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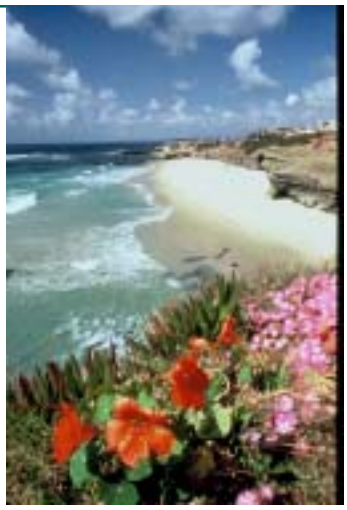
ABVE SPRING CONFERENCE 2003

MARCH 20-23–SAN DIEGO

Theme: Cultivating & Perfecting The Expert Witness



By now you have all received your registration form for the upcoming Spring Conference. The following are highlights of the conference, which once again will prove to be of great value to the Vocational Expert.

There will be two great pre-conference Value-Added Sessions. G. Michael Graham will present on *How to Excel During Cross-Examination.* Larry Sinsabaugh will present on *Family Law/Divorce Cases- Emerging Paradigm For Forensic Experts.*

Kerry Steigerwalt, Attorney at Law, will present the Key Note Address. Attorney Steigerwalt will discuss *"Defining An Effective Expert Witness."* This speaker was involved with the recent Westerfield child-murder case and will use illustrations from working with experts for that case development & trial presentation in defining what should be considered the qualities of an effective expert witness, examples of some uses & abuses of experts perpetrated by the attorney as well as by the expert. Roger A. Thrush, Ph.D. will present on the *Job Analysis Methods For Forensic Testimony.* Dr. Thrush is well published in the area of Job Analyses.

The husband and wife team of Susan and Leonard Silberman are both experienced attorneys who represent the opposite sides of cases. Susan represents plaintiff/applicants, while her husband, Leonard, works the defense side of the bar. Leonard Silberman, a California attorney, has published several textbooks and many journal articles regarding the Worker's Compensation system and it's governing laws. Susan started her career as a rehabilitation specialist before attending law school and becoming a practicing attorney. Their presentation will no doubt be quite interesting as we hear the dialogue from two different perspectives, on how our vocational expert opinions are utilized.

Alex Ambroz, MD, MPH will present on *Medical Disability Evaluations- Help or Hindrance For the Testifying Expert?* Of course ABVE will offer an ethics portion of the conference presented by Hank Lageman, MS and Catherine Martin Miller, Ph.D. Their topic will be a discussion on *Ethics and the Expert.*

Susan Stevenson will expand on *Practice Management Techniques in Family Law Testimony.* Eloy Castillo will conclude our conference with offering *Practice Management Techniques and Business Opportunities with the Veterans Administration.*

Don't Delay–Register On Line Today, at *www.abve.net.*
The Hotel Cut off Date is March 1, 2003.

Who are Our Clients?

By Scott E. Streater, DVS

Most of us come from a common educational background. Our science is psychology. The mark of a true professional is to be in control of their science. Whether we were initially based in rehabilitation counseling, psychology, or educational psychology our common thread is our training. We graduate to a new plane rising out of these separate disciplines, in a manner of speaking, when we take on the role of forensic practitioners. It is not that we actually leave our training behind; we simply change our roles and assume different responsibilities. These responsibilities call for a change in our behavior. They are responsibilities that are frequently not defined by our own rules of behavior but rather the rule of law. A great deal changes in doing so; our role, the use of our knowledge, and the use of the empirical information that frames our findings, opinions and conclusions are more formal.

I watch and hear conversations and discussions from practitioners who attend our national conferences, and believe that we are often confused and conflicted about these role changes. We all have our own ideas about this area. The problem arises when this role is prescribed by another discipline because we are functioning in another arena, the Law.

For the purpose of this article, I will refer to our role as evaluators, although we could just as easily be called therapists, teachers, practitioners, or voc rehabbers. Formerly, our primary task was to teach whether it is in an individual, one-to-one role, or a group setting. Our clients or patients (I never have really liked the label because of its inactive connotation) were easily identified or defined. We dispensed our wears, in our

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President's Message

By Dick Baine, ABVE President, 2002–2003

We have recently enjoyed a successful conference in Williamsburg, VA and now look forward to our Spring 2003 event in San Diego. I know that I, like many others from the colder regions of our country, always look forward to the Spring Conference as a chance to "thaw out" and to acquire the updates about what is occurring in the courts and with vocational assessment. The current legal climate, though it may be slightly different in various jurisdictions in our country is one of which we must always be vigilant.

The journal is up and running once again thanks to Bruce Growick. The Newsletter under the guidance of Cynthia Grimley continues to be prepared to provide members with information that is of interest and importance to the practicing vocational expert. However, both publications rely on the input of the membership. Therefore, I encourage everyone to contribute to these publications by contacting both Cynthia and Bruce if you have a topic of interest, which you may wish to present to the membership. The Board of Directors continues to work at their assigned tasks in areas such as ethics, test maintenance, publications and information, membership and the development of a regionalized mentor program. The membership will be appraised of developments and board recommendations for each of these areas as they occur.

Finally, I wish to take this time to extend my best wishes and that of the Board of Directors and the management firm of BTF Enterprises and extend a bountiful New Year of 2003.

Letter From the Editor

By Cynthia Grimley, MS, Newsletter, Editor

Dear Members:

Many of you are now viewing the third edition of our newsletter in a PDF format, which you received via email. You will need Adobe Acrobat reader to view the PDF format. The feedback of this format continues to be favorable. If you have any problems receiving your email please let BTF know immediately. Those members who do not have email will still continue to receive their newsletter by mail. It is very important that you keep BTF updated of any email address changes.

I continue to look for members to assist me on a committee for the newsletter. I would like to see members contribute items such as book reviews, or any other areas that may be of interest to our forensic community. If a committee could be formed to assist with the contribution of such items then these can be distributed via email on a monthly basis, in between the regular newsletter publications.

Please contact me if you are interested in serving on the newsletter committee. I can be reached at 803-765-1513 or CPGRIMLEY@AOL.COM.

New Members, Can You Make a Difference?

By Bart Hultine, Ed.D., Treasurer and Membership Services Chair

Membership in ABVE has been steadily declining since 1989. Why? There are probably a lot of reasons, but here are some of the most common reported. I'm not going to subject myself to your test. I'm not going to subject my reports to your peer review. I think you are an elitist group. I think you are self serving. I think it costs too much.

How valid are these comments? Well ABVE began in the early 1980s primarily by grand fathering several hundred Social Security Experts into a newly formed credentialing organization. In 1985, this organization was reorganized as a nonprofit, and the validity of the credential became less suspect. Indeed, with true peer review, ABVE enjoys a truly unique place among the many vocational and rehabilitation organizations.

In 1989, our screening test underwent a much needed validity and reliability study, and the Board allowed another grandfather period regarding the test results. No one would fail the certification process because of poor examination scores. Membership numbers once again grew as a result of this second grace period.

Now we find ourselves twelve years from the last grandfather period and our membership numbers are approximately half of what they were in 1989. We seem to lack a commitment to grow the organization. We continue to lose more members each year than we pick up. Indeed, our membership continues to be divided with regard to the need for new blood. We discuss the need and means to promote membership two weeks before the conference, and then forget about it until next year.

