THE DOZEN MOST LITIGATED ISSUES INVOLVING VOCATIONAL EVALUATIONS

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Vocational evaluations should be thorough and comprehensive. If used appropriately, they add an important element to the disability assessment. Unfortunately, many vocational evaluations do not take into account all of the factors necessary to perform the particular occupation, nor the limitations of an individual's functional abilities. Recently courts have more closely scrutinized vocational evaluations for they are often the hook on which disability companies hang their hat in denying benefits. A review of evolving case law provides valuable insight regarding analysis of this for both claimant advocates and disability insurers.

1. IS A VOCATIONAL EVALUATION REQUIRED, NECESSARY OR EVEN NEEDED IN ORDER TO CONDUCT A FULL AND FAIR REVIEW?

What is and should be the focus of the VA in any particular case? The policy definition of "total disability" is the roadmap to answer this question. If the objective is to determine whether the claimant is able to perform the duties of *his occupation*, considering his restrictions and limitations, the VA should describe in detail the material and substantial (or important) duties of that occupation. The next step would be to evaluate what physical and mental level of functioning is necessary to perform these duties. The VA should then match this information to the facts of the claim to evaluate whether the restrictions and limitations set forth would prevent the individual from performing his occupation.

If the objective is to determine whether an individual can perform the duties of any "*gainful occupation*", an assessment must take into account the individuals' pre-disability abilities, his restrictions and limitations, and how that correlates with the functional demands of employment.

Now having generally described what a vocational assessment adds to a claim analysis, the next consideration is whether they are needed in every case. Some courts have addressed this issue.

In *Caldwell v. Life Insurance Company of North America***,** 287 F.3d 1276, 1289-1290 (10th Cir. 2002), the court considered whether Cigna was required to collect vocational evidence regarding how the employee's impairment affects his ability to perform jobs other than that held prior to the onset of disability, in order to determine whether the insured is disabled from any occupation. The court held that whether a claims administrator must consider vocational or occupational evidence in reaching its

determination to deny a claimant *any occupation* benefits depends on the circumstances of the particular case and the terms of the benefits plan. If a claims administrator can gather substantial evidence to demonstrate that a claimant is in fact able to perform other occupations in the open labor market, then consideration of vocational expert evidence is unnecessary. Thus, the plan administrator is not; in every case where the 'any occupation' standard is applicable, required to collect vocational evidence in order to prove there are available occupations for the claimant**.** See *Regula v. Delta Family-Care Disability Survivorship Plan* 266 F 3d 1130, 1141 n. 6 (9th Cir 2001) cert pending; [citing *McKenzie v. Gen. Telephone Co. of California*, 41 F.3d 1310, 1317 (9th Cir. 1994)].

According to the court in *Caldwell,* five other circuits have also addressed this question. Not one has held vocational evidence to be the sine qua non of the 'any occupation' evaluation in all cases. Rather, the courts have consistently allowed for a case by case determination of whether a vocational or occupational assessment is required when deciding whether a claimant is able to perform any occupation as that term is defined by the insurer's policy. See *Pari-Fasano v. ITT Hartford Life & Accident Ins. Co*., 230 F. 3d 415, 420-1 (1st Cir, 2000)(vocational assessment not necessary in light of substantial medical evidence and conclusions of reviewing physicians that claimant had no more than minor restrictions on her ability to work); *Quinn v. Blue Cross & Blue Shield Ass'n* 161 F 3d 472, 476 (7th Cir 1998) (administrator under no obligation to undertake full-blown vocational evaluation of claimant's job and abilities, but has a duty to make reasonable inquiry into type of skills possessed by claimant and whether skills may be used at another job in the same salary range)**.** *McKenzie v. Gen. Tel. Co. of California*, 41 F. 3d 1310, 1317 (9th Cir. 1994) (consideration of vocational evidence unnecessary where evidence in record supports conclusion that claimant does not have impairment preventing him form performing some identifiable job). *Duhon v. Texaco, Inc.* 15 F. 3d 1302, 1309 (5th Cir. 1994) (reviewing court determines on case by case basis whether, under particular facts, plan administrator abused discretion by not obtaining opinion of vocational rehabilitation expert. However, the Eighth Circuit disagrees with the above. See *Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan*, 874 F. 2d 496, 499 (8th Cir 1989) (plan should not have terminated claimants benefits without aid of qualified opinion from vocational expert) and *Potter v. Connecticut Gen. Life Ins. Co.*, 901 F. 2d 685, 686 (8th Cir. 1990) (no need for introduction of vocational expert testimony in light of substantial other evidence claimant not disabled).

In many cases, particularly during an appeal of a denial of a claim governed by ERISA, the claimants' advocate should consider obtaining a vocational assessment. This will enable the claimant to contest the denial of benefits by supplying an expert's view, one that usually carries more weight than merely an advocate arguing that the disability carrier has either mischaracterized the claimant's occupation, misapplied the claimant's medical limitation and restrictions, or ignored documentation vital and relevant to a complete and thorough analysis.

