

EXPERIENCE FROM THE INSIDE: ERRORS I HAVE SEEN REPRESENTATIVES MAKE AND HOW TO AVOID THEM

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For ten years of my professional life I did nothing but defend ALJ decisions in federal court on behalf of SSA at its Office of the General Counsel (OGC). In my private practice, I handle federal court appeals for various attorney and non-attorney representatives. Through this experience I have reviewed countless federal court transcripts and been able to assess the hearing performances of hundreds of disability advocates from across the country. Based on this experience, I have been able to identify some common mistakes made by advocates at the ALJ and Appeals Council levels. To be honest, I could write at length on this subject and identify quite a few such errors. However, that seems more appropriate as a conference topic than as a topic for a short article. As a result, I have decided to pick only one common error at each level. Highlighting these errors and how to avoid them is what this article is about.

You may disagree with some of my observations, a few of which may be contrary to the conventional wisdom. That's fine because at least you have considered these issues. I selected the errors pointed out in this article based on 3 criteria: (1) they are common; (2) they can be outcome-determinative; and (3) they are easily avoided. So let's get to it.

The Big Error at the ALJ Level: Lengthy Cross-Examinations of Vocational Experts

This is probably the most common error I see and one where my point of view is definitely contrary to the conventional wisdom.

The conventional wisdom seemingly is that you should relentlessly challenge a VE's testimony to show that it is based on nothing. I disagree with this strategy for several reasons. First, I don't feel comfortable doing it. While some highly experienced former VEs and some representatives may be able to do this effectively at times, I just don't feel comfortable trying to do it. I think I know just enough about VE testimony issues to get myself in trouble, which is usually the result of the lengthy VE cross-examinations that I have seen in federal court transcripts. Second, the ALJ is not going to believe you. Third, the Appeals Council is not going to believe you. If the Agency agreed with the theorem that VE testimony is essentially fictional then they wouldn't pay millions and millions of dollars to VEs across the country every year. You may be right, but perhaps no one cares. In many ways, the disability adjudication system is a game and VEs are a foundational rule of that game.

I think most advocates do extensive cross-examinations of vocational experts because they think they are supposed to and because they feel like they want to "do something" at the hearing. However, the results that are often achieved are bad for your client. If sitting silently and "doing nothing" gets the best result, then that is what you absolutely must do.

In the vast majority of cases I have seen, extensive cross-examination of VEs does nothing more than plug holes that were in that testimony. Rather than doing anything effective, all you have achieved is potentially undermining strong issues that you could have pursued on appeal. At best, such crosses do little more than reenforce already damaging testimony that was better left alone.

Generally, my cross-examination seeks to get the VE to do only three things: (1) testify that favorable medical opinions are not consistent with SGA; (2) testify that the claimant's testimony is not consistent with SGA; and (3) specify DOT codes for the jobs they identified, although there are cases where this is definitely a mistake. These three points have a dual purpose of building the basis for an allowance and setting up an appeal in the event I do not prevail before the ALJ. The only additional point I draw out of VE's was covered in the article that I wrote for the last edition of this newsletter.

The Big Error at the Appeals Council Level: Nothing at All or That's Just Too Darn Long!

OK, that seems to be two errors, but bear with me. They are unified in the single mistake of being extremes which need to be avoided. The pursuit of such extremes is the main error I have seen consistently at the Appeals Council level.

Saying too little is dangerous because you are unlikely to get the Appeals Council to grant review. If all you do is submit a form with no specific issues identified then your chances of getting a remand are quite slim indeed. You make it very easy for the Appeals Council to merely rubber stamp a denial. If you really want to win at this level, you have to give the Appeals Council analyst something specific to work with. In addition, although the Supreme Court has held that issue exhaustion is not legally required at the Appeals Council level, many district courts disagree and rule to the contrary *sub silentio*. Making some attempt to identify specific issues avoids this problem completely.

This is not to say that specific arguments must be made in every single case. In certain instances where you believe that an appeal to a federal court is inevitable, it can be strategically

advantageous to not raise specific issues before the Appeals Council. Nevertheless, in most cases you should be making very specific arguments of error to the Appeals Council.

Saying too much is the other extreme. As I mentioned above, I worked at SSA's OGC for a long time. For a short period our regional OGC office handled requests for review because the Appeals Council had a huge backlog. I can tell you with certainty that if you go beyond a few pages, no one is going to read it. Period. As with saying too little, saying too much makes it easy for the Appeals Council to pull out the old rubber stamp. Also, lengthy Appeals Council briefs are usually nothing more than mere requests for the Council to re-weigh the evidence and reach a different conclusion than the ALJ. Such requests for a re-weighing are generally doomed to failure.

At OGC we sometimes had to request that the Appeals Council voluntarily accept remand in cases where there was undeniable and significant legal error. Such requests for voluntary remand were required to be no more than two pages in length. You may have noticed that the Commissioner recently proposed strictly limiting the length of briefs that could be submitted to the Appeals Council. This rule change did not occur. However, the Agency's own internal practices combined with this proposed rule change clearly demonstrate that the Appeals Council wants it short and simple. Don't waste your time with procedural histories or evidentiary summaries. Go directly to the errors you have identified and state them succinctly with nothing beyond essential citations to relevant legal authorities.

I hope you found this article useful and perhaps we can touch on this topic again in future issues. At the very least, it should give you some food for thought.

BIO

David F. Chermol, Esquire is a Social Security Disability attorney based in the Philadelphia area. He worked with SSA's Office of the General Counsel for more than 10 years and litigated hundreds of disability appeals in federal courts across the United States. As SSA's senior disability litigator in Mid-Atlantic Region III, he participated directly or indirectly in most of the major precedential cases decided by the Third and Fourth Circuit Courts of Appeal over the last decade. He is a NADR member and served on President Barack Obama's National Disability Policy Committee. His firm focuses on disability appeals in the federal courts.