



Journal of the National Association of Administrative Law Judiciary

Volume 44 | Issue 2

Article 2

5-15-2024

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Recommended Citation

Kevin Liebkemann, *Job Incidence Numbers in Social Security Disability Claims: A Case Study and Analysis*, 44 J. Nat'l Ass'n Admin. L. Judiciary 15 (2024)
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Job Incidence Numbers in Social Security Disability Claims: A Case Study and Analysis

Kevin Liebkemann

I. Introduction

The Social Security Administration (SSA) processes numerous disabled worker applications each year.¹ In adult disability claims, SSA employs a strict five-step sequential disability evaluation to decide whether a person is disabled.² Many adult Social Security Disability claimants either win or lose at the fifth and final step, where an SSA adjudicator decides whether there is “a significant number of jobs (in one or more occupations) having requirements which you are able to meet with your physical or mental abilities and vocational qualifications.”³ This article examines the vocational evidence that SSA uses to decide the significant number of jobs issue. It also presents the results of a case survey the author performed that probes into the reliability of vocational evidence that SSA obtains from vocational experts (VE) to decide the significant number of jobs issue.

In adult disability claims, SSA bears the burden of proof at the final step while disability claimants have the burden in the first four steps.⁴ SSA hearings are considered non-adversarial

¹ In 2023, SSA processed 1,904,635 disabled-worker claim receipts. Social Security Administration, *Disabled Worker Beneficiary Statistics by Calendar Year, Quarter, and Month*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/STATS/dibStat.html> (last visited Feb. 21, 2024).

² The five-step sequential evaluation is as follows: (1) Are you working? (Claim denied if yes.) (2) Do you have a severe impairment? (Claim denied if no.) (3) Do you have an impairment that meets or medically equals a Social Security “listing”? (Claim approved if yes; proceed to next step four if no.) (4) Are you able to do your past work? (Claim denied if yes.) (5) Can you do any other kind of work? (Claim approved if yes; denied if no.) Social Security Administration, *Understanding Supplemental Security Income If You Have A Disability or Are Blind -- 2024 Edition*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-disable-ussi.htm> (last visited Feb. 21, 2024).

³ 20 C.F.R. §404.1566.

⁴ Tom Johns, *SSA's Sequential Evaluation Process for Assessing Disability*, SOC. SEC. ADMIN., [https://www.ssa.gov/oidap/Documents/Social%20Security%20Administration.%20%20SSAs%20Sequential%20Ev aluation.pdf](https://www.ssa.gov/oidap/Documents/Social%20Security%20Administration.%20%20SSAs%20Sequential%20Evaluation.pdf), (last visited Mar. 25, 2024).

proceedings,⁵ in which adjudicators have a duty to develop the record.⁶ SSA has some rules that, amongst other things, direct a finding of disability or non-disability at this final step.⁷ However, in some cases, these rules do not apply because many disability claimants have non-exertional or other impairments not covered in the guidelines.⁸ SSA often relies on testimony of VEs that it hires to help decide such claims.

During these SSA disability hearings, VEs are often tasked with answering hypothetical questions about “whether a person with the physical and mental limitations imposed by the claimant's medical impairment(s) can meet the demands of the claimant's previous work . . . or any other work in the national economy (and the availability of such work).”⁹ When VEs identify a job, they typically must ensure it is a job bearing a title from the Dictionary of Occupational Titles (DOT) per SSA requirements. VEs are then asked to provide national job incidence numbers—figures which correlate to the number of jobs existing in the economy,

⁵ 20 C.F.R. § 404.900 (b). (“In making a determination or decision in your case, we conduct the administrative review process in an informal, non-adversarial manner.”); 20 C.F.R. § 416.1400 (b) (“In making a determination or decision in your case, we conduct the administrative review process in an informal, non-adversarial manner.”).

⁶ The SSA enumerates its duty to develop the record in 20 C.F.R. § 404.1512, which states in relevant part, “[b]efore we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application” 20 C.F.R. § 404.1512(b)(1). That duty extends to vocational evidence. Social Security Administration, *SSR 00-4p: Titles II and XVI: Use of Vocational Expert and Vocational Specialist Evidence, and Other Reliable Occupational Information in Disability Decisions*, https://www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (last visited April 27, 2024).

⁷ Social Security Administration, *Appendix 2 to Subpart P of Part 404—Medical-Vocational Guidelines*, SOC. SEC. ADMIN.: CODE OF FED. REGUL., https://www.ssa.gov/OP_Home/cfr20/404/404-app-p02.htm (last visited Feb. 21, 2024).