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New Members
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I was your treasurer and membership chair in 1998 and 1999. We lost members in those years also, but something happened that affirmed my belief in a basic recruiting technique. A few very hard working and committed individuals, among them Mary Desmond, Bonnie Gladden, Stephanie Sleister, John Burg, Hank Lageman and others, helped host regional membership drives in their states. Contacts were made by these members with professionals in their area, yes in some cases their competition, and encouraged them to join ABVE. To the best of my calculations, this resulted in 6 new members.

At first glance this doesn't seem like much, but nothing could be further from the truth. The ratio of concerned, involved ABVE members to new recruits is one to one. It seems too simple to proclaim that if each member got just one new member, we would double our membership. We all know that is not going to happen, but what we don't know is why. What's your excuse?

Too busy? Too busy to call one professional colleague and encourage him to join an organization that has served you so well these past years?

Too threatened? Will more ABVE Certified professionals in your area decrease your workload? I do not think so. Everyone I have talked to has told me how busy he or she is. Without ABVE would you be as special as you are? If there were a few more ABVE Certified VE's in your area, wouldn't that question the validity of those who were not so certified?

Well, what ever your individual excuse, please put it aside for a short time. Pick up the phone and call a colleague in your area, or if you do not want to do that, call me, and I will call them for you. The efforts of a few members a couple of years ago resulted in doubling their numbers. Your efforts now could do the same and would really be appreciated.

ABVE is faced with decreasing revenue and the only way to curb that without new members is to increase membership dues or decrease service. I know you believe in ABVE or you would not continue to support it as you have. The time to act is now. You may refer prospective members to the web site, have them call ABVE, or you may call me and I will contact them on your behalf, but please, take the lead from your colleagues and do something.

The American Board of Vocational Experts, never has, and currently does not, endorse the use of any specific tests, test batteries, or commercial products.

ABVE Journal Resumes Publishing

By Bruce Growick, Ph.D. and Craig Johnston, MRC

The ***Journal of Forensic Vocational Analysis***, the official journal of the American Board of Vocational Experts, resumed publication under the direction of its new editors, Dr. Bruce Growick, faculty member, and Craig Johnston, doctoral student, both from The Ohio State University. Although the publication was released this past summer, it was dated December of 2001, Volume 4, Number 1, so that it would be consistent with the numbering from previous years. In this way, there would be no break in publication years.

This latest volume, including 61 pages of copy, contained many practical articles of interest to our membership. As stated in the introductory remarks by the new editors, the continued purpose of ABVE's journal is to 'unify the broad array of participants involved in the varied applications of forensic vocational assessment and related rehabilitative issues'. The Journal will also continue to provide a forum, by which the field can publicly interact and constructively respond to the changing judicial climate, especially considering the recent new criteria for the admissibility of expert testimony. Recognizing this theme, it is crucial for members of our profession to respond to articles that they view as controversial in our field.

In particular, the last issue of JFVA contained an article by Tierney and Missun entitled "Defining Earning Capacity: A Process Paradigm" which some of our readers considered inappropriate for our journal. In letters to the editor, they characterized their concerns based on the lack of validity for the proposed model of measuring wage loss by Tierney and Missun, and the potential harm to our field by publishing this material. These concerns need to be adequately articulated in a formal submission to the Journal so that all of our readers understand the basis for the allegations. Without responses and rebuttals, the literature in our field will not grow and some assertions may continue to be unchallenged. The editors of JFVA do not feel that it is our place to monitor theories or procedures, but rather to publish submitted manuscripts based upon their scholarly contribution to our field as recommended by the review board.

Roger Weed was the Guest Editor for the most recent publication of the JFVA. This was a Special Issue on the purpose and use of transferable skill analysis (TSA) in vocational forensics. Individuals supporting various TSA programs were asked to articulate and support a rationale for the use of their software programs in expert testimony. The focus of each article is to be on the procedure and processes that the software uses, and not necessarily the product itself. A plaintiff and defense attorney were asked to review the manuscripts, and offer suggestions and comments on how each procedure may fair under Daubert standards.

Lastly, for those of you who were not able to attend our last conference in Williamsburg, VA, Craig Johnston, Stephanie Sleister and I presented on their tips and suggestions for publishing in professional journals. In the meantime, if you have any ideas about publishing, and/or want some assistance with the publication process, please feel free to contact either Craig [johnstonvoc@aol.com], or Stephanie [sleister@nts.net] directly. They are willing and committed to helping you develop your ideas for publication, and sharing your thoughts and aspirations with the field.

Journal Guidelines Available

Those interested in submitting manuscripts for *The Journal of Forensic Vocational Assessment* can request specific guidelines from:

Bruce Growick
Phone: 614-292-8463.
mailto:growick.1@osu.edu

Who are our Clients?
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own fashion subscribing to a loosely defined professional code that guided our behavior both in our style of practice and our behavior ethically.

After a significant length of practice, with some advanced education and hopefully some specialized training or mentoring, for some reason or another, we wind up in the expert chair offering an opinion about one thing or another. That is the moment our role truly takes on a different dimension. Hopefully, we are aware of this role shift and accommodate its mandates. If one is unaware of the roles and responsibilities of an expert one can find them in deep legal trouble, brought on by the very person who hired you.

As a practicing vocational expert, you have offered your professional services to another profession. The person who hired you is in hopes of demonstrating something to a court in an effort to demonstrate or ameliorate some damages that the client has apparently suffered or in the case of being hired by a judge, illuminating or clarifying an issue for the court. This role and the manner in which you will carry out this task, is far different than the role we undertake in dealing with our own clients. What are some of these differences?

The first difference is the definition of who our client truly is. We are familiar with the role that defines the client as the person who has sought out our services. That is typically the individual who is sitting in the chair across the table or desk. In a forensic role the client of the attorney has been referred to you for a specific service. You have become the *agent* of that referral source and subject to the limits of the referral sources directives of what you are to do. Because you have become the agent of the referral source, you are acting on their direction.

Law, as well as the consequences for not following that directive defines this role. Typically, if you have been asked to evaluate for a loss of earning capacity, then that is what you must do. Law also defines this request and deviation from that specific service request can also hold some adverse consequences. This means that your role as an expert is tightly defined, and structured in a manner that can be punitive, if you deviate from that role without contacting the referral source and securing their permission. In this set of circumstances you are not a treatment source. You are an evaluator, pure and simple.

This situation becomes particularly dicey in the case of a physician who discovers a disease process in his evaluation of a referral. Many states have accommodated this situation in law. Some states have not and a discussion of such a situation must occur before the information is supplied to the referee. You may find yourself in a similar situation and a call to the attorney of record is a mandate for your own protection.

The reasons for this are simple. We are not lawyers and are not expert on the law. We may not be familiar with the manner and style of practice with which this lawyer may wish to approach the court in this case. If you deviate from your prescribed role and open "a can of worms" for this lawyer by this deviation, you may have committed a tort, a damaging act, for which you can be sued for the potential value of the case, damages, and on top of it all, potentially destroy your professional reputation. One of the reasons we all carry malpractice insurance, right?

This is not to say one can never provide ancillary services. But, to do so the additional service must be prescribed either by a referral agreement or a standing order from the attorney who referred. It is something I used to cover in my referral agreement. It is important to secure such an agreement on all referrals.

Now, if you remember my previous articles, you will know that this article is not based on facts specifically covering your legal venue. It is a generalization that is true of some states, but perhaps not true for all states. My purpose in writing this article is to encourage you to learn what your role is in your legal environment(s), and behave accordingly. I clearly remember a conference held in Fond du Lac, Wisconsin in the nineteen eighties. It was a seminar put on by the Wisconsin Bar for experts. It was attended by all manners of individuals, doctors, lawyers, and Indian chiefs. Conferees attended from three states, Wisconsin, Minnesota and Illinois. The section on the law started by asking a series of 10 questions, which you were obliged to record on an answer on a sheet provided. The questions were directed to the role of the expert and the legal aspects of functioning as an expert. In a room of nearly 200 experienced professionals from multiple professions, fewer than 20% of the responses were correctly answered.