An example of the potential outcome of a claim where no professional vocational assessment was used to tie the facts to the claim occurred in *Marsteller vs. Security of America Life Insurance Company* 2002 U.S. Dist. LEXIS 17560 (N.D. Ohio 2002)**.** Ms. Marsteller was a CPA with a concentration in tax and filed a claim for disability benefits because of cervical, back and shoulder problems associated with constant computer work. She claimed she was unable to continue with her occupation because she became unable to use the computer for the hours necessary to perform the duties of her occupation. After paying STD benefits, Security denied further benefits, claiming that her medical problems may be a result of her particular work conditions and hours, but were not because her "regular occupation" required such computer use. Defendant submitted evidence in the form of an affidavit by a CPA stating it is possible to perform the substantial and material duties of a CPA with limited computer use, since CPAs are not typically required to spend such extensive hours at the computer. Defendant supplemented its file with the opinion of two doctors who concurred that Ms. Marsteller was capable of limited computer use. The plaintiff did not produce the certification of any other CPA to support her claim that the regular occupation of a tax specialist requires one to spend extensive hours at the computer. The court determined that Ms. Marsellor had failed to connect medical restrictions and limitations to her ability to function as a CPA[1] and denied motions for summary judgment due to factual disputes.

2. SHOULD THE MANNER IN WHICH THE OCCUPATION IS PERFORMED FOR THAT EMPLOYER OR IN THE GENERAL MARKETPLACE BE THE YARDSTICK USED?

Often the disability insurance company applies a national standard as to what the duties of the occupation are across the nation. But a generic canvassing of how the occupation is performed in the national economy falls short of the requirement to fairly evaluate the claim if no such "national economy" clause is included in the contract policy. Courts are requiring a consideration of employability to include an assessment of the occupation as it is typically performed in a comparable environment. For example, the duties of a nurse working at a busy city hospital will not be considered the equivalent of a nurse working at a rural hospital. For one thing, the person at the city hospital may have many more duties than the nurse working in the country. The opposite could even be true. That is why it is so important to generate a valid and accurate synopsis of the manner in which the claimant is performing the particular occupation. "Defendant should have looked to the duties of a CEO in a comparably sized company, as opposed to the CEO generally. It was not required, however, to consider the idiosyncrasies of the plaintiff's

[1] "The only restrictions were light work, minimize stress, and allow work breaks. These are not restrictions relating to the occupational activities of a tax accountant nor do they indicate that plaintiff's condition is caused by the use of a computer. Id at *20

particular job". *Forchic v. Lippincott,* No. 98-5423 (JBS) 1999 U.S. Dist. LEXIS 21419 at *35 (D.N.J. 1999).

This concept is, however, not to be extended to situations were the disability arises out of something unique to a particular office. What if the medical condition causing the disability is inspired by an explosive relationship with ones' boss (stress=disability) or the cleanliness of the workplace (allergy=disability). If the claimed work "stress" is not caused by the manner in which the particular occupation is performed, but rather is caused by an impasse between employee and employer, there may be no disability from the occupation but only a need to find a new job in that occupation elsewhere. "The evaluation of disability should be made in light of the usual duties of that occupation and not depend on ad hoc peculiarities of a specific job or the requirements of a particular employer who may require activities beyond that generally contemplated by the occupation". *Ehrensaft v. Dimension Works Inc. Long Term Disability Plan,* 120 F. Supp 2d 1253, 1259 (D. Na 2000)

That being said, the following cases examined situations where courts have found for the claimant because the insurance company has improperly pegged the occupation into a square hole in order to deny coverage.

Mizzell v. Paul Revere 118 F. Supp 2d 1016 (C.D. Cal 2000) Mr. Mizzell, an advertising executive, had purchased an own occupation policy. He suffered a heart attack, returned to work performing some of his duties, but delegated many other duties and found that he was unable to attend client meetings and travel as he had before. Finally, he stopped working altogether. The court found the insurer abused its discretion by simply relying on DOT definitions that the insured's job was sedentary instead of evaluating how the insured performed his job. The court said, 'the essential dispute can be framed as whether plaintiff needs to be disabled from his general occupation or from his actual job or own occupation." Here, the carrier had to consider the insured's ability to perform the occupational duties his employer required, rather than simply relying on a more limited DOT definition of the occupation. As an added bonus, the court examined whether the carrier would be required to consider the individuals' actual job duties if the policy defined total disability as an inability to perform his "regular occupation". In that setting, the court reasoned that the carrier should consider whether the insured could perform in a position of the "same general character" as the previous job, requiring similar skills and training and comparable duties.

Kinstler v First Reliance Standard Life Ins. Co. 1997 WL 401813 (S.D.N.Y. 1997) First Reliance had denied benefits, claiming that Kinstler's position, as director of nursing was sedentary, relying on the department of Labor definition. To the contrary, the facts disclosed that up to 25% of Nurse Kinstler's duties required direct patient care and could not be described as sedentary. The definition of TD in the policy was "regular occupation" which the court said should be construed to mean "a position of the same general character

as the insured's previous job, requiring similar skills and training, involving comparable duties". *Id.,* (citing *Dawes v. Unum Life,* 851 F. Supp 118, 122 (S.D.N Y 1994).

