zone [that] the evidentia[ry] force of . . . [a scientific] principle must be recognized, and while courts will go a long way in admitting expert testimony[,] . . . the thing from which [a] deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[13]

This Note discusses ways in which the SSA can avoid the disintegration of the disability determination process by protecting the integrity of disability proceedings and assuring claimants are afforded an adequate level of fairness. Part II of this Note discusses the SSA system, namely the aspects of disability hearings, the role of VEs within these hearings, and the evidentiary standards implemented pre- and post-*Daubert v. Merrell Dow Pharmaceuticals, Inc.*[14] Part III explains the extent to which the SSA relies on the testimony of VEs and discusses Social Security enactments, such as Social Security Ruling 00-4p ("S.S.R. 00-4p"), which were implemented to ensure fairness in disability proceedings; Part III also analyzes the possibility of implementing a *Daubert*-type standard to evaluate VE testimony to ensure that a disability claimant is afforded an adequate level of fairness.[15] Finally, Part IV proposes a solution in the form of a model Rule to resolve these issues.[16]

II. BACKGROUND

The SSA is a large and intricate adjudication system that is constantly evolving.[17] This Part discusses the historical development,

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[12] TRAVER, *supra* note 2, §1400. "Traditionally slow to act in the face of change, [the] SSA so far has published no regulations to bridge the divide between" the obsolete *DOT* and its methodology and new and updated occupational sources. *Id.* § 1503. *See also* JASPER, *supra* note 6, at 7 (discussing the immense effect that disability benefits have on people's lives and that "[a]lmost 3 in 10 of today's 20 year-olds will become disabled before reaching age 67[]"); Claire R. Kelly, *The Dangers of Daubert Creep in the Regulatory Realm*, 26 J. NAT'L ASS'N ADMIN. L. JUDGES 469, 471 (2006) (discussing the situations in which a standard needs to be implemented to ensure that federal agencies are relying upon acceptable evidence to base conclusions); *infra* note 74 and accompanying text (discussing the outdated methodology of the *DOT* and the updated occupational source O*NET).

[13] *Frye*, 293 F. at 1014 (discussing the need for expert testimony to be based on a solid foundation that is generally accepted in the particular field in question).

[14] *See infra* notes 17–139 and accompanying text.

[15] *See infra* notes 141–212 and accompanying text.

[16] *See infra* notes 214–38 and accompanying text.

[17] For the disability claimant who has filed an appeal and requested a hearing in front of an Administrative Law Judge ("ALJ"), the SSA will assign a hearing date at which the claimant will have his chance in front of an ALJ at the SSA Office of Disability Adjudication and Review ("ODAR"). *See* WOLFE & POSZEK, *supra* note 8, at 247. Upon entering the hearing room, the claimant will be greeted by the ALJ who will provide an introductory

functional aspects, and policy objectives of the SSA system.[18] First, Part II.A provides an overview of the Social Security Disability Insurance Benefits ("DIB") program.[19] Next, Part II.B discusses the functional aspects of the SSA's disability hearings—namely, the five-step sequential disability determination process.[20] Part II.C discusses the policy objectives of the SSA (regarding VEs), the *DOT*, and other occupational sources used to support VE testimony.[21] Last, Part II.D addresses pre- and post-*Daubert* evidentiary approaches, and policies that the SSA has introduced since *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[22]

A. Overview of the Social Security Disability Insurance Program

The SSA, with the authority granted to it by the Social Security Act,[23] provides cash and insurance benefits[24] to individuals through two

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statement explaining the nature of the hearing and stating the issues to be addressed. *Id.* If there are any exhibits not already submitted into the administrative record, the claimant will have a chance to submit them to the ALJ, who will mark them and make each a part of the record. *Id*. If the claimant is represented by counsel, he or she will make an opening statement to the ALJ which frames the contours of the case and explains the theory of the claim. *Id.* at 248. The next part of the hearing consists of the ALJ or the claimant's counsel asking the claimant a series of questions outlining the claimant's impairments, limitations, and daily activities. *Id.* If the claimant brings other witnesses, such as a significant other or a family member, the ALJ will question those witnesses about the claimant's condition and limitations. *Id*. Next, the ALJ will examine the medical expert, making a general inquiry about the claimant's documented impairment(s) and elicit the expert's opinion concerning whether a listing is met. *Id.* Subsequently, the ALJ will examine the VE, "eliciting the expert's opinion about the nature of the claimant's past relevant work, specifying exertion and skill level; followed by an inquiry about transferable skills; and ending in a series of hypothetical questions in which various limitations are expressed as part of the claimant's (hypothetical) residual functional capacity." *Id.* Last, the closing argument is presented, or if the claimant does not have an attorney, the ALJ will ask if the claimant has anything more that the ALJ should know before the ALJ makes a decision. *Id.*

[18] *See infra* Part II.

[19] *See infra* Part II.A.

[20] *See infra* Part II.B.

[21] *See infra* Part II.C.

[22] 509 U.S. 579 (1993); *see infra* Part II.D.

[23] *See generally* 42 U.S.C. § 423 (2000) (discussing the purpose and scope of the Social Security Act).

[24] Jae Kennedy & Marjorie F. Olney, *Factors Associated with Workforce Participation Amount SSDI*, 72 J. REHAB. 4 (2006) (stating that "[t]he Social Security Disability Insurance . . . program provides cash benefits and health insurance to approximately 6.8 million disabled workers and their families, at a total annual cost of about $66 billion[]"). Incentives for applying for these benefits have been drastically affected by changes in institutional, economic, and demographic factors. *See* Hu et al., *supra* note 6, at 2. An example of institutional factors is reductions in state programs assisting the impaired, thus shifting the reliance from state agencies to the SSA. *Id*. Examples of economic and demographic factors include an aging population, the rise in unemployment, a reduction in the number of blue collar jobs, and the loss of health coverage for workers and their

disability programs, both of which use the same disability determination process, but both of which also have different, yet complementary, goals.[25] The first program is the Social Security DIB program, which is part of the comprehensive social security insurance program,[26] and the second program is the Supplemental Security Income ("SSI")[27] program,

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families. *Id*. The application process consists of: (1) submitting an application to a Social Security Administration District Office; (2) the District Office Representative ("Rep") being assigned the case and scheduling an initial interview with the claimant; (3) the Rep, in the initial interview, checking the claimant's non-medical criteria to ensure that the claimant is below the full retirement age, has worked in at least five of the ten most recent years, and is not currently engaged in substantial gainful activity; (4) if the claimant meets the non-medical criteria, the application is forwarded to one of the Disability Determination Services office ("DDS") where medical examiners scrutinize medical evidence from one or more of the claimant's health care providers regarding the claimant's capability of performing employment; (5) if deemed necessary, the DDS will order that the claimant undergo a consultative examination; and (6) if the DDS is able to find the claimant has an impairment that meets or equals a Medical Listing, then the claimant is entitled to benefits. WOLFE & PROSZEK, *supra* note 8, at 3–5. If the DDS denies the claimant's application for disability benefits, the claimant has several options, such as, the claimant can request: (1) a reconsideration by a different team at the DDS; (2) a hearing in front of an Administrative Law Judge; or (3) an appeal to the Social Security's Appeal Council. *Id.* The Social Security Act mandates that each Social Security claimant exhaust his administrative remedies before appealing to a federal district court. 42 U.S.C. § 405(g) (2000).

[25] *See* Hu et al., *supra* note 6, at 11; *see also* David H. Autor and Mark G. Duggan, *The Rise in Disability Recipiency and the Decline in Unemployment* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 8336, 2006), *available at* http://www.nber.org/papers/w8336 (stating that the medical eligibility criteria for the two programs are identical).

[26] MILLS, *supra* note 1, at 2. The DIB social insurance program is authorized under Title II of the Act and is called the Old Age, Survivors, and Disability Insurance (OASDI) program. *See* Hu et al., *supra* note 6, at 5. This program is funded through payroll tax contributions allocated to the Disability Insurance Trust Fund. *Id.* The types of Title II Benefits include retirement Insurance Benefits (20 C.F.R. § 404.310), Survivors' Insurance Benefits, and Disability Insurance Benefits (20 C.F.R. § 404.315). Survivors' Insurance Benefits include the following: Spouses and Divorced Spouses (20 C.F.R. § 404.330); Child's Benefits (20 C.F.R. § 404.350); Parent's Benefits (20 C.F.R. § 404.370); Special Payments at Age 72 (20 C.F.R. § 404.380); and Lump-Sum Death Payment (20 C.F.R. § 404.390). 20 C.F.R. § 404.301 (2006). Entitlement factors for Disability Insurance Benefits are defined under 20 C.F.R. § 404.315 and require the following: (1) that the claimant be under 65 years of age; (2) that the claimant file an application; (3) that the claimant satisfies the disability insurance requirements located under 20 C.F.R. § 404.130; (4) that the claimant is disabled as defined by the Act; and (5) that the claimant completed the five full calendar months waiting period. *See* 20 C.F.R. § 404.130 (2006).

[27] MILLS, *supra* note 1, at 2. Authorized under Title XVI of the Act, the Supplemental Security Income (SSI) provides for disabled individuals who fail to meet the insured status requirement:

> (1) Every individual who—
> (A) is insured for disability insurance benefits (as determined under subsection (c)(1) of this section),
> (B) has not attained retirement age (as defined in section 416(*l*) of this title),

which is a means-based program designed specifically to guarantee a minimal level of income to only the poorest of the aged, blind, and disabled.[28] Because SSI benefits are means-based[29] and consist of only nine-percent[30] of the benefits paid by the SSA, this Note focuses on DIB.[31]

> (C) if not a United States citizen or national—
> (i) has been assigned a social security account number that was, at the time of assignment, or at any later time, consistent with the requirements of subclause (I) or (III) of section 405(c)(2)(B)(i) of this title; or
> (ii) at the time any quarters of coverage are earned—
> (I)is described in subparagraph (B) or (D) of section 1101(a)(15) of Title 8,
> (II) is lawfully admitted temporarily to the United States for business (in the case of an individual described in such subparagraph (B)) or the performance as a crewman (in the case of an individual described in such subparagraph (D)), and
> (III) the business engaged in or service as a crewman performed is within the scope of the terms of such individual's admission to the United States.
> (D) has filed application for disability insurance benefits, and
> (E) is under a disability (as defined in subsection (d) of this section),
> shall be entitled to a disability insurance benefit . . . .

42 U.S.C. § 423(a)(1) (2000). In 1974, under President Richard Nixon, the SSI program was introduced and targeted individuals who had limited income and were disabled. *See* John R. Kearney, *Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 SOC. SEC. BULL. 3, 1 (2005–2006). *See* Social Security Administration's SSI Page, http://www.socialsecurity.gov/notices/supplemental-security-income. Unlike the Disability Insurance Benefits, the SSI benefits are not based on prior work, and are financed by general funds of the U.S. Treasury. *Id.*

[28] *See* Hu et al., *supra* note 6, at 1; *see also* WOLFE & POSZEK, *supra* note 8, at 40 (explaining that the SSI program is basically a type of welfare program).

[29] 42 U.S.C. §§ 1381–1383f (2000). The Act provides supplemental security income for disabled individuals who fail to meet the insured status requirement. *Id.*; *see also* Autor, *supra* note 25, at 4 (stating that SSI benefits are means-tested and thus, there is no requirement that the claimant have any prior work history); WOLFE & POSZEK, *supra* note 8, at 40 (explaining that the SSI program is not based on a past history of employment like the DIB program, from which payment into a trust fund creates an insured status).

[30] *See* WOLFE & POSZEK, *supra* note 8, at 41. In July 2000, 6.5 million recipients received SSI payments with the average monthly benefit of approximately $377. *Id*. This accounted for roughly nine-percent of the benefits paid out by the SSA, and is significantly less than the 86% of benefits paid out through the DIB program. *Id.*; *see also* JASPER, *supra* note 6, at 7 (stating that "[t]he passage of the Contract with American Advancement Act of 1996 narrowed the number of people allowed to receive SSI disability benefits by requiring that drug addiction or alcoholism not be a material factor in their disability[]").

[31] A historical overview of the Disability Insurance program reveals that in 1954 the SSA instituted the disability "freeze" which limited eligibility to persons disabled for at least six months and whose earnings history proved a solid connection to the workforce. *See* Kearney, *supra* note 27, at 1. Disability determinations were made by the states and reimbursed through the Social Security trust fund. *Id.* It was in 1956 that monthly benefits began to be provided to disabled workers aged 50–64. *Id.* Two years later in 1958, benefits were established for the dependents of disabled workers. *Id.* In 1960, the harsh

To be eligible for DIB, the SSA requires that an applicant be unable to engage in "substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."[32] To make this disability determination, and in an attempt to balance the need for efficiency with the need of ensuring that a claimant is treated fairly, the SSA adopted a subjective, five-step sequential process that considers the uniqueness of a claimant's impairment or impairments.[33]

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requirement that a worker be at least 50 years old to be eligible for disability benefits was eliminated. *Id.* Subsequently, in 1972 Medicare coverage was extended to Disability Insurance beneficiaries after two years of entitlement. *Id.* In 1980, a cap was placed on family benefits to disabled workers and periodic disability reviews were enacted, as well as return-to-work incentives. *Id.* Subsequently in 1984, Congress addressed the issue of mental related disabilities by implementing new criteria for adjudication of claims involving mental impairments. *Id.* The new criteria greatly liberalized the disability screening process by making disability benefits significantly more attainable to employees with less severely disabling impairments, such as cognitive disorders and degenerative musculoskeletal ailments. *See* Hu et al., *supra* note 6, at 1. Consequently, the implementation of the new criteria broadened the previously narrowly defined disability insurance benefits program to allow for an expanded population with a more subjectively defined entitlement to disability insurance benefits. *Id.* at 2. The changes to the eligibility requirements occurred as a result of actions taken by Congress and the courts. *Id.*

[32] 20 C.F.R. § 404.1505 (2006). The Social Security Act's definition of disability has three separate components: (1) the severity requirement (the inability to engage in any substantial gainful activity); (2) the origin requirement (the disability must be based on a medically determinable physical or mental impairment); and (3) the duration requirement (qualifying impairment must last at least one year or be expected to result in death). Social Security Act § 223(d)(2)(A). *See also* Frank S. Bloch et al., *Developing a Full and Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 17 (2003) (explaining that the three requirements must be met; for example, a short-term disability, no matter how severe, is not sufficient to establish eligibility under the Social Security Act). *See also* Barnhart v. Walton, 535 U.S. 212 (2002). In *Walton*, the claimant (Walton) challenged the Social Security Administration's determination that he was not entitled to disability benefits as a result of returning to part-time work eleven months after losing his full-time teaching job due to his serious cognitive impairment. *Id.* at 1267. The claimant argued that the SSA's interpretation of the statute's qualifications was unlawful. *Id.* at 1265. The Supreme Court started by addressing the issue of whether or not the regulation of the durational requirement of the provision was unlawful. *Id.* The Court determined that the provision made no explicit statements about the duration of the claimant's inability. *Id.* The statute did not unambiguously forbid the SSA regulation. *Id.* Then, the Court considered the construction of the statute and determined that there was no infringement. *Id.* The Court concluded that the SSA's interpretation was in line with the statute's basic objectives, which necessitated some durational requirement. *Id.* Consequently, the Court found that the interpretation did not contradict the SSA's own precedent regarding interpretation. *Id.* The Court held that the SSA regulation was lawful and that the regulation of the duration provision was a reasonable interpretation of the statute. *Id.*

[33] S.S.R. 03-3p (Nov. 10, 2003), *available at* http://www.ssa.gov/OP_Home/rulings/di/01/SSR2003-03-di-01.html (discussing the purpose of Social Security Ruling 03-3p). It is

B. *Functional Aspects of Social Security Hearings: The First Three Steps of the Five-Step Sequential Disability Determination Process*

Like most valid and recognized adjudication systems, the SSA's five-step disability determination process is based on the notion of fundamental fairness.[34] Understanding how the five-step process works is crucial; accordingly, two key concepts should be realized: first, the analysis is sequential, meaning that the claimant cannot proceed from one step to another until it is determined that he is didsabled; and second, the analysis is a process, meaning that it requires consideration of many elements, consisting of both medical and vocational evidence.[35]

In order for the process to begin, a claimant must first be eligible.[36] If a claimant is rendered unable to continue employment at any time before age sixty-five, the claimant may be eligible for DIB as long as the claimant meets the SSA's standard for disability and is "deemed 'insured' because [the claimant has] worked the required number of quarters for a person [of her] age and has contributed to the [SSA] system."[37]

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important to realize that in the sequential evaluation process there are limited opportunities for a claimant to be granted benefits. *See* WOLFE & POSZEK, *supra* note 8, at 248. The claimant can be granted benefits at step three, e.g., the claimant meets or medically equals a medical listing. *Id.* The claimant can also be granted benefits at step-five, e.g., the claimant satisfies the requisite criteria for a disability award based on the Medical-Vocational Guidelines ("Grids"). *Id.* Last, the claimant can be granted benefits at the second part of step five, e.g., the claimant is awarded disability benefits using the Grids as a framework and the VE testifying that there are no jobs that exist in significant numbers which the claimant can maintain. *Id.*

[34] *See supra* note 1 and accompanying text (discussing the notion of fairness and justice within the adjudication system). *See also* WOLFE & POSZEK, *supra* note 8, at 50 (discussing the underlying notion of fairness and justice that support the five-step framework). Disability hearings before ALJs are governed by the Administrative Procedure Act (APA), which governs the on the record adjudications. *Id.* at 244. These on the record hearings are like regular judicial hearings in that they are recorded verbatim. *Id.* The record is crucial for organization, and serves as an invaluable tool for the claimant's attorney if the hearing is not successful because the hearing record contains enumerated exhibits, all of which constitute the record on which the decision was made. Thus, filing an appeal is easier because all of the exhibits and transcripts are available and may be thoroughly examined for any errors made during the hearing. *Id.*

[35] WOLFE & POSZEK, *supra* note 8, at 50. Not surprisingly, the sequential evaluation process is founded on the same public policy argument that supports the Social Security Act, namely, that if an employee is unable to maintain a minimum level of personal sustenance, society has deemed it necessary to offer resources so that the employee does not suffer. *Id*.