⁸ *Id.* § 200(e) (“Since the rules are predicated on an individual's having an impairment which manifests itself by limitations in meeting the strength requirements of jobs, they may not be fully applicable where the nature of an individual's impairment does not result in such limitations”). Some of these non-exertional impairments are mentioned in Social Security Rulings, and a useful summary with links is available at Health Hippo, *SSR Table Related to Particular Limitations*, <https://www.healthhippo.com/disability/#table1> (last visited April 27, 2024).

⁹ Social Security Administration, *I-2-6-74 Testimony of a Vocational Expert*, SOC. SEC. ADMIN.: HALLEX, § D, https://www.ssa.gov/OP_Home/hallex/I-02/I-2-6-74.html.

regardless of whether those jobs are available—for that DOT job title. For example, when tasked with ascertaining job availabilities for a person with certain physical and mental limitations, a VE may identify the DOT job title of addresser, DOT #209.587-010, as having requirements within the capabilities of that profile. The VE may further note there are 2,700 such addressers in the nation and testify to regional job incidence numbers if asked.

Once a VE has provided such figures on job incidence, the Administrative Law Judge (ALJ) then determines whether these numbers are credible. As a fifth and final step in this process, the ALJ makes the outcome-determinative decision as to whether the national number of jobs identified by the VE can be classified as “significant.” The accuracy of the VE testimony and the ALJ’s role in developing the record to ensure such accuracy are thus vital to the integrity of these final-step decisions. In 2019, there were over 213,000 step-five medical decisions in Title II disability cases alone according to SSA statistics.¹⁰

II. Where is National Job Incidence Data Found and How is it Categorized?

SSA typically requires that job incidence numbers be given by DOT job title when it decides disability claims at the fifth step of the sequential disability evaluation. However, the U.S. Dept. of Labor stopped updating the DOT in the early 1990s and no longer surveys the economy for job incidence numbers using DOT title classifications.¹¹ Previously, the DOT

¹⁰ See *Number and Percentage Distribution of Final Medical Denials, by Year of Application and Reason for Denial, 1992–2019*, Table 65, at Social Security Administration (noting that of 509,969 claims, 41.8% were decided based on the claimant’s ability to do other work). This number does not include Supplemental Security Income (SSI) for adult disability or concurrent claims. (Id.) In addition to Title II disability benefits based on a beneficiary or qualified family member’s work record, SSA administers the SSI program for adults and children who meet certain income and resource requirements. Social Security Administration, *Supplemental Security Income (SSI)*, <https://www.ssa.gov/ssi> (last visited Mar. 28, 2024).

¹¹ U.S. Dep’t Lab., *Dictionary of Occupational Titles - Fourth Edition, Revised 1991*, U.S. DEP’T LAB.: OFF. ADMIN. L. JUDGES, <https://www.dol.gov/agencies/oalj/topics/libraries/LIBDOT> (last visited April 27, 2024). Many jobs listed in the DOT were last updated in the 1970’s. See *id.*

only collected and published information regarding job description and requirements and did not include figures pertaining to job incidence. Consequently, no government survey or publication has published job incidence numbers categorized by DOT title since the early 1990's. Rather, currently, the government uses a different classification system when publishing job-incidence data.

a. Government Sources

The federal government's current method of classification—the Standard Occupational Classification (SOC)—classifies workers into occupational categories to collect, calculate, or disseminate data.¹³ All workers are classified into one of 867 detailed occupations according to the applicable occupational definition. One can obtain national and local job incidence data by SOC code on the U.S. Dept. of Labor, Bureau of Labor Statistics Occupational Employment and Wage Statistics (OEWS) website.¹⁴ The U.S Census Current Population Survey is collected by household survey, using census groups which are then related or allocated to the SOC classification system.¹⁵

There is a “crosswalk” tool that allows a researcher to determine what SOC code a DOT job title fits into.¹⁶ Further research can determine which other DOT codes fit into a particular SOC

¹³ U.S. Bureau Lab. Stats., *Standard Occupational Classification Home*, U.S. BUREAU LAB. STATS.: STANDARD OCCUPATIONAL CLASSIFICATION, <https://www.bls.gov/soc/> (last visited Mar. 25, 2024).

¹⁴ U.S. Bureau Lab. Stats., *Occupational Employment and Wage Statistics Home*, U.S. BUREAU LAB. STATS.: OCCUPATIONAL EMP. AND WAGE STATS., <https://www.bls.gov/oes/>, (last visited Mar. 25, 2024). The OEWS survey is a federal-state cooperative program between the Bureau of Labor Statistics (BLS) and State Workforce Agencies (SWA). OEWS estimates are constructed from a sample of about 1.1 million establishments collected over a 3-year period. U.S. Bureau Lab. Stats., *supra*, at *Occupational Employment and Wage Statistics Overview*, https://www.bls.gov/oes/oes_emp.htm.