*Dionida v. Reliance Standard Life Insurance CO***.** 50 F. Supp 2d 934 (N.D.Cal. 1999) In Dionida, the court was faced with deciding whether there is a functional difference between a "general duty nurse" and a "registered nurse", in terms of assessing disability. Can a general classification of "nurse" be universally applied across the board to all nurses no matter their specialty? The court said NO. The court found for Nurse Dionida, a "general duty nurse", because Reliance was wrong to reclassify her as a "registered nurse" when her regular occupation was specified as a general duty nurse. Typically, the evaluation must focus on the specific specialty within the overall classification in order to perform a fair analysis of the duties associated with the particular occupation which can no longer be performed.

Flood v. Long Term Disability Plan for First Data Corporation and Continental Casualty Company 2002 US Dist LEXIS 18183 (N.D. Ill. 2002). Charlene Marie Flood worked as a VP of sales until the onset of psychiatric symptoms associated with panic attacks, major depression and anxiety. Continental denied the claim, based on the opinion of a psychologist paper reviewer who concluded that although Flood was unable to return to her job at First Data, she was able to perform the substantial duties of her occupation for another employer. The paper reviewer based his conclusion on the mere fact that the panic attacks did not occur except when Ms. Flood worked or thought about working for her employer. The Court evaluated the evidence to determine whether the demands and pressures at First Data were the types of demands and pressures typical in this occupational field or out of the mainstream. Integral to the court's decision was Flood's submission that her doctors concluded her condition not only disables her from work for her boss, but any job or position wherein a high level of stress is an integral factor.

For a contrary finding, see *Pelletier v. Reliance Standard Life Insurance Company* 2002 U.S. Dist. LEXIS 18443 (D. ME 2002). Pelletier alleged that she was disabled due to fibromyalgia, osteoarthritis and psychological disorders. She claimed that her inability to work was influenced by the stress she was under, but failed to present any evidence that the stress and anxiety of her job was endemic to the occupation as opposed to the particular position she had. The court found, in an ERISA setting, that defendant was not unreasonable in citing that Pelletier failed to substantiate she was not able to perform her occupation for another employer in an alternative work setting.

3. REASONABLE CONTINUITY

In *Lamarco v. Cigna Corporation* 2000 U.S. Dist. LEXIS 14341 (N.D.Ca. 2000), the court restates law set out long ago in California and followed elsewhere. When coverage provisions in general disability policies require the total inability to perform "any occupation" the courts have assigned a common sense interpretation to the term "total disability" so that total disability results whenever the employee is prevented from working

with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage given his station and physical and mental capacity. In determining disability eligibility, an individual is not capable of performing the duties of "any occupation" simply because he or she is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of a business. Rather, the inquiry must focus on the individuals' actual employment prospects in their customary occupation, or one reasonable expected to serve as an alternative, given their particular age, education, training and experience. *Moore v. American United life Ins. Co.* 150 Cal. App. 3d 610, 618, (1984); *Erreca v. West States Life Ins. Co*. 19 Cal 2d 388, 394-95 (1942)

4. IS THE EMPLOYER'S AGREEMENT TO ACCOMMODATE THE DISABLED EMPLOYEE MATERIAL TO THE ANALYSIS?

The American with Disabilities Act (ADA) 42 U.S.C.S. 12101-12213, prohibits employers from discriminating against a qualified individual because of his disability. Such discrimination includes an employer's failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business. How does this conumdrum affect an employee's claim for disability benefits? What if an employer, consistent with the ADA, offers the employee his job with accommodation? Apparently, the answer lies in the extent to which the employee's newly accommodated position compares to his pre disability one. In *Saffle v. Sierra Pacific Power Company Bargaining Unit Long Term Disability Income Plan* 85 F.3d 455 (9th Cir. 1996); the Court held that it was an abuse of discretion for the plan to consider the accommodations offered by the employer in their determination regarding his entitlement to benefits. The definition of total disability in Saffle was "he is completely unable to perform each and every duty of his regular occupation". Saffle 85 F.3d at 457. Her employer agreed to make material changes to the manner in which she performed his job, relieving him of some duties, and adding others she was not performing previously. As long as Saffle was unable to perform her regular occupation without accommodation, she was disabled within the meaning of the policy. See also *Lasser v. Reliance Standard Life Ins. Co.*, 146 F.Supp. 2d 619 (D.N.J. 2001). In *Lee v. Unum Life Insurance Company* 1998 U.S. App. Lexis 7979 (9th Cir 1998), [unpublished], the court considered the effect of an employer's agreement to accommodate the disabled employee by eliminating certain duties she could not perform. The definition of total disability was the inability to perform each of the material duties of your regular occupation. The court held that the administrator erred by factoring accommodation into the criteria for total disability. Unum's interpretation was unreasonable because it required that Lee work with special accommodations, first, in a non-hospital setting (she was a respiratory therapist at a hospital), and second, at a job involving no exertional activity.