[36] *See* 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (2000) (explaining the requirement that the claimant is no longer able to work due to health reasons can be expected to last for a continuous period of not less thantwelve months).

[37] JASPER, *supra* note 6, at 41–42 (discussing how the claimant must be first eligible to apply before the disability determination process starts).

Once the applicant is deemed eligible, the SSA next determines whether the applicant is disabled under the five-step sequential evaluation process.[38] The first of the five-step sequential evaluation process is to determine whether the individual is engaged in substantial gainful activity ("SGA").[39] If the individual is working and the work meets the criteria of SGA, then the individual is not disabled and the

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[38] 20 C.F.R. § 404.1520 (2006). The ALJ must sequentially follow the five-step evaluation process. *Id.* Thus, if the ALJ can find that the claimant is disabled or not disabled by application of a specific step, the ALJ makes his or her determination or decision and does not go on to subsequent steps. 20 C.F.R. § 404.1520(4) (2006). As mentioned in note 6, the concept of disability is subjective, so without an objective standard as to who is determined to be disabled can vary widely among individuals. *See* WOLFE & POSZEK, *supra* note 8, at 50. The legislature's solution was "a legal standard which takes into account both medical and vocational issues, founded on the premises that disability in American society is grounded in an ability to maintain a minimum level of sustenance through one's own efforts." *Id.* at 50. *See also* JASPER, *supra* note 6, at 43 (stating that "[q]ualifying disabilities are usually determined by a state agency that handles health issues—generally known as a disability determination service—which must find that the individual is suffering from a physical or mental impairment that meets SSA criteria[]").

[39] 20 C.F.R. § 404.1520(i). Regulations define "substantial gainful activity" as "work that [] (a) [i]nvolves doing significant and productive physical or mental duties; and (b) [i]s done (or intended) for pay or profit." *Id.* § 404.1510 (2006). Thus, the definition of SGA consists of work activity that is both (1) substantial and (2) gainful. *Id. See also* 20 C.F.R. § 404.1572 (2006) (stating that substantial work involves doing significant physical and or mental activities with reasonable regularity, e.g., work cannot be sporadic or transitory, and also that gainful work is work activity done for pay or profit). This regulation states that any monthly income below three-hundred dollars does not rise to the level of SGA. *Id.* § 404.1574(b)(3). However, any monthly income that exceeds three-hundred dollars, but is below seven-hundred and eighty dollars, will prompt a review by the SSA in order to determine whether the applicant is engaging in SGA. *Id.* This review process will determine whether the applicant's work is comparable to that of unimpaired individuals in the community doing the same or similar work, including similar time, skills, energy, and responsibility. *See* WOLFE & POSZEK, *supra* note 8, at 64. Then, the review process will determine whether the work, though significantly less than that done by unimpaired individuals, worth the amount presumed to be consistent with the SGA amount of seven-hundred and eighty dollars. *Id.* In other words, the SSA determines whether the applicant's monthly income is subsidized because, even though the applicant is working, the work is at a substandard level and the employer continues to employ the applicant even though the work product is substandard to that of an average employee. *See* THOMAS E. BUSH, SOCIAL SECURITY DISABILITY PRACTICE §113 (2006) (stating that "[w]ork may not be substantial when a claimant is unable 'to do ordinary . . . tasks satisfactorily without more . . . assistance than is usually given other people doing similar work' or when a claimant is doing work 'that involves minimal duties . . . that are of 'little . . . use' to the employer . . . .") (quoting 20 C.F.R. § 404.1573(b)). After 2001, the SSA adopted a policy declaring that the amount of income that qualifies as gainful activity is adjusted for growth in national wages. 20 C.F.R. § 404.1574(b)(2)(ii). The average monthly earnings in 2004 were eight-hundred and ten dollars. *See* BUSH, *supra*, § 113.

determination process ceases; however, if the claimant meets the SGA requirement, then the process continues.[40]

The second step is to determine whether the individual has an impairment, or combination of impairments, that is severe.[41] If the individual does not have an impairment, or combination of impairments, that is severe, the SSA finds the individual not disabled, and the determination process ceases.[42]

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[40] *See* 20 C.F.R. § 404.1572 (2006). If the claimant is actually working at a certain level of earnings at the applicable time, the claimant is not disabled, regardless of the claimant's medical severity. *Id*. § 404.1520(b). In *Markham v. Califano,* 601 F.2d 533 (10th Cir. 1979), the court determined that SGA was employment performed on a regular basis. *Id*. at 534. The court further determined that intermittent employment does not necessarily constitute SGA, and the SSA should review medical testimony to determine if such an intermittent employee qualifies for disability benefits. *Id*.

[41] 20 C.F.R. § 404.1520(ii). If the claimant does not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 404.1509, or a combination of impairments that is severe and meets the duration requirement, the SSA will find that the disability claimant not disabled. *Id*. The duration of the impairment needs to have lasted or expected to last for a continuous period of at leasttwelvemonths. *See* 20 C.F.R. § 404.1509 (2006). The word 'severe' is a term of art, and its definition is found in § 223(d)(3) of the Social Security Act and also in 20 C.F.R. § 404.1520(c). There is a two-fold process in determining the existence of a severe impairment: (1) A medically determinable impairment which is (2) more than a slight abnormality and has more than a minimal effect on the ability to do basic physical or mental work activities. *See* S.S.R. 96-3p (July 2, 1996). Medically determinable means the result of anatomical, physiological or psychological abnormalities which can be shown by medically acceptable clinical or laboratory diagnostic techniques. *See* 20 C.F.R. § 404.1508 (2006); *see also* S.S.R. 96-3p (July 2, 1996) (stating that a severe impairment is an impairment or combination of impairments which significantly limits the physical or mental ability to do basic work-related activities). The combined effect of all impairments must be assessed without regard to whether any single impairment, if considered separately, would be severe in determining if a severe impairment exists. *See* 20 C.F.R. § 404.1523 (2006). A severe impairment should be determined to exist when there are multiple impairments that, considered in combination, have more than a minimal effect on the ability to perform basic work-related activities. *See* S.S.R. 86-8 (Nov. 30, 1985). The issue of tacking arises when there are unrelated severe impairments that develop sequentially, one following the other or with some overlap, and at least one impairment must alone meet the duration requirement. *See* 20 C.F.R. § 404.1522(a) (2006). Also, such impairments cannot be combined to meet the duration requirement, even though the impairments together have met or are expected to last for twelve months. *See* S.S.R. 82-52 (Nov. 30, 1981); *see also* 20 C.F.R. § 404.1522(b) (2006) (stating that where severity is established only because concurrent impairments are severe when considered in combination, i.e., no single impairment is severe in and of itself, the combination must be expected to persist at a severe level for twelve months in order to meet the duration requirement).

[42] 20 C.F.R. § 404.1520(c) (2006). The SSA has defined a severe impairment as an impairment that significantly limits a claimant's mental or physical ability to perform basic work activities. *Id.* "The standard for assessing 'severity' at step 2 is medical only. Vocational factors, such as age, education, and past work history, are considered at this step, but they are more important at step 5 of the sequential evaluation process." WOLFE & POSZEK, *supra* note 8, at 74; *see also* S.S.R. 96-3p (July 2, 1996) (stating that the ALJ is

The third step is to determine whether the individual's impairment meets the severity of an impairment listed[43] in the Social Security Regulations.[44] If it does, the individual is deemed disabled.[45] If it does not, the SSA proceeds to step four, which is to determine whether the individual's impairment(s) prevent(s) her from doing her past relevant

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required to evaluate a claimant's impairment to assess the impairment's effect on the claimant's performance of basic work activities and that in situations when the effect of an impairment on the claimant's ability to perform work activities is indeterminable, the ALJ should presume that a severe impairment exists and proceed to step three).

[43] *See* 20 C.F.R. pt. 404, subpt. P, App. 1 (2006). Appendix 1 of subpart P of part 404 is the body system listing and consists of the following sections: 1.00 Musculoskeletal System; 2.00 Special Senses and Speech; 3.00 Respiratory System; 4.00 Cardiovascular System; 5.00 Digestive System; 6.00 Genitourinary Impairments; 7.00 Hematological Disorders; 8.00 Skin Disorders; 9.00 Endocrine System; 10.00 Impairments That Affect Multiple Body Systems; 11.00 Neurological; 12.00 Mental Disorders; 13.00 Malignant Neoplastic Diseases; and 14.00 Immune System. *Id*. If the DIB claimant's impairment meets or equals one of the above listings, then the Agency will halt the process at Step 3 and find that the claimant is disabled. *Id.*

[44] 20 C.F.R. § 404.1520(iii) (2006). If the disability claimant has an impairment that meets the duration requirement and is listed in appendix 1 or is the equivalent of a listed impairment, the SSA will find the claimant disabled without considering the claimant's age, education, and work experience *Id*. § 404.1520(d) (2006). However, if a person has a severe, medically determinable impairment which, though not meeting or equaling the criteria in the Listing of Impairments, prevents the person from doing PRW, it must be determined whether the person can do other work. *Id*. This involves consideration of the person's RFC and the vocational factors of age, education, and work experience. *Id. See generally* S.S.R. 85-15 (Nov. 30, 1984) (discussing the transition between steps 3 and step 4).

[45] WOLFE & POSZEK, *supra* note 8, at 91 (discussing the additional step in the five-step sequential evaluation process). The five-step sequential process arguably has six steps because before proceeding to step four, the ALJ must establish the claimant's residual functional capacity (RFC). *See* Hu et al., *supra* note 6, at 8 (stating that step four consists of two determinations). A claimant's RFC is based on that individual's physical and mental limitations and measures how the limitations affect the claimant's ability to work, and it serves as an evaluation of what the claimant can still do despite his or her limitations. *See* 20 C.F.R. § 404.1545(a) (2006). The RFC assessment is used at the fourth step to determine if the individual can do past relevant work. *See id.* at §404.1520(e). *See also* WOLFE & POSZEK, *supra* note 8, at 91 (stating that before the analysis under step four can be completed, the RFC needs to be assigned at "step *Three-and-a-Half* of the five-step sequential evaluation process[]"). Establishing the claimant's RFC is completed by reviewing the claimant's medical records and then comparing the claimant's limitations to one of five categories of exertion-type work activity located in the *DOT*. *Id*. at 92. The five categories are as follows: (1) Sedentary work; (2) Light work; (3) Medium work; (4) Heavy work; and (5) Very heavy work. *Id.* The ALJ gauges the claimant's ability to engage in various activities, classified as exertional or non-exertional. *Id*. at 51. The claimant's functional capability varies, depending on the inability to engage in specified exertion-type or non-exertion-type activities. *Id.* at 92. "It is this variation, and the absence of a specific capability, or *limitation*, that ultimately defines the individual's capacity for different work categories . . . ." *Id.* at 51. Thus, once the claimant is assigned a residual functional capacity, the issue becomes whether the individual's employment within the previous fifteen years can still be completed. *Id.* at 52.

work ("PRW"), considering her residual functional capacity ("RFC").[46] If the individual's impairment(s) prevent(s) her from doing her PRW, the SSA proceeds to the last of the five-step process.[47]

In this last step, the SSA determines whether a significant number of jobs that the individual is able to perform exists in the national economy, considering her RFC together with the vocational factors of age, education, and work experience.[48] If a significant number of jobs that the individual can perform exists in the national economy, the SSA finds that

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[46] *See* 20 C.F.R. § 404.1560(1) (2006) (stating that past relevant work is employment that an individual completed within the past fifteen years, was classified as substantial gainful activity, and lasted long enough for the individual to learn how to complete the tasks); *see also* S.S.R. 82-62 (Nov. 30, 1981) (stating that the employment must have been done for a sufficient length of time to learn and provide average performance). The Code requires that if the impairment does not match a listing in the Social Security Regulations, then the ALJ shall assess and make a finding about the claimant's residual functional capacity based on all the relevant medical evidence and other evidence in the claimant's case record. 20 C.F.R. § 404.1520(e) (2006). The individual's impairment and any related symptoms, such as pain, may cause physical and mental limitations that affect what the individual can accomplish in their employment setting; thus, the RFC is the most an individual can still accomplish despite their limitations. *Id.* § 404.1545(a)(1). Although the ALJ is responsible for assessing an individual's RFC, the ALJ must consider and evaluate any assessment of the individual's RFC by a state agency, or medical, or psychological consultant. *See* S.S.R. 96-6p (July 2, 1996); *see also* S.S.R. 96-8p (July 2, 1996) (stating that the RFC assessment is derived from the following medical and non-medical sources: (1) medical history; (2) medical signs and laboratory findings; (3) treating physician's reports; (4) the effects of treatment, including limitations or restrictions imposed by the mechanics of treatment; (5) reports of daily activities; (5) lay evidence; (6) consultative examination reports; (7) the claimant's testimony at the hearing; (8) the opinion from the DDS physician; (9) the effects of the symptoms, including pain, that is reasonably attributed to a medically determinable impairment; (10) work evaluations; (11) evidence from attempts to work; and (12) the need for a structured living environment).

[47] *See* WOLFE & POSZEK, *supra* note 8, at 173. Only if it is determined that the claimant is rendered unable to perform previous employment will the question be considered whether there are other, less-demanding competitive jobs that the individual can perform. *Id.* Arguably, the support behind steps four and five comes from a public policy to encourage individuals who are capable of work to do just that—work. *Id.* at 52. "[S]ociety should not have to supply a minimum daily sustenance to an individual who is capable of working at a competitive level." *Id.*

[48] *See id.* at 52 (explaining that once it is determined that the claimant is not able to return to a past job, the determination of whether there are other jobs that the claimant can perform must be made). "Whatever criteria may be used in determining whether a claimant is capable of performing a significant number of jobs in the national economy, it is generally immaterial that the number of jobs that the claimant can perform is a small percentage of the total number of jobs in a given region." 3 SOC. SEC. LAW & PRAC. § 43:137 (Dec. 2007). The term 'region' can refer to the number of jobs existing in the entire state. *See* Gonzalez v. Secretary of Health and Human Servs., 773 F. Supp. 994 (W.D. Mich. 1991) (discussing the broadness of the SSA's definition of regional economy). *But see* Meeks v. Apfel, 993 F. Supp. 1265 (W.D. Mo. 1997) (holding that the term 'region' can refer to the number of jobs existing in a particular area of the state).

the individual is not disabled under Social Security Regulations; if a significant number of jobs that the individual can perform does not exist in the national economy, then the SSA rules that the individual is disabled.[49]

When determining disability, the SSA does not consider whether the individual filing for DIB would actually be hired if she applied for work; in other words, factors such as unemployment rates or job availability in the claimant's hometown are not considered.[50] Instead, the Social Security Regulations declare that the test for disability takes into account only the individual's *ability* to complete work.[51]

Thus far, this overview of the five-step sequential process has not discussed the use of a VE; that is because a VE becomes involved in the

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[49] *See* 20 C.F.R. § 404.1520(g) (2006). If the individual can make an adjustment to other work, then that individual is not disabled under theSocial Security Regulations definition of disabled. *Id.* In order for the SSA to meet its burden at the fifth step, the SSA must demonstrate that the claimant can perform at least a substantial portion of the employment in the claimant's assigned residual functional capacity category. *See* Campbell v. Bowen, 822 F.2d 1518 (10th Cir. 1987). The SSA has enacted policies that state that a claimant is capable of performing other work when the range and kind of work for which the claimant is functionally and vocationally suited is broad enough that the claimant can be reasonably expected to make the vocational adjustment. *Id.* at 1523.

[50] Ken Matheny, *Social Security Disability and the Older Worker: A Proposal for Reform*, 10 GEO. J. ON POVERTY L. & POL'Y 37, 40 (2003) (quoting 42 U.S.C. § 423(d)(2)(A) (2002)) (stating that regardless of whether a specific job vacancy exists for the individual, or whether that individual would be hired if she applied for work, if the jobs exist in significant numbers in the national economy, then the individual is not disabled); *see also* WOLFE & POSZEK, *supra* note 8, at 52 (suggesting that the question is not whether there exists actual employment in the regional or national economy, rather, the question is whether, hypothetically, employment exists in the regional or national economy).

[51] *See* 42 U.S.C. § 423(d)(2)(A) (2000).

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. . . . 'work which exists in the national economy' means work which exists in significant numbers ether in the region where such individual lives or in several regions of the country.

Id. (citations omitted). *See also* 3 SOC. SEC. LAW & PRAC, *supra* note 48, at § 43:137.

> [F]or the purpose of determining a claimant's ability to engage in work other than past relevant work, work is considered to exist in the national economy when there [exists] a significant number of jobs, in one or more occupations, that have requirements that the claimant is able to meet with her physical or mental abilities and vocational qualifications.

Id.

five-step sequential process only during the fourth and fifth steps (and plays an influential role only at the fifth step).[52] Accordingly, this Note next focuses on the fourth and fifth steps of the five-step sequential process, and the SSA's policies regarding VEs and their use of the *DOT*.

C. *The Fourth and Fifth Steps of the Five-Step Sequential Disability Determination Process: Policy Objectives Regarding Vocational Experts, the Dictionary of Occupational Titles, and the Social Security Administration's Legal Standards*

At the fourth of the five-step sequential disability determination, the Administrative Law Judge ("ALJ") relies on VE testimony on a limited basis; at the fifth step, however, the SSA relies heavily on testimony from the VE who forms his or her opinion after reviewing the disability claimant's records and data in the *DOT*.[53] This testimony is crucial because neither the ALJ nor the claimant possess the ability to analyze the exertion or skill required by particular employment positions, because the categories in the *DOT* are organized in an exceedingly technical fashion.[54] Thus, VE testimony serves as the foundational building block of the SSA disability determination process, because, without it, a complete, accurate, and reasonable decision would not be possible.[55]

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[52] TRAVER, *supra* note 2, § 1303 (stating that vocational evidence plays a critical role at only steps four and five of this sequential evaluation process).