After the test and the presentation there were intense discussions that grew into arguments hat became extremely heated. One of the most intense commentaries was the question of who the client is and what was the responsibility of the practitioner to the individual referred. Truly, there was no reason to argue, as the evaluator's role was clearly spelled out in the law.

Please, take the time and check the law and accommodate your findings into your practice. While the mark of a true professional is to be in control of his science, a second and very important mark is to know what you are doing in a specific circumstance. Do you know what you are doing? If not, find out and modify your behavior to the professional level expected.

Welcome to the Following New Members

New and/or Reactivated Diplomates

Timothy Bruffey
Blake Smith Clark
Dennis Contreras
Rachel Hawk
Arthur Kaufman
Edmond Provder
Allen Grayson Simmons

Upgrades from Fellow to Diplomate

Gregory LeRoy

Associate Members

Gwendolyn Holland
Michael Kibler
Robyn Maitoza
Bonnie Martindale
Nancy Shor

Information For the Work Place

Vocational Expert Testimony and the Social Security Administration– Daubert Standards

When conducting research as to how Vocational Experts function as experts with the Social Security Administration as related to Daubert Standards I found two cases where Daubert and FRE 702 were mentioned. The first of these cases where Daubert has been cited in the context of questioned VE testimony as related to Social Security is Fitzgerald v. Apfel- decided 2/14/00. The court was asked to review the final decision of the Commissioner of Social Security ("Commissioner") denying her claim for disability insurance benefits and supplemental security income.

The attorney raised the Daubert issue on appeal to the **Federal District** court and got it shot down because it was not raised at the **administrative tribunal** level (and who knows what transpired at the **hearing level**).

The disposition of the Daubert issue was that even if petitioner's argument regarding Daubert had merit at one time; it had been waived because it was not raised before the administrative tribunal- perhaps, if not for this technicality, it would have. So, the judge did not close the door to Daubert as a viable basis for objection.

Then Donahue v. Barnhart – decided January 25, 2002 in the United States Court of Appeals For the Seventh Circuit alludes as support for its decision and references the Supreme Court case Richardson v. Perales, 402 U.S. 389 (1971). The "big one" is the Supreme Court case (Richardson) that seems to distinguish the character of an SSA administrative hearing from other legal proceedings and lays the groundwork for why FRE 702 does not apply. However, the opinion in Donahue v. Barnhart states that the Vocational Expert could have been cross-examined (since Donahue was represented by counsel) and asked of the Vocational Expert about the genesis of the numbers or the reason for the discrepancy in the Dictionary of Occupational Titles. It was stated that an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand. FRE 704 (a). The question was asked, what happens when the discrepancy is unexplored?

My research found that there are now two cases that have made it up into the Federal Court system involving Vocational Experts and questioned testimony within the Social Security Administration; the last case went all the way to the Seventh Circuit.

Fitzgerald vs. Apfel was the first case, which has any semblance of precedential value- and very little at that because the argument was thrown out on a technicality. The judge did, however, allude to the fact that the Daubert argument may have had merit, if it were not for the technicality. Whether or not this has portent is yet to be seen. Then as in Donahue vs. Barnhart, the opinion clearly stated that counsel could have questioned the reliability of the vocational expert's testimony.

I do not interpret that either of these cases state a ruling that Daubert can't be used at a Social Security hearings. In my opinion, I don't think that there is anything to stop an attorney from raising this issue (in any court) in order to be prepared to appeal to a higher court. In fact, many states have taken on Daubert overtones as their standards.

This may be why VE's across the country who are doing work at Social Security are having their testimony questioned at the hearing level. They are being forced to validate their testimony. The attorneys are aware that now this issue must have been raised at a lower level of the court, i.e.., the hearing level or administrative tribunal level before Daubert can be brought forth as an issue in Federal Court. In my opinion, it is only a matter of time. It would be very instructive to review Richardson v. Perales, 402 U.S. 389 (1971) since this was a case that was pre-Daubert but referenced as related to Daubert issues in Social Security proceedings.

I am printing the opinions of both Fitzgerald v. Apfel and Donahue v. Barnhart for your own review and interpretation. I would welcome continued discussion of these cases on our list serve. Please note that the hyperlinks are included for reference only, and will not link you directly to the case citation.

Submitted by:
Cynthia P. Grimley, MS

KATHLEEN **FITZGERALD** v. KENNETH S. APFEL, Commissioner of Social Security

CIVIL ACTION NO. 99-3914

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2000 U.S. Dist. LEXIS 20858

February 14, 2000, Decided
February 14, 2000, Filed

SUBSEQUENT HISTORY: [*1] Adopting Order of August 17, 2000, Reported at: 2000 U.S. Dist. LEXIS 20942.

DISPOSITION: Plaintiff's and Defendant's Motions for Summary Judgment DENIED, and case remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff claimant sought judicial review of the final decision of defendant Commissioner of Social Security that denied her claim for disability insurance benefits and supplemental security income. Both parties cross-moved for summary judgment.

OVERVIEW: The claimant alleged she was disabled due to vascular disease, high blood pressure, and bad nerves. After a series of administrative hearings, appeals, and remands, the Commissioner of Social Security finally reached a final decision denying claimant disability insurance benefits and supplemental security income. Both parties cross-moved for summary judgment. The court denied the motions for summary judgment and remanded the case for further review of the medical records, for the taking of additional evidence from a mental-health specialist, and for the taking of additional testimony from a vocational expert. The claimant asserted seven reasons that the Commissioner's decision should be vacated. The court determined that the administrative law judge had made a number of errors, which warranted remand. The ALJ failed to mention claimant's treating physician's more recent report, which included the opinion that the claimant was disabled. The ALJ's finding's regarding the claimant's psychiatric condition were not supported by substantial evidence. The ALJ could not accurately assess the job base remaining to the claimant because he was relying on erroneous vocational information.

OUTCOME: A magistrate judge recommended that both plaintiff 's and defendant's motions for summary judgment be denied, and this case remanded.

COUNSEL: For KATHLEEN FITZGERALD, PLAINTIFF: ROBERT SAVOY, THREE NESHAMINY INTERPLEX, TREVOSE, PA USA.

For KENNETH S. APFEL, DEFENDANT: DAVID M. FRAZIER, SOCIAL SECURITY ADMINISTRATION, OFFICE OF THE GENERAL COUNSEL, WILLIAM B. REESER, SOCIAL SECURITY ADMINISTRATION, OFFICE OF GENERAL COUNSEL, PHILADELPHIA, PA USA.

JUDGES: JACOB P. HART, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: JACOB P. HART

OPINION: REPORT AND RECOMMENDATION

Kathleen Fitzgerald ("Fitzgerald") brought this action pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) to review the final decision of the Commissioner of Social Security ("Commissioner") denying her claim for disability insurance benefits and supplemental security income. The parties have filed cross-motions for summary judgment. For the reasons that follow, I recommend that both motions be denied and the matter remanded for a fresh review of the medical records, the taking of further testimony from a vocational expert, and to obtain further evidence from a mental health expert.

I. Factual and Procedural Background

Fitzgerald was born on January 2, 1949. Record at 31. She completed some high school, but did not graduate. Record at 119. Fitzgerald worked for many years as a waitress. Record at 119 and 49. She also worked in a factory for two years. Record at 119. Fitzgerald stopped working in 1992, having left the job voluntarily after a disagreement with her manager. **[*2]** Record at 52-3.