A somewhat different analysis took place in *Ross v. Indiana State Teacher's Association Insurance Trust, ET. Al* 159 F. 3d 1001 (7th Cir. 1998). Mr. Ross was

employed to represent teachers with respect to matters including collective bargaining, grievance processing, unfair labor practices and other employment related matters. After working for 25 years in this position, a degenerative hip condition prevented him from performing many of the physical requirements of his position. When his employer would not accommodate his medical limitations, he filed for grievance under the ADA and stopped work. In litigation, his employer offered to make some of the accommodations Ross's physicians sought, and the Trust considered the reasonable accommodations in the process of determining whether Mr. Ross was totally disabled under the disability policy. The court held the Board of Trustees acted well within its discretion when it interpreted the plan to allow it to consider the accommodations in determining whether Mr. Ross was unable to perform the substantial duties of his job. The difference between *Ross* and *Saffle. supra* is that Saffle's employer was materially changing her job duties, thus creating a job different from her "regular occupation".

In another setting, if the employee does make accommodations to keep his job, by reducing duties, obligations and hours, do they define a new occupation? At least one court, faced with this issue said no. In *Peterson v. Continental Casualty Co.* 116 F. Supp. 2d 532 (S.D.N.Y. 2000); 282 F.3d 112 (2nd Cir. 2002), the pre-accommodation duties of Peterson's occupation formed the basis of an analysis of his later filed disability.

5. TRANSFERABILITY OF SKILLS (TSA)

Transferable skills analysis is the process used by insurance companies to identify similar, new or related jobs the disabled person can do, which are consistent with previous work experience, education and training, and the limitations and restrictions placed on them by the doctors. In order to perform a fair and balanced TSA, vocational personnel performing them must be aware of the limitations and restrictions imposed by the medical condition.

What is the medical condition, and how is that person restricted and limited? What is it about their prior occupation they can no longer do? If, for example, they have a memory problem, or a cognitive deficit, this limitation must be considered in the TSA, for to ignore it would be to ignore the very problems, which disable the individual from performing their prior occupation.

The TSA is a process in which jobs are identified consistent with the worker's capabilities and functional restrictions. Must the company even perform a TSA or market conduct study? In some situations, it is not necessary to perform a TSA. *O' Reilly v. Hartford Life and Accident* 272 F. 3d 955 (7th Cir. 2001). O'Reilly was an actuary who became hearing impaired. After denial of the claim, O'Reilly obtained a TSA, which indicated he was incapable of earning 60% of his previous income. Because Hartford already knew that the insured was performing some of the duties of his occupation despite the hearing loss, it decided not to perform a TSA. The court held that Hartford's decision was not unreasonable because its decision was based on evidence in the form of statements

from its actuarial department and the Chicago Society of Actuaries. Other cases finding no requirement for a TSA are:
McKenzie v. General Telephone Company, 41 F. 3d 1310 (9th Cir 1994); *Duhon v. Texaco, Inc.* 15 F.3d 1302(5th Cir 1994); *Jestings v. New England Telephone and Telegraph Co.* 757 F.2d 8 (1st Cir 1985); *Goldammer v. Aid Ass'n for Lutherans,* 747 F.Supp. 1366 (D.S.D.1990) aff'd by 950 F. 2d 727 (8th Cir. 1991); *Potter v. Connecticut General Life Ins. Co.* 901 F.2d 685(8th Cir. 1991)
Cases in favor of a TSA include: *Quinn v. Blue Cross & Blue Shield Ass'n* 161 F 3d 472, 476 (7th Cir 1998) (The administrator should have identified the skills necessary to obtain another job and whether the claimant possessed those skills); *Gunderson v. W.R.Grace and Co. LTD Income Plan* 874 F.2d 496(8th Cir. 1989); *Mein v. Pool Company Disabled International Employee Long Term Disability Benefit Plan, et.al* 989 F. Supp. 1337 (D. Co. 1998) In *Mein,* the court granted the claimant's motion for SJ due to the plan's failure to consider vocational evidence.

6. DOT, ITS USES AND ABUSES [2],[3]

Parke v. First Reliance standard Life Insurance Company 2002 U.S.Dist. LEXIS 18762 (D. Minn. 2002) Parke was an account executive for a television station suffering from diabetes. First Reliance defined the occupation as sedentary, but the court disagreed, based on the job requirement that she work at a rapid pace with multiple demands on her time, represent team stations, conduct sales and marketing and function in high stress. The Court went further, finding that First Reliance intentionally misclassified Parke's occupation as sedentary in order to support its decision to deny. This, they found, was evidence of a procedural irregularity infecting the process and establishing a conflict of interest.