[53] CAROLYN A. KUBITSCHEK, SOCIAL SECURITY DISABILITY: LAW AND PROCEDURE IN FEDERAL COURT 158 (1994). In determining whether a claimant can return to past relevant work, the ALJ must make a specific finding on that issue. *Id.* "In evaluating past work, the ALJ must make findings as to the physical and mental demands of that work, and the stress of that work." *Id.* In complex cases, it is the responsibility of the ALJ to use a vocational expert to determine the exertional and non-exertional requirements of the claimant's past work. *Id.* at 224. However, the ALJ may not rely upon a vocational expert in deciding whether the claimant can return to past work. *Id.* at 223; *see also infra* note 86 and accompanying text (discussing how the claimant bears the burden of proving that he or she is unable to perform any past work).

[54] WOLFE & POSZEK, *supra* note 8, at 155 (stating that such knowledge is beyond the knowledge of the ordinary person, and thus, requires a vocational expert); *see also* U.S. Department of Labor, Office of Administrative Law Judges, "U.S. Department of Labor, Office of Administrative Law Judges, 'Dictionary of Occupational Titles (4th Ed., Rev. 1991)—Appendix D,'" *available at* http://www.oalj.dol.gov/PUBLIC/*DOT*/REFERENCES/*DOT*APPD.HTM. The *DOT* will assist in identifying occupational progression and skill transfers vertically within a technology or horizontally among closely related technologies. *Id*. Each occupational definition also provides essential job placement information by indicating the industry or industries in which a given occupation is found, and by describing job tasks and task variables. *Id.*

[55] 20 C.F.R. § 404.1566(e) (2006) (stating that if the issue in determining the individual's disability rests upon whether the individual's work skills can be used in other work and the specific occupations in which they can be used, or if a similarly complex issue exists,

1. The Vocational Expert

A VE is a consultant who specializes in employment placement and occupational requirements.[56] Although a VE is hired by the SSA, a VE is neither the SSA's nor the claimant's witness, but rather renders an impartial opinion based on evidence presented at a hearing and the claimant's assigned RFC.[57] Because a VE bases his opinion on pre-hearing documentation and oral testimony of the claimant and others, the VE is normally the last witness to testify.[58] The VE's role is to provide an opinion regarding the skill and exertion levels of various jobs, the transferability of the claimant's skills, and the employment positions that the applicant for disability benefits can or cannot perform.[59]

The basis of a VE's authority is the VE's credentials.[60] Thus, the SSA holds that an ALJ is authorized to defer to a proposed VE on the ground

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the Agency may use a vocational expert); *see also* Fines v. Apfel, 149 F.3d 893, 895 (8th Cir. 1998) (stating that the Social Security regulations expect ALJs to consult VEs).

[56] *See* BUSH, *supra* note 39, § 340. "Vocational experts testify . . . in many more social security disability hearings than do medical experts; but the experience, knowledge, ability, understanding of the VE role, and the prejudices of individual VEs vary much more widely than do the comparable skills and experience of medical experts." *Id.*

[57] WOLFE & POSZEK, *supra* note 8, at 155 (discussing how the VE is considered an independent contractor employed by the SSA); *see also* TRAVER, *supra* note 2, § 1302 (stating that "[t]hough paid for his professional services, the vocational expert is not an agent of the Social Security Administration[]"); HARVEY L. MCCORMICK, 2 SOCIAL SECURITY CLAIMS AND PROCEDURES 65 (1998) (discussing how the claimant should not make the point that the VE was selected and being paid by the SSA because the SSA will point out that the VE receives the same fee no matter what way the VE's testimony is directed).

[58] TRAVER, *supra* note 2, § 1303 (discussing when the VE will normally testify at the disability hearing). The VE's observation of the claimant at the hearing might yield evaluative clues regarding appearance, responsiveness, general intelligence, communication skills, and other claimant characteristics. *Id*. Additionally, the VE might notice the claimant's physical capacities, such as the use of limbs or physical endurance during the course of a lengthy hearing. *Id.* Furthermore, and maybe most importantly, the VE can also deduce the RFC for work from the claimant's testimony about everyday activities. *Id.*

[59] KUBITSCHEK, *supra* note 53, at 224. The VE must "(1) assess the effect of any limitation on the range of work at issue; (2) advise whether the impaired person's [residual functional capacity] permits him or her to perform substantial numbers of occupations within the range of work at issue; (3) identify jobs which are with the [residual functional capacity], if they exist[.]" *Id.* Additionally, the VE is permitted to testify as to whether a claimant has attained transferable skills in a prior job. *Id*. at 225.

[60] *See* Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005) (holding that the vocational expert's own expertise establishes the necessary foundation for his or her testimony and thus no additional foundation is required).

that the VE has good credentials in a vocational field that is categorized as atypical and complex.[61]

The broad deference afforded to a VE is limited by only two safeguards.[62] First, while attempting to strike a balance between fairness and the implementation of an efficient, informal adjudication process, courts have held that VE testimony supporting a Social Security disability proceeding "is not 'substantial' if [that] vital testimony has been conjured out of whole cloth."[63] The other example of a check on VEs testimony is that if a contradiction exists between the VE's testimony and the data contained in the *DOT*, the ALJ shall make an inquiry (similar to Rule 702 of the *Federal Rules of Evidence* ("Rule 702")), to determine whether the VE's testimony is reliable.[64]

After a VE testifies and the ALJ asks whether the VE's testimony is in accordance with the *DOT*, if the claimant does not question the VE's reasoning (even if that reasoning contradicts the data contained in the *DOT*), then the claimant's right to later question the reasoning is waived.[65] This means that the claimant's attorney needs to be well-

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[61] *See* Zenith Elecs. Corp. v. WH-TV Broad, Corp., 395 F.3d 416, 420 (7th Cir. 2005) (stating that if an expert relies upon his or her expert intuition or curriculum vitae, then that expert's extrapolations are neither normal among social scientists nor testable, and conclusions that are not falsifiable are not worth much to the court).

[62] *See infra* note 63 and accompanying text (discussing how substantial testimony is required to support a finding, and that if the testimony is merely hypothesized then it is not substantial); *see also* S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (explaining why and when the ALJ can rely upon a VE to give testimony at a disability hearing); *infra* note 130 and accompanying text (discussing how the ALJ has an obligation to play a gatekeeper role by asking if any inconsistencies exist between the VE's testimony and the data contained within the *DOT*).

[63] Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002). Although expert witnesses must meet the requirements of 702 (that (1) the testimony be based upon sufficient data; (2) the testimony satisfy the aspects of reliability; and (3) the expert applies the principles and methods reliably to the facts of the case), this heightened level of due process protection is not implemented in Social Security disability hearings which are a hybrid of the adversarial and the inquisitorial models. *Id*. The notion that experts should use reliable methods does not depend upon only Rule 702. *Id*. Rather, because the Social Security disability process requires a showing of substantial evidence, there is an appropriate check on the broad credibility granted to the VE. *Id*. "Evidence is not 'substantial' if vital testimony has been conjured out of whole cloth". *Id*.

[64] *See Donahue*, 279 F.3d at 446; *see also* TRAVER, *supra* note 2, § 1403.1.1 (stating that under S.S.R. 00-4p, the Social Security Commissioner states that only reliable job information available from various publications will be used).

[65] *Donahue*, 279 F.3d at 446 (stating that if 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 *DOT* because the *DOT*, after all, just records other unexplained conclusions and is not even subject to cross-examination).

versed in the intricacies of the *DOT* and understand the methodologies used by VEs to form their conclusions.[66]

On appeal, if a claimant wishes to challenge the VE's testimony by arguing that the same claimant did not receive a fair hearing, the claimant must show that the ALJ's behavior, in the context of the whole case, was so extreme as to display clear inability to render a fair judgment.[67] This is a strict requirement to overcome and does not allow the claimant to attack the reliability of the VE's testimony; rather, the claimant is forced to establish that the ALJ's conduct is of such an extreme nature that a fair judgment is not possible.[68]

As mentioned above, the VE's testimony is based on the oral testimony of the claimant, the claimant's RFC for work, and any of the claimant's pre-hearing documentation.[69] The VE takes into account all of this information and then places the assigned limitations into categories within the *DOT* to determine the types of jobs the claimant is able to perform.[70] Thus, the *DOT* and the VE's testimony are intricately linked, and because the *DOT* is the main source upon which the VE's conclusion is based, familiarity with this reference is essential.[71]

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[66] TRAVER, *supra* note 2, § 1900.1 (discussing how undermining a VE's credentials involves confirming 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 determining the truth).

[67] *See* Bayliss v. Barnhart, 427 F.3d 1211, 1215 (9th Cir. 2005) (discussing the standard that a disability claimant must overcome in order to successfully argue that a fair hearing was denied).

[68] TRAVER, *supra* note 2, § 1900.3. This challenging requirement enacted by the SSA should be criticized for allowing the poor quality of scientific analyses conducted by many VEs as well as the SSA's practice of obscuring its assumptions by disguising policy-based decisions as scientific ones. *Id.*

[69] KUBITSCHEK, *supra* note 53, at 217. The VE may assess the effect of any exertional or non-exertional limitations on the range of work at issue (e.g., the potential occupational base);

> advise whether the impaired person's [residual functional capacity permits] him or her to perform substantial numbers of occupations within the range of work at issue; identify jobs which are within the [residual functional capacity], if they exist; and provide a statement of the incidence of such jobs in the region in which the person lives or several regions of the country.

Id. (quoting S.S.R. 83-12 (Nov. 30, 1982)); DeFrancesco v. Bowen, 867 F.2d 1040 (7th Cir. 1989).

[70] KUBITSCHEK, *supra* note 53, at 225–26 (discussing how a VE needs to know not only what sort of skills and characteristics that a claimant needs to do a job, but also the characteristics of the various jobs that exist, which are located in the *DOT*).

[71] *See* TRAVER, *supra* note 2, § 1400 (stating that it is crucial to understand the *DOT* because of the SSA's reliance upon the VE's testimony which is based in part on data found in the *DOT*); *see also* S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/

2. The *Dictionary of Occupational Titles*

The *DOT* is a publication of the U.S. Department of Labor that provides basic occupational information by classifying jobs into occupations based on their similarities and also defining the structure and content of all listed occupations.[72] Interestingly, this source was last modified twenty-five years ago, and the latest edition, the Fourth Edition, of the *DOT* was last updated in 1991.[73] In addition, the United States Department of Commerce (U.S. Census Bureau) has replaced the *DOT* with the Standard Occupational Classification ("SOC").[74] Because the *DOT* is obsolete, a link no longer exists between Census Codes and

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rulings/di/02/SSR2000-04-di-02.html (providing an example of how significant the *DOT* is to the SSA's adjudication process).

[72] *See* KUBITSCHEK, *supra* note 53, at 218 (discussing the various aspects and the information contained within the *DOT*); *see also* TRAVER, *supra* note 2, § 1400 (discussing the basic contents and data found within the *DOT*).

[73] *See* U.S. Department of Labor, Office of Administrative Law Judges, "United States Department of Labor Dictionary of Occupational Titles Fourth Edition, Revised 1991," *available at* http://www.oalj.dol.gov/libDOT.htm. "The *DOT* was created by the Employment and Training Administration, and was last updated in 1991. The *DOT* is included on the Office of Administrative Law Judges web site because it is a standard reference in several types of cases adjudicated by the Office of Administrative Law Judges, especially labor-related immigration cases. The *DOT*, however, has been replaced by the O*NET." *Id.* (discussing the history of the *DOT*).

[74] KUBITSCHEK, *supra* note 53, at 219. During the early 1980s, the United States Department of Labor published the Selected Characteristics of the Dictionary of Occupational Titles, as a companion volume to *DOT*. *Id*. at 218. Because "[t]he new version of the *DOT* does not list the environmental factors present at each job, as *Selected Characteristics* did . . . [,]" the SSA permits the use of both for a more complete explanation of the characteristics of each job. *Id.* at 219 (quoting 20 C.F.R. § 404.1566(d) (2006)). *See also* TRAVER, *supra* note 2, § 1501 (stating that because the *DOT* does not contain adequate data to be useful to the Social Security Administration's adjudication system, the SSA refers to SCO, as well as other sources of vocational data). The following example illustrates how the *DOT* became obsolete and how the SSA could replace the *DOT* with an updated occupational source called O*NET:

> With the introduction of the Department of Labor's 1998 database for analyzing jobs, known as the Occupational Information Network (O*NET), the *Dictionary of Occupational Titles* (*DOT*) and related Department of Labor publications including the *Selected Characteristics* became obsolete, as did their underlying occupational methodology and framework. Moreover, with the conversion by the Department of Labor to the O*NET methodology for analyzing jobs, the Social Security Administration's Regulations for adjudicating medical-vocational issues no longer conform to the Department of Labor's methodology for analyzing jobs.

Id. § 1503.

the *DOT*, which means that no useful source of job information provides data for the titles in the *DOT*.[75]

Furthermore, many jobs listed in the *DOT* no longer exist and many jobs that now exist are not yet listed in the archaic *DOT*.[76] Nonetheless, a VE often attempts to categorize a claimant's previous work using a ratio of equivalencies to jobs listed.[77] Essentially, a VE must statistically break down the source data to estimate the number of jobs available in the appropriate categories of the *DOT*.[78] This is a complicated endeavor, and if a VE has not received education or training in occupational analysis, then the VE's qualifications and testimony lack reliability.[79]

The claimant additionally faces an uphill battle if the claimant wishes to challenge the reliability of the *DOT* because the SSA relies so heavily on the *DOT* and both the fourth and fifth steps of the sequential process are entwined with data found in the *DOT*.[80] To understand the intricate roles that the VE and the *DOT* play at the fourth and fifth steps, it is essential to have a solid understanding of these steps.[81]

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[75] David Traver, *A Brief Introduction to U.S. Census Bureau Occupation Codes and the Myth of Vocational Testimony*, CONNECT, Oct. 1, 2007, http://www.ssaconnect.com/content/view/55/175/html. Because there is no longer a link between the Census Codes and the *DOT*, the VEs must do something none of them are qualified as Economist to do, namely break down statistically the source raw data of job counting to project or estimate the number of jobs in the smaller component categories of the *DOT*. *Id*. In the past, VEs merely took the data from the State governmental departments that used the *DOT* and testified that an identified number of jobs existed and could be done by an afflicted claimant. *Id*. Under this process, their judgment was vocational in nature and they could do this with their educational and experienced backgrounds, having placed people in jobs. *Id*.

[76] *See* WOLFE & POSZEK, *supra* note 8, at 149.

[77] *Id.*; *see also* MCCORMICK, *supra* note 57, at 62 (citing Pendergraph v. Celebrezze, 255 F. Supp. 313 (M.D. N.C. 1966)) (stating that too much reliance on the *DOT* by the VE does not comply with the substantial evidence rule).

[78] *See supra* note 76 and accompanying text (arguing that if the vocational expert is not qualified to perform job analysis, or if the vocational expert has not used job analysis standards that are applicable to the vocational profession, then the testimony should be rejected).

[79] *See* Traver, *supra* note 75 (stating that the VE is required to have specialized training dealing with occupational analysis); *see also* Solomon, *supra* note 9, at 210 (stating that under HALLEX, the VE is first subject to *voir dire* on his or her qualifications, and then on the content of his or her testimony); *supra* note 9 and accompanying text (discussing the contents and uses of HALLEX).

[80] *See* Donahue v. Barnhart, 279 F.3d 441, 445 (7th Cir. 2002). Because the *DOT* is published by the Department of Labor as a reference tool; it does not purport to contain rules of law, and no statute or regulation gives it binding force. *Id*. Thus, there is a need for the VE to match the facts, i.e., the limitations of the claimant to relevant job data within the *DOT*. *Id*.

[81] *See* TRAVER, *supra* note 2, § 1400 (stating that familiarity with and knowledge of the *DOT* is essential to disability practice at the SSA because use and reliance upon the *DOT* and its progeny are firmly embedded in the SSA's regulations).

3. The Fourth of the Five-Step Sequential Disability Determination Process

During the fourth of the five-step sequential disability determination process, the VE takes the claimant's assigned RFC for work and matches it against the job data in the *DOT* to determine if the claimant can competitively hold a job that he or she held within the past fifteen years.[82] For the first time in the sequential process, the claimant's RFC for work is measured according to actual work previously performed.[83] This is also the first time when the full public policy underlying the disability program is tested: given the client's RFC for work, can she or he actually engage in competitive work?[84] If it is determined that the claimant is able to perform past relevant work, then the process stops there and the claimant is found not disabled.[85] If the claimant reaches the fifth step, the burden shifts to the SSA[86] to demonstrate that reference to the Medical-Vocational Guidelines (the "Grids")[87] dictates that either

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[82] 20 C.F.R. § 404.1565 (2006). The fifteen-year standard is meant to protect the claimant from having remote jobs considered against him or her because it is no longer realistic to expect that skills and abilities learned in that job are relevant, let alone honed. *See id*.

[83] KUBITSCHEK, *supra* note 53, at 220 (citing S.S.R. 85-15 (Nov. 30, 1984)). A VE is permitted to testify in cases in which the issue is whether the claimant can make a vocational adjustment to a new job, considering his or her remaining occupational base (as a result of reduced residual functional capacity) with his or her age, education, and past work experience. *Id.*

[84] WOLFE & POSZEK, *supra* note 8, at 147 (discussing the importance of past relevant work).

[85] *See* Larry M. Gropman, *Social Security*, 1996 DET. C.L. REV. 517, 525 (1996) (stating that it is important to note that the fifteen-year standard does not apply to unskilled jobs because such work does not entail complex cognitive demands and can be learned after brief training); *see also* Smith v. Sec'y of Health & Human Servs., 893 F.2d 106, 110 (6th Cir. 1989) (stating that if it is determined that the claimant can perform his or her past relevant work, a finding of not disabled is rendered and there is no need for testimony from a vocational expert because the sequential process stops there).

