

DISABILITY DETERMINATION

Using vocational experts

By Bruce Growick, Ph.D.

The process of determining *disability* in America today has become clearly more complex over the last few years. In workers' compensation, social security, pension/disability funds and personal injury, the medical status of the individual alone is no longer sufficient for determining disability. Other factors, such as an individual's age, education, past work experience, and access to the labor market must now also be taken into consideration.

Broader Criteria

For many years, the medical condition represented by the Guides for Permanent Impairment by the American Medical Association was the sole source for determining disability. If an individual's physical and/or mental condition was serious enough as determined by the percentage of impairment, then a finding of disabled was granted. However, now-a-days other facts are being considered to determine an individual's ability to return-to-work and whether they are disabled.

In particular, the vocational opportunities available to an injured individual, as a function of these other factors such as age and education, must also be taken into consideration. If a person possesses enough residual functional capacity and work-related skills necessary to perform a job adequately, then a determination of not being disabled is warranted. Likewise, if an individual after injury or illness cannot perform any work due to medical limitations and age, education, work history and available employment, then a determination of disability is indicated.

Using the AMA Guides for Permanent Impairment as the only criterion for disability has given way to a more inclusive process. Disability determination is now based on personal and social factors that affect employability as well. This broadening of the decision-making process has been beneficial yet difficult. It is difficult because, like any new process that broadens its mandate, there are more factors and professionals that need to be considered. Where the disability determination process used to be the sole providence of the medical doctor, it now must consider the facts and opinions of vocational experts.

Expert Interpretation

The Vocational Expert (VE) is a professional who has studied and understands the relationship between the functional limitations of illness and/or disability, and the physical and mental demands of work. No longer is

it permissible to determine disability solely based on the percentage of impairment as dictated by the AMA Guides. Ideally, the physical and psychological limitations that are imposed by an accident and/or disease must now be translated into the loss of *specific* vocational opportunity. And, that vocational loss must be interpreted in terms of the whole world of work per the U.S. Department of Labor, the availability of jobs within different geographical areas and the average wage that those jobs command.

The VE is the professional who is retained to provide such information to the court. They are usually asked to provide an opinion on the overall employability of the individual, taking into account not only their physical and psychological limitations, but also their age, education and past relevant work. These latter factors are tremendously important to the overall employability of the individual being considered for permanent and total disability.

Historically, the Federal Social Security Administration was the first entity to consider these other factors in their disability determination process, and to use the VE. The Social Security Administration requires that in making a determination of disability a VE is necessary to provide an opinion on the nature of a person's past work, and the ability to perform it, or any other work in substantial numbers in a certain geographical area. The VE describes a person's work history according to skill and exertion level per the Dictionary of Occupational Titles and provides an opinion on whether the individual, given the functional limitations of the medical condition, can perform adequately the essential functions of a job. Furthermore, the VE needs to articulate whether a substantial number of those jobs exist in the national economy.

In Workers' Compensation here in Ohio, the VE is used on a regular basis in a similar manner. The Stephenson decision by the Ohio Supreme Court in the 1980's mandated that the Ohio Industrial Commission



Bruce Growick, Ph.D.
The Ohio State University

must consider an individual's personal and social factors in determining permanency and totality of disability. As a result, the Industrial Commission uses the VE not only to define past relevant work according to skill and exertion, but also to indicate which jobs an individual can perform given functional limitations, age, education, and work experience. The decisions of the Industrial Commission in workers' compensation in Ohio are now considered more fair and equitable.

Interestingly, but not surprisingly, pension and disability funds have also begun to use the VE to assist in the process of determining extent of disability. Currently, the Ohio Police and Firemen's Pension and Disability Fund uses the VE, in conjunction with medical advisors, to help in determining the vocational effect of disability for its members who apply for disability retirement. It appears that a fairer and more prudent disability rating is achieved when the vocational factors, as well as the medical aspects of an individual, are considered.

Civil Litigation

In the context of civil tort proceedings, such as personal injury, medical malpractice, or product liability, the VE is also being used more often. In this venue, the VE is being asked not only to provide an opinion on the availability of jobs for an individual with a disability or illness, but also on the affects of the disability on lifetime earning capacity. The concept of 'loss of earning capacity' is very important in civil proceedings because it helps to quantify the extent of the disability, and places a dollar amount on the projected loss. In this situation, the VE indicates which

jobs an individual can perform, and what he/she can earn doing it. The loss of earning capacity is a function of the jobs a person can do, and what can be earned over the working life. The VE provides a very useful purpose to the court because they demonstrate the relationship between an individual's residual abilities, the world of work (ie, employability) and earning capacity.

The role of the VE in the legal arena over the last few years has increased as attorneys realize that the VE can help bridge the gap between medical limitations, and the physical and mental requirements of work. The VE helps to determine what jobs an individual can perform, how many of those jobs exist and what they pay. In fact, here at OSU, more of our coursework in the field of rehabilitation covers the role and functions of the VE in litigation, and more of our graduates are becoming employed in this area. The scope of practice and the acceptance of the VE in the courts will certainly increase as lawyers continue to use us for assisting in the process of disability determination.

Dr. Bruce Growick is on faculty at The Ohio State University in Rehabilitation Services. growick.1@osu.edu



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