Ebert v. Reliance Std. Life Ins. Co., 171 F.Supp. 2d 726 (S.D. Ohio 2001). Carolyn Ebert was a cardiopulmonary assistant who injured her back at work. Reliance used a DOT that

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[2] The Dictionary of Occupational Titles and the Occupational Outlook Handbook is considered "reliable job information" to be used in the determination process of SSI transferability. Part CFR 404.1566(d)
The DOT was last published in 1991 in the form of a 4th revision. The publication consists of 1404 pages containing job listings and descriptions with only a few defined characteristics for each title.

[3] **The Occupational Network Service (O*Net98)**
During the last decade, the federal government, including the U.S. Department of Labor, decided not to create a 5th edition of the DOT. As an alternative, a new format of occupational information was planned and developed through a contractual arrangement primarily with the Utah Department of Economic Security and the American Institutes of Research.
The worker traits are rated on the level of ability to perform (0-7), the Importance of the ability (0-5) and how frequent the activity is performed (1-4). Each occupation has the potential to be rated on approximately 450 elements and thus has met with some resistance in use.
Step 1: identify jobs in a persons work history:
Step 2: Select a code and title for each job.
Step 3: create the residual functional capacity (takes into consideration any restrictions imposed by injury or illness.

was not similar to Ebert's job and therefore not reliable. When the claimant submitted her employer's description of her job and indicated how that differed from the DOT description being used by Reliance, it still did not adjust its thinking. The court rejected the simplistic use of the Dictionary of Occupational Titles and ruled that the claimant's actual job duties had to be considered in evaluating her ability to perform the duties of her regular occupation. Moreover, the plan's failure to consider pain as a component of Ebert's medical restrictions was improper. As the court reasoned, "classifications of job duties such as sedentary, light, medium and heavy are of little consequence when they are based on a job that is not the job performed by the plaintiff or are based on a job that is not sufficiently similar to the job performed by the plaintiff." The carrier was instructed to use the definition of Ebert's regular occupation supplied by her employer, and not that set forth in the DOT.

7. WHAT IS WRONG WITH THE VE RELYING ON SURVEILLANCE, PHYSICAL ASSESSEMENT OF FUNCTIONING FORMS OR FUNCTIONAL CAPACITY EVALUATIONS?

Carugati v. Hartford 2002 WL 441479 (N.D. Ill. 2002) Ms. Carugati was an Office clerk/receptionist who became totally disabled by chronic fatigue and fibromyalgia. After paying Carugati under the own occupation definition, Hartford denied benefits, relying on video surveillance taken over several days, showing her walking her dog for 14 minutes, carrying and climbing on a small stepladder, and reaching above her head and removing an air conditioner cover. Also, psychometric testing questioned her motivation. A work capacity evaluation questioned her efforts. Carugati complained not only of physical fatigue, but dizziness, memory loss, lack of concentration and comprehension, and cognitive function. When interviewed, Carugati stated she spent most of her time in bed. The court found that Hartford's emphasis was on the video surveillance, but they had ignored whether or not Carugati had the skills to perform any job in the national economy. There was no vocational evidence that Carugati could find employment with her physical limitations or could become qualified for employment through training or education. The court said that Hartford failed to consider whether Carugati's physical limitation prevented her employment, failed to consider how Carugati's decline in cognitive ability, general knowledge, calculation ability and abstract reasoning affected her employability and neglected to consider her age, work history and skills. The video surveillance, showing Caragati walking a dog didn't shed light on her ability to function at a full time job. "Total disability is not equated with a plan participant's ability to walk, care for oneself, or perform routine daily functions but a participant's inability to engage in employment." The court found Hartford's decision arbitrary and capricious. See, *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154 (9th Cir. 1999) "relying on videotapes showing the plaintiff engaging in activities that are significantly less taxing than working…when all of the other objective evidence of treating physicians and therapists confirms that the plaintiff is totally disabled…is an abuse of discretion"…"The videotapes show plaintiff engaged in some bending, lifting and sitting. These activities have little relation to being a trial

attorney and say nothing about the plaintiff's ability to perform the job on a day to day basis over an extended period of time." *Id.*

Austin v. Continental Casualty Company 216 F. Supp 2d 550 (D.N.Car. 2002) Austin was a subassembly worker with few skills and an incomplete primary school education. She was diagnosed with cervical arthritis, fibromyalgia, diabetes and suffered from extensive pain, cervical dystonia and spasmodic torticollis. After a vocational evaluation, she was determined to be very limited due to her low academic functioning "even before the functional limitations caused by her medical problems were considered." The court found her unable to meet the critical demands of the competitive employment. She was unable to

- concentrate on tasks
- maintain persistence or pace
- maintain attendance and punctuality
- carry out tasks in a timely manner
- complete a work day or work week without an unreasonable number of breaks related to her symptoms

Continental also hired a vocational evaluator and claimed he was independent. The court was not so convinced, once shown the VE's website which contain advertisements touting their availability to reduce employer's costs. The court recognized the vocational case manager never considered plaintiff's education or cognitive skills when assessing her ability to perform suitable jobs selected for her. It is apparent that the in house vocational case manager placed great weight on the "sit and squirm" test conducted by the vocational evaluator. The court pointed out that this evaluator never explained how Austin could work when she had to lay down 15 to 20 minutes per hour. The court reasoned "it is the duty of the decision maker, whoever that might be, to at least explain the basis for discrediting the subjective complaints of the claimant. If a decision maker fails to show some rational basis for his decision, a reviewing court can only assume he has none. He never explained how plaintiff, with second grade math skills and fourth grade reading skills, could possibly do any of the listed jobs or why the opinion of the vocational expert should be disregarded."