[86] KUBITSCHEK, *supra* note 53, at 216. To meet this burden, the ALJ must support the finding with substantial evidence that the claimant has the vocational qualifications to perform specific jobs. *See* O'Banner v. Sec'y of Health, Educ. & Welfare, 587 F.2d 321, 323 (6th Cir. 1978). The burden of proof rests upon the claimant throughout the first four steps. WOLFE & POSZEK, *supra* note 8, at 169. The disability claimant must prove by a preponderance of the evidence each of the requirements necessary to keep advancing through the sequential evaluation process. *Id*. Thus, at the fourth step the claimant must demonstrate that she can no longer perform her past work. *Id.*

[87] KUBITSCHEK, *supra* note 53, at 216. The Medical-Vocation Guidelines represent outcome-determinative assumptions. WOLFE & POSZEK, *supra* note 8, at 177. "If a specific set of conditions exists, considering a variety of factors, the law presumes that the claimant is or is not disabled." *Id*. "In each Grid rule are discrete factors that must be determined in order to properly apply the rules." *Id.* To illustrate, if the "claimant was found to be limited to sedentary work, was fifty-five years of age, [and] was a high school graduate, but . . . [the claimant's] education did not otherwise provide for direct entry into skilled

the claimant is *able* to perform other substantial gainful employment[88] or that a significant number of jobs that the claimant is able to perform is *available* in the national economy.[89]

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work, and . . . [the claimant's] skills were *not* transferable[]" under Grid rule 201.06, the claimant would be deemed disabled. *Id.* The RFC assigned by the ALJ to the claimant determines which table of the Medical-Vocational Guidelines is to be used: Table One applies to individuals whose RFC limits them to sedentary work; Table Two applies to individuals whose RFC limits them to light work; and Table Three to those limited to medium work. *See* 20 C.F.R. pt. 404 subpart P App. 2 (2006). Interestingly, no tables exist for claimants able to perform heavy or very heavy work, probably because the Guidelines state that regardless of the claimant's age, education, or work experience, sufficient jobs exist in the national economy for claimaint's whose RFCs indicate that they are capable of achieving substantial gainful activity. *Id.* On the other extreme, if a claimant is found to be unable to perform work at even a sedentary level, the claimant will be presumed to be disabled, absent specific evidence to the contrary. *Id.*

[88] KUBITSCHEK, *supra* note 53, at 216. If the claimant's vocational factors and assigned RFC coincide with all of the criteria of a particular rule, that Grid rule dictates a finding of either disabled or not disabled. *See* Gropman, *supra* note 7, at 527. If the claimant matches one of the Grid rules, the Medical-Vocational Guidelines provide substantial evidence that the claimant is capable of performing gainful work in the national economy. *Id.* at 528. In *Heckler v. Campbell*, 461 U.S. 458 (1983), the Supreme Court upheld the Medical-Vocational Guidelines suggesting that the Grids provide the SSA with a shortcut that make the process more efficient and eliminate the need for calling vocational experts. *Id.* However, the Court warned that the Grids are applicable only when the claimant's RFC or relevant vocational factors match exactly those reflected in the particular Grid rule. *Id.*; *see also* S.S.R. 83-14 (Nov. 30, 1982) (stating that no Grid rule mandates a conclusion of 'Disabled' or 'Not Disabled' where a claimant has a non-exertional limitation or restriction imposed by a medically determinable impairment).

[89] *See* Myers v. Apfel, 238 F.3d 617, 619 (5th Cir. 2001) (stating that the claimant has the burden of proving disability under the first four steps); *see also* Savage v. Barnhart, 372 F. Supp. 2d 922, 927 (S.D. Tex. 2005) (stating that if the claimant is successful in carrying her burden through the first four steps, the burden shifts to the SSA at step five to show that other substantial gainful employment, which the claimant is capable of performing, is available in the national economy); 20 C.F.R. § 404.1520 (2006) (stating that if the SSA is able to verify that other employment exists in significant numbers in the national economy—employment that the disability benefits claimant is capable of performing in spite of his or her existing impairments—the burden shifts back to the claimant to prove that he or she is unable to perform the alternative work described). In *Barnhart v. Thomas*, the Court addressed whether an applicant for disability benefits under the SSA could qualify as disabled if he or she can perform his or her previous job, even if that job disappeared from the economy. 540 U.S. 20, 21 (2003). The claimant (Thomas) who had previously worked as an elevator operator applied for disability benefits and was subsequently denied benefits because her impairments did not prevent her from performing her previous work. *Id.* at 22. Although the claimant argued that her job had largely disappeared from the national economy, the ALJ did not find the disappearance of her job to be relevant. *Id.* The Court interpreted the statute as creating two separate requirements for disability—that an applicant must be unable to do her previous work and that she must be unable to find any substantial work which exists in the national economy. *Id.* at 24. The issue arose that although, by the terms of the statute, substantial gainful work must exist in the national economy it is not clear whether previous work must also exist in the national economy. *Id.* at 28. The Court noted that the SSA, through its regulations, had

4. The Fifth of the Five-Step Sequential Disability Determination Process

The main function of the fifth of the five-step sequential disability determination process is for the SSA to prove that the claimant is able to perform other jobs that exist in significant numbers; one method of demonstrating that a significant number of jobs exist in the national economy is through the use of the Grids.[90] The Grids cannot be applied to claimants who have non-exertion characteristics because the Grids were constructed to apply only to claimants' exertional abilities.[91] Thus, if the Grids are not applicable, because either the Grids cannot be applied or because the claimant's RFC or relevant vocational factors are different from those reflected in a particular grid rule, the SSA must use other means of proving that jobs exist that the claimant can perform.[92] The most common way to prove that jobs exist is through the use of the testimony of the VE.[93] The ALJ directs questions to the VE that

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interpreted the statute to reject such a requirement and that the five-step process promulgated by the SSA, defers the inquiry into the state of jobs in the national economy until the fifth step. *Id*. The Court held SSA's interpretation of the statute was correct and that the lower court erred by ignoring canons of grammatical construction which indicated that the qualifying phrase that exists in the national economy should only apply to substantial gainful work. *Id*. The Court reasoned that consideration of the claimant's previous employment may function as a proxy for an analysis of employment existing throughout the economy, regardless of whether a previous job exists in the economy. *Id*. The Court justified its reasoning by stating that such an interpretation allows the SSA to avoid the burden of analyzing applications individually. *Id*. at 29.

[90] KUBITSCHEK, *supra* note 53, at 216 (discussing an overview of vocational evidence within the sequential evaluation process).

[91] *See* WOLFE & POSZEK, *supra* note 8, at 178. The Grid rules consider the following factors: (1) the claimant's age; (2) the claimant's educational attainment; (3) the claimant's skill level, e.g., past work experience; and (4) the claimant's exertional level. *Id*. "Each factor represents a sliding scale of possibilities, and each possibility has the potential to dramatically affect the outcome shown by the Grid rule." *Id.*

[92] KUBITSCHEK, *supra* note 53, at 217. If the Grids are deemed inapplicable, "then the courts have uniformly held that Social Security Administration must use other means of proving that other jobs exist in the national economy which the claimant can perform." *Id.* (citing Buck v. Bowen, 885 F.2d 451 (8th Cir. 1989)).

[93] Solomon, *supra* note 9, at 209. In order for reliance on the vocational expert's opinion to be justified, the ALJ must pose the hypothetical question so that it incorporates and fully sets forth the claimant's impairments. *See* Totz v. Sullivan, 961 F.2d 727, 730 (8th Cir. 1992) (citing Shelltrack v. Sullivan, 961 F.2d 894, 898 (8th Cir. 1991)); *see also* Hinchey v. Shalala, 29 F.3d 428, 432 (8th Cir. 1994) (stating that when a hypothetical question does not encompass all relevant impairments, VE testimony does not constitute substantial evidence to support the ALJ's decision). The ALJ will ask the VE to assume certain facts, such as the existence of a hypothetical individual who is the same age as the claimant and has the same educational and occupational history. *See* WOLFE & POSZEK, *supra* note 8, at 52. After laying this foundation, the ALJ poses a set of limitations, asking whether, given these limitations, there is other less-demanding employment that the individual can perform. *Id*.

incorporate hypothetical situations. The ALJ's hypothetical questions presume that the facts presented in the claimant's case are true.[94] The hypothetical questions start with the least restrictive RFC for work, and subsequently, the ALJ adds new limitations to each additional hypothetical question.[95]

In *Fast v. Barnhart*, 397 F.3d 468 (7th Cir. 2005), the claimant's impairments were only mental. *Id.* The ALJ assigned an RFC with only non-exertional limitations, and relied on VE testimony to find that the claimant could perform some 16,000 jobs in the region and thus was not disabled. *Id.* at 469. The court affirmed, stating that the ALJ properly considered VE testimony where non-exertional limitations substantially limited the range of work that the claimant could perform. *Id.* at 468. The claimant had argued that the ALJ was not permitted to deny benefits based on the VE's testimony because the claimant would be disabled under the Grid rules if limited to sedentary work and because the number of jobs that the VE identified was less than the total number of sedentary unskilled jobs. *Id.* at 469. Under these circumstances, the claimant asserted that the Social Security regulations required the ALJ to find the claimant disabled using the Grids as a framework. *Id.* The court held that the claimant's argument conflicted with the common-sense rule that where the Grids do not address a particular problem, the ALJ is entitled to rely on the expert testimony of a VE. *Id.* at 472. This outcome means that the Grids do not apply as a framework at all when a claimant has solely non-exertional limitations. *Id.*

[94] WOLFE & POSZEK, *supra* note 8, at 193. During the first four steps, the claimant has the burden of proving his or her disability. *See* 20 C.F.R. § 404.1512(a) (2006); *see also* 42 U.S.C. § 423(d)(5)(A) (2000) (stating that the claimant will not be considered to possess a disability unless the claimant furnishes such medical and other evidence to the SSA). Nevertheless, jurisprudence makes clear that upon proof by a claimant that he or she cannot perform prior work, e.g., that the claimant has satisfied step four, the burden shifts to the SSA to prove that the claimant can perform other work available in the national economy. Bloch et al., *supra* note 32, at 1; *see also* Bowen v. Yuckert, 482 U.S. 137, 146 (1987). In *Yuckert*, the Court determined that Congress conferred on the SSA Commissioner exceptionally broad authority to prescribe standards for applying certain sections of the Act. *Yuckert*, 482 U.S. at 146 (citing Heckler v. Campbell, 461 U.S. 458, 466 (1983) (quoting Schweiker v. Gray Panthers, 453 U.S. 34, 43, (1981))). The *Yuckert* Court also determined that the SSA authorizes the Commissioner to adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proof and evidence and the method of taking and furnishing the same in disability cases. *Id.* (quoting 42 U.S.C. § 405(a)). The *Yuckert* Court then pointed out that where the statute expressly entrusts the Commissioner with the responsibility of implementing a provision by regulation, review is limited to determining whether the regulations promulgated exceeded the Commissioner's statutory authority and whether they are arbitrary and capricious. *Id.* (quoting Heckler v. Campbell, 461 U.S. 458, 466 (1983)).

[95] WOLFE & POSZEK, *supra* note 8, at 193. The ALJ's first hypothetical question is normally the least restrictive RFC, followed by the second hypothetical which builds on the first, using the original limitations as a foundation on which new, more restrictive limitations are layered. *Id.* at 192. The third hypothetical is the most restrictive RFC. *Id.* An example of the sequential nature of these hypothetical questions is as follows: (1) a light RFC (frequently lift ten pounds, occasionally twenty pounds); then (2) a light RFC with sit-stand option (sit thirty minutes; stand thirty minutes); and then (3) a light RFC, with sit-stand option and the need to lie down two times each day (in the morning and afternoon because of drowsiness from medication side effects). *Id.* "This layered effect allows both the judge and the representative to clearly delineate the claimant's restrictions,

In this fifth step, the VE plays his or her most significant role in the disability determination process.[96] The VE testifies regarding whether, using the claimant's RFC and the ALJ's hypothetical limitations, in comparison with employment data taken from the *DOT*, the claimant can perform other work that exists in significant numbers within the national economy.[97] Essentially, the VE's testimony—which supports a finding that in view of the claimant's age, education, and work experience other work exists or does not exist in the national economy—is based on data from the *DOT*.[98]

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and further allows the representative to monitor the limitations the judge is considering." *Id.* at 193. An example of the typical structure of an ALJ hypothetical question at the least restrictive level is as follows:

> Given your opinion that the claimant cannot return to past work, assume with me the existence of an individual the same age as the claimant, with the same vocational history and education. Now assume that this person can only lift fifteen pounds at a time, cannot sit longer than one hour at a time before having to stand; cannot stand for more than thirty minutes at a time before having to sit, and, because of asthma cannot be exposed to dust, gases, fumes, or odors. Are there other, less demanding jobs that this individual can perform?

Id. at 190.

[96] *See* McKinnie v. Barnhart, 368 F.3d 907, 910 (7th Cir. 2004) (stating that in social security disability cases, the ALJ may depend on the VE's testimony to find the claimant disabled or not disabled); *see also* TRAVER, *supra* note 2, § 1403.1.1 (stating that "the SSA's disability adjudication framework is founded on the DOT and the supporting assumptions, research, data, and vocational theories (or lack thereof)[]").

[97] *See infra* note 74 and accompanying text (discussing the antiquity of the *DOT*); *see also* TRAVER, *supra* note 2, § 1500 (discussing how the vocational expert's testimony is based on information from the *DOT* and other labor statistic sources). *See also* WOLFE & POSZEK, *supra* note 8, at 149. Because the *DOT* has not been updated in many years, job descriptions have changed and many jobs now exist that are not described in the *DOT*. *Id.* Nevertheless, a VE will often attempt to categorize a claimant's previous work using equivalencies to jobs that are listed. *Id.* "The danger, of course, is that without specific testimony about actual work duties, the client may be held to the standard of the 'approximated' *DOT* entry, which may or may not reflect the work actually done on the job." *Id.*

[98] 20 C.F.R. § 404.1566(d)(1) (2006) (stating that the Agency relies on the *DOT*, published by the Department of Labor); *see also* Lynn Martin, U.S. Department of Labor, Office of Administrative Law Judges, "Dictionary of Occupational Titles (4th Ed., Rev. 1991)–Message From The Secretary," *available at* http://www.oalj.dol.gov/PUBLIC/*DOT*/REFERENCES/*DOT*MESS.HTM (stating that "[s]ince its inception, the . . . *DOT* has provided basic occupational information to many and varied users in both public and private sectors of the United States economy[]"); WOLFE & POSZEK, *supra* note 8, at 149 (stating that the vocational expert renders an opinion that includes several components, mostly through reliance on the *DOT*, including the following: (1) the job title, with appropriate reference to the job listing set forth in the *DOT*; (2) the exertional level required by the job (whether the job requires sedentary, light, medium, heavy, or very heavy); and (3) the skills associated with performing the job).

The claimant is assured that the SSA relies on reliable job information available from various publications, including the *DOT* and other documents, as provided by the regulations.[99] Thus, as determined by the ALJ after relying on the testimony of the VE, the claimant is entitled to DIB only if a significant number of jobs that he or she is able to perform is not available in the national economy.[100]

Section 405(g) of the SSA allows unsuccessful claimants to seek judicial review of the ALJ's decision.[101] However, the scope of judicial review in such cases is limited because the SSA's denial of benefits is not to be disturbed if it is supported by substantial evidence and contains no legal error.[102] In regard to Social Security disability proceedings, substantial evidence is "more than a mere scintilla, but may be less than a preponderance."[103] Indeed, the ALJ's resolution of evidentiary conflicts requires such deference.[104]

Considering the high level of deference given to the SSA with regard to evidentiary matters, and the relatively broad credibility granted to VE testimony, questions of reliability and fairness are bound to arise in Social Security disability proceedings.[105] The lack of concrete standards

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[99] TRAVER, *supra* note 2, § 1403.1.2 (quoting 20 C.F.R. § 404.1566(d) (2006)).

[100] 20 C.F.R. § 404.1520(f) (2006); *see also* WOLFE & POSZEK, *supra* note 8, at, 173 (discussing the only two steps at which a claimant can be granted benefits: step-three (the medical listings) and step-five (the step in which the claimant's RFC determines whether there are other less-demanding jobs that can be performed, or, if not, whether benefits will be granted)).

[101] *See* 42 U.S.C. § 405(g) (2000) (setting forth the requirements claimants must meet in order to challenge the ALJ's determination); *see also supra* note 67 and accompanying text (discussing the challenging obstacles the claimant must overcome in order to be successful in arguing that she was not afforded a fair hearing).

[102] *See* Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1197 (9th Cir. 2004) (holding that when the evidence before the ALJ is subject to more than one rational interpretation, deference must be given to the ALJ's conclusion); *see also* Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (stating that "[i]f the evidence can support either outcome, the [reviewing] court may not substitute its judgment for that of the ALJ[]") (quoting Sousa v. Callahan, 143 F.3d 1240, 1243 (9th Cir. 1998)). *But see* Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989) (holding that the Appeals Council's decision cannot be affirmed simply by isolating a specific quantum of supporting evidence). Rather, a court must "consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [SSA] Secretary's conclusion." Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993); *see also* Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986) (holding that the record as a whole must be considered).

[103] Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001); *see also* Howard *ex rel.* Wolff v. Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003) (finding substantial evidence in the record despite ALJ's failure to discuss every piece of evidence).

[104] *See Lewis*, 236 F.3d. at 509 (stating that deference must be given to the ALJ's credibility determinations and resolutions of evidentiary conflicts).

[105] *See* Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005) (emphasis added) (stating that the vocational expert's own expertise provides the necessary foundation for his or her

regulating the methodology used by VEs is the key factor undermining the integrity of the five-step sequential disability determination process.[106] For this reason, the next section addresses the progression of evidentiary standards as they apply to expert witnesses, as well as the SSA's attempt to curb the broad credibility granted to VEs.[107]

D. *Evidence: Pre- and Post-*Daubert *Standards and Post-*Daubert *SSA Policies*

Because the VE testifies at the disability hearing and that testimony is used by the ALJ to determine whether a claimant is disabled, a standard is needed to define the specific requirements that the VE's testimony and the VE's methodology must satisfy in order to maintain the integrity of the VE's testimony.[108] The most well-known example of a standard that places a check on the testimony of an expert is Rule 702, but before the adoption of Rule 702, American courts relied on the *Frye* standard.[109]

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testimony and no other foundation is required); *see also* Dobrowolsky v. Califano, 606 F.2d 403, 408 (3d Cir. 1979) (stating that vocational expert testimony without a foundation is not substantial evidence in a disability hearing). *But see* Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002) (stating that even though Rule 702 does not apply, the vocational expert's testimony must still be based upon substantial evidence because vital testimony is not substantial if it is conjured out of "whole cloth").