Fitzgerald filed an application for disability benefits on October 19, 1993, with a protective filing date of August 31, 1993. Record at 115. She also filed an application for Supplementary Security Income on August 31, 1993. Record at 264. Fitzgerald alleged disability as a result of vascular disease, high blood pressure, and "bad nerves." Id. Her application was denied initially and upon reconsideration. Record at 98 and 105.

In April, 1994, between the date of the initial denial and reconsideration, Fitzgerald was hospitalized for an infarct (a condition something like a stroke; see Dorland's Illustrated Medical Dictionary, 28th ed. 1994). In March, 1995, Fitzgerald was once again hospitalized, and diagnosed as having suffered a second stroke. Record at 218.

On July 18, 1995, Fitzgerald's case was considered *de novo* by an Administrative Law Judge ("ALJ"). A medical expert and a vocational expert were present at the hearing. The ALJ also had before him statements by Dr. Eugene Siegel, Fitzgerald's long-time treating physician, and Dr. Navjeet Singh, a neurologist. Record at 167 and 214. In a telerecorded message dated November 1, 1993, Dr. Siegel opined **[*3]** that Fitzgerald's "impairment for standing and walking would be definitely impaired to about less than two hours", but that she had no limitation as to sitting. Record at 167-68. Dr. Singh filled out a Medical Source Statement form, in which she found that Fitzgerald had no limitation as to sitting, could lift twenty pounds occasionally, but could walk "less than 2 hours" in an eight-hour workday. Record at 216.

The ALJ asked the vocational expert whether Fitzgerald could work—specifically, as a security monitor—if she could walk 50 feet, stand for fifteen minutes, sit for thirty minutes, lift ten pounds, but had to keep her feet elevated on a level halfway to her heart while she sat. Record at 42. The vocational expert answered that there was no work, which would permit Fitzgerald to sit with her feet raised so high. Id. The medical expert then opined that there was no medical reason Fitzgerald had to elevate her feet, and that this was usually contraindicated for vascular disease. Record at 44. The ALJ posed no other hypotheticals to the vocational expert.

At the close of the hearing, the ALJ asked that Fitzgerald be sent for psychiatric testing to explore the nature of her **[*4]** claimed "nerve problems." Record at 66. The record was accordingly supplemented by the September 19, 1995 report of Sherri Landes, Ph.D., a clinical psychologist. Record at 250.

Dr. Landes found Fitzgerald to be "significantly depressed." Record at 252. On the Medical Assessment of Ability to Do Work-Related Activities (Mental) form which she filled out, Dr. Landes put none of Fitzgerald's abilities in the "unlimited/very good" or "good" range and placed in the "poor to none" range her ability to relate to co-workers; deal with work stresses; interact with supervisors; and demonstrate reliability. Fitzgerald also demonstrated severe deficits in memory, attention to detail, sequential reasoning and visual motor coordination, which Dr. Landes believed arose from the stroke. Record at 253.

In a decision dated March 18, 1996, the ALJ denied Fitzgerald's claim. Record at 260. In his decision, the ALJ rejected Dr. Landes's report "to the extent that [it] would preclude the claimant's performing essential work related activities." Record at 270. He cited two medical consultants for the SSA who reviewed the available medical evidence in 1993 and 1994 and found that Fitzgerald's mental **[*5]** condition was secondary to her physical pain and to the stress of being unemployed, and concluded that it was not severe enough to affect her ability to work.

The ALJ wrote that Dr. Landes's report "combines the physical limitations with [the diagnoses of an anxiety-related disorder] and then jumps to work related limitations which are seemingly almost totally conclusory." Record at 266. He also wrote that "at the hearing .. the claimant's manner and testimony seemed to show her to be less unstable than did the report of the psychologist." Id.

As to the vocational evidence, the ALJ wrote that "According the vocational expert's testimony at the hearing, security monitor is one example of a job that exists in substantial numbers in the national economy that the claimant can perform." Record at 271.

The ALJ's specific findings included the following:

> 3. The medical evidence establishes that the claimant has severe cardiovascular and mental impairments ... .
>
> 4. The claimant's testimony regarding the nature and severity of her symptoms, including pain, is less than fully credible.
>
> 5. The claimant has exertional limitations that would prevent her from working at **[*6]** jobs that require more than sedentary exertion (20 C.F.R. § 404.1545 and § 416.945).
>
> 6. The claimant's residual functional capacity for the full range of sedentary work is reduced by an ability to do only low-stress, unskilled jobs and by an ability to have only limited contact with co-workers and the general public.
>
> 12. Although the claimant's non-exertional limitations do not allow her to perform the full range of sedentary work there are a significant number of jobs in the national economy, which she could perform. One example of such jobs is security monitor.

Record at 272-3. Thus, he found that Fitzgerald was not disabled.

By order dated June 27, 1997, however, the Social Security Appeals Council remanded Fitzgerald's case to the Administrative Law Judge. Record at 21. In its remand order, the Appeals Council criticized the ALJ's failure to pose a hypothetical question to the vocational expert reflecting the limitations the ALJ ultimately found. Record at 22. It therefore directed the ALJ to obtain supplemental evidence from a vocational expert. Id. The Appeals Council also noted the absence of any notes in the record subsequent **[*7]** to Fitzgerald's second stroke. Accordingly, it told the ALJ to "obtain updated records concerning the claimant's residual limitations from the infarct in order to complete the administrative record." Id.

The ALJ held a second hearing on this case on November 14, 1997, at which he had before him the relevant records from Dr. Siegel. Record at 282. He also had new residual functional capacity assessments by Dr. Singh and Dr. Siegel, as well as records from Dr. Erwin A. Cohen, and Dr. Samuel Wilson, to whom Dr. Siegel referred Fitzgerald, apparently for her vascular disease. Record at 282-319, 322-29.

At the second hearing, the ALJ posed the following hypothetical to the vocational expert:

> The hypo is the person is limited to sedentary work and the additional nonexertional requirements are that the work be low stress and that there be minimal contact with co-workers but does not require much contact with co-workers and the general public. Can you identify any jobs that are consistent with that work and in doing so would you tell us the numbers of such jobs that exist in this regional economy and the numbers of such job, specific numbers that exist in the national economy? **[*8]**

Record at 75. The vocational expert suggested a number of jobs, as set forth on page 7 of this opinion, *infra*. Record at 75-78. He testified that each of these jobs existed in the regional economy in significant numbers. Id.

Then, after a review of Fitzgerald's's physical limitations as found by Dr. Singh, the ALJ asked: "Are those additional restrictions consisting (*sic* "consistent") with performance of the jobs you have identified to this court?" The vocational expert replied: "Not the way he stated. In my review of the document that's still consistent with sedentary work and also consistent with the jobs I've mentioned." Record at 79. The vocational expert and the ALJ then engaged in a detailed discussion of the stress level attending these jobs. Record at 80-1.

The discussion of job-related stress led to a consideration of Fitzgerald's mental condition. The ALJ determined that Fitzgerald was not undergoing any treatment for a mental health condition. Record at 81. He once again criticized Dr. Landes's report:

> I found in my decision that Shirley Landes's report is not really based on anything that's in this record. It's pretty much created from whole **[*9]** cloth. I mean I really don't know where she just, it's based pretty much on what the ... claimant—anybody can go to Shirley Landes apparently and tell her I can't deal with the public, I can't deal with stress, I can't deal with concentration and be disabled.

Record at 84.