¹⁵ *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATS., <https://www.bls.gov/cps/> (last visited Feb. 29, 2024).

¹⁶ *DOT Crosswalk Search*, O*NET ONLINE, <https://www.onetonline.org/crosswalk/DOT/> (last visited Feb. 29, 2024).

code, using the U.S. Dept. of Labor’s ONET site (example provided below).¹⁷ The O*NET database is the nation’s primary source of occupational information, containing hundreds of standardized and occupation-specific descriptors on almost 1,000 occupations covering the entire U.S. economy.¹⁸

Another way the government classifies jobs is by industry code. That includes job numbers for the approximately 830 job categories found in the North American Industry Classification System (NAICS).¹⁹ A resource called County Business Patterns (CBP) also provides data, including job incidence numbers, by NAICS industry code.²⁰ Additionally, County Business Patterns uses data from the Census Bureau and a variety of administrative records and survey sources, including tax data collected by the IRS.²¹

The U.S. Dept. of Labor, Bureau of Labor Statistics (BLS) also publishes employment projections on its website.²² Table 1.8 is particularly useful as it provides what it calls “industry-occupation matrix data, by occupation.” Using that table, a researcher can easily choose a SOC code and receive results indicating national job incidence projections for that SOC code with a detailed breakdown by industry.²³ Another table, (1.9), provides numbers by industry instead of

¹⁷ With only 13,000 DOT Titles and 867 detailed SOC occupations, sometimes many DOT Titles fit into a single SOC occupation. As discussed further below, that creates difficulties for vocational experts in determining how to rationally assign SOC-based job incidence numbers amongst multiple DOT titles.

¹⁸ *About O*NET*, O*NET RESOURCE CENTER, <https://www.onetcenter.org/overview.html> (last visited Feb. 29, 2024).

¹⁹ *North American Industry Classification System*, U.S. CENSUS BUREAU, <https://www.census.gov/naics/> (last visited Feb. 29, 2024).

²⁰ *County Business Patterns*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/cbp.html> (last visited Feb. 29, 2024).

²¹ *County Business Patterns Methodology*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/cbp/technical-documentation/methodology.html> (last visited Feb. 29, 2024).

²² *Employment Projections*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/emp/tables.htm> (last visited Feb. 29, 2024).

²³ *Industry-occupation matrix data, by occupation*, U.S. BUREAU OF LABOR STATISTICS,

occupation. Data from these projections sometimes appears in other U.S. Dept. of Labor publications like its *Occupational Outlook Handbook*.²⁴

An example of how this data can be used follows.

-The DOT job title of addresser (DOT#: 209.587-010) cross-walks into SOC code 43-9022.00, word processors and typists.²⁵

-According to the OEWS website, there are 41,990 jobs in the nation within SOC code 43-9022, word processors and typists. You can also see a breakdown of those job numbers by industry and location.²⁶

-8 different DOT titles (including addresser) fall within SOC code 43-9022, word processors and typists.²⁷

-If we go to BLS's Employment Projection website, table 1.8, and select the table for SOC code 43-9022, it shows a national employment figure of 44,000, with breakdowns of that number by industry.²⁸

<https://www.bls.gov/emp/tables/industry-occupation-matrix-occupation.htm> (last visited Mar. 27, 2024).

²⁴ *Occupational Outlook Handbook*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/ooh/> (last visited Mar. 27, 2024).

²⁵ See *DOT Crosswalk Search Titles matching "addresser,"* O*NET ONLINE, <https://www.onetonline.org/crosswalk/DOT?s=addresser> (last visited Mar. 27, 2024).

²⁶ See *Occupational Employment and Wage Statistics*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/oes/current/oes439022.htm> (last visited Mar. 27, 2024) the breakdown of national employment job numbers for SOC code 43-9022.

²⁷ See *Word Processors and Typists*, O*NET ONLINE, https://www.onetonline.org/link/result/43-9022.00?c=ro&n_ro=10&c=cw&n_cw=10&s_cw=DOT (last visited Mar. 27, 2024) for how to determine the DOT Titles within a SOC code.

²⁸ See *Employment Projections*, U.S. BUREAU OF LABOR STATISTICS, <https://data.bls.gov/projections/nationalMatrix?queryParams=43-9022&ioType=o> (last visited Mar. 27, 2024) for SOC code 43-9022.

There is a small difference between the BLS Employment Projection website figure of 44,000 and the OEWS website figure of 41,990 for SOC code 43-9022, word processors and typists, though the numbers are statistically consistent.