"An impartial adjudicator, such as a plan administrator, has a fiduciary duty not only to the plan but also to the beneficiaries. If, as here, an individual's functional capacity precludes the performance of past work, other factors, including age education and past work experience must be considered in order to determine if other work can be performed." Id.

Furthermore, vocational conclusions of the plaintiff's doctors carry little weight. It is a medical doctor's findings that are most helpful in determining what impairments are interfering with a plaintiff's ability to work. Similarly, the conclusions of the in house medical expert as to the impact such impairments have on plaintiff's vocational capacity must be disregarded.

The "sit and squirm" observations of the vocational expert have long been held invalid. *Jenkins v. Sullivan* 906 F. 2d 107 (4th Cir. 1990). The sit and squirm test is incompetent and completely unfair in view of the evidence that a person with plaintiff's problems enjoys periods of remission that can last for hours. (*Denial reversed and plaintiff awarded benefits.)*

8. WHAT FACTORS MUST BE CONSIDERED AS PART OF THE VOCATIONAL ASSESSMENT?

Cases where the examiner failed to consider factors affecting the individual's ability to work: *Scothorn v. Connecticut General Life Insurance Company* 1996 WL 341110 (N.D. Cal.) (Unreported). The vocational assessment, performed early in the claim, failed to consider the later arising psychiatric component of the disability. Here, the court reasoned that it might be necessary to perform vocational assessments for certain claims.

Honda v. Sunshine Biscuit 1997 U.S. App. Lexis 35920 (9th Cir 1997) Honda was a sales representative/display worker with orthopedic complaints. Liberty Mutual, the administrator, obtained a work capacity evaluation through Pangburn Vocational Associates, and used a second vocational expert who conducted a labor market survey and transferability process report. The court held that vocational evaluators must consider pain, as it would affect the ability to work at suggested jobs. Because the vocational experts did take into account the subjective complaints of pain as well as her physical limitations in performing sedentary work, the decision to deny was appropriate.
Spangler v. Lockheed Martin Energy Sys., Inc. Metro. Life Ins. Co. 313 F. 3d 356 (6th Cir. 2002) The administrator denied benefits based on its belief that Spangler could return to work for her employer, despite her doctors' opinions that she was still disabled. The vocational evaluator was provided only with select documents instead of the complete claims file. For example, the evaluator was given a PAF form completed by one of Spanglers' doctors indicating a limited ability to sit, stand, walk, and lift and an FCE which had concluded Spangler was fit to work at a sedentary level, even though she could only sit for 14 minutes, stand for 10 seconds and walk for 30 seconds 4 times. The vocational analyst used these materials, performed a transferable skills analysis and concluded Spangler was fit to work. The court had this to say about the report:

"Why Met Life did not also send Dr Rice's report or the rest of Spangler's file to Crawford for review by the vocational consultant is inexplicable. Indeed, we can only conclude that Met Life "cherry picked" her file in hopes of obtaining a favorable report from the vocational consultant as to Spangler's ability to work."

Met Life should have provided Crawford with all of the medical records relevant to Spangler's capacity to work. As a result, the report of Crawford's vocational consultant was incomplete, inaccurate and inherently flawed. The Court of Appeals labeled this practice "cherry picking" and the denial arbitrary and capricious.

Spangler is similar to *Myers v. Hercules, Inc.* 253 F. 3d 761 (4th Cir. 2001) where Provident ignored Myer's need to rest her back frequently, although she could sit, stand, etc. for periods of time. The court found Provident sole reliance on the information on the Physical Capacities Form arbitrary and capricious in view of the claimant's doctor's documentation that Myers was unable to work. *Connors v. Connecticut General Life Ins. Co.* 272 F. 3d 127 (2nd Cir. 2001) Mr. Connors was a salesman who became disabled due to back condition. The court rejected Connecticut Generals' assessment of Mr. Connor's ability to perform his occupation since, in their view, the ability to sit for a total of four hours does not generally satisfy the standard for sedentary work. Indeed, the Social Security Administration's definition of sedentary work, generally involves up to two hours of standing or walking and six hours of sitting in an eight-hour workday. *Curry v. Apfel* 209 F. 3d 117, 123 (2nd Cir. 2000) (quoting Soc. Security Rule. 83-20)