[106] *See* Traver, *supra* note 75. At the fifth step, the ALJ calls on the testimony of a vocational expert, and the testimony from these experts is based on the *DOT*. *Id*. Astonishingly, when the vocational expert reaches the stage of testimony regarding particular jobs and the number of jobs in the regional economy, some experts may be inclined to hypothesize about data. *Id.* Because data sources are no longer tracked to the *DOT* and a statistical evaluation is now necessary, the VEs who are trained and qualified to understand employment and job placement, do not have the appropriate preparation to manipulate job data to identify components of job groups provided by the *DOT*. *Id.* Thus, the VE's methodology is outside the parameters of their training. *Id*. When the VE gives the based upon my experience answer, the VE should be able to back thatanswer up with explanations that support the testimony. *Id*. In the absence of that foundation, the testimony is simple ipse dixit. *Id*. *See also* TRAVER, *supra* note 2, §1900.4 (stating that "attacking the VE's credentials involves confirming 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[]").

[107] *See infra* notes 108–39 and accompanying text (discussing evidentiary standards as they apply to experts and the SSA's attempt to put a check on the broad credibility granted to VEs, thereby ensuring that claimants are afforded an adequate level of fairness).

[108] TRAVER, *supra* note 2, § 1302 (discussing how the SSA created the role of the VE to dispassionately contribute his or her vocational evidence toward reaching an equitable decision).

[109] *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the defense offered a scientist as an expert to testify that the result of a blood pressure deception test, conducted on the defendant before the trial, proved that the defendant was innocent. *Id*. at 1013–14. The court held that the testimony resulting from the test, which the defense hoped to

1. Pre-*Daubert*: *Frye v. United States*

Before implementation of Rule 702,[110] the *Frye* general acceptance standard was the established standard for determining the admissibility of expert testimony.[111] This standard required testimony from experts in relatively novel scientific fields to be closely scrutinized and ultimately ruled inadmissible if the expert's conclusions had not yet gained scientific recognition among other experts in the novel scientific field.[112]

2. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*

In 1983, *Daubert* incorporated into evidentiary jurisprudence the notion that judges act as gatekeepers; this required a judge to determine whether a proffered expert opinion is both relevant and reliable to the issue being sought for admission.[113] *Daubert* established that federal

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admit, had not yet achieved standing and scientific recognition among physiological and psychological authorities and thus was inadmissible. *Id.* at 1014.

[110] *See* FED. R. EVID. 702 (stating that an expert witness may testify when the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods to the facts of the case in a reliable manner); *see also* 33A FED. PROC., L. ED. § 80:213 (stating that although Rule 702 does not require absolute certainty of a result for the admissibility of expert testimony, the gatekeepers must find that the testimony is properly grounded, well-reasoned, and free from speculation).

[111] *Frye*, 293 F. at 1013 (stating that originally the general rule was that the opinions of experts were admissible as evidence in those cases in which the matter of inquiry was such that inexperienced persons were unlikely to prove capable of forming a correct judgment on those opinions).

[112] *See id.* at 1014 (stating that if the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence).

[113] Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). In *Daubert*, the Court considered whether the *Frye* test had been superseded by of Rule 702. *Id.* The plaintiffs sued Merrill Dow, alleging that birth defects suffered by their children resulted from the ingestion of the drug Bendectin while the mothers were pregnant. *Id.* at 582. Merrill Dow sought summary judgment on the grounds that the plaintiffs could not present any admissible evidence to prove Bendectin caused the alleged birth defects. *Id.* Because the plaintiffs' expert witnesses' testimonies—that the drug could cause birth defects—were based on animal studies, the defendant's expert testified that no study had linked the drug to birth defects in humans. *Id.* at 582. Merrill Dow argued that the abandonment of *Frye's* general acceptance standard would result in confused juries not capable of understanding absurd and irrational pseudoscientific assertions. *Id.* at 595–96. The Court realized that Rule 702 granted expert witnesses wide latitude to express opinions not afforded to ordinary witnesses. *Id.* at 592. However, the Court held that intense cross examination, offering conflicting evidence and proper jury instructions, would be an effective method of attacking questionable, but admissible, evidence. *Id.* at 596.

judges cannot merely defer to a proposed expert on the ground that the expert has good credentials in a field that is atypical or complex.[114] Any prospective *expert evidence* that is not both reliable and relevant must be excluded by the gatekeeper because it is speculation rather than knowledge.[115]

Eventually, the Supreme Court expanded *Daubert* by declaring that gatekeepers must ensure that any and all *scientific testimony* is not only relevant, but reliable, and gatekeepers must apply this rule equally to all *expert testimony*.[116] Under *Kumho Tire Co., Ltd. v. Carmichael*, courts are expected to filter the good science from the bad science and thus ensure that the proposed expert testimony is supported by appropriate validation.[117]

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[114] *See* Margaret A. Berger, *What Has a Decade of* Daubert *Wrought?*, AMER. J. OF PUB. HEALTH, July 2005, S60 (stating that before *Daubert*, courts normally deferred to the various fields of experts); *see also* Paul S. Miller and Bert W. Rein, *"Gatekeeping" Agency Reliance on Scientific and Technical Materials After Daubert: Ensuring Relevance and Reliability in the Administrative Process*, 17 TOURO L. REV. 297, 303 (2000) (stating that "[n]o longer may a federal judge simply 'defer' to a proposed expert on the ground that he or she has good credentials in a field that is unusual or difficult[]"). *See also* Stewart Lee, Comment, *Evidence-Expert Witnesses-Daubert Applies to All Expert Testimony*, 69 MISS. L.J. 979 (1999). Lee discusses the application of the *Daubert* standard to all experts:

> Regarding reliability, the [*Daubert*] Court identified four factors that the district courts might find helpful in assessing the reliability of a particular scientific theory or technique as follows: (1) whether the theory can be . . . tested, (2) whether the theory has been subjected to peer review and publication, (3) whether the theory has a high known or potential rate of error and whether there are standards controlling the technique's operation and (4) whether the technique enjoys general acceptance within a relevant scientific community.

Id. at 984–86 (citation quotations omitted) (footnotes omitted).

[115] Miller & Rein, *supra* note 114, at 303. The authors continue by stating "that, '[i]f scientific, technical, or other specialized knowledge will assist the trial of fact,' an expert 'may testify thereto[]' . . . ." *Id.* at 299 (quoting Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)). *See also* Alan Charles Raul and Julie Zampa Dwyer, *"Regulatory Daubert": A Proposal to Enhance Judicial Review of Agency Science by Incorporating Daubert Principles Into Administrative Law,* 66 LAW & CONTEMP. PROBS. 7 (2003). The authors state that *Daubert* demands that 'good science' be fostered in court proceedings and that expert testimony which is not grounded in scientific methods and procedures be rejected. *Id.* "Federal agencies . . . have been widely criticized for lacking a commitment to sound science. Too often, federal courts have upheld agency decisions that are based on faulty scientific evidence or unsupported assumptions and conclusions." *Id. See also* E. Donald Elliott, *Science, Agencies, and the Courts: Is Three a Crowd?*, 31 ENVTL. L. REP. 10125, 10126 (2001) (stating that the harms of junk science within agency proceedings demand the implementation of a *Daubert*-style standard).

[116] Miller and Rein, *supra* note 114, at 299 (quoting *Daubert*, 509 U.S. 579; Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999) (citation omitted)).

[117] 526 U.S. 137 (1999). *See* Mason, *supra* note 1, at 892 (stating that gatekeepers are expected to separate bad science from good science, i.e., separate the recognized science

3. Why the *Daubert* Standard Does Not Apply in Social Security Disability Hearings

In *Richardson v. Perales*, the Supreme Court considered whether the requirements of expert testimony as outlined in Rule 702 applied to experts testifying at Social Security disability hearings.[118] In *Richardson*, the Court determined that Rule 702 and its requirements do not govern the admissibility of evidence in disability hearings.[119] Furthermore, under 42 U.S.C. § 405(b)(1) and 20 C.F.R. § 404.950(c), it is clear that Rule 702, and thus *Daubert*'s interpretation of Rule 702 criteria, does not apply to the admission of evidence in Social Security disability hearings.[120] As mentioned above, the reason for this approach is described by the *Richardson* Court: the "strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent[.]"[121] The *Richardson* Court held that evidence that would be inadmissible in a court proceeding

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from the unrecognized science, and that by doing so, a standard of evidentiary reliability may be established).

[118] 402 U.S. 389 (1971). In *Richardson*, the Court held that a written report by a medical doctor who examined the claimant and who extrapolated his findings which were limited to his area of competence was admissible at the disability hearing, despite its hearsay character. *Id.* at 402. The Court held that even though the claimant did not have an opportunity to cross examine the doctor about his findings, the doctor's report may constitute substantial evidence supportive of the ALJ's decision against granting benefits to the claimant. *Id*. The Court determined that Congress had granted the Social Security Commissioner full power and authority to make regulations and to establish procedures necessary to carry out the regulations, and required the Social Security Commissioner to adopt reasonable and proper regulations to provide for the nature and extent of the proofs and evidence. *Id*. at 399–400. The Court reasoned that the medical report which adversely affected the claimant being granted disability benefits was admissible because four other medical doctors had participated and had arrived at a similar conclusion. *Id.* at 404. Thus, the Court reasoned that the claimant's due process rights were in no way infringed because there were no inconsistencies in the reports of the five specialists. *Id*.

[119] *Id.* at 399; *see also* Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005). In *Bayliss*, the court ruled that a foundation for a VE's testimony was not required. 427 F.3d at 1211. The ALJ's reliance on VE testimony regarding the number of relevant jobs in the national economy was warranted because the ALJ may take administrative notice of any reliable job information, including information provided by the VE. *Id*. at 1218.

[120] *See* 42 U.S.C. § 405(b)(1) (2000). During a hearing, investigation, or other proceeding, the SSA Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. *See id.* Evidence may be received at any hearing before the Commissioner of Social Security even though it may be inadmissible under rules of evidence applicable to court procedure. *See id.*

[121] *Richardson*, 402 U.S. at 400. The Court reasoned that administrative procedures should be understandable to the ordinary claimant and should not be strict in tone and operation. *Id.* The Court qualified the previous statement by stating that although "[t]his is the obvious intent of Congress[,] [it is the case only] so long as the procedures are fundamentally fair." *Id.* at 401.

could nonetheless constitute substantial evidence supporting a Social Security disability determination.[122] The Court reasoned that with regard to Social Security disability proceedings, "[t]here emerges an emphasis upon the informal rather than the formal."[123]

The *Richardson* Court emphasized that the Social Security disability proceeding should be comprehensible to a layman claimant and that the proceeding "should be liberal and not strict in tone and operation."[124] This informal evidentiary approach continued as *Daubert*'s interpretation of Rule 702 and *Daubert* criteria was used in traditional courtrooms and federal agency hearings.[125]

Additionally, in Social Security disability proceedings, unlike in traditional proceedings, the VE's recognized expertise provides the necessary foundation for his or her testimony; no other requirements exist to establish additional foundation for the testimony.[126] Because

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[122] *Id.* at 400. In dissent, Justice Douglas stated that "Congress provided in the [SSA] that '[e]vidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure,' Congress also provided that findings of the Secretary were to be conclusive only 'if supported by substantial evidence.'" *Id.* at 412–13 (emphasis omitted) (citations omitted). Furthermore, Justice Douglas pointed out that "[u]ncorroborated hearsay untested by cross-examination does not by itself constitute 'substantial evidence.'" *Id.* at 413 (citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 230 (1938)). The reason for this was because when a claimant

> testifies as to the nature and extent of his injury and his family doctor testifies in his behalf supporting the fact of his disability, the Secretary should not be able to support an adverse determination on the basis of medical reports from doctors who did not testify or the testimony of an HEW employee who never even examined the claimant as a patient.

Id. In an attempt to ensure that disability claimants are afforded an adequate level of fairness, Justice Douglas pointed out that "[o]ne doctor whose word cast this claimant into limbo never saw him, never examined him, never took his vital statistics or saw him try to walk or bend or lift weights." *Id.*

[123] *Id.* at 400; *see also* WOLFE & POSZEK, *supra* note 8, at 244 (stating that although judicial hearings are strict in form and process, this is not the case for proceedings before ALJs in Social Security Disability appeals, because in an attempt to maintain a user-friendly atmosphere, the SSA has not promulgated formal rules of proceeding in such hearings).

[124] *Richardson*, 402 U.S. at 400–01. The Court continued by determining that it was Congress's intent that the Social Security proceedings be informal as long as the hearings were fundamentally fair. *Id.*

[125] *See id.* (explaining that although the formal rules of evidence are not applicable because the layman claimant should not be prejudiced by strict guidelines, this does not mean that the SSA can permit evidence which is not reliable). *See also* WOLFE & POSZEK, *supra* note 8, at 103. Because the formal rules of evidences are not applicable at disability hearings, a concern exists regarding the quality and validity of evidence stemming from the absence of a standard that sets forth which evidence is acceptable. *Id.*

[126] *See* Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005). In *Bayliss*, the claimant argued that the ALJ's reliance on the VE's testimony was an error because the evidence of the number of relevant jobs in the national economy was not grounded. *Id.* The claimant argued that requirements for the admissibility of expert testimony under the Federal Rules

Daubert and Rule 702 do not apply to Social Security disability hearings, the SSA correspondingly enacted only a minimal standard for VE testimony, so as to afford the claimant a fair and just hearing.[127]

5. Social Security Administration Policies

In response to mounting concerns about the reliability of VE testimony, the SSA enacted S.S.R. 00-4p as an administrative check on the broad credibility granted to VEs.[128] S.S.R. 00-4p is essentially an administrative or "regulatory *Daubert*" check on the broad credibility granted to vocational experts.[129] Under this Ruling, the ALJ is required

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of Evidence Rule 702, which were established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), do not apply because Rule 702 is inapplicable to SSA proceedings, and also because *Daubert* standards were developed under Rule 702 and therefore do not govern the admissibility of evidence before an ALJ in SSA proceedings. *Id.* The court held that an ALJ may take administrative notice of any reliable job information, including information provided by a VE because the VE's recognized expertise provides the necessary foundation for his testimony. *Id.* "Thus, no additional foundation is required." *Id. But see* Miller, *supra* note 114, at 303 (stating that after *Daubert* "[n]o longer may a federal judge simply 'defer' to a proposed expert on the ground that he or she has good credentials in a field that is unusual or difficult[]").

[127] *See generally*, S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (discussing the purpose of S.S.R. 00-4p). *See also* D. HiepTruong, *Daubert and Judicial Review: How Does An Administrative Agency Distinguish Valid Science from Junk Science?*, 33 AKRON L. REV. 365 (2000) (stating that with the implementation of a *Daubert*-type standard, Congress would not be second-guessing the SSA's decision making, but rather merely ensuring that the evidence relied upon by the agency meets the same threshold requirements to which a federal litigant is already subject).

[128] *See* S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html. Because questions have arisen about how the SSA ensures that conflicts between data contained in the *DOT* and testimony proffered by the VE are resolved, the SSA enacted S.S.R. 00-4p to clarify its standards for identifying and resolving conflicts. *Id.* This policy enactment requires the ALJ to identify and obtain a reasonable explanation for conflicts between VE testimony and data contained in the *DOT* and other vocational sources used by the VE. *Id.* Furthermore, the ALJ must explain how any conflict was resolved. *Id.*

[129] *See* Kelly, *supra* note 12, at 471 (stating that some have called for federal agencies to implement some form of regulatory *Daubert*, basically calling for a standard to examine, test, or question evidence upon which federal administrative agencies rely); *see also* Barnhart v. Walton, 535 U.S. 212, 225 (2002) (stating that the SSA is permitted to formulate rules without being burdened by formal rulemaking because the SSA's complexity, the vast number of claimants that it engenders, and the resulting need for agency expertise and administrative experience indicate the need for a considerable amount of authority to interpret, matters of detail related to the Agency); Miller, *supra* note 114, at 298 (stating that generally courts, when reviewing agency actions, defer to agency expertise on scientific and technical issues and affirm the agency so long as the administrative record contains some support for the agency's conclusions and the agency addressed any conflicting issues

to act as a gatekeeper by inquiring whether the VE's testimony adheres to data found in the *DOT*.[130] Although the SSA only recently enacted S.S.R. 00-4p, the ruling has already been eroded by courts.[131]

The erosion continues to occur because courts are divided as to whether the failure to inquire into *DOT* inconsistencies entitles claimants to relief.[132] In other words, if the ALJ fails to fulfill their gatekeeping duty as mandated by S.S.R. 00-4p, the question arises as to whether that failure constitutes a reversible error.[133]

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raised during the proceedings); *infra* Part IV.A.1 (discussing a model Social Security Ruling applicable to VEs).

[130] *See* S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (discussing the function and applicability of S.S.R. 00-4p); *see also supra* note 128 (discussing the purpose of S.S.R. 00-4p).