However, there is no government source that answers the question SSA would ask at Step 5 of the sequential disability evaluation, namely how many addressers there are in the nation, by DOT title. All we know from government surveys is that there are between 41,990 and 44,000 people in the SOC code, and there are 8 DOT titles in the SOC code of which addresser is one. We do not know how many of those 41,990 to 44,000 people would fit into the addresser DOT title as opposed to the other 7 DOT titles. Some services gather the above data and further information and then present it in useful and convenient formats. Some examples include Occu Collect²⁹ and the sources listed below.

b. Private Sources

Two private companies deliver estimates of national job incidence by DOT number through paid subscription services. As a result, their use is popular with VEs, who are called upon to give such numbers at SSA disability hearings. Neither of these two companies report that they do their own labor market surveys. Rather, they provide estimates using existing government survey data.

-SkillTRAN Job Browser Pro (JBP)

SkillTRAN publishes Job Browser Pro, a Windows-based software product that estimates employment numbers at the DOT level among others.³⁰ As a result, a JBP subscriber can use the

²⁹ OCCU COLLECT, <https://occucollect.com/> (last visited Feb. 29, 2024).

³⁰ *Job Browser Pro*, SKILLTRAN LLC, <https://SkillTRAN.com/index.php/products/pc-based-solutions/job-browser-pro> (last visited Mar. 27, 2024).

service to type in a DOT title and get a national job number estimate. However, SkillTRAN notes that additional consideration and expertise are needed to avoid giving bad information for these estimates. For example, it notes three different methods used to get job numbers:

1. Total Group. Report only the total OES group employment number [e.g. the SOC number].
2. Equal Distribution. Equally divide the total OES group employment number by the total number of DOT occupations in that SOC group.
3. Proportionate Distribution. Use the national proportion of employment reported in the OES survey attributable to the industry or industries in which the DOT occupation is likely to be found.³¹

SkillTRAN cautions that selecting the *total group* method is only appropriate in the 1.43% of cases in which there is only one DOT title within the SOC group.³² Examples of VEs ignoring this caution and giving faulty job numbers appear in the reported cases, notably in *Goode v. Commissioner of SSA*, a case examined in more detail later in this article. In *Goode*, the VE gave group numbers for an entire SOC code with 65 DOT titles within it, when asked to give national numbers for just one of those 65 DOT titles.³³

Regarding the *equal distribution* method, SkillTRAN cautions as follows:

Option 2 requires the assumption that all of the DOT occupations in an SOC group do occur with equal frequency. While this may be reasonable for some SOC groups in which there are just a few DOT occupations, it is highly unlikely to hold true when many DOT occupations share a single SOC code. It is more likely to lead to significant over- or under-estimation for a specific DOT occupation. In a recent

³¹*Id.*

³² *Id.*

³³ *Goode v. Comm'r of Soc. Sec.*, 966 F.3d 1277 (11th Cir. 2020).

remand decision within SSA (Hill v Colvin - 12/3/2015), the notion of equal distribution was described as “preposterous.”³⁴

Regarding the *proportionate distribution* method, SkillTRAN explains, it examines the industry context in which it considers a specific DOT occupation is likely to occur, using available government-reported OES industry proportions to estimate employment for a specific DOT. When looking at numbers for a SOC group on the OES website, it includes a breakdown by industry. One example of proportionate distribution would be to exclude numbers for industries reported within the SOC group, in which the DOT title in question was not likely to appear. SkillTRAN takes a hybrid approach considering industries and “further adjusts the number by equal distribution if there are other DOT occupations in that that SOC group that are also likely to be found in that industry.”³⁵ SkillTRAN also makes assumptions concerning occupational density in certain locations to adjust its numbers; however, its documentation does not indicate in detail how it does that.

SkillTRAN reports one of its studies showed that selecting the equal distribution method showed 350% more employment when compared to the proportionate distribution method.³⁶ One further warning SkillTRAN offers its users is that “. . . particularly for this important group of 137 sedentary, unskilled DOT occupations . . . [s]ome of these occupations may no longer exist at all due to automation, outsourcing, off-shoring, combination with other occupations, or obsolescence.”³⁷

SkillTRAN further advises VEs to:

³⁴ SkillTRAN, *supra* note 26.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

Know your data sources, data collection methods, and their limitations,
Use multiple methods to shape your opinion,
Have an opinion about specific methods, and
Compare the results of any estimation method to your knowledge and experience of real labor markets.³⁸

Thus, according to the source due diligence for a VE using JBP involves much more than just typing in a DOT number and reporting the result. Failing to use the correct methods can result in reporting greatly inflated job numbers, as occurred in the *Goode* case. Following the JBP methodology would also require the VE to apply their own knowledge of labor markets, select the correct industries to limit the numbers to, and research whether an occupation they are reporting has become obsolete as described in the DOT, lest they report numbers for a job that has significantly changed or no longer exists. Even after doing all that, there is the question of whether the equal distribution method is defensible in a given case, as described in SkillTRAN's own documentation.