The ALJ proposed that the hearing reconvene with a mental health expert who could evaluate Dr. Landes's report. Id. Fitzgerald's attorney asked that, instead, the ALJ order a second psychiatric comprehensive examination. Record at 87.

In the end, the ALJ ordered neither a new hearing in the presence of a mental health expert nor a new psychiatric comprehensive examination. Instead, on February 2, 1998, he issued a ruling in which he once again denied Fitzgerald's claim for benefits. Record at 11. The ALJ adopted his own earlier decision, except to the extent to which it was modified or supplemented. He found:

> 1. The claimant has the following impairments that, in combination, have more than a minimal impact on her ability to perform work-related activities; hypertension, hyperlipidemia, peripheral vascular disease, and anxiety disorder.
>
> 2. The claimant retains the ability to lift up to **[*10]** ten pounds; stand/walk for two hours, using a hand-held assistive device; sit for eight hours; and occasionally perform postural activities, except for climbing and balancing. This functional

capacity is consistent with the requirements of sedentary work. The claimant is further limited to low stress, unskilled work, which does not involve contact with the public and only involves incidental contact with co-workers.

. . .

8. Although the claimant's additional nonexertional limitations do not allow her to perform the full range of sedentary work, using the grid as a framework there are a significant number of jobs in the national economy which she could perform. Examples of such jobs are: product inspector (i.e., touchup screener, candy, plastics, gaskets) of which there are 1,000 in the Philadelphia area and 80,000 to 100,000 in the nation; surveillance system monitor of which there are 200 to 300 in the Philadelphia area and 15,000 to 20,000 in the nation; and assembler (i.e. circuit boards, small products, hardware, jewelry) of which there are 3,000 in the Philadelphia area and over 200,000 in the nation.

Record at 16-17.

The Appeals Council this time denied Fitzgerald's **[*11]** request for review. Record at 6. The Commissioner adopted the Appeals Council's decision, making it the final decision of the Commissioner. Fitzgerald then appealed to this Court.

II. Legal Standards

The role of this court on judicial review is to determine whether the Commissioner's decision is supported by substantial evidence. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971); Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986); Newhouse v. Heckler, 753 F.2d 283, 285 (3d Cir. 1985). Therefore, the issue in this case is whether there is substantial evidence to support the Commissioner's conclusion that Fitzgerald is not disabled.

Substantial evidence is relevant evidence viewed objectively as adequate to support a decision. Richardson v. Perales, supra at 401; Kangas v. Bowen, 823 F.2d 775 (3d Cir. 1987); Dobrowolsky v. Califano, 606 F.2d 403 (3d Cir. 1979).

This court must also ensure that the ALJ followed applied the proper legal standards. Podedworny v. Harris, 745 F.2d 210, 221 n. 8 (3d Cir. 1984). **[*12]** To establish a disability under the Social Security Act, a claimant must demonstrate that there is some "medically determinable basis for an impairment that prevents him from engaging in any 'substantial gainful activity' for a statutory twelve-month period." 42 U.S.C. § 423(d)(1) (1982); Schaudeck v. Commissioner of Social Security Administration, 181 F.3d 429, 1999 WL 426321 at *2 (3d Cir. 1999).

As the Third Circuit has recently explained, the Commissioner evaluates each case according to a five-step process to determine whether the claimant is disabled:

> The sequence is essentially as follows: (1) if the claimant is currently engaged in substantial gainful employment, she will be found not disabled; (2) if the claimant does not suffer from a "severe impairment," she will be found not disabled; (3) if a severe impairment meets or equals a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1 and it has lasted or is expected to last continually for at least twelve months, then the claimant will be found disabled; (4) if the severe impairment does not meet prong (3), the Commissioner considers the claimant's residual **[*13]** functional capacity ("RFC") to determine whether she can perform work she has done in the past despite the severe impairment - if she can, she will be found not disabled; and (5) if the claimant cannot perform her past work, the Commissioner will consider the claimant's RFC, age, education, and past work experience to determine whether she can perform other work which exists in the national economy. *See id.* § 404.1520(b)-(f).

Schaudeck v. Commissioner, supra; 42 U.S.C. § 423(d)(2)(A).

III. The Motions for Summary Judgment

In her motion for summary judgment, Fitzgerald claims that the Commissioner's decision should be vacated for these reasons: (1) the ALJ wrongly failed to consider Dr. Siegel's opinion; (2) the ALJ wrongly rejected Dr. Landes's opinion; (3) the vocational evidence contradicts the Department of Labor's Dictionary of Occupational Titles; (4) the ALJ did not use the Medical-Vocational Guidelines as a framework for

adjudication as required by Social Security rules and regulations; (5) the findings relating to Fitzgerald's physical RFC are unsupported by substantial evidence; (6) there was an inadequate **[*14]** foundation for the vocational testimony; and (7) the vocational testimony upon which the ALJ relied is based on a faulty hypothetical.

The Commissioner responds in his motion for summary judgment that substantial evidence supported his findings, and that he committed no legal error. Accordingly, he argues, summary judgment should be granted in his favor. Each of Fitzgerald's arguments is discussed below.

IV. Discussion

A. Dr. Siegel's Opinion

In her motion for summary judgment, Fitzgerald argues that the ALJ erred by ignoring the fact that Dr. Siegel checked off on a 1997 Pennsylvania Department of Public Welfare form that Fitzgerald was "permanently disabled", i.e., "has a physical or mental condition which permanently precludes any gainful employment." Record at 282.

Disability is an issue reserved to the Commissioner, so a statement by a medical source that a claimant is "disabled" does not mean that the claimant is entitled to a determination of disability by the SSA. 20 C.F.R. §§ 404.1527(e), 416.927(e). "Nevertheless, [SSA] rules provide that adjudicators must always carefully consider medical source opinions about any issue, **[*15]** including opinions about issues that are reserved to the Commissioner. For treating sources, the rules also require that [an adjudicator] make every reasonable effort to recontact such sources for clarification when they provide opinions on issues reserved to the Commissioner and the bases for such opinions are not clear ...." SSR 96-5p.

An ALJ must mention and explain medical evidence adverse to his position. Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981); Stewart v. Secretary of HEW, 714 F.2d 287, 290 (3d Cir. 1993). The opinion of a treating source such as Dr. Siegel is entitled to substantial weight. Wallace v. Secretary, 722 F.2d 1150, 1155 (3d Cir. 1983); Cotter v. Harris, supra. It cannot be ignored without adequate explanation. Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1981).

In his first decision, the ALJ explained that he did not weigh Dr. Siegel's 1993 report heavily because it was made before Fitzgerald suffered her 1994 infarct. In his second decision, however, the ALJ did not mention Dr. Siegel's more recent report, which the Appeals Council had directed him to obtain, **[*16]** and which included Dr. Siegel's opinion that Fitzgerald was disabled. This was an error warranting remand of the case for a more thorough review of the medical record regarding Fitzgerald's physical complaints.

B. The ALJ's Treatment of the Psychiatric Evidence

The ALJ's conclusions regarding Fitzgerald's psychiatric condition are not supported by substantial evidence. In his first decision, the ALJ rejected Dr. Landes's findings "to the extent that they would preclude the claimant's performing essential work related activities." Record at 270. He explained in detail his reasons for doing so. However, the only contrary evidence consists of the Psychiatric Review Technique form prepared by one reviewing physician in 1993, and reviewed by another, in 1994. Record at 147.