[131] *See infra* note 201 and accompanying text (discussing how safeguards that ensure fairness have been subsequently eroded). For example, in *Morales v. Barnhart*, the district court found that the ALJ did not comply with S.S.R. 00-4p, but that the ALJ's failure to comply with this Ruling did not mandate either a reversal or remand of the decision and that the court may affirm the ALJ's decision if it was supported by substantial evidence. Morales v. Barnhart, No. 06cv0884, 2007 U.S. Dist. LEXIS, 7421, at *11 (9th Cir. Jan. 17, 2007). In *Morales*, the claimant argued that several of the jobs described and testified to by the VE were inconsistent with the *DOT*. *Id*. at *12. The SSA did not dispute Morales's argument, but argued that the VE's testimony was not entirely inconsistent with the *DOT*. *Id*. The SSA specifically asserted that even though the jobs of a storage clerk and a furniture rental consultant are not limited to simple, repetitive tasks, the jobs of a counter clerk are so limited, and thus there is substantial evidence to support the ALJ's decision. *Id*. at 13. The court held that "although the ALJ did not comply with S.S.R. 00-4p, there is substantial evidence to support his decision that Plaintiff is not disabled." *Id.* at 14. *See also* Renfrow v. Astru, 496 F.3d 918 (8th Cir. 2007) (holding that the ALJ's error in failing to ask the vocational expert whether his testimony regarding the available jobs in the economy was consistent with the *DOT* was harmless); Williams v. Barnhart, 424 F. Supp. 2d 796, 800 (E.D. Penn. 2006) (citing Rutherford v. Barnhart, 399 F.3d 546, 557 (3d Cir. 2006)) (stating that although some inconsistencies existed between the VE's testimony and the *DOT*, the inconsistencies were not present regarding all jobs that the VE listed); Brown v. Barnhart, 408 F. Supp. 2d 28, 35 (D.D.C. 2006) (stating that because at least one of the three jobs described by the VE was consistent with the *DOT* and existed in significant numbers in the national economy, the ALJ did not error by failing to ask if any conflicts existed, and thus this failure to abide by S.S.R. 00-4p did not warrant a reversal). However, other courts have ruled that the ALJ's failure to comply with S.S.R. 00-4p is not harmless error. For example in *Lancaster v. Comm'r of Social Security*, the court held that the failure of the ALJ to examine the VE's proffered testimony was not a harmless error because the VE's testimony was unreliable and inconsistencies existed between the VE's testimony and the *DOT*. 228 F. App'x 563, 577 (2007). In *Lancaster*, the court decided that two mistakes—the inconsistencies with the VE's testimony and the undermining of the treating physician's medical opinion—amounted to serious error. *Id*.

[132] *See infra* note 135 and accompanying text (discussing the three avenues courts have taken in interpreting S.S.R. 00-4p (Dec. 4, 2000)).

[133] *See* S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (discussing the function and applicability of S.S.R. 00-4p).

Courts have taken three avenues: first, some courts have ruled that the ALJ's failure to fulfill the gatekeeping role by S.S.R. 00-4p does not constitute a reversible error; second, other courts have held that failure to comply with S.S.R. 00-4p constitutes a reversible error; third, other courts have taken a middle ground approach by holding that whether failure to follow the mandate of S.S.R. 00-4p constitutes reversible error depends on the degree of the failure and the circumstances surrounding the decision.[134] Viewing the three approaches as a whole, it is evident that the SSA still requires compliance with S.S.R 00-4p and that non-compliance is not always harmless error.[135]

Because the VE relies on the unreliable and obsolete *DOT*, and because there are no particularized standards regulating the VEs, the integrity of VE testimony and the SSA's entire disability determination process is brought into question.[136] Additionally, without testimony

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[134] *See* Steward v. Barnhart, 44 F. App'x 151, 152 (2002) (finding that the claimant was entitled to relief because all three jobs that the VE stated that the claimant could perform were in conflict with the *DOT*); *see also* Lancaster v. Comm'r of Social Sec., 228 F. App'x 563, 577 (2007) (finding that the ALJ did not ensure the lack of conflict and holding that the ALJ's failure to carry the burden at the fifth step was a reversible error). *But see* Teverbaugh v. Comm'r of Soc. Sec., 258 F. Supp. 2d 702, 705 (E.D. Mich. 2003) (discussing how the Social Security Commissioner did not dispute that the ALJ failed to question the VE regarding whether the jobs that the VE identified as consistent with the claimant's RFC conflicted with the *DOT*). The court in *Lancaster* stated:

> Other courts have found that claimants should not be permitted to scan the record for implied or unexplained conflicts between the specific testimony of an expert witness and the voluminous provisions of the *DOT*, and then present that conflict as reversible error, when the conflict was not deemed sufficient to merit adversarial development in the administrative hearing. Adopting a middle ground approach, in which neither the *DOT* nor the vocational expert testimony is per se controlling, permits a more straightforward approach.

228 F. App'x 563 at 574 (citations omitted).

[135] An example of the importance of complying with S.S.R. 00-4p is evident in *Prochaska v. Barnhart*, 454 F.3d 731 (7th Cir. 2006). In *Prochaska*, the claimant had a back impairment, was obese, and offered evidence of mental impairments. *Id.* at 735. The ALJ found that her allegations were not credible and, accordingly, denied her claim at the fifth step. *Id.* However, the ALJ failed to ask the VE whether the VE's testimony was consistent with information in the *DOT*. *Id.* The court remanded the case upon finding that the ALJ did not comply with S.S.R. 00-4p and that the error was not harmless. *Id.* at 731. The SSA argued that, with respect to a significant number of jobs, no inconsistency existed between the VE's testimony and the *DOT*. *Id.* at 735. The court concluded, however, that it could not determine whether the testimony was consistent with the *DOT* and that the ALJ should have resolved that issue with the VE. *Id.* at 736. Indeed, it is evident that the ALJ must comply with S.S.R. 00-4p and that any inconsistencies between the VE's testimony and the *DOT* must be addressed by the ALJ. *See id.*

[136] *See supra* note 5 and accompanying text (discussing whether the integrity of the disability adjudication system has been compromised); *see also supra* note 4 and

from VEs and reliance on the *DOT*, the SSA disability determination process crumbles.[137] Thus, because the validity of the VE's testimony has been compromised, the entire SSA disability determination process is susceptible to collapse.[138]

In an attempt to address concerns about the validity of VE testimony and reliance on the *DOT,* Part III addresses the practical effect of applying a *Daubert*-type standard to VE testimony in the SSA's disability adjudication system. By applying this standard as proposed in Part IV, the SSA will ensure that the integrity of its disability adjudication system remains intact, and that the claimant is afforded an adequate level of protection against arbitrary and capricious testimony.[139]

III. ANALYSIS

Justice cannot be achieved without the presumption that the legal process is finding truth.[140]

Testimony from a VE serves a crucial role in disability proceedings because it has potential to help the ALJ discover whether the claimant is entitled to disability benefits.[141] Due to the importance of this testimony,

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accompanying text (discussing how the SSA previously dealt with the problem of VE testimony at disability proceedings).

[137] *See supra* note 4 and accompanying text (discussing how, without reliable vocational evidence, the fourth and fifth steps of the sequential evaluation process would be compromised); *see also infra* Parts IV.A.1–3 (discussing how the integrity of the disability process can be protected by promulgating a Ruling that incorporates a *Daubert*-type standard applicable to VEs that includes qualifications requirements for VEs, as well as, a mandate that VEs rely upon only reliable, complete, and up-to-date occupational data and sources).

[138] *See supra* note 1 and accompanying text (discussing the importance of maintaining the authority upon which conclusions are based in order to ensure that justice is maintained); *see also infra* Part IV.A (illustrating a model Ruling that would ensure that disability claimants are afforded a certain level of fairness through the implementation of defined standards applicable to VEs employed by the SSA).

[139] *See infra* Parts IV.A.1–3 (discussing how the promulgation of a Social Security Ruling applicable to VEs will bring credibility and stability to the SSA's disability determination process, while also ensuring that disability claimants are protected from arbitrary and capricious vocational evidence).

[140] Mason, *supra* note 1, at 906 (discussing the foundation upon which empirical data is based and how if that foundation is compromised the authority of the conclusions will be undermined).

[141] *See supra* note 2 and accompanying text (discussing how the VE and the *DOT* play a crucial role in disability proceedings because of the potential to discover the truth about whether the claimant is disabled); *see also* McKinnie v. Barnhart, 368 F.3d 907, 910 (7th Cir. 2004) (stating that in social security disability cases, the ALJ may depend on the VE's testimony to find the claimant disabled or not disabled); S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (discussing when an

any evidentiary-admissibility standard should consider the testimony's potential to acquaint the ALJ with the truth.[142]

When adopting the SSA's current standard regarding VEs, the government had to be mindful of two concerns.[143] First, an all-encompassing, efficient process that accounts for the wide range of possible alleged disabilities, while also deterring abuse of disability benefits is crucial to the management of the largest adjudication system in the world.[144] Second, the fundamental notions of fairness and government accountability are also crucial to any adjudication system, especially one that has such a significant impact on a large portion of United States citizens.[145] If the SSA is free to justify its policy preferences based on testimony that may lack integrity, the SSA's accountability—along with the lives of millions of disability claimants—will be adversely affected.[146]

Like any governmental agency with an adjudication system that has its power vested in the United States Constitution, the SSA is obligated to adhere to grounded and reliable testimony from its experts.[147] If VEs

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ALJ can rely upon a VE during the disability determination process); *supra* note 55 and accompanying text (discussing that the complexity of the vocational field requires the use of an expert).

[142] *See supra* note 1 and accompanying text (discussing the importance of how an admissibility standard ought to consider the potential of a piece of evidence to acquaint a judge with the truth).

[143] *See supra* note 9 and accompanying text (discussing the SSA's current standard regarding VEs and VE testimony); *see also infra* Part IV.A.1–3 (discussing how these two concerns can be addressed while ensuring that a balance between efficiency and fairness).

[144] *See* Hu et al., *supra* note 6, at 10 (stating that the SSA has to process and adjudicate claims as consistently, expeditiously, and cost effectively as possible); *see also infra* note 179 and accompanying text (discussing the need to reach a balance between SSA efficiency and the level of fairness afforded the claimant); *infra* Part IV.A.1–3 (discussing that when the integrity of the disability process is compromised due to unreliable vocational evidence, the balance favors SSA efficiency over the level of fairness afforded to the claimaint).

[145] *See* Richardson v. Perales, 402 U.S. 389, 412 (1971) (Douglas, J., dissenting). When a federal bureaucracy treats an individual unjustly, it is a matter of concern to all people. *Id.* at 412. Such a system must be fair, and it must work. *Id.* at 399. *See also* Hu et al., *supra* note 6, at 10 (stating that with the SSA accepting approximately 2.5 million applications per year, the SSA's budgetary and welfare implications are undeniable).

[146] *See* TRAVER, *supra* note 2, § 1302 (discussing that currently no standards exist to regulate VE methodologies); *see also* Hu et al., *supra* note 6, at 11 (discussing how the SSA has aggressively and successfully defended its adjudication process, which has, in principle, been endorsed by Congress and by courts).

[147] *See* McKinnie v. Barnhart, 368 F.3d 907, 910 (7th Cir. 2004) (stating that the vocational expert's testimony can only be relied on if it is reliable). In *McKinnie*, the court held that the ALJ erred by not requiring the vocational expert to produce data and evidence to support her opinion. *Id.* at 911. The VE testified with vague responses to the claimaint's questions, and she also failed to substantiate her findings with a written report or other documentation to substantiate her figures. *Id.*

are required to do something that none of them are qualified as economists to do—statistically breaking down the source data to estimate the number of jobs available in the appropriate categories of the *DOT*—then the resulting testimony could hardly be considered grounded and reliable.[148]

If the SSA bases its disability determination on testimony that is not grounded in acceptable standards of scientific inquiry or on the best empirical data available, then the SSA should not be allowed to rely on these experts.[149] An expert who—either due to lack of experience, education, or simply because the sources are inadequate—manipulates either the data or the process to reach a desired outcome should not be relied on because his extrapolations are mere ipse dixit.[150] As the Court held in *Donahue v. Barnhart*, "[e]vidence is not 'substantial' if vital testimony has been conjured out of whole cloth."[151]

This dilemma could be avoided with an adequate standard.[152] For example, because the main purpose of *Daubert* in the federal agency context is "to encourage reviewing judges to be less deferential, and thus more probing, of agency science and related administrative justifications for regulatory action[,]"[153] it seems logical that the implementation of a

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[148] *See* Traver, *supra* note 75 (arguing that if the vocational expert is not qualified to perform job analysis, or if the vocational expert has not used job analysis standards applicable to the vocational profession, then the testimony should be rejected); *see also* TRAVER, supra note 2, § 1900.1 (discussing that the VE needs to be both a placement specialist and a labor market specialist whose experiences provide the necessary competency to assist the ALJ in the adjudicative process).

[149] *See* Mason, *supra* note 1, at 905 (stating that some science and methodologies are better than other science and methodologies in the search for objective truth); *see also* TRAVER, *supra* note 2, § 1900.1 (stating that it is nearly impossible to attempt to show that the VE does not meet Social Security's minimum standards to be a VE, as those standards are practically nonexistent).

[150] *See McKinnie*, 368 F.3d at 910 (holding that without first inquiring into the reliability of the VE's opinions, the ALJ should not have so unquestioningly accepted the VE's testimony that a significant number of jobs were available to the claimant, where the claimant contested the reliability of the VE's conclusions); *see also* Zenith Elecs. Corp. v. WH-TV Broad Corp., 395 F.3d 416, 420 (7th Cir. 2005) (stating that when an expert did not base his opinions on data from comparable markets and instead relied upon his general expertise and curriculum vitae, his extrapolations were mere ipse dixit).

[151] Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002) (citing Peabody Coal Co. v. McCandless, 255 F.3d 465 (7th Cir. 2001); Elliott v. CFTC, 202 F.3d 926 (7th Cir. 2000)).

[152] *See infra* Part IV.A (discussing how the implementation of a Social Security Ruling regarding vocational experts will bring credibility and stability to the disability hearing); *see also infra* Part IV.A (illustrating a model rule applicable to VEs that would ensure the integrity of the disability determination process).

[153] *See* Raul & Dwyer, *supra* note 115, at 8 (arguing for the implementation of a *Daubert*-type standard within Environmental Protection Agency proceedings). *But see* Wendy Wagner, *Importing* Daubert *to Administrative Agencies Through the Information Quality Act*, 12 J.L. & POL'Y 589, 600–12 (2004) (explaining how implementing *Daubert* will greatly hinder

Daubert-type standard would be beneficial to the SSA because it would allow institutional credibility to remain intact and the notion of fairness to be preserved.[154]

Part III.A of this Note analyzes the SSA's reliance upon the testimony of VEs and whether S.S.R. 00-4p is a sufficient safeguard.[155] Part III.B examines the level of fairness owed to the claimant by the SSA; in particular, this Part examines jurisprudence stipulating the degree of due process afforded to the claimant.[156] Part III.C analyzes the possibility of implementing a *Daubert*-type standard applicable to VE testimony to ensure that the claimant is afforded an adequate level of fairness.[157]

A. *The Vocational Expert, the Foundational Source, and the Administrative Safeguard: The Vocational Expert's Use of the Dictionary of Occupational Titles and Social Security Ruling 00-4p*

All experts should have some foundational source upon which to base their empirical conclusions.[158] For VEs in SSA disability proceedings, this foundational source is, among other occupational sources, the *DOT*.[159] However, as mentioned previously, the *DOT* is outdated and obsolete; indeed, relying on this source and its methodology is hardly reliable.[160]

The idea that VEs should use reliable methods is not necessarily grounded in Rule 702; rather, it is based in the SSA's process that

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policy decisions, by challenging the agency's data while also imposing a greater informational burden on agencies and slowing down the administrative process).

154 *See supra* note 114 and accompany text (discussing the benefits of implementing a regulatory *Daubert*); *see also* Raul & Dwyer, *supra* note 115, at 8 (stating that implementing a *Daubert*-type standard into administrative law would improve agency decision making and enhance accountability); *infra* Part IV.A.1 (discussing the promulgation of a new Ruling that incorporates a *Daubert*-type standard applicable to VEs engaged by the SSA).

155 *See infra* Part III.A (analyzing VEs and the basis upon which a VE's testimony is founded, namely, the *DOT*).

156 *See infra* Part III.B (analyzing the level of fairness afforded to the disability claimant).

157 *See infra* Part III.C (analyzing the *Daubert* standard and whether it would be beneficial to hold VEs to that standard).

158 *See supra* note 1 and accompanying text (discussing that the authority upon which a conclusion is based depends upon the mode in which the conclusion was reached); *see also* Zenith Elecs. Corp. v. WH-TV Broad, Corp., 395 F.3d 416, 420 (7th Cir. 2005) (stating that general expertise is not sufficient to support an expert's conclusions).

159 *See supra* note 2 and accompanying text (discussing how a VE's main source relied upon for occupational data (the *DOT*) and the SSA's reliance upon that data is the keystone in the arch that supports the entire vocational framework of the SSA).

160 *See supra* note 75 (discussing the antiquity of the *DOT*); *see also infra* Part IV.A.3 (discussing why a need exists to promulgate a Ruling that mandates the use of *only* reliable, complete, and up-to-date occupational data and sources).

requires every decision to be supported by substantial evidence.[161] If the VE's testimony has been conjured out of "whole cloth[,]" then it is not substantial and should be attacked by the claimant.[162]

The SSA anticipated these problems and responded by enacting S.S.R. 00-4p, which mandates that when the VE provides evidence about the requirements of a job, the ALJ is obligated to ask about any possible conflict between that evidence and the information provided in the *DOT*.[163] Although this response adds a much needed safeguard and heightens the evidentiary standard pertaining to VE testimony, this solution is only a superficial band-aid on a gaping wound because the reliance on the *DOT* could hardly be considered good science in the courtroom and would in many instances be rejected as unreliable evidence under *Daubert*.[164] Thus, the SSA's attempt to self-regulate by implementing S.S.R. 00-4p seems superficial.[165]

One of the weaknesses of S.S.R. 00-4p is that most ALJs rely on the vocational expert's conclusion because the ALJ obviously lacks the knowledge, expertise, or education in making conclusions relating to the claimant's ability to perform jobs that exist in significant numbers in the economy.[166] If the ALJ was an expert in the vocational field, there would be no need for the VE to participate in the disability determination

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[161] *See* Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002).

[162] *See supra* note 151 and accompanying text (discussing substantial evidence); *see also Donahue*, 279 F.3d at 446 (stating that without substantial evidence supporting it, the testimony is merely conjured out of "whole cloth"); *see also* Solomon, *supra* note 9, at 215 (stating that the standard argument that a claimant makes against the VE is that the VE is merely using anecdotal experiences rather than scientific fact).