c. U.S. Publishing

U.S. Publishing is a private company that also provides estimates by DOT number.³⁹ The company describes that the entirety of its data comes from government sources including the U.S. Dept. of Labor, Bureau of Labor Statistics, and U.S. Department of Commerce (Census Bureau). U.S. Publishing combines data from government sources into documents called

³⁸ Defending Your Use of Job Browser Pro Methodology, SKILLTRAN, <https://SkillTRAN.com/index.php/support-area/documentation/223-jbp-defense> (last visited Mar. 27, 2024).

³⁹ *Occupational Statistics*, U.S. PUBLISHING, <https://www.uspublishing.net/references.html> (last visited Mar. 27, 2024).

Occupational Employment Quarterly (OEQ) and the Specific Occupational Employment - Unskilled Quarterly.

U.S. Publishing contains some of the same warnings as SkillTRAN about the use of its estimates. It states: “The data is intended to be used in conjunction with local labor market expertise and research. All data are estimates and should be used accordingly.”⁴⁰ When using its products to, “...estimate the number of individuals employed in a specific DOT job, local knowledge of the labor market should be used. No government agency reports employment by specific DOT codes.”⁴¹ “Data produced by local research should be given more weight than [sic] U.S. Publishing data estimates.”⁴² Thus, according to the source, just quoting U.S. Publishing estimates without doing local research and applying expertise would not constitute a responsible use of the product by a VE.

One treatise states that one of U.S. Publishing’s shortcomings is that “methodology, reliability and margin of error for source data are not publicly disclosed.”⁴³ The treatise also points out concerns about the way U.S. Publishing apportions part-time versus full-time work when counting jobs, among other things.⁴⁴ One court found that it was likely that U.S. Publishing uses the “equal distribution” method mentioned above, and critiqued the method.⁴⁵

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ David Traver, *Social Security Disability Advocate’s Handbook* § 1510.2.2, at 15–438 (Volume 1).

⁴⁴ *Id.*

⁴⁵ *Jones v. Saul*, 2021 U.S. Dist. LEXIS 5234 (N.D. Ind. 2021).

Reportedly, U.S. Publishing uses equal distribution for its OEQ publication though possibly not for its SOEQ publication.⁴⁶

III. What number of jobs in the nation is a “significant number”?

No SSA rule states what a significant number of jobs is. Consequently, the determination is left to the discretion of SSA adjudicators. In the absence of guidance from SSA, some courts reviewing SSA adjudicator decisions have grappled with the question, leading to a lack of uniformity on where to draw the line. Federal courts sometimes consider both national and regional number of jobs when making the determination. The threshold for what constitutes a significant number of jobs in the nation varies considerably amongst the Federal Circuits.⁴⁷

A sample of cases shows there is no general consensus but a loose trend. National job numbers under 10,000 are usually found insignificant. For numbers between 10,000 and 25,000 the outcome may depend on which court or federal judicial circuit you are in. Once above 25,000, most Courts tend to find a significant number of jobs.

IV. Case survey results for the DOT job title addresser, DOT# 209.587-010.

One fundamental validity test is to check whether a method or process yields reproducible results. In the context of job incidence data in Social Security Disability claims, that suggests a few questions:

⁴⁶ An example of an SOEQ page can be viewed at U.S. Publishing. *See Occupational Statistics*, <https://www.uspublishing.net/catalog/sample/soeuqsamplpage.pdf> (last visited [Date of Access]).

⁴⁷ *Sanchez v. Comm’r of Soc. Sec.*, 705 F. App’x 95, 99 (3d Cir. 2017) (finding 18,000 jobs in the national economy a “significant number”); *Byrd v. Astrue*, No. 2012 U.S. Dist. LEXIS 4450 (W.D. Wash. 2012) (12,500 jobs in the national economy not necessarily a significant number of jobs); *Ashley T. v. Comm’r of Soc. Sec.*, 2019 U.S. Dist. LEXIS 244265 (W.D. Wash. 2019) (finding up to 23,186 jobs is not a significant number); *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 529 (9th Cir. 2014) (25,000 jobs in the nation is a “close call” but not a significant number of jobs); *James A. v. Saul*, 471 F.Supp. 3d 856 (N.D. Ind. 2020) (“14,500 is far below any national number of jobs that the Seventh Circuit Court of Appeals has determined to be significant”); *Johnson v. Chater*, 108 F.3d 178 (8th Cir. 1997) (10,000 jobs in the nation found to be a significant number of jobs).