10. HOW DOES STRESS FACTOR IN AND MUST IT BE CONSIDERED?

Lasser v. Reliance Standard Life Ins. Co. 146 F. Supp. 2d 619 (D.N.J. 2001). An orthopedic surgeon claimed disability due to cardiac problems because his doctors prescribed reduced stress in his personal and professional life following several cardiac events. The doctor therefore reduced his schedule significantly and omitted performing surgery. Reliance paid until it obtained a DOT and occupational survey. The court found the occupational survey completely flawed, "faulty and unreliable" by its failure to consider occupational stress. The carrier should not focus on the physical capacity to work and ignore emotional stress and its affects. The court pointed out that an 'occupational' disability policy defines disability as the inability to perform the material duties of one's 'regular occupation.' The court reasoned, "a duty is material when it is sufficiently significant in either a qualitative or quantitative sense that an inability to perform it means that one is no longer practicing the "regular occupation". *Lasser v. Reliance Std. Life Ins. Co.*, 146 F. Supp. 2d 619, 636 (D.N.J. 2001). Failure to consider the issue of how occupational stress factors into the analysis of whether he can work is evidence of arbitrary and capricious behavior.

Keep in mind the insured is disabled when the activity in question would aggravate a serious condition affecting the insured's health (the common care and prudence rule). *Henar v. First Unum Life Ins. Co*. 2002 U.S.Dist. LEXIS 17585 (So. Dist. N.Y.) Mr. Henar was a CFO suffering from cardiac problems. His treating doctor said that Henar should avoid physical and mental stress. Unum's nurse disagreed, commenting that any potential severe psychological reactions to stress should be psychologically managed by stress management programs, and further, that the incidence of cardiac events is no greater on the job than off the job. Henar contended that UNUM's vocational assessment ignored his medically supported contention that mental stress caused by his occupation disables him and thus he must not be exposed to an occupation, which causes mental stress. UNUM also adopted the recent tactic of designating this type of occupation as sedentary, relying on the DOT description of a comptroller as sedentary in physical exertion. The court held that the administrative record as a whole reflects a disregard for the findings of the

plaintiff's treating cardiologist that plaintiff's coronary condition precluded subjecting him to the mental stress associated with his occupation of Chief Financial Officer.

11. MUST THE CARRIER ACTUALLY FIND THE DISABLED A JOB?

Perez v. Aetna Life Insurance 205 F. 3d 1341 (6th Cir. 2000) The definition of total disability here was whether Perez is unable to work at any reasonable occupation because of his injury. Perez claimed that Aetna had to show that there was an actual job that he could perform, plus his competitive employability, but the court disagreed. Aetna merely had to show that Perez could perform jobs that others do with similar education, training and experience, The difference here, based on the policy, was that he must be determined to be **able** to find a job, not that he actually find one. Several cases from New York follow this trend. The administrator must demonstrate there is employment for which the claimant is qualified, and will generate comparable earnings. See *Lavoie v. Betz Laboratories Inc. LTD Benefits Plan [and MetLife]* 2002 DNH130; 2002 U.S.Dist. LEXIS 13083 (D.N.H. 2002) MetLife denied benefits to Mr. Lavoie, claiming he had the capacity to work as a financial planner and earn the equivalent of 60% of his salary. However, the Court reversed the denial, finding that MetLife failed to support its bald claim with any evidence in the record In *Peterson v. Continental Casualty Co.* 116 F.Supp. 2d 532 (S.D.N.Y. 2000) (vacated on other grounds) the court determined that the "reasonably fitted by training, education or experience" language contained in the Plan requires the claim administrator to demonstrate the existence of a job which the claimant is capable of, qualified to perform, and which is comparable in terms of remuneration. See *Mossa v. Provident Life and Casualty Ins. Co.* 36 F. Supp.2d 524, 531 (E.D.N.Y. 1999)

See also Chauvin *v. Unum Life Insurance Company of America* 2002 WL 461 523 (E.D. LA 2002) Mr. Chauvin was a truck driver who required cervical fusions due to an injury. UNUM denied continued benefits and Chauvin complained that UNUM did not specifically identify jobs available to him or confirm that the salary levels identified by the vocational consultant were actually available within a reasonable distance from his home. The court acknowledged that the plan does not require UNUM to demonstrate that plaintiff can find a job, but only that the plaintiff is able to perform any gainful occupation.

12. **EACH AND EVERY LANGUAGE: HOW FAR WILL THE COURT GO?**

Gallagher v. Reliance Standard Life Insurance Company, 305 F.3d 264 (4th Cir. 2002) Here, the definition of total disability was "each and every material duty. Obviously, the court took these words for their literal meaning, and decided that Gallagher had to be unable to perform **each and every single material duty** of his occupation in order to be considered disabled. This test, when applied to a complex occupation, will result in denials, as long as the individual can perform even one material duty of his occupation, even if he is unable to perform all of the physical components of his job. This new reasoning is contrary to law established long ago.