[163] *See supra* note 128 and accompanying text (discussing the purpose and requirements of S.S.R. 00-4p); *see also infra* Part IV.A (discussing the need for a new Ruling directed at VEs to ensure that the integrity of the disability determination system is not compromised).

[164] *See supra* note 115 and accompanying text (discussing what constitutes good science under a *Daubert* standard); *see also* TRAVER, *supra* note 2, § 1403.1.1. Even though the SSA maintains that the supposed "'experts' are 'reliable[,]' there is no evaluation process, testing, certification, or other mechanism in place to ensure their reliability. With no vetting process in place, how does the Commissioner know her experts are 'reliable?'" TRAVER, *supra* note 2, § 1403.1.1. In most instances, the ALJ will not know that inconsistencies exist between the VE's testimony and the *DOT*, and therefore, relying on the VE to state whether there are any inconsistencies creates an inherent conflict of interest. *Id*.

[165] *See* TRAVER, *supra* note 2, at § 1403.1.1 (discussing how "Rule 00-4p's claim of reliability is just a bit of puffery in the adjudication process[]").

[166] *See* S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (discussing why the ALJ relies upon a VE during the hearing). Clearly, this is why there is a need for vocational experts. *Id.* If ALJs had training and expertise in the vocational field, vocational experts would not be needed because the ALJ could easily and accurately make a conclusion based on the claimant's assigned RFC and the jobs that exist in significant numbers in the economy. *Id.*

process. To rely on the ALJ to investigate whether the VE's conclusion is reliable defeats the purpose of protecting the claimant from extrapolations that are merely ipse dixit.[167] Furthermore, to require that the claimant raise an objection to the conclusions of the VE at the disability hearing seems contradictory to the purpose of S.S.R. 00-4p, which assigns this task to the ALJ. Thus, courts have held that when the VE's reasoning is not questioned, the ALJ is entitled to accept the VE's conclusion.[168]

Taking into consideration multiple methodologies adopted by VEs that purport to offer data about the number of jobs that exist in the economy, these implications (e.g., that VEs lack the necessary education, knowledge, or experience), if not resolved, will greatly undermine the integrity of the SSA's disability proceedings.[169] In addition, the court in *Donahue* held that a VE is free to give a bottom-line conclusion, provided that the underlying occupational data and reasoning are available on demand.[170] This holding grants even broader authority to the VE, which is bound to give rise to a VE failing to come to the hearing with documentation and underlying occupational data to support his conclusions.[171] Moreover, the court in *McKinnie v. Barnhart* held that the ALJ erred in not requiring the VE to produce the data and evidence that supported the VE's extrapolations, where the VE failed to substantiate her conclusions with a written report or other documentation forming a basis for her conclusions.[172] Indeed, it is clear that S.S.R. 00-4p has

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[167] *See* Traver, *supra* note 75; *see also* S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (explaining why and when the ALJ can rely upon a VE during the disability determination process).

[168] Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002) (stating that if no one questions the VE's foundation or reasoning, an ALJ is entitled to accept the vocational expert's conclusion, even if that conclusion differs from the *DOT*).

[169] *See* TRAVER, *supra* note 2, § 1403.1. The SSA's reliance upon the VE and the *DOT* is the foundation of the fourth and fifth steps; thus the VE's testimony, which is based upon the *DOT*, is the deciding factor in the outcome of millions of disability claims each year. *Id.* If this foundation is undermined, then the entire system loses its validity. *Id. See also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (stating that "[t]he validity and moral authority of a conclusion largely depend on the mode by which . . . [the conclusion] was reached[]"). *But see* Hu et al., *supra* note 6, at 11 (stating that the SSA has aggressively and successfully defended the adjudication process).

[170] *Donahue*, 279 F.3d at 446 (citing FED. R. EVID. 704(a)) (stating that a VE is free to render only a bottom-line determination, provided that the underlying data and reasoning are available on demand).

[171] *See* Solomon, *supra* note 9, at 209 (stating that VEs should have a valid basis for their testimony, which consists of not only relying on the *DOT* but also other labor market surveys and reference materials).

[172] 368 F.3d 907, 910 (7th Cir. 2004).

eroded as an administrative check on the broad credibility granted to VEs.[173]

The problem revolves around proper standards regarding VEs, their methodologies, and the sources upon which they base their conclusions.[174] If the standard regarding VEs was heightened, the number of occasions that a VE who is not qualified to perform occupational analysis would be reduced.[175] If these occasions were reduced, then the fear of the VE's testimony adversely affecting the level of fairness afforded the claimant would be greatly diminished.[176]

B. A Need for a Standard Applicable to Vocational Experts That Will Ensure the Claimant is Afforded an Adequate Level of Fairness: Examining Jurisprudence Stipulating the Degree of Fairness Afforded to the Claimant

With the seemingly high degree of deference given to the ALJ with regard to evidentiary matters and the relatively broad credibility granted to the VE's testimony, the question bound to arise is whether an adequate level of fairness is afforded disability claimants.[177] In *Richardson,* the Court mandated that evidence not normally admissible in regular court proceedings could constitute substantial evidence in

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[173] *See supra* note 129 and accompanying text (discussing the erosion of S.S.R. 00-4p (Dec. 4, 2000)); *see also infra* Part IV.A (discussing the practical effect of promulgating a new Social Security Ruling directed at VEs and the resulting safeguards of such a Ruling).

[174] *See supra* note 114 and accompany text (discussing the practical effects of implementing a *Daubert*-type evidentiary standard); *see also infra* Part IV.A.1–3 (discussing what a model Ruling applicable to VEs might look like).

[175] TRAVER, *supra* note 2, § 1403.1. No longer would disability claimants be subject to the SSA's belief that the *DOT* and its related data are better than nothing. *Id.*; *see also infra* Part IV.A.2 (discussing the positive benefits of promulgating a Ruling that includes qualification requirements for VEs engaged by the SSA).

[176] *See generally* 70 Fed. Reg. 43589 (July 27, 2005). The previous Commissioner stated that the SSA would study the issue of occupational information with the announcement made in the Federal Register. *Id. But see* TRAVER, *supra* note 2, § 1403.1 (stating that "as of October 1, 2007, the SSA continues to [use] [sic] the *DOT* . . . ").

[177] *See supra* note 105 and accompanying text (discussing whether an adequate level of fairness is afforded to the claimant); *see also* 42 U.S.C. § 405(a) (2000) (stating that the Social Security Commissioner shall have full power and authority to make rules and regulations and to establish procedures necessary to carry out such regulations, and that the Social Security Commissioner shall adopt reasonable and proper regulations to provide for the nature and extent of proof, evidence, and the method of taking and furnishing the same in order to establish the claimant's right to Social Security disability benefits); *Id.* § 405(b) (2000) (stating that evidence may be admissible at Social Security disability hearings even though it is inadmissible under the rules of evidence that are applicable to court procedure); *infra* Part IV.A (discussing the promulgation of a model Social Security Ruling that would ensure that the disability claimant is provided a certain level of fairness, thereby protecting the claimant's due process rights).

disability hearings.[178] One of the justifications for this holding was that the disability hearings should be understandable for the layman claimant, but the Court could have hardly meant that relaxation of evidentiary rules in disability hearings was meant to relax any obligation of fairness owed to the disability claimant.[179] The Court's holding that the medical report was admissible was not based on the notion of the rules being relaxed, but instead on the fact that four other medical experts had arrived at the same conclusion.[180]

Richardson arguably would have been decided differently if the medical expert's report instead would have been an occupational report completed by a VE who was not qualified (to manipulate job data and identify components of job groups provided by the various vocational sources), and whose field was a relatively new science.[181] The Court in *Richardson* arguably would have been more concerned about an infringement of procedural due process afforded to disability claimants.[182] But what has been perceived as a victory for disability claimants actually hinders the level of protection granted to the claimants from unqualified VEs or conclusions arrived at by mere extrapolations which are ipse dixit.[183]

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[178] *See* Richardson v. Perales, 402 U.S. 389, 400 (1971) (holding that the strict rules of evidence, applicable in the courtroom, do not bar the admission of otherwise pertinent evidence at social security disability hearings).

[179] *Id.* at 401. The right to Social Security benefits is earned, and the extent to which procedural due process must be afforded is influenced by the extent to which the claimant may be condemned to suffer a grievous loss. *Id.* But "when a grave injustice is wreaked on an individual by the presently powerful federal bureaucracy, it is a matter of concern to everyone[] . . . ." *Id.* at 413 (Douglas, J., dissenting); *see also* MILLS, *supra* note 1, at 2 (discussing how the SSA's priority is to quickly and efficiently process disability applications and hearings); *infra* Parts IV.A.1–3 (discussing that when the integrity of the disability process is compromised due to unreliable vocational evidence, the balance between SSA efficiency and the level of fairness afforded to the claimaint favors SSA efficiency).

[180] *Richardson*, 402 U.S. at 402.

[181] TRAVER, *supra* note 2, § 1403.1 (discussing how VE testimony lacks validity because it is based on the outdated *DOT* and because of the lack of standards that VEs must satisify in order to testify at SSA hearings); *see also supra* note 10 and accompanying text (discussing how the vocational field is a relatively new discipline); *infra* Parts IV.A.1–3 (discussing the benefits of promulgating a Ruling to ensure that disability claimants are protected from arbitrary and capricious vocational evidence).

[182] *See supra* note 75 and accompanying text (discussing the lack of qualifications that VEs have relative to statistical evaluation); *see also* Part IV.A.2 (discussing how the promulgation of a Ruling mandating that VEs meet certain qualification standards, including statistical or economical evaluation experience, would ensure that vocational evidence is reliable).

[183] *See* McKinnie v. Barnhart, 368 F.3d 907, 910 (7th Cir. 2004) (discussing how manipulating either the data or the process to reach a desired outcome is not reliable because the extrapolations are merely ipse dixit); *see also* Victor G. Rosenblum, *The Right to*

Subsequently, courts have interpreted the relaxed evidentiary standards in SSA proceedings to mean that heightened standards for vocational experts are not necessary.[184] For example, in *Bayliss v. Barnhart,* the Court declared that the VE's expertise establishes the necessary foundation for his testimony, and so, no additional foundation is necessary.[185] In *Bayliss*, the claimant argued that the requirements for admissibility of expert testimony under Rule 702, established in *Daubert* should apply to the testimony of the VE.[186] However, the *Bayliss* Court determined that because the *Daubert* decision rested on the interpretation of Rule 702, the safeguard implications established in *Daubert*, and subsequently extended to all expert testimony via *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), did not govern the admissibility of evidence before the ALJ in SSA proceedings.[187]

In *Donahue v. Barnhart*, the Court held that although Rule 702 does not apply to SSA proceedings, the notion that VEs should use reliable methods does not depend on Rule 702 because the Social Security proceedings require every decision to be supported by substantial evidence.[188] Additionally, the Court pointed out that "[e]vidence is not 'substantial' if vital testimony has been conjured out of whole cloth."[189]

These cases suggest two propositions: first, in part because of *Richardson,* Rule 702 and subsequently the safeguard implications of *Daubert* do not apply; and second, the foundation requirements of the VE's expertise are not uniformly established.[190] The interpretations of

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Cross-Examine Physicians in Social Security Disability Cases, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 317, 318 (2000) (discussing how *Richardson v. Perales* was first interpreted as granting procedural safeguards to disability claimants and was subsequently interpreted as a rejection of those safeguards).

[184] *See* Bayliss v. Barnhart, 427 F.3d 1211 (9th Cir. 2005).

[185] *See supra* note 60 and accompanying text (discussing how the VE's expertise provides the necessary foundation for his or her testimony); *see also Bayliss*, 427 F.3d at 1218.

[186] *See Bayliss*, 427 F.3d at 1218. The court cited 42 U.S.C. § 405(b)(1) and *Richardson*, holding that the ALJ may receive evidence even though the evidence would not be admissible in court. *Id.*

[187] *Id.* at 1218 n.4.

[188] *See* Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002).

[189] *Id.* Interestingly, even though the court declared that Rule 702 does not apply, the court later cited to Rule 704(a), holding that a VE is free to give a bottom line determination, provided that the underlying data and reasoning are available on demand. *Id*.

[190] *See supra* note 153 and accompanying text (discussing the benefits of implementing a regulatory *Daubert*); *see also* Elliott, *supra* note 115, at 10126 (stating that the harms of junk science within agency proceedings demand appropriate gatekeeping); *supra* note 10 and accompanying text (discussing how there is a lack of uniformity regarding the foundational requirements of vocational experts). *But see* WAGNER, *supra* note 153, at 600–12 (discussing the dangers of *Daubert* in the Administrative sector, noting that *Daubert* will adversely

Richardson somehow seem flawed because a system that was meant to be informal to benefit the layman claimant should not be allowed to relax the level of fairness the system owes to the claimant.[191] Moreover, the rejection of a *Daubert*-like standard to VEs does not seem justified.[192] Applying a *Daubert*-like standard would not adversely affect the substantial evidence requirement.[193] Rather, it would ensure the integrity of the administration of the system by permitting only qualified experts, whose testimony is based on sufficient and updated data that is formulated through the use of reliable and accepted principles.[194]

C. *Why the Vocational Expert Should Be Held to a* Daubert-*Type Standard*

In *Donahue*, Judge Easterbrook asked the opposing parties at oral argument what makes a VE an "expert" and "where [does] the information in the [*DOT*] c[o]me from[]."[195] Not surprisingly, both parties "did *not* know."[196] This predicament would not exist if the SSA adopted a *Daubert*-type standard.[197] Implementing a *Daubert*-type approach would ensure the following: (1) that all VEs adhere to reliable methodologies and data to support their findings; (2) that the level of fairness afforded to claimants is not jeopardized because of questionable testimony from VEs; (3) that uniformity exists within the SSA disability

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affect policy decisions because it requires increased scrutiny of data and imposition of a greater burden on agencies to provide better information pertaining to its holdings).

[191] *See supra* note 179 and accompanying text (discussing how the extent to which procedural due process must be afforded is influenced by the extent to which the claimant may be condemned to suffer a grievous loss); *see also infra* Part IV.A (discussing that when the integrity of the disability process is compromised due to unreliable vocational evidence, the balance between SSA efficiency and the level of fairness afforded to the claimant favors SSA efficiency).

[192] *See supra* note 115 and accompanying text (discussing the lack of justification for not implementing a *Daubert*-type standard for VEs within disability proceedings); *see also* Elliott, *supra* note 115, at 10126 (stating that the harms of junk science in agency proceedings demand appropriate gatekeeping).

[193] *See supra* note 154 and accompanying text (discussing the impact that regulatory *Daubert* would have on the agency).

[194] *See supra* note 110 and accompanying text (quoting FED. R. EVID. 702) (discussing how an expert witness may testify when the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case); *see also infra* Part IV.A. (presenting a model Social Security Ruling that incorporates aspects of Rule 702 under the guise of a *Daubert*-type standard).

[195] Donahue v. Barnhart, 279 F.3d 441, 445–46 (7th Cir. 2002).

[196] *Id.* at 446 (emphasis added).

[197] *See* Miller & Rein, *supra* note 114, at 299 (quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)) (stating that *Daubert* required judges to determine whether a proffered expert opinion is both reliable and relevant, i.e. whether it isbased on knowledge derived from a valid scientific method).

proceedings; and (4) that integrity in the fourth and fifth steps of the sequential evaluation process is maintained.[198]

The claimant seeking disability benefits is entitled to a certain level of fairness, which "is applicable to the adjudicative [and] administrative proceeding involving 'differing rules of fair play,['] . . . and . . . [to] the 'extent to which procedural due process must be afforded[,] the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'.'"[199] The claimant who is denied disability benefits stands to suffer a grave loss (i.e., the loss of funds to sustain a meager living and funds to treat the severe impairment that hinders the ability to work), while the burden placed on the SSA is merely a more rigorous standard for its VEs, which would not adversely affect the substantial evidence standard, but rather complement it.[200]

Furthermore, S.S.R. 00-4p already mandates that the ALJ act as a gatekeeper by requiring that the ALJ inquire into whether there are any inconsistencies between the VE's testimony and the foundational source (e.g., the *DOT*).[201] Extending the other safeguards of *Daubert* to address the problem of questionable VE testimony due to a VE's lack of statistical evaluation expertise, unreliable methodologies, or outdated source of occupational data, would not significantly burden the SSA. Indeed, any burden to the SSA would be outweighed only by the fact that the grievous loss typically suffered by the disability claimant would be averted.[202] Implementing a regulatory *Daubert* approach will force the

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[198] *See supra* note 154 and accompanying text (discussing the benefits of implementing a *Daubert*-type standard); *see also* BUSH, *supra* note 39, § 340 (discussing how there is a lack of uniformity regarding the foundational requirements of vocational experts); *supra* note 179 (discussing the Court's balancing test which balances the claimant's level of loss and the burden placed on the government to implement safeguards); *infra* Part IV.A.1 (discussing how implementation of a *Daubert*-type standard will assure institutional integrity).

[199] *Richardson v. Perales*, 402 U.S. 389, 401–02 (1971) (citing Hannah v. Larche, 363 U.S. 420, 442 (1960); Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970)); *see also supra* note 12 and accompanying text (discussing the level of loss that disabled and disadvantaged claimants potentially face).

[200] *See supra* note 179 and accompanying text (discussing how the benefits of implementing additional safeguards to protect the claimant from suffering a grievous loss is not outweighed by the burden of implementing a *Daubert*-style approach in addition to the already established S.S.R. 00-4p); *see also infra* Part IV.B (discussing the benefits of enacting a Ruling applicable to VEs that incorporates a *Daubert*-type standard).

[201] *See supra* note 131 and accompanying text (discussing the benefits and shortcomings of S.S.R. 00-4p and how this ruling has been eroded); *see also infra* Part IV.A.1–3 (discussing why there is a need for promulgating a new ruling that is applicable to VEs).