-Do VEs, when testifying in disability claims around the same time, provide reasonably similar national job number estimates for the same DOT job title?

-To what degree do Social Security's ALJs accept disparate job numbers from different VEs for the same DOT job title?

If there is a reliable system in place, then VEs should not be giving widely differing national job numbers for the same DOT job title close in time. Furthermore, SSA adjudicators should not be accepting such widely differing numbers.

Data to explore these questions are limited because the SSA administrative level claims decisions and transcripts that include VE job incidence data are not publicly available. However, once disability claims are appealed to the Federal District Court level, then some information from those claim decisions becomes publicly available. Many of those federal court case decisions include a recitation of facts from those administrative records that include information such as:

-The DOT job categories that the vocational witness identified at the hearing, with national job incidence numbers.

-Whether the ALJ accepted the vocational witness testimony, and

-The dates of the hearing, ALJ claims decision, and federal court decision.

V. Methodology With Descriptions and Analysis of the Data

In August, 2023 researchers performed searches on Westlaw and Google Scholar of federal court cases that yielded 494 results. Search terms included "Kijakazi" and "addresser."⁴⁸ Westlaw is a subscription based legal research program. Google Scholar is a publicly available

⁴⁸ Using the term "addresser" and its DOT code "209.587-010" was noted to generate a similar pool of responses on using the search engine's options to limit the search results to a similar time period (2021-2023).

resource that indexes and allows searches of opinions from U.S. Federal Court decisions.

“Kijakazi” was the last name of the Acting Commissioner of Social Security during the years 2021-2023, who was typically a named defendant in Social Security Disability cases in Federal Court during that time period. “Addresser” is the name of a DOT job title.⁴⁹

Results of the 494 federal court decisions were reviewed in order presented by the search engines until at least 50 Social Security cases were identified in which the decisions reported vocational expert (VE) testimony detailing the national job incidence number for the DOT title Addresser. Those 50 cases are reported below. Other case decisions are not reported.

The 494 Google Scholar results included many cases in which VEs had identified addresser as a job at the administrative level disability hearing, but the Federal Court decision did not indicate the national job incidence numbers. These cases were excluded from the sample as they did not provide evidence to aid in assessing the consistency of the VEs national job incidence number estimates. A review of the 494 Google Scholar results revealed that the search terms effectively captured federal court Social Security disability cases within a limited time range, in which the vocational expert identified the DOT job title addresser at the administrative hearing. All case decisions reviewed involved denials of disability benefits at the administrative level. In the cases that we reviewed, the ALJ accepted VE job incidence testimony as credible.

The time range of the 494 Federal Court case decisions captured in the Google Scholar search was between July 2019 to August 2023. The time range of the 50 Federal Court case decisions used in the study was between July 2021 to August 2023 (2 years, 1 month). The time range was purposefully kept narrow to make it unlikely that fluctuations in the labor market could account for any disparities in reported job incidence numbers.

⁴⁹ See Dictionary of Occupational Titles, Addresser, <https://occupationalinfo.org/20/209587010.html> (last visited Mar. 31, 2024).

For cases that were included in the sample, the researchers recorded the following information (when available in the federal court decision): (1) citation for the federal case with Westlaw or Google Scholar link, including date of the decision, (2) identity of the vocational expert, (3) date of ALJ hearing, (4) ALJ decision date, and (5) number of addresser positions reported by the VE. The DOT job title of addresser, DOT# 209.587-010, was selected because SSA identified that job as the most frequently cited in SSA step-five disability claim denials—9.5% of all step-five denials in the year 2011.⁵⁰ The survey results of fifty cases between 2021 and 2023 are depicted below. The lowest national job incidence number for addresser identified by a VE was 2,000.⁵¹ The highest national job incidence number identified by a VE for addresser was 115,000.⁵² There was significant variance in addresser national job incidence numbers reported by VEs and accepted by ALJs in the 50 cases reviewed:

10,000 or less jobs	25 cases
10,001 to 24,999 jobs	11 cases
25,000 or more jobs	14 cases

The following chart shows the scatter of job incidence numbers reported by the VE, by case study number.