The Psychiatric Review Technique form is inadequate to counter Dr. Landes's report. The reviewing doctors never examined Fitzgerald and had before them only the medical records, which, in 1993 and 1994, did not include anything prepared by a mental health professional. Even more importantly, the 1993 reviewer had before him no information relating to either of Fitzgerald's strokes. Of course, neither reviewer **[*17]** was aware of the 1995 stroke.

Thus, there is no evidence in the file which contradicts Dr. Landes's findings that Fitzgerald's strokes caused deficits in memory, attention to detail, sequential reasoning and visual motor coordination. There is also no evidence in the file from a mental health professional who saw Fitzgerald after Dr. Landes, or even reviewed Dr. Landes's report.

In the absence of contemporary medical evidence, which opposes Dr. Landes's report, it appears that the ALJ's partial rejection of it is impermissibly based on his own opinion. His observation that "At the hearing .. the claimant's manner and testimony seemed to show her to be less unstable than did [Dr. Landes's report]" was improper. Record at 266.

In Van Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir. 1983), the ALJ "disregarded all evidence of Van Horn's emotional disabilities because he concluded that Van Horn 'certainly did not present any emotional difficulty during the course of the ... hearing.'" The Third Circuit said:

> This court has repeatedly held that "an ALJ is not free to set his own expertise against that of physicians who present competent medical evidence." Fowler v. Califano, 596 F.2d 600, 603 (3d Cir. 1979). **[*18]** See also Rossi v. Califano, 602 F.2d 55 (3d Cir. 1979); Gober v. Matthews, 574 F.2d 772, 777 (3d Cir. 1978). Indeed, we have previously warned that, "[in cases of alleged psychological disability, such lay observation [by an administrative judge] is entitled to little or no weight." Kelly v. Railroad Retirement bd., 625 F.2d 486, 494 (3d Cir. 1980) (quoting Lewis v. Weinberger, 541 F.2d 417, 421 (4th Cir. 1976).

717 F.2d at 874.

Thus, even if the flaws the ALJ found in Dr. Landes's report were real, the ALJ erred in substituting his own opinion for hers. An ALJ is not free to independently review and interpret medical reports. Ferguson v. Schweiker, supra, at 765 F.2d 37. When an ALJ believes that a key medical report is conclusory or unclear, it is incumbent upon him to secure additional evidence from another physician. Id. The ALJ suggested at the second hearing that he would either obtain a mental health expert to evaluate Dr. Landes's report, or order a second psychiatric examination. Record at 84-87. This is what the ALJ should have done, and a remand **[*19]** for such action is appropriate.

C. The Dictionary of Occupational Titles and The Impact of SSR 97-6P

The ALJ's second decision relied upon the testimony of the vocational expert in the November 14, 1997 hearing, who found Fitzgerald qualified to do a number of jobs: touchup screener, inspector of candy, plastics or gaskets; surveillance system monitor; or assembler of circuit boards, small products, hardware, or jewelry.

Fitzgerald has accurately pointed out that most of the proposed jobs are classified by the Dictionary of Occupational Titles as in the light, rather than the sedentary exertional level. Another, that of jewelry assembler, is a sedentary job, but is classified as semi-skilled. Since the ALJ found Fitzgerald capable of performing only sedentary, unskilled work, those jobs, which are otherwise classified, were not appropriately considered as part of her job base.

It is not clear whether, or under what circumstances, an ALJ in the Third Circuit may rely upon the testimony of a vocational expert who departs from the DOT. Certain courts have found that, where a vocational expert's testimony conflicts with a DOT entry, an ALJ is not obligated to rely upon the DOT. **[*20]** Cline v. Chater, 82 F.3d 409 (4th Cir. 1996) (unpublished disposition), 1996 U.S. App. LEXIS 8692, 1996 WL 189021 at **4 (4th Cir. 1996); Conn v. Secretary of Health and Human Services, 51 F.3d 607, 610 (6th Cir. 1995).

Others, however, have taken the opposite approach—that where a vocational expert disagrees with a DOT listing, the DOT controls, at least where there is no evidence of record to support the expert's deviation. Light v. Social Security Administration, 119 F.3d 789 (9th Cir. 1997); Porch v. Chater, 115 F.3d 567, 571 (8th Cir. 1997); Williams v. Shalala, 302 U.S. App. D.C. 292, 997 F.2d 1494, 1500 (D.C. Cir. 1993); Campbell v. Bowen, 822 F.2d 1518, 1523 at ftn. 3 (10th Cir. 1987).

Our Court of Appeals has not yet addressed this issue. However, the District Court for the Eastern District of Pennsylvania has twice remanded cases where a vocational expert differed from the DOT, and the discrepancy was not discussed by the ALJ, on the ground that it was unclear whether the vocational expert simply disagreed with the DOT, or whether he testified in error. Rosser v. Chater, 1995 U.S. Dist. LEXIS 18120, 94-5620, 1995 WL 717449 **[*21]** (E.D. Pa., Dec. 4, 1995), aff'd 205 F.3d 1329 (3d Cir. 1999); Rose v. Chater, 1995 U.S. Dist. LEXIS 8397, 94-4421, 1995 WL 365404 (E.D. Pa. June 15, 1995). Here, as in Rosser and Rose, there is no certainty as to the vocational expert's intention. Inadvertent departure from the DOT seems a distinct possibility.

Moreover, SSA regulations provide that even a claimant not of an advanced age, who is capable of sedentary work and has no transferable skills may be found disabled, if she is able to perform such a limited range of sedentary work that her job base is significantly eroded. Social Security Ruling 96-9P; see, 20 C.F.R. Pt. 404, Subpart. P, Appendix 2, Table 1.

Here, the ALJ could not accurately assess the job base remaining to Fitzgerald because he was relying on erroneous vocational information. Of the jobs mentioned by the vocational expert, two were unskilled jobs at the sedentary level—touchup screener, and surveillance system monitor. The vocational expert testified that 200-300 surveillance system jobs existed in the Philadelphia metropolitan area, with 15,000 - 20,000 such jobs nationally. Record at 78. He made no specific finding as to the number **[*22]** of touchup screener jobs in existence, as distinguished from the entire group of inspector jobs he had named.

Remand of this case is warranted for the taking of new testimony from a vocational expert regarding the size of the job base available to Fitzgerald, and consideration by the ALJ of the possible relevance of SSR 96-9P.

D. Fitzgerald's Physical RFC Assessments

Fitzgerald is correct in pointing out that there was no substantial evidence supporting the ALJ's observation that Fitzgerald could walk or stand for two hours or more in an eight-hour workday. Dr. Siegel reported that Fitzgerald's standing and walking "would be definitely impaired to about less than two hours." Record at 167. In 1994, Dr. Singh also reported that Fitzgerald could walk and stand "less than two hours." Record at 216. The second medical source statement Dr. Singh submitted, in 1997, included a notation under "walking/standing" that "Hand-held assistive device medically required for ambulation." Record at 328. This cannot be interpreted as an improvement in Fitzgerald's walking. The ALJ nevertheless wrote in his second report that Fitzgerald could "stand/walk for two hours." Record at 15. Clearly, **[*23]** that was erroneous.

The ALJ's error in this regard does not, however, provide a basis for disturbing his decision, since he concluded that Fitzgerald could engage only in a limited range of sedentary work. Sedentary work does not require the claimant to be capable of walking or standing in for two hours or more in an eight-hour day, but only that the claimant be capable of "occasional" walking and standing. 20 C.F.R. § 404.1567(a) and § 419.967(a). Thus, the ALJ's conclusion that Fitzgerald was capable of sedentary work is consistent with the medical evidence.