"Provisions in a disability policy requiring that the insured be unable to perform every duty pertaining to his or her occupation must be given a liberal construction. For example, clauses which relate to the occupation to be considered in determining whether the insured is entitled to benefits will not be liberally construed or applied where, to do so, would make recovery of benefits unreasonably impossible in all or practically all cases. Thus, the duties of an insureds' occupation must be viewed as a whole and not separately or piecemeal. L.Russ and T. Segalla, *Couch on Insurance 3d* SS 147:106 at 147-8.

A case following closely on the heels of *Gallagher* is *Carrigan v. Reliance Standard* 2003 WL 132981 (4th Cir. 2003). Mr. Carrigan was a corporate officer and publisher for Goodwill Publishing Inc. for over 30 years. Carrigan became unable to work due to serious orthopedic problems, necessitating surgery. The definition of total disability required Carrigan to be unable to perform "each and every material duty of his regular occupation". The court concluded that in order for a claimant to be eligible for benefits, he must submit objectively satisfactory proof that he was unable to perform all the material duties of his occupation. They remanded the case to the District Court in order to apply this law to the facts in accordance with its ruling in Gallagher.

This decision is contrary to the law of other circuits. In *Saffle*, supra, the court rejected an interpretation that would deny disability based on language requiring proof of inability to perform each and every material duty, reasoning that reading "each and every" literally could mean that a claimant is not totally disabled if she can perform any single duty of her job, no matter how trivial. There is little question that the phrase should not be given the former construction, as "total disability" would only exist if the person were essentially non-conscious".

See also Hammond v. Fidelity and Guaranty Life Insurance Company 965 F 2d 428 (7th Cir. 1992);*Kinstler v. Reliance First Standard* 181 F. 3d 243 (2nd Cir. 1999) and *Lain v. UNUM Life Insur. Co. of America*, 279 F. 3d 337 (5th Cir. 2002) In *Lain*, the Fifth Circuit rejected Unum's argument that Lain's disability policy required her to prove her inability to perform "each" of the duties of her occupation of attorney. Instead, the Court held the inability to perform any of the material duties entitled the insured to benefits. Id. At 346. See also *Torix by Ball Corp*. 862 F.2d 1428 (10th Cir. 1988)

Is a business owner who is only able to perform 35% of his former duties entitled to total disability benefits? In *McFarland v. General American Life Insurance Company* 2000 U.S. Dist. Lexis 1473 (7th Cir. 2000), the insured was the owner and a sheet metal worker of a heating and air conditioning corporation whose injuries rendered him unable to supervise field jobs, unload and load trucks for deliveries or make service calls. The court evaluated whether these were the material and substantial duties of his occupation because these physical tasks were admittedly necessary to his occupation as a sheet metal worker. The court considered whether McFarland's injuries caused a quantitative or qualitative reduction in capacity such that he could no longer operate as president of his company. A qualitative reduction is one that "would occur when a person was no longer

able to perform one core and essential aspect of his job". *McFarland v. General American Life Ins. Co.*, 2000 U.S. Dist. Lexis 1473, at 5 (7th Cir. 2000). A quantitative reduction is one "that would occur when the injury or sickness renders the person unable to perform enough tasks or to perform for a long enough period to continue working at his regular occupation". Id. The court evaluated McFarland's pre and post injury duties and concluded that the only duties he cannot perform are the manual labor aspects of the job. His title and salary have not been reduced since the onset of his injuries. Since the injuries did not cause a quantitative or qualitative reduction in his capacity, such that he could no longer operate as president of his company, he was not totally disabled.

Johnson v. Trustmark 771 So. 2d 307 (2nd Cir. 2000) Dr. Johnson was found to be totally disabled because he was no longer able to perform surgery, although he took an administrative post at the hospital and a teaching role as professor of surgery. This case was interesting because the court intentionally disregarded the extra clause in the contract that total disability from his own occupation meant not only that he was unable to perform the duties of his occupation but that he was also not working in any other occupation. The court was guided by a statutory definition of total disability found in the La a statute applicable to disability polices issued after 1990.

Shapiro v. Berkshire Life Insurance Co. 212 F. 3d 121 (2nd Cir 2000) Shapiro's occupation was that of a dentist and his administrative duties were incidental to his material and substantial duties as a full time dentist. His inability to perform chair dentistry rendered him totally disabled under the terms of the contract. Berkshire had claimed that Shapiro's occupation was as an administrator and manager of his various dental practices as well as a practitioner of chair dentistry, because the disability did not prevent him from doing his administrative or managerial work, and therefore he did not satisfy the policy's definition of total disability (material and substantial duties).

In closing, issues regarding the thoroughness of vocational evaluations continue to be a source of contention amongst claimant advocates and disability insurers for years to come. These cases provide some insight as to current trends. As these dozen "litigated issues" percolate to the top and receive the courts' attention and analysis, other hot topics regarding disability vocational assessments are certain to arise and challenge those of us dedicated to this specialty.