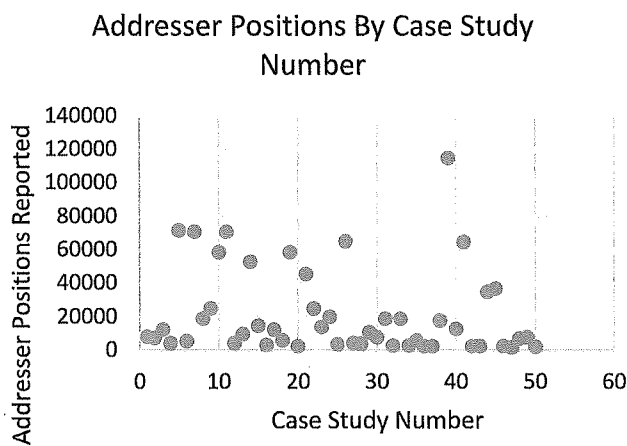
Table 1: Reported Addresser Positions By Case Study Number⁵³

⁵⁰ See M. Trapani & D. Harkin, *Occupational and Medical-Vocational Claims Review Study*, <https://www.ssa.gov/oidap/Documents/PRESENTATION--TRAPANI%20AND%20HARKIN--OIDAP%2005-04-11.pdf> (last visited Mar. 25, 2024).

⁵¹ Claudio v. Comm’r of SSA, Civ. Action No. 23-cv-108 (N.D. Tex. 2023).

⁵² Champion v. Kijakazi, Case No. 1:22-CV-214-KDB (W.D. North Carolina 2023).

⁵³ See *infra* note 45.



As stated, the jurisprudence among federal judicial circuits indicates a range between approximately 10,000 and 25,000 jobs as an approximate threshold for finding significant number of jobs in the nation. The case study shows differences in job incidence numbers amongst VEs that could be material to a disability claim outcome. There was no indication in the surveyed cases that ALJs questioned the accuracy of the vocational witness job incidence data testimony. It was rare for any two vocational experts to find the same number of jobs. In four different cases, however, vocational experts found 2,700 jobs for addresser (with two more finding 2,711 jobs).⁵⁴

The cases in which VEs reported higher job numbers raise a red flag considering the results of the exercise performed in Section II.⁵⁵ The DOT title of addresser appears along with seven other DOT titles in SOC group 43-9022. U.S. Department of Labor survey results showed 41,990 jobs in the nation for SOC code 43-9022. Thus, the DOT title of addresser, and the seven

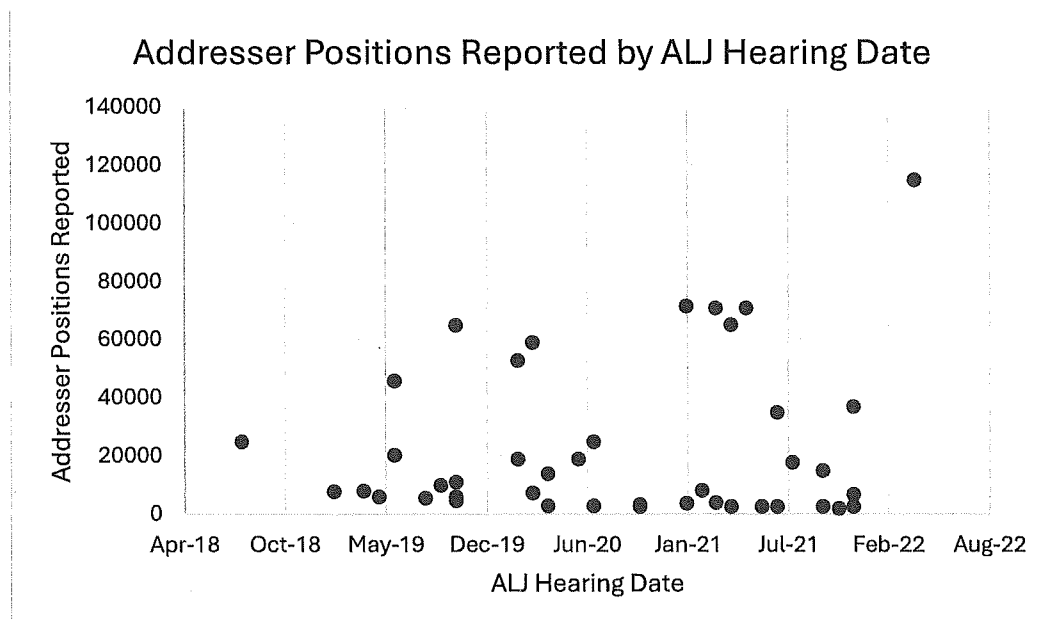
⁵⁴ In May 2021, SkillTran/Job Browser Pro estimated there were 2,308 addressers in the national economy, using its industry context method. SkillTran, *Estimated DOT Employment Number per DOT Occupation*, <https://skilltran.com/pubs/SkillTRAN-DOT-EstimateReport.pdf> (last visited Feb. 28, 2024).

⁵⁵ See *supra* Section II.

other DOT titles, should each be limited to some portion of the 41,990 jobs reported for SOC group 43-9022. Nevertheless, the study results document that some VEs testified to a greater number of addresser jobs than contained in the entire SOC group.