E. Lack of Foundation for the Vocational Expert's Opinion

Citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), Fitzgerald has argued that a foundation was lacking for the vocational expert's opinion as to the number of jobs existing in the local and national economies, because the vocational expert was not qualified to answer such questions. At the hearing, however, the ALJ asked counsel if he had any objection to the vocational expert's qualifications, and counsel replied "no". Record at 72. Since one of the fundamental **[*24]** purposes of obtaining testimony from a vocational expert is to establish a claimant's job base, counsel must have known that this type of testimony was forthcoming. Moreover, counsel raised no objection to the testimony when it came.

Objections to the qualifications of a vocational expert have been found waived if not raised before the administrative tribunal. Hando v. Shalala, 13 F.3d 405, 1993 WL 523213, *4 (10th C. 1993) (unpublished opinion); Davis v. Mathews, 450 F. Supp. 308, 316 (E.D. Cal. 1978). Even if Fitzgerald's argument in this regard had merit at one time, it has by now been waived.

F. The Vocational Expert's Response to the ALJ's Hypothetical

Finally, Fitzgerald argues that the vocational expert's response to the ALJ's hypothetical question is not substantial evidence because it is ambiguous. She maintains that his response to the ALJ's question: "Are those additional restrictions consisting (*sic* "consistent") with performance of the jobs you have identified to this court?" ("Not the way he stated. In my review of the document that's still consistent with sedentary work and also consistent with the jobs I've mentioned. **[*25]** " Record at 79) is incomprehensible since the reader does not know who "he" is, or what "document" is referred to.

This court does not believe the vocational expert's statement is incomprehensible, since it concludes that what the ALJ put before him is "still consistent with sedentary work and also consistent with the jobs I've mentioned." In any case, Fitzgerald's argument is mooted by the fact that we have recommended a remand for a fresh review of the medical records, additional evidence from a mental health professional, and new evidence from a vocational expert.

IV. Conclusion
For the reasons set forth herein, I make the following:
RECOMMENDATION

AND NOW, this 14 day of Feb, 2000, it is RESPECTFULLY RECOMMENDED that both Plaintiff's and Defendant's Motions for Summary Judgment be DENIED, and this case remanded for further review of the medical records, for the taking of additional evidence from a mental-health specialist, and for the taking of additional testimony from a vocational expert.

BY THE COURT:
JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

Patrick W. **Donahue,** Plaintiff-Appellant, v. Jo Anne B. Barnhart, Commissioner of Social Security, Defendant-Appellee.

No. 01-2044

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

279 F.3d 441; 2002 U.S. App. LEXIS 978; 78 Soc. Sec. Rep. Service 144; Unemployment Ins. Rep. (CCH) P16, 697B

November 14, 2001, Argued
January 25, 2002, Decided

PRIOR HISTORY: [1]** Appeal from the United States District Court for the Eastern District of Wisconsin. No. 99-C-1507. Thomas J. Curran, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff claimant sought an award of supplemental security income on the basis of disability. He appealed a decision of the United States District Court for the Eastern District of Wisconsin upholding an administrative conclusion of defendant Commissioner of Social Security that he was not disabled.

OVERVIEW: The claimant suffered back pain. He was illiterate and had personality problems as a result of organic brain damage. After hearing the testimony of a vocational expert, who stated that the Milwaukee, Wis., area alone offered, among others, some 5,000 janitorial jobs claimant could do, the administrative law judge (ALJ) concluded that he could perform low-stress tasks and therefore was not disabled. The claimant argued on appeal that the ALJ improperly discounted his contention that back pain hampered his ability to work, but the court found that substantial evidence supported the ALJ's decision. It rejected the claimant's contention that the ALJ did not include in the list of problems his personality disorder and shortcomings in concentration. The claimant also contended that the ALJ contradicted the Dictionary of Occupational Titles when testifying that an illiterate person could perform the jobs. The court concluded that, on the record, with no questions asked that revealed any shortcomings in the vocational expert's data or reasoning, the ALJ was entitled to reach the conclusion she did. The assertion that the dictionary always won was untenable.

OUTCOME: The decision was affirmed.

COUNSEL: For PATRICK DONOHUE, Plaintiff - Appellant: Frederick J. Daley, Chicago, IL USA.

For JO ANNE B. BARNHART, Defendant - Appellee: Malinda Hamann, SOCIAL SECURITY ADMINISTRATION, Office of the General Counsel, Region V, Chicago, IL USA.

JUDGES: Before Coffey, Easterbrook, and Diane P. Wood, Circuit Judges.

OPINION BY: Easterbrook

OPINION: [*443] Easterbrook, *Circuit Judge.* Patrick Donahue, who last was employed (as a truck driver) in 1986, seeks an award of supplemental security income on the basis of disability. The substantive standards for supplemental security income are materially the same as those for Social Security disability benefits, though the monthly payment is lower. Donahue had a laminectomy in 1977 and continues to suffer back pain. He is illiterate and suffers from some personality problems as a result of organic brain damage. But after hearing the testimony of a vocational expert, the administrative law judge concluded that Donahue could perform low-stress tasks with moderate exertional requirements, such as janitorial work, and therefore is not disabled—for supplemental security income is not a form of unemployment insurance and is unavailable if any do-able work exists in the national economy, even if other persons with better skills are likely to be hired instead. The district court concluded that **[**2]** substantial evidence supports the administrative conclusion.

[*444] Donahue's lead argument is that the ALJ improperly discounted his contention that back pain hampers his ability to work. It is not clear to us that the ALJ's credibility finding made any difference. Donahue's own estimate is that his pain reaches a level of 3 on a scale of 0 to 10, and this does not sound disabling. What the ALJ found is not that the pain should have been rated a 2, but that it is not bad enough to prevent Donahue from performing jobs such as janitor. In making this determination the ALJ did not limit herself to an observation that the severity of pain cannot be demonstrated by objective medical evidence. If the ALJ had made such a finding, it would have been a legal error, for both regulations and interpretive guides provide that the agency will consider all evidence. See 20 C.F.R. § 416.929(c)(2); Social Security Ruling 96-7p; *Zurawski v. Halter*, 245 F.3d 881, 887-88 (7th Cir. 2001). What the ALJ actually did, however, is compatible with all legal requirements. The ALJ

observed that Donahue continued working for a decade after his back operation (and was fired for **[**3]** refusing to participate in counseling, a reason unrelated to back pain), implying that the pain could not be disabling unless things had gotten worse since 1986. Then the ALJ noted that Donahue relied for pain control on over-the-counter analgesics and reported that these gave him good relief, from which the ALJ inferred that the level of pain could not be severe. A physician concluded that Donahue can lift 50 pounds and stand for 6 hours in an 8-hour period, which again implies that the level of pain he must endure is not disabling. There was more; but what we have recited supplies substantial evidence for the ALJ's decision. Donahue puts a different spin on the evidence; he contends, for example, that he settled for over-the-counter analgesics because an unnamed physician once told him that there was not much else to do. At oral argument his lawyer stated that Donahue could not afford more powerful painkillers, a position never communicated to the ALJ. In either event the fact remains that he reported good pain control with what he used, and the resolution of competing arguments based on the record is for the ALJ, not the court. See, e.g., *Brewer v. Chater*, 103 F.3d 1384, 1392 (7th Cir. 1997); **[**4]** *Stephens v. Heckler*, 766 F.2d 284 (7th Cir. 1985).

