

Tools for Trial

Implications for Vocational Services

By

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I am a vocational rehabilitation counselor/consultant with Management Consulting and Rehabilitation Services, Inc. in Ankeny, Iowa. I have been asked by staff of the Litigation Counsel of America (LCA) to contribute monthly and/or periodically to the new online newsletter. I have 30 years of experience in providing counseling and vocational services to persons with disabilities. In June of 1999, the United States Supreme Court cited the results of my vocational rehabilitation evaluation (VRE) in a landmark Americans with Disabilities Act (ADA) decision, *Murphy v. United Parcel Services, Inc.*

This was a landmark decision because it was part of a trilogy of decisions by the Supreme Court that literally changed the definition of disability under the ADA. These decisions, along with numerous others in the last few years by the Court have been the instigating factors in recent efforts to submit legislation to congress to restore coverage under the Americans with Disabilities Act. This effort will be discussed in future columns.

The goal of this column is to provide useful information that will serve to inform, provide resources, or to update members of LCA regarding the specialty field of vocational rehabilitation. It is my hope that members of the LCA will be able to use the information and/or resources provided to enhance their legal practice.

A VRE can be used by either the plaintiff or defense. The purpose in providing a VRE is to provide an objective analysis of an individual's potential for employment and placement in the competitive labor market. In this vocational context, a VRE provides the court, and all parties concerned, with an analysis of the impact of an injury/accident or illness/disease upon the individual's ability to be employed in the competitive labor market. In some instances, it is necessary to also evaluate whether or not the individual will experience a loss of earning capacity as a result of a loss of access to occupations within the labor market.

Loss of earning capacity can be described as the "diminution, reduction, or loss of access to employment or a labor market, due to loss of work capacity by the injured party, as measured by potential earnings." Loss of earning capacity is also defined as the comparison between what an individual was able to earn pre-injury status and what that individual can reasonably expect to earn post-injury. In summary, a loss of earning capacity is a reduction in the value of the power to earn. VRE's have been very helpful to the courts in identifying the possible loss of earning capacity and quantifying that loss.

Of course, in the forensic setting, the VRE and the evaluator must be able to withstand a Daubert challenge. In the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U. S. 579 (1993), the Supreme Court established four basic guidelines for determining whether scientific testimony from expert witnesses is admissible. Those four guidelines are as follows: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) the known or

potential rate of error; and (4) general acceptance within the relevant scientific community. The Supreme Court also formulated the standard for admission of expert testimony.

A vocational rehabilitation counselor in the forensic setting must be able to meet a Daubert challenge in both the methodology of the VRE and as an expert witness. This issue will also be explored in future columns.

Generally speaking, within a VRE, as noted above, the concept of employability is frequently used. Employability refers to the condition of having the skills and abilities to do one or more occupations within the labor market and that the occupations exist in significant numbers. It refers to the ability of an individual to qualify for particular occupations based upon education, skills, training, and abilities. Employability encompasses the kinds and types of occupations for which the individual could presumably perform. Occupations are generally defined in part as a group of jobs, found at more than one establishment.

Placeability on the other hand, is defined as the probability that within a particular occupation the individual will actually be able to obtain and retain employment. Placeability takes into consideration such factors as age; sex; race; choice or interests; job seeking skills; motivation; labor market conditions; workforce participation data; personality-style; presentation and appearance; employer's attitudes; architectural barriers; need for accommodations and mental and physical health status. It takes into consideration the difficulty in placing a person with an impairment or a disability in a particular occupation within their occupational profile.

Placeability issues are both objective and subjective. They are the types of issues that are usually dealt with by a vocational rehabilitation counselor when assisting the individual to return to competitive employment in the labor market. Those are some of the issues that the rehabilitation counselor addresses in providing guidance to that individual.

Another important factor, depending upon the type of case being evaluated, is the labor market survey component. Labor market survey data provides the court with the answer to the question; do the occupations that have been identified in the VRE exist in significant numbers within the individual's geographic labor market area? Labor market information is important depending upon the type of case being reviewed.

Defining disability can be a complicated process. In a report to the Interagency Committee on Disability Research prepared by Cherry Engineering Support Services, Inc., (CESSI), in a search of the United States Code, there were 67 places where disability is defined. This includes definitions of disability, disabled person, individuals with a disability, handicapped, or other variations of the term disability. Considerable overlap was found among the definitions. It was determined that some statutes have more than one definition. According to the report by CESSI, of the 67 acts or programs that define disability, 35 have self-contained definitions, 26 use definitions from other Code sections, and 6 definitions are from more than one Code section.

Many of the Codes have adopted a definition that encompasses the person, their physical surroundings, and their social environment. Disability is often defined on the basis of specific activities of daily living, the work that people perform, or other functions

that are essential to their full participation in the community. The Americans with Disabilities Act for example, has a definition that identifies a physical or mental impairment that substantially limits one or more “major life activities.” For Social Security Disability Insurance (SSDI) benefits or Social Security Supplemental Income (SSI), individuals must have a severe disability, or combination of disabilities, that have lasted, or is expected to last, at least 12 months (or to result in death), and which prevents working at a “substantial gainful activity” level.

A VRE is helpful in the SSDI arena to assist the adjudicator in deciding whether or not a person has a disability under the law. A VRE can be just as helpful to the court in determining whether or not an individual is employable, placeable, has a loss of access to occupations in the labor market and/or has a loss of earning capacity.

Looking Ahead

In keeping with the goals of this column to provide useful information that serves to inform, be a resource, or to update members of the LCA, a variety of topics will be explored in the future. For example, in the September issue, a beginning series on the Americans with Disabilities Act and Supreme Court decisions will be discussed. This review will include the ADA from case law to practice and Section 504 of the Rehabilitation Act of 1973 as the foundation for the ADA. In the November issue, an ADA framework to provide vocational evidence based upon Court decisions will be explored.

Future issues will provide some explanations of the wide variety of uses of a VRE in medical malpractice cases, Federal Employment Liability Act, (FELA), workers’ compensation, various discrimination laws and marriage dissolutions.

Future discussions will also include the value of vocational rehabilitation certifications that are currently available to rehabilitation counselors and forensic experts. There will also be discussion related to the code of conduct for those certifications and the ethical standards for vocational rehabilitation counselors.

A special thank you to the staff of the LCA for requesting a column of this type in the LCA Commentary.

References

- Cherry Engineering Support Services, Inc., (2003), “Federal Statutory Definitions of Disability,” Prepared for The Interagency Committee on Disability Research, McLean, Virginia
- Weed, Roger O & Johnson, Cloise B., (2006), “Life Car Planning in Light of Daubert and Kumho,” Elliott & Fitzpatrick, Inc., Athens, Georgia