ALJ hearing dates are significant and relevant to the case study because these are usually the occasions when the VE provides their testimony. ALJ hearing dates are available in forty-two of our fifty case samples, with the most occurring in 2019 (14), 2020 (13), and 2021 (15).

Table 2: Addresser positions by ALJ Hearing Date (rounded to the month):



Reviewing the data demonstrated issues. For example, in March, 2020 a VE testified in an ALJ hearing that there were 7,380 addressers in the nation, while in a different ALJ hearing that same month a different VE testified there were 59,000 addressers in the nation.⁵⁶ In January, 2021 a VE testified in an ALJ hearing that there were 3,900 addressers in the nation,

⁵⁶ Karla J. v. Kijakazi, No. 3:20-CV-1051-MGG, 2022 WL 4463347 (N.D. Ind. 2022) (7,380 addressers); James A. M. v. Kijakazi, No. 20-CV-00372-JED-SH, 2022 WL 1510563 (N.D. Okla. 2022), report and recommendation adopted sub nom, James A. M. v. Kijakazi, No. 20-CV-0372-NDF-SH, 2022 WL 1014952 (N.D. Okla. 2022) (59,000 addressers).

while in a different ALJ hearing that same month, another VE testified there were 71,000 addressers in the nation.⁵⁷ In all four cases the ALJ accepted the VEs reported job numbers as credible. Since the respective VEs in the examples reported job numbers in the same month, fluctuations in the labor market can be reasonably excluded as an explanation for the disparate job incidence numbers. A copy of the case study data is available for viewing.⁵⁸

VI. Court Scrutiny Of VE Job Incidence Number Testimony and Methodologies

If VE testimony is not challenged on the administrative record then federal courts generally preclude the disability claimant from raising the issue, and give deference to an ALJ's acceptance of it.⁵⁹ An ALJ's factual findings are conclusive if supported by substantial evidence.⁶⁰ Some courts have found challenges to be valid when cross-examination and rebuttal evidence from the claimant's counsel at the administrative claim level showed that the vocational witness' methodology was not reliable. One example of such a case follows.

A. Court scrutiny finds VE testimony did not constitute substantial evidence.

In one case, a U.S. District Court examined whether substantial evidence supported an unfavorable ALJ decision reliant on VE testimony when the VE stated she was reporting job numbers from Job Browser Pro/SkillTRAN, U.S. Publishing, and other sources.⁶¹ The Court in

⁵⁷ Henri A. v. Kijakazi, No. 1:22-CV-00461-TWP-TAB, 2023 WL 386334 (S.D. Ind. 2023) (stating 3,900 addressers); Penny P. v. Kijakazi, No. 21-CV-1055-SPM, 2022 WL 1289355 (S.D. Ill. 2022) (stating 71,000 addresser jobs).

⁵⁸ Kevin Liebkemann, *Job Incidence Numbers in Social Security Disability Claims: LSNJ Preliminary Case Study Results*, NAT'L ORG. OF SOC. SEC. CLAIMANTS' REPRESENTATIVES 1, <https://nosscr.org/wp-content/uploads/2023/10/LSNJ-Preliminary-Case-Study-Results.pdf> (last visited Mar. 31, 2024).

⁵⁹ Brown v. Colvin, 845 F. 3d 247, 254 (7th Cir. 2016) (finding that a disability claimant's failure to raise a challenge on vocational evidence issues at the administrative level precluded raising those issues in federal court).

⁶⁰ Substantial evidence is "more than a mere scintilla," and means only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Biestek v. Berryhill, 139 S. Ct. 1148, 1154 (2019); 42 U. S. C. § 405(g).

⁶¹ Milner v. Kijakazi, Civ. No. 20-1016-KK, 2022 WL 1125402 at *7-9 (D.C.N.M. 2022).

Milner carefully examined the cited sources, which purported to extrapolate job incidence numbers by DOT title .⁶² The Court determined that the VE testimony did not constitute substantial evidence because each source warned that they provided estimates and that further expertise was needed before they could be relied upon.⁶³

With regards to U.S. Publishing, the court noted the company's own publications which state that, " . . . data is [sic] intended to be used in conjunction with local labor market expertise and research" because its data "are estimates and should be used accordingly."⁶⁴ According to U.S. Publishing, a VE should use "local knowledge of the labor market" and "[d]ata produced by local research should be given more weight than [sic] U.S. Publishing data estimates."⁶⁵

The VE did not use the local expertise and research that U.S. Publishing indicated should be employed, so the court found she did not use a reliable methodology.⁶⁶ With regards to Job Browser Pro/SkillTRAN, the