Asked what jobs could be performed by an illiterate person who has some back pain and difficulty interacting with others, can lift 25 pounds frequently and 50 pounds occasionally, and can stand or walk for 6 hours during a working day but needs to sit when back pain and dizzy spells occur, the vocational expert replied that the Milwaukee area alone offers some 5,000 janitorial jobs, 3,000 assembly jobs, and 1,500 hand-packing jobs that satisfy these limitations. The ALJ accepted this testimony, which doomed Donahue's application. He now raises two objections: first, that the ALJ did not include in the list of problems his personality disorder and shortcomings in concentration; second that the ALJ contradicted the Department of Labor's *Dictionary of Occupational Titles* (4th ed. 1991), when testifying that an illiterate person could perform these jobs. The first of these contentions seems to us picayune. The ALJ specified that Donahue had difficulty interacting with others and would need to sit, on his own schedule, to accommodate back pain and dizziness. The vocational expert did not name jobs in which steady concentration **[**5]** or sociability is essential. Donahue does not contend that he has deteriorated in these respects since the years he worked as a truck driver; it is only because of his testimony about dizzy spells that the ALJ concluded that he could not return to his former occupation, **[*445]** and the dizziness limitation was stated for the vocational expert's consideration.

The conflict between the vocational expert's testimony and the *Dictionary of Occupational Titles* is not so easy to deal with. It turns out that whoever wrote the Dictionary believes that basic literacy (defined as a vocabulary of 2,500 words, the ability to read about 100 words a minute, and the ability to print simple sentences) is essential *for every job in the economy*, and that janitors require a higher level (the ability to read about 200 words per minute). See *Dictionary* at classifications 382, 358.687-010, 381.687-014, 381.687-018, 382.664-101 (discussing various janitorial classifications), and Appendix C pp. 1010-11 (literacy for all jobs). The vocational expert obviously did not agree—nor did Donahue's former employer, for he was no more literate during the 23 years he drove a garbage truck than he is today. Illiteracy is not **[**6]** a progressive disease.

Courts disagree about the appropriate interaction between the *Dictionary* and a vocational expert. The eighth circuit held at one point that an ALJ always must prefer the *Dictionary* over the view of a vocational expert. See *Smith v. Shalala*, 46 F.3d 45, 47 (8th Cir. 1994). If this is so, then Donahue (and every other illiterate person in the United States) must be deemed "disabled," even though illiteracy is not a listed impairment leading to an automatic finding of disability under the Commissioner's regulations. On the other hand, three circuits hold that an ALJ always may prefer the testimony of a vocational expert over the conclusions in the *Dictionary*. See *Jones v. Apfel*, 190 F.3d 1224 (11th Cir. 1999); *Conn v. Secretary of Health and Human Services*, 51 F.3d 607 (6th Cir. 1995); *Carey v. Apfel*, 230 F.3d 131 (5th Cir. 2000). Three more circuits allow the ALJ to accept a vocational expert's position, but only after providing an explanation (with record support) for doing this; in these circuits a vocational expert's bare conclusion is not enough. See *Haddock v. Apfel*, 196 F.3d 1084 (10th Cir. 1999); **[**7]** *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995); *Mimms v. Heckler*, 750 F.2d 180 (2d Cir. 1984). We have yet to face the issue squarely, on occasion remanding for a better explanation and on occasion affirming, but never articulating a rule of decision for cases of this kind. Compare *Young v. Secretary of Health and Human Services*, 957 F.2d 386, 392-93 (7th Cir. 1992), and *Tom v. Heckler*, 779 F.2d 1250, 1255-56 (7th Cir. 1985) (both remanding), with *Powers v. Apfel*, 207 F.3d 431, 436-37 (7th Cir. 2000) (permitting a hearing officer to rely on expert testimony that contradicts the *Dictionary*).

The position articulated in *Smith* that the *Dictionary* always wins is untenable. *Smith* itself gave no reason for a flat rule, and the eighth circuit sensibly has retreated in more recent cases. See *Young v. Apfel*, 221 F.3d 1065 (8th Cir. 2000); *Jones v. Chater*, 72 F.3d 81 (8th Cir. 1995); *Montgomery v. Chater*, 69 F.3d 273 (8th Cir. 1995). Smith would make the *Dictionary of Occupational Titles* an independent source of listed impairments, giving the *Dictionary's* team of authors a power that **[**8]** Congress has bestowed on the Commissioner of Social Security. The editorial board of the *Dictionary* has not been nominated by the President or confirmed by the Senate. The *Dictionary* is published by the Department of Labor as a tool; it does not purport to contain rules of law, and no statute or regulation gives it binding force. The Commissioner of Social Security is entitled to examine independently those questions covered by the *Dictionary*—something that the *Dictionary* itself proclaims when observing that users should rely on better data if they have any **[*446]** in their own possession. See *Dictionary* at xiii. To go by the record of this case (and many others), that caution is prudent. Donahue had a job for a long time despite his poor reading skills. (One wonders how Donahue can be "illiterate" if he could take and pass the tests required of truck drivers, but the parties make nothing of this.) Indeed, people who arrive in the United States without even the ability to recognize the Latin alphabet often find work. So the ALJ must be entitled to accept testimony of a vocational expert whose experience and knowledge in a given situation exceeds that of the *Dictionary's* authors. But when **[**9]** will this be

true? We asked the parties at oral argument what makes a vocational expert an "expert" (and where the information in the *Dictionary* came from). They did not know. Maybe both the authors of the *Dictionary* and the vocational expert in this case are talking out of a hat.

Rule 702 of the Federal Rules of Evidence provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." This substantially codifies the holdings of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), and its successors. Rule 702 does not apply to disability adjudications, a hybrid between the adversarial and the inquisitorial models. See *Richardson v. Perales*, 402 U.S. 389, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971). But the idea that experts should use reliable methods does not depend on Rule 702 alone, and it **[**10]** plays a role in the administrative process because every decision must be supported by substantial evidence. Evidence is not "substantial" if vital testimony has been conjured out of whole cloth. See *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001); *Elliott v. CFTC*, 202 F.3d 926 (7th Cir. 2000). Even in court, however, an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand. Fed. R. Evid. 704(a). That's what the vocational expert did here. Presented with a statement of Donahue's abilities and limitations, the vocational expert produced some job titles and numbers. At this point the expert could have been cross-examined (Donahue was represented by counsel) about where these numbers came from, and why the expert's conclusion did not match the *Dictionary's*. Holding out this opportunity is an approach deemed adequate in *Richardson v. Perales*. Yet counsel did not ask the vocational expert about the genesis of the numbers or the reason for the discrepancy.

What, then, happens when the discrepancy is unexplored? When no one questions the vocational expert's foundation or reasoning, an ALJ is entitled **[**11]** to accept the vocational expert's conclusion, even if that conclusion differs from the *Dictionary's*—for the *Dictionary*, after all, just records other unexplained conclusions and is not even subject to cross-examination. If the basis of the vocational expert's conclusions is questioned at the hearing, however, then the ALJ should make an inquiry (similar though not necessarily identical to that of Rule 702) to find out whether the purported expert's conclusions are reliable. Social Security Ruling 00-4p, promulgated in December 2000 (and thus not directly applicable to this case), is to much the same effect. This ruling requires the ALJ to "explain [in the] determination or decision how any conflict [with the *Dictionary*] that *has been identified* was resolved." (Emphasis added.) The ruling requires an **[*447]** explanation only if the discrepancy was "identified"—that is, if the claimant (or the ALJ on his behalf) noticed the conflict and asked for substantiation. Raising a discrepancy only after the hearing, as Donahue's lawyer did, is too late. An ALJ is not obliged to reopen the record. On the record as it stands—that is, with no questions asked that reveal any shortcomings in the vocational **[**12]** expert's data or reasoning—the ALJ was entitled to reach the conclusion she did.

Affirmed

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