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"Off-task"
An example, an explanation and how to use to "off-task" to address medical apportionment from a vocational perspective

An "Off-task" example:

Dr. Lewis used the following definitions from chapter 14.3e Class of Impairments Due to Mental and Behavioral Disorders to quantify degrees of mental functional limitations:

1. None means no impairment is noted in the functions.
2. Mild implies that any discerned impairment is compatible with most useful functioning.
3. **Moderate** means that the identified impairments are compatible with **some, but not all, useful functioning.**
4. Marked is a level of impairment that significantly impedes useful functioning. Taken alone, a marked impairment would not completely preclude functioning, but together with marked limitation in another class, it might limit useful functioning.
5. Extreme means that the impairment or limitation is not compatible with useful function.

Degrees of **loss of useful function** for a **moderate restriction** expressed as percentile:

1. ☐ "Off-task" 10% of the time over the course of an 8 hour day when performing the mental activity;
2. ☐ "Off-task" 15% of the time over the course of an 8 hour day when performing the mental activity;
3. ☐ "Off-task" 20% of the time over the course of an 8 hour day when performing the mental activity;
4. ☐ "Off-task" 25% of the time over the course of an 8 hour day when performing the mental activity;
5. ☐ "Off-task" ____% of the time over the course of an 8 hour day when performing the mental activity;

Assume that "off-task" means an inability to perform the activity and/or a reduction in productivity over the course of an 8 hour work day.

To quantify the **loss of useful function** expressed as percentile Dr. Lewis determined that Mr. Smith will be "off-task," meaning an inability to perform the activity and/or a reduction in productivity 20% over the course of an 8 hour work day.

An "Off task" explanation:

Chapter 14 the AMA Guides refers to "task completion" and "productive task."

> 14.3c: "Task completion refers to the ability to sustain focused attention long enough to permit the timely completion of tasks commonly found in activities of daily living or work settings."
>
> 14.3e: "An extreme limitation in concentration, persistence, and pace means that the individual cannot attend to conversation or any productive task;…"

The opposite of "task completion" is an inability to complete a task and the opposite of performing a "productive task" is an inability to perform a "productive task." Together these concepts are referred to by vocational experts as "off-task," meaning an inability to complete a task or reduced task productivity quantified as a percentage of loss during a work day. (See American Board of Vocational Experts (ABVE 2/25/2014 endnote[i])

The term "off-task" is standard verbiage used by medical experts and considered by Vocational Experts in Social Security disability evaluations when a claimant cannot be expected to complete a task or maintain a level of competitive task productivity for a percentage of a day. The maxim that Social Security regulations are not relevant to Workers Comp is not born out by the AMA Guides. In one of many examples of the AMA Guides 5th Edition adopting SSA regulations, the Guides states in chapter 14.4d:

> Assessment of the ability to perform activities at work requires evaluations of similar abilities, along with unique skills, particularly to the work place. To assess the ability on an individual to function in the workplace, the evaluator may obtain additional information by using a multidimensional description of remaining work-related abilities. *Four capacities, indicated below, have been used by SSA regulations to characterize residual functional capacity*.
>
> 1. *Understanding and memory……*
> 2. *Sustained concentration and persistence……*
> 3. *Social interaction…….*
> 4. *Adaptation……..*

These are the 4 categories that contain the 20 mental functions adopted without modification by the AMA Guides on page 365 in chapter 14.4d definitions of Assessment of Workplace Function.

"Task completion" is explained in federal regulation section 416.926 a (h) and POMS Dl 25225.0:15 "Attending and Completing Tasks" "C". (See endnote[ii])

A medical expert and vocational expert use "off-task" percentiles to quantify the degree an individual is unable to complete a task and the deleterious affect it may have on work. These issues have been adjudicated by the United States Court of Appeals. (See endnote[iii])

In other words, consideration of “task completion” and “productive task” along with its corollary “off-task” is used extensively by medical doctors, vocational experts, the Federal Government and the AMA Guides.

The AMA Guides does not provide for a quantification of the percentage of a day an applicant may be unable to engage in “task completion” and “productive tasks.” A medical doctor however is equipped to render this type of determination.

Dr. Lewis opined that Mr. Smith will be “off-task” 20% of the day for the following functions:

- The ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances.

- The ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.

20% “off-task” therefore converts to:

Therefore, 20% x 480=96 minutes (1.6 hours) x 5 days= 480 minutes or 1 day each week that Mr. Smith will be “off-task” in the performance of the aforementioned 2 mental functions.

……..

“Off-task” to address apportionment to non-industrial impairment, not functional limitations:

Dr. Lewis determined 10% non-industrial impairment.

Impairment may or may not result in functional limitations. Dr. Lewis did not provide any indication in this respect. However if one were to assume that Mr. Smith’s non-industrial medical impairments may have led to functional limitations then, from a vocational perspective, the following calculations can either be adopted or ignored depending on whether it is determined if Mr. Smith’s non-industrial impairments led to pre-injury functional limitations:

- 20% “off-task”

- 20% x 0.9 (industrial apportionment) = 18% “off-task” to industrial causation.

- 18% “off-task” x 480 = 86.4 minutes (1.44 hours) x 5 days= 432 minutes or 7.2 hours each week that Mr. Smith will be “off-task” in the performance of the aforementioned 2 mental functions after non-industrial impairment.

Dr. Lewis determined that Mr. Smith will be "off-task" 20% over the course of an 8 hour work day for the following functions:

- The ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances.

- The ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.

After non-industrial impairment is excluded Mr. Smith will be "off-task" 18% over the course of an 8 hour work day.

Vocationally these calculations mean that, after subtracting 10% apportionment from his mental limitations the residual loss remains significant enough that when combined with the functional limitations from his orthopedic condition they will result in a total loss of earning capacity and total loss of labor market access.

This is because if theoretically Mr. Smith were to attempt work within his pre-injury labor market he would experience a significant reduction in productivity due to his mental limitations that, in my opinion, would not be tolerated in a competitive work environment. Under this theory, and the facts of this case as I understand them this employee is totally disabled.

Consequently, Mr. Smith is not amenable to vocational rehabilitation and therefore has sustained a total loss in his capacity to meet occupational demands, a total loss of labor market access and a total loss of future earning capacity.

Accordingly, and in the absence of medical information to the contrary, I conclude that the functional limitations attributable to industrial medical factors produce a vocationally significant and quantifiable synergistic effect that functionally eliminates any meaningful avenue or capacity to return to and maintain work in a competitive labor market whether at an on-site establishment or home based. Under this theory, and the facts of this case as I understand them this employee is totally disabled.

This is an alternative method to *Estrada* for "considering" medical apportionment that I developed in the case of *John Monteleone v Standford Dining*, *Zurich*. While it is by no means not legal authority it has been scrutinized and accepted by at least two WCJs and the WCAB. (**See endnote**[iv])

Sincerely,

Vocational Rehabilitation Counselor

Endnotes

[i] Be the Strongest Link: Strengthening Forensic Testimony: In Social Security Hearings with Applications to other Venues. Presented by:
Julie Sawyer Little, MS OT/L CRC, CLCP, ABVE/F;
Dale A. Thomas, MTS, CRC, CCM, ABVE/D;
Michelle McBroom Weiss, MA, CRC, CCM, NCC, MSCC, ABVE/D

"Time Off Task" Survey by Dr. Amy Vercillo:

What percentage of the work day can a hypothetical employee be off task (for example, due to pain, side effects of medication, unscheduled work breaks, and difficulty with Concentration)? Responses are below:

5% of the workday = 22% of respondents
10% of the workday = 45.2% of the respondents
15% of the workday = 26.8% of respondents
20% of the workday = 9.5 % of respondents
25% or more = 0%

[ii] CFR Section 416.926 a (h):

Section 416.926 a (h) *Attending and completing tasks.* In this domain, we consider how well you are able to focus and maintain your attention, and how well you begin, carry through, and finish your activities, including the pace at which you perform activities and the ease with which you change them.

(1) *General.* (i) Attention involves regulating your levels of alertness and initiating and maintaining concentration. It involves the ability to filter out distractions and to remain focused on an activity or task at a consistent level of performance. This means focusing long enough to initiate and complete an activity or task, and changing focus once it is completed. It also means that if you lose or change your focus in the middle of a task, you are able to return to the task without other people having to remind you frequently to finish it.

(ii) Adequate attention is needed to maintain physical and mental effort and concentration on an activity or task. Adequate attention permits you to think and reflect before starting or deciding to stop an activity. In other words, you are able to look ahead and predict the possible outcomes of your actions before you act. Focusing your attention allows you to attempt tasks at an appropriate pace. It also helps you determine the time needed to finish a task within an appropriate timeframe.

Dl 25225.0:15 "Attending and Completing Tasks" "C" Policy - examples of limited functioning in attending and completing tasks

The following examples describe some limitations we may consider in this domain. Your limitations may be difference from the ones listed here. Also, the examples do not necessarily describe a "marked" or "extreme" limitation. Whether an example applies in your case may depend on your age and developmental stage; e.g. an example below may describe a limitation in an older child,

but not a limitation in a younger one. As in any case, your limitations must result from your medically determinable impairment(s). However we will consider all of the relevant information in your case record when we decide whether your medically determinable impairment(s) results in a "marked" or "extreme" limitation in this domain.

1. You are easily startled, distracted, or over reactive to sounds, sights, movements, or touch.
2. You are slow to focus on, or fail to complete activities of interest to you, e.g., games or art projects.
3. You repeatedly become sidetracked from your activities or you frequently interrupt others.
4. You are easily frustrated and give up on tasks, including ones you are capable of completing.
5. You require extra supervision to keep you engaged in an activity.

[iii] United States Court of Appeals for the Second Circuit Docket No. 12-2432 Sandra Jones-Reid, Plaintiff-Appellant, v. Michael J. Astrue, Commissioner of Social Security, Defendant-Appellee. Certification per Federal. R. App. P. 32(a)(7)(C):

> "On cross examination, Jones-Reid's attorney asked the VE to amend the hypothetical to include that the individual would be off-task for four and one-half hours per week, and the VE opined that there were no unskilled jobs where the individual could be off-task more than ten percent of the time."

United States District Court for the Western District of Wisconsin, Trudy Bjronson, Plaintiff, v. Carolyn Colvin, Acting Commissioner of Social Security: May 10, 2013 OPINION AND ORDER 12-cv-511-bbc by BARBARA B. CRABB District Judge

> "Plaintiff Trudy Bjornson is seeking judicial review of the final decision of the Commissioner of Social Security denying her application for social security disability benefits based on her claims of lumbar decompression, attention deficit disorder and depression. She argues that the administrative law judge made a mistake when he concluded that she would be off-task no more than 10% of the workday despite her moderate limitations with respect to concentration, persistence and pace and when he relied on the testimony of the vocational expert without resolving a conflict between the testimony and the Dictionary of Occupational Titles."
>
> ……
>
> He began by asking what jobs were available for a person limited to sedentary, unskilled work, with physical limitations to accommodate a back injury such as plaintiff's and being off task 10% of the day. The vocational expert testified that the person could work in assembly jobs, unskilled packing jobs, as an unskilled office helper, as a food preparation worker or as a home companion.
>
> ……..
>
> The administrative law judge then asked the vocational expert to "further assume that because of a combination of mental impairments and/or physical impairment that . . . this hypothetical individual . . . is not going to be able to sustain the sufficient concentration,

persistence and pace to maintain and stay on task such that they're off task greater than 10% of the day." AR 63-64. The vocational expert answered that there would be no jobs available for such an individual.

OPINION

A. Concentration, Persistence and Pace

Plaintiff argues that the administrative law judge's determination that she had moderate limitations of concentration, persistence and pace is internally inconsistent with his determination that she would be off-task at most 10% of the day. (Plaintiff has not explained why she believes that substantial evidence did not support the administrative law judge's decision that she would be off-task no more than 10% of the workday.) However, plaintiff does not cite any medical evidence showing that a person with moderate limitations in concentration, persistence and pace would be off task for more than 10% of the day and she does not cite any portion of the record suggesting that she would likely be off task more than 10% of the workday as a result of her specific conditions.

Instead, plaintiff relies on one district court opinion in which the court mentioned that a vocational expert had testified that the claimant would be unable to work if his moderate limitations of concentration and pace meant that he would be off-task 20% of the time. Ball v. Commissioner of Social Security, 1:09-CV-684, 2011 WL 765978, *4 (S.D. Ohio Feb. 25, 2011). In Ball, the court did not say, as plaintiff implies, that a person with moderate limitations will be off-task 20% of the time. Rather, the court held that the administrative law judge erred because he disregarded the treating physician's statement that included limitations of concentration and pace, failed to include in the hypothetical question any restriction on the claimant's ability to sustain work and ignored the possibility noted by the vocational expert that the claimant may be unable to work because she would be off-task too frequently. In this case, the administrative law judge did not ignore the possibility that plaintiff would be off-task too frequently; he simply decided that plaintiff would not be off task more than 10% of the time. Moreover, another district court has held that it was reasonable for an administrative law judge to conclude that a claimant's moderate limitations in concentration, persistence and pace would lead him to be off-task for 5% of the workday. Sayles v. Astrue, No. 12CV0446, 2012 WL 5877417 (N.D. Ohio Nov. 20, 2012).

In her reply brief, plaintiff argues that the administrative law judge's decision was inconsistent with the agency's regulations. The agency rates the degree of a claimant's limitations on "the following five point scale: None, mild, moderate, marked, and extreme." 20 C.F.R. § 404.1520a. The "extreme" rating represents "a degree of limitation that is incompatible with the ability to do any gainful activity." Id. Plaintiff argues that because "moderate" is the third or middle rating, it was unreasonable for the administrative law judge to conclude that her moderate limitation was equivalent to being off-task at most 10% of the time. Plaintiff waived this argument by not raising it in her opening brief. Even if she had not, the argument is undeveloped and unconvincing. She offers no argument for this interpretation based on the

text of the regulation or the nature of employment. She assumes that an extreme limitation in the ability to concentrate would translate into being off-task 100% of the time, but perhaps being off-task 30% of the time is incompatible with the ability to do any gainful activity. In any case, this dispute is beside the point. Whether plaintiff would be off-task more than 10% of the time depends on the nature of her attention deficit disorder and depression, not the definition of "moderate" limitations of concentration, persistence and pace.

Plaintiff has identified no basis on which the court could conclude that the administrative law judge's conclusion that she experienced moderate limitations in concentration, persistence and pace was inconsistent with his determination that she would be off-task for no more than 10% of the workday. Therefore, she has not established that the administrative law judge erred in his determination of her residual functional capacity.

(Undersigned comment: this decision is an example of why it is essential to obtain a medical opinion regarding the degree to which a claimant may be "off task" for a particular function. Plaintiff's attorney apparently failed to do this and instead substituted his or her own non-medical opinion as to the degree the claimant would be "off task." JM)

The United States District Court for the Northern District of Ohio Eastern Division Sonya L. Stein Plaintiff, v. Michael J. Astrue, Commissioner of Social Security, Defendant, Case December 6, 2011 No. 1:10-cv-2915 Nancy A. Vecchiarelli U.S. Magistrate Judge

Stein also argues that the ALJ should not have relied on the VE's opinion because it was internally inconsistent. According to Stein, the vocational testified that a person with Stein's qualifications could not be absent more than two times per month. But, Stein continues, if she were off task 20% of the day, this would mean that she would be off task for 1.6 hours in the workday in addition to breaks. If that 1.6 hours were multiplied by five days per week, Stein would be off task eight hours per week or the equivalent of four days per month. Since the VE said that more than two absences per month would make Stein unemployable, opining that Stein is employable if she is off task 20% of the time is contradictory.

This argument, while ingenious, is not well-taken for the simple reason that being off task is not equivalent to being absent. The VE's opinion was carefully considered, as evidenced by his additional testimony that if someone were off task one-third of the time, that person would be unemployable.

(Undersigned comment: I believe this is the correct analysis. Absenteeism is a different question for a medical provider and should not be conflated with that being off task. JM)

[iv] Decisions on Apportionment:

In *Jamon Gaines v. Wireless, That's It, LLC Berkshire Hathaway* Opinion on Decision denying reconsideration, ADJ4685690 (4/21/16) the WCJ adopted my opinion regarding apportionment to non-industrial factors writing:

I am persuaded that no apportionment is appropriate here, both because Dr. Zwerin's analysis does not satisfy the applicable legal standards and because, even assuming his opinion does satisfy them, Mr. Malmuth's method arrives at a proper assessment of applicant's prospects for employment in the competitive labor market, even absent considering the effect of the non-industrial portion of applicant's overall impairment.

John Monteleone v Standford Dining, Zurich San Francisco; Case No. ADJ4507242 (5/7/2015) finding and award after remand with opinions on decision the WCJ wrote:

Mr. Malmuth presents three vocational scenarios wherein apportionment could possibly be applied with respect to loss of future earning capacity. All three come down to the fact that but for original injury to the low back, Mr. Monteleone would continue to be gainfully employed at the level he was previously enjoying.

In the first approach, Mr. Malmuth reviewed the medical opinions regarding apportionment. Even when applying the apportionment found for the compensable consequences, Mr. Malmuth still concluded that "the functional limitations attributable to industrial medical factors alone will produce a vocationally significant and quantifiable synergistic effect to multiple body parts that functionally eliminates any meaningful avenue or capacity to return to and maintain work in a competitive labor market whether at an on-site establishment or home based."

In the second approach, Mr. Malmuth again considered the medical apportionment as it would apply to a similarly situated employee. He stated that "... evaluating a 'similarly situated employee' prevents the importation of vocational factors not directly attributable to the industrial injuries since prior to injury and absent contrary evidence notwithstanding, the injured worker was capable of performing full duty." He considered a similarly situated employee of Executive Chef that was hired to perform and executed until the date of his career ending injuries. "Under this theory, and the facts of this case as I understand them his similarly situated employee is totally disabled."

In the third approach, he again addresses the similarly situated employee and the fact that the non-industrial factors produced no functional limitations or disability as it specifically applied to Mr. Monteleone.

After presenting a re-cap of Mr. Monteleone's career as an executive chef which included prestigious positions and invitations nationally and internationally, Mr. Malmuth concluded that "Mr. Monteleone's capacity to meet the occupational demands within his pre-injury labor market was unaltered and unrestricted in any way prior to his career ending injuries irrespective of medical apportionment to non-industrial factors. Vocationally, Mr. Monteleone's diminished post-injury labor market [i.e., total loss] is diminished solely as a result of his residual functional capacity and not by any non-industrial factors.

I believe that Mr. Malmuth's thorough analysis of the issue of apportionment supports my finding that Mr. Monteleone is 100% vocationally permanently disabled due solely to the industrial injury of 3/26/2004. It also satisfies the Reconsideration Unit's directive for further development of the vocational record. This case is the exception to the law of apportionment as set for in Labor Code §4663. It is one of those "extremely 'limited circumstances'" cases where apportionment can be "excused" as noted in *Borman, supra*.