[202] *See supra* note 106 and accompanying text (discussing the unreliability of the VE's testimony because the VE lacks qualifications in statistical evaluation); *see also* Richardson v. Perales, 402 U.S. 389, 401 (1971) (discussing the Court's balancing test which balances the claimant's level of loss and the burden placed on the government in implementing

SSA to better explain itself and better document its findings, thus ensuring that the claimant is afforded an adequate level of fairness and the integrity of the Social Security disability proceedings remains intact.[203]

The issue comes down to fairness.[204] Although the SSA is the largest adjudication system in the world and considers millions of applications a year, this should not exempt it from complying with the fundamental notion of fairness.[205] The SSA has implemented a regulation that mandates the ALJ inquire into any inconsistencies between the VE's testimony and the *DOT*; it also requires that the evidence be substantial for the ALJ to make a decision. However, this level of protection granted to claimants is nominal.[206]

The inadequacies are apparent when the system struggles to define who qualifies as an expert.[207] If the VEs are unqualified in statistical evaluation and yet are likely to implement various methodologies—which arguably are not testable and are based on an obsolete occupational source—how can they be referred to as experts, and why should the SSA rely on their testimony in a disability proceeding?[208]

As if the deck was not already stacked against the claimant, a claimant who wishes to challenge a VE's testimony by arguing that the

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safeguards); *supra* note 180 and accompanying text (discussing the benefits of implementing a *Daubert*-type standard).

[203] *See supra* note 179 and accompanying text (discussing the Court's test which balances the claimant's level of loss and the burden placed on the government in implementing safeguards); *see also infra* Part IV.A.1 (discussing how implementation of a *Daubert*-type standard will assure institutional integrity). *But see* WAGNER, *supra* note 154, at 100–12 (discussing how implementing *Daubert* will infect policy decisions under the guise of challenging data, imposing a greater informational burden on agencies and slowing down the administrative process).

[204] *See supra* note 1 and accompanying text (discussing the issue of fairness with regard to expert witness testimony).

[205] *See supra* note 34 and accompanying text (discussing the balancing act between efficiency and fairness); *see also* Hu et al., *supra* note 6, at 10 (stating that theoretically all disabled applicants should be granted disability benefits and all physical and mentally able applicants denied benefits; however, as a result of imperfections in the adjudication process, inevitably some applicants who are disabled are denied).

[206] *See* TRAVER, *supra* note 2, § 1900.3 (stating that Rule 00-4p explains how VEs are relied upon for guidance, but that this Ruling fails to explain what makes a VE an expert); *see supra* note 131 and accompanying text (discussing how the Social Security Administration has implemented what has turned out to be merely quasi-safeguards).

[207] *See supra* note 168 and accompanying text (discussing *Donahue v. Barnhart*'s requirement that the claimant raise any objections to the VE's testimony during the hearing, or else the right to object is deemed waived).

[208] *See supra* note 74 and accompanying text (discussing how the *DOT* and its methodology became obsolete upon the advent of the Department of Labor's implementation of O*NET).

VE lacks qualifications, that a conflict of interest exists because the VE is hired and paid by the SSA, or that due process was violated, will rarely be successful by challenging the VE's qualifications or by challenging that a conflict of interest exists.[209] Additionally, if arguing that due process was violated, the claimant must show that the ALJ's behavior, in the context of the whole case, was so extreme as to display clear inability to render a fair judgment—again, in such a case, a claimaint will rarely be successful.[210]

These obstacles are nearly impossible to overcome, and it does not help the claimant that the courts are extremely deferential to the SSA.[211] Additionally, the claimant is more disadvantaged because he or she cannot directly attack the reliability of the VE's testimony; rather, the claimant is forced to establish that the ALJ's conduct is of such an extreme nature that a fair judgment is not possible.[212]

For these reasons, the SSA should apply its statutory directives more vigorously by promulgating a Social Security Ruling directed at primarily VEs, the methodologies VEs implement, and the occupational sources on which VEs rely. This promulgation should include the *Daubert*-type safeguards which are applied to all experts engaged in the federal judiciary.

IV. CONTRIBUTION

When a grave injustice is wreaked on an individual by the presently powerful federal bureaucracy, it is a matter of concern to everyone.[213]

Flowing from this analysis is one method that the SSA can use to address the intricate dilemmas regarding VE testimony at disability

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[209] *See* TRAVER, *supra* note 2, § 1900.3 (discussing how because there is a very minimal standard to be a VE, most challenges of the VE's qualifications will fail); *see also* MCCORMICK, *supra* note 57, at 65 (discussing how the conflict of interest challenge will be rebuked because the VE receives the same fee no matter what way his testimony is directed).

[210] *See supra* note 67 and accompanying text (discussing the disadvantage that the claimant faces if the claimant attempts to directly challenge the reliability of the VE's testimony).

[211] *See* Hu et al., *supra* note 6, at 11 (discussing how the SSA has aggressively and successfully defended its adjudication process, which has, in principle, been endorsed by Congress and the courts).

[212] *See supra* note 105 and accompanying text (discussing the SSA's policies prohibiting an attack on the reliability of the VE testimony).

[213] Richardson v. Perales, 402 U.S. 389, 413 (1971) (Douglas, J., dissenting); *see also supra* note 2 and accompanying text (discussing how the outcome in millions of disability claims annually are decided at the fourth and fifth steps where the VE's testimony is the lynch-pin to the claimant being entitled to benefits or not entitled to benefits).

hearings. Promulgating a Social Security Ruling applicable to VEs will adequately address the concerns raised by unreliable VE testimony.

Part IV.A.1 discusses a method that the SSA should use to appropriately implement *Daubert* standards for experts in non-administrative settings, such as the federal judiciary, and also *Daubert*-type standards within federal administrative settings, such as the Food and Drug Administration and the Environmental Protection Agency.[214]

In addition to implementing *Daubert*-type standards applicable to VEs, Part IV.A.2 discusses how the promulgation should ensure that the qualifications of VEs are closely scrutinized and that a statistical and economical competency model qualifies VEs to break down and match the occupational code numbers with the existing jobs.[215] Additionally, Part IV.A.3 discusses how the Social Security Ruling should mandate that VEs base their testimony only on current data and sources, thereby prohibiting the use of the obsolete *DOT*.[216] Finally, Part IV.A.3 briefly summarizes the advantages of promulgating a Social Security Ruling applicable only to VEs at disability hearings.[217]

A. Promulgation of a Social Security Ruling Applicable to Vocational Experts

1. Implementation of a *Daubert*-type Standard for Vocational Experts

The purpose of a *Daubert*-type standard is to subject federal agencies that deal with technical scientific data to a high standard.[218] Because VE testimony is the lynch pin to the determination of millions of disability hearings each year, and to the determination of technical issues that arise regarding the occupational field, VEs must be held to a high standard.[219]

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[214] *See infra* Part IV.A.1 (discussing the implementation of a *Daubert*-type standard within SSA disability proceedings directed at VEs, and how this standard would ensure that VE methodologies and testimonies are reliable).

[215] *See infra* Part IV.A.2 (discussing how the Ruling should incorporate qualification requirements for VEs, thereby ensuring that all VEs meet high standards before they can give testimony at SSA disability proceedings).

[216] *See infra* Part IV.A.3 (discussing the need for the SSA to prohibit the use of the obsolete *DOT* and other outdated supplements which are not reliable sources for occupational data).

[217] *See infra* Part IV.A.3 (discussing the advantages of promulgating a Social Security Ruling that is directed explicitly at VEs, their methodologies, and the occupational sources upon which they may base their conclusions).

[218] *See supra* note 114 and accompanying text (discussing the four *Daubert* factors for assessing the reliability of a particular scientific theory or technique); *see also* Miller & Rein, *supra* note 114, at 298 (discussing how both the EPA and the FDA require scientific and technical knowledge and thus should be subject to *Daubert* discipline).

[219] *See supra* note 117 and accompanying text (noting that a higher standard should govern the admissibility of VE testimony because of the technical nature of the

This better-than-nothing mentality is not a reliable basis on which to award and deny critical, life-sustaining benefits to the disabled and disadvantaged, and absolutely no reason exists to allow 'junk science' or unreliable technical information to provide legally adequate support for an agency's decision in any type of administrative action.[220] An ALJ should no longer merely defer to a proposed VE on the ground that the VE has good credentials in a field that is unusual or difficult.[221] Because under *Daubert* the expert's evidence has to be adequate to support a decision, the evidence must be based on knowledge—not mere speculation.[222] Thus, when the VE bases his or her testimony on unreliable occupational data or unsupported assumptions, that testimony should not be accepted, because justice will never be achieved without the presumption that the legal process is aimed at finding the truth.[223] Because *Daubert* provides a suitable framework for reviewing the quality of agency science, and because a *Daubert*-type standard would ensure that the VE's scientific methodology maintains a certain level of legitimacy, a Social Security Ruling incorporating a *Daubert*-type standard within the disability adjudication process should be promulgated.[224]

2. Scrutinize the Qualifications of Vocational Experts

Along with implementing a *Daubert*-type standard, the Social Security Ruling should include language addressing qualification standards for VEs. Considering that no requirements exist to become a VE, and no training, supervision, or credential requirements apply to VEs, the Ruling proposed in this Note can address this concern by

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methodologies of VEs); *see also infra* Part IV.B (discussing the benefits of promulgating a Ruling that heightens the standards for VEs engaged by the SSA).

[220] TRAVER, *supra* note 2, §1400 (discussing how the SSA is traditionally slow to act in the face of change); *see also supra* note 115 and accompanying text (discussing how junk science should not be tolerated within any agency adjudication proceeding).

[221] *See* Miller & Rein, *supra* note 114, at 298 (discussing how both the EPA and the FDA require scientific and technical knowledge and thus should be subject to *Daubert* discipline).

[222] *Id.* at 315.

[223] *See supra* note 1 and accompanying text (discussing the value and importance of maintaining integrity within the process of finding truth); *see also supra* note 149 and accompanying text (discussing the need for legitimacy and how certain methodologies are better than others in the quest for truth).

[224] *See supra* Parts IV.A.1–3 (discussing how the implementation of a *Daubert*-type standard would be beneficial to the SSA because institutional credibility would remain intact and the notion of fairness would be preserved); *see also supra* note 115 and accompanying text (discussing how the implementation of a *Daubert*-type standard will force agencies to use good science within adjudication proceedings).

implementing a qualification standard that VEs must meet in order to be engaged by the SSA.[225]

Additionally, a specific ruling pertaining to VEs could provide guidelines concerning acceptable methodologies for VEs to rely on when arriving at a conclusion.[226] The ruling addressing acceptable methodologies should coincide with the implementation of a *Daubert*-type standard that would ensure the legitimacy of the VE's methodologies because, as stated previously, some sciences and methodologies are better than other sciences and methodologies in the search for objective truth.[227]

3. Mandate the Use of Current Occupational Data and Sources

By promulgating a Ruling that incorporates a *Daubert*-type standard and specifically addresses VE qualifications and acceptable methodologies, the SSA will be closer to restoring credibility in the disability determination process. However, the Ruling would not be successful if it did not address the concern about the sources upon which VEs base their conclusions.[228] If the promulgation included an additional requirement—that all sources upon which a VE bases conclusions be reliable, complete, and up-to-date—the SSA would ensure the integrity of VE testimony.[229]

The SSA has an obligation to disability claimants to ensure that VEs (whose testimony might adversely affect the claimant's case) base their

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[225] *See* TRAVER, *supra* note 2, § 1302 (discussing how no standards exist to become a VE—no training, no supervision, and no credential requirements). Although the SSA's last promulgated ruling, 00-4p, addresses some issues regarding VEs, and although HALLEX has some guidelines for VEs, there is no particular Regulation or Ruling that specifically addresses VEs. *See supra* note 9 and accompanying text (discussing the implications of S.S.R. 00-4p (Dec. 4, 2000)); *see also* TRAVER, *supra* note 2, § 1403.1 (discussing the requirements listed in SSA's HALLEX).

[226] *See supra* note 75 and accompanying text (discussing the lack of VE's statistical and economical competency and approaches that can be implemented to ensure accuracy).

[227] Mason, *supra* note 1, at 905; *see also supra* note 12 and accompanying text (discussing how the SSA is traditionally slow to act); *supra* note 149 and accompanying text (discussing the need for legitimacy and how certain methodologies are better than others in the quest for truth).

[228] *See supra* note 2 and accompanying text (discussing how reliance on the outdated and obsolete *DOT* undermines the adjudication process); *see also* TRAVER, *supra* note 2, § 1503 (pointing out that the SSA is slow to act in the face of change, and explaining why the SSA has not published any new regulations to bridge the divide between its regulations and the O*NET methodology).

[229] *See supra* note 2 and accompanying text (discussing how VE testimony lacks validity, and, thus, the entire adjudication process fails because the integrity of the system has been compromised and concluding that this could be remedied by restoring the integrity of VE testimony).

findings on a foundational source that is up-to-date and reliable.[230] As previously discussed, the *DOT* is neither up-to-date nor reliable.[231] In fact, the *DOT* is obsolete, and the SSA's failure to update it implies that the SSA has determined the *DOT* and its related data are better than nothing.[232] However, as also previously mentioned, this type of mentality should not be tolerated, even in a massive bureaucratic institution.[233] A better-than-nothing mentality is not a reliable basis on which to award and deny critical, life-sustaining benefits to the disabled and disadvantaged.[234]

The following is a proposed Social Security Ruling incorporating a *Daubert*-type standard applicable to VEs. It outlines the qualifications for VEs and describes acceptable occupational resources:

> Purpose: This Ruling clarifies our standards for the use of Vocational Experts ("VEs") who provide evidence at hearings before Administrative Law Judges ("ALJs"), and other reliable sources of occupational data in the evaluation of disability claims.[235]
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> I. *This Ruling emphasizes that the methodology of a VE must: (1) be tested and capable of repetition; (2) have been subjected to peer-review; (3) have a known or potential rate of error and standards that control the technique's operation; and (4) have enjoyed a general acceptance within the relevant scientific community.*

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[230] *See supra* note 1 and accompanying text (discussing the obligation of the SSA to ensure that disability claimants are affored fair hearings).

[231] *See supra* note 75 and accompanying text (discussing the unreliability of the *DOT* and why VE should not rely upon the outdated occupational data contained within the *DOT*).

[232] *See supra* note 12 and accompanying text (discussing the SSA's mentality regarding the *DOT*); *see also supra* note 176 and accompanying text (discussing how the SSA made the announcement that it was going to prohibit the use of the *DOT*, but then never carried out the plan).

[233] *See supra* note 12 and accompanying text (discussing how the balance between a better-than-nothing mindset and the crucial disability benefits that many claimants rely upon should tilt toward the latter).

[234] *See supra* note 1 and accompany text (discussing how the notion of justice will never be achieved without the presumption that the legal process is aimed at finding truth); *see also supra* note 149 (discussing the need for legitimacy and how certain methodologies are better than others in the quest for truth).

[235] *See generally* S.S.R. 00-4p (Dec. 4, 2000), *available at* www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (illustrating the general format and structure of SSA Rulings).

II. *Before the SSA may use a VE, said expert must meet the SSA's requirements. A VE must have: (1) satisfied all educational requirements, including (i) a Ph.D. in the occupational field; and (ii) documented occupational research abilities; (2) proven employment-placement experience; and (3) proven statistical or economic proficiency. Additionally, the SSA shall keep a documented file on VEs. This file must include the above mentioned documents. To ensure ongoing competency, the SSA shall require VEs to attend training sessions. Last, the SSA shall review the qualifications of VEs on a yearly basis.*

III. *For those VEs who meet the qualification standard, the ALJ may rely on the VE's conclusions, only after the ALJ ensures that the conclusions were based on reliable, complete, and up-to-date occupational data. Additionally, the ALJ must obtain an explanation for any deviations from the standard methodology and must explain in the decision how any identified deviation was resolved.*

B. *The Advantages of the Proposed Social Security Ruling Applicable to Vocational Experts*

Promulgating a Ruling that applies only to VEs testifying at a disability hearing has three advantages. First, implementing a Ruling that incorporates a *Daubert*-type standard will ensure that VE methodologies are reliable.[236] Second, promulgating a Ruling that describes the requirements to be a VE, including, but not limited to, the educational background, the credential requirements and the required training needed, will ensure that the SSA only relies on qualified experts.[237] Third, a Ruling that mandates the use of only reliable occupational sources will ensure the legitimacy of VE testimony and thus the entire disability system.[238]

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[236] *See supra* Part IV.A.1 (discussing the practical effects of promulgating a Social Security Ruling, applicable to VEs, that incorporates a *Daubert*-type standard).

[237] *See supra* Part IV.A.2 (discussing the benefits of implementing a Ruling that defines the qualification requirements to be a VE engaged by the SSA).

[238] *See supra* Part IV.A.3 (discussing the positive impact of promulgating a Social Security Ruling that mandates the use of only reliable, complete, and up-to-date occupational data and sources).

V. CONCLUSION

Vocational evidence is the building block of the fourth and fifth steps of the sequential disability determination process. With millions of disability benefits granted or denied at those steps, the significance of this vocational evidence should not be understated. Vocational evidence within the SSA's disability adjudication process is valuable for its ability to lead the ALJ to truth, but only if it is based upon reliable and up-to-date occupational data. If the integrity of this testimonial evidence is compromised, then the entire disability process crumbles because the validity of the conclusion depends primarily upon the manner in which it was reached.

With a large adjudication system, both the efficiency of the SSA and the level of fairness afforded to disability claimants must be balanced. Currently, this balance favors the disability system, and the SSA has adopted a better-than-nothing mentality concerning the vocational evidence dilemma. However, a balance between efficiency and the level of fairness provided to the claimant can be achieved by promulgating a Ruling applicable to VEs. This Ruling would incorporate a *Daubert*-type standard, a concrete guideline regarding VE qualifications and acceptable methodologies, and a requirement that all VE testimony be based on up-to-date, reliable occupational data. The Ruling proposed in this Note addresses the current imbalance, and correspondingly allows the SSA to ensure the integrity of its disability adjudication system and maintain a system whereby claimants are afforded an adequate level of protection against arbitrary and capricious testimony.

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