



Step Four: Recent Agency Policy

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eric@schnauffer.com

www.schnauffer.com

September 2011 POMS

- Most important step-four guidance since 1996 — SSR 96-8p
- Address policy issues not previously addressed
- Clarify longstanding policy
- Directly contradict how many ALJs in fact adjudicate claims
- POMS controlling for most issues
- SSR 96-8p, SSR 82-61, SSR 82-62, & POMS

Three Requirements for Past Relevant Work

- Substantial gainful activity
 - Step-one law applies
- Long enough to learn how to do it
 - DOT Specific Vocational Preparation not controlling
- Recent enough — 15-year guidelines
 - Date of adjudication
 - Date last insured (or similar period) if expired
 - POMS allows a stretching

Three Types of Step-Four Findings, But Only Two Proper

- Social Security Act
 - Does not include sequential evaluation
 - Refers to “previous work”
- Agency stretched “previous work”
 - 20 C.F.R. § 404.1560(b); SSR 82-61
 - Proper: as actually performed (AAP)
 - Proper as generally performed (AGP)
 - Improper: generic occupational classification
 - E.g., “cleaner,” “assembler”

Claimant's Step-Four Burden

- Claimant's burden to prove an inability to perform past relevant work
- Burden of persuasion — yes
- Burden of production — depends
 - AAP — claimant has evidence
 - But duty-to-develop argument
 - AGP — depends
 - Invented by the Agency — Agency's burden
 - Burden to rebut Agency's proposed AGP

Required Step-Four Findings

- SSR 82-62 requires three findings
 - (1) RFC
 - (2) Physical and mental demands of PRW
 - (3) Comparison of RFC and demands
 - ALJs commonly violate SSR 82-62, but harm must be shown
- SSR 96-8p requires a function-by-function comparison of demands of PRW with RFC AAP

As Generally Performed (I)

- “As generally performed in the national economy”
 - More than half, not how some performed
- AGP = full-time work — SSR 96-8p
- Agency uses the DOT for AGP
- If no DOT occupation, then no AGP?
 - Yes, according to the POMS, but VE testimony
- VE testimony about non-DOT AGP
 - Local VE knowledge of national economy

As Generally Performed (II)

- DOT can be wrong — SSR 00-4p
- Do not accept that the DOT is accurate or reliable with respect to AGP
- VE will normally rely on the DOT for AGP even when the VE knows that the DOT is wrong
- There is a truth of the matter
 - Standing and walking requirements of “light”
 - Sitting requirements of “sedentary”

As Generally Performed (III)

- POMS say that the DOT does not provide information about
 - Composite job
 - Work in a foreign country
 - Work in isolated industries
 - Work not sampled by the Dep't of Labor
 - New occupations
- Significant numbers irrelevant for AGP

As Generally Performed (IV)

- Agency policy about ADA/Rehabilitation Act found in Cleveland (SSR 00-1c)
- ADA/Rehabilitation Act accommodation never taken into account for PRW AGP
- VEs commonly implicitly testify about AGP with irrelevant accommodation
- Claimant must challenge VE testimony that implicitly assumes irrelevant accommodation

No-AGP: Composite-Job Rule (I)

- Claimant may not have PRW AGP!
- Composite job – SSR 82-61 and POMS
 - September 2011 POMS
 - 2 separate DOT occupations = composite
 - Composite job = no PRW AGP
- Many ALJs and VEs do not follow composite-job rule
- Claimant must identify composite job
- Composite PRW based on more than 2

No AGP: Composite-Job Rule (II)

- Pre-hearing preparation useful
 - Identify composite job
 - Obtain evidence corroborating composite job
 - Submit pre-hearing memorandum
- Hearing advocacy
 - If VE is present, present argument before the VE testifies
 - Obtain corroborating VE testimony
 - Dispute VE testimony

No AGP: Composite-Job Rule (III)

- Post-hearing advocacy
 - Submit additional corroborating evidence
 - Explain how VE did/did not follow the composite-job rule
- Appeals Council advocacy
 - Cite SSR 82-61 and the POMS
 - Submit additional evidence
- Judicial Review
 - Difficult argument if not argued below

As Actually Performed (I)

- AAP means AAP — each and every demand
- AAP requires a function-by-function comparison of the demands of AAP with the claimant's RFC — SSR 96-8p
- Claimant's duty to provide AAP demands
 - Work History Report, testimony, etc,
 - But see SSR 82-62 and POMS
- DOT should not be used to fill-in AAP

As Actually Performed (II)

- Part-time AAP may be PRW — SSR 96-8p, n.2
 - Hours performed may change over time
 - Average earnings over the period of work — SSR 83-35
- More than 40 hours per week AAP
 - Inconsistent with nearly all State-agency determinations!
 - POMS encourages adjudicators to question whether more than 40 hours was required

As Actually Performed (III)

- Accommodation may be taken into account — POMS “stool” example
- If accommodation was in fact provided, then a step-four AAP determination is made taking into account that accommodation
- Under the POMS, accommodation is taken into account AAP even if the accommodation was withdrawn

Substantial Gainful Activity

- Claimant's burden to show that past work was not substantial gainful activity
- Earnings are averaged over the period of work — SSR 83-35 — so the claimant must prove the period of work
- Expedite the hearing by proving pre-hearing or in opening statement that past work is not substantial gainful activity
- Don't concede when you don't know

Not Relevant — POMS Rules

- Volunteer work (not SGA)
- Unsuccessful work attempt (not SGA)
- Illegal work even if SGA
 - Public policy concerns about harm to the public and to the claimant
- Work during closed period when adjudicating a closed period
- Work in a prior period of disability when applying for expediting reinstatement

Factor *Not* Considered (I)

- Thomas — PRW need not exist
- Education
 - But consider AGP irrationality
- Skill transferability
 - But consider mental capacity for skills AGP
- Work performed in foreign country — SSR 82-40
- Elected position
- Military past work when no longer in military

Factor *Not* Considered (II)

- Licensure
 - But consider POMS truck-driver example
 - Mental impairment may prevent licensure
 - No AR for Berry (9th Cir.)
- Part-time work (if SGA)
- Seasonal work
 - Claimant can argue that some seasonal work is not PRW even if SGA
- Normal 20 C.F.R. § 404.1566(a) factors (job openings, hiring practices, etc.)

Skipping Step-Four POMS

- “Expedited Vocational Assessment”
- Applies only to State agencies
- If vocational evidence insufficient for step-four adjudication on any basis, proper to proceed to step five to render an unfavorable decision
- If RFC, age, education, and work experience would result in allowance, adjudicator must return to step four to
 - Find sufficient evidence or
 - Deny for failure to cooperate

Pre-Hearing Memorandum

- Do not concede PRW casually
- Do not use term “past relevant work” casually
- Watch floating fifteen-year guideline
- Do not casually endorse statements
- Defeat each possible past relevant job
- Provide supplemental information
- Identify composite past relevant work
- Identify as generally performed?
- Address State-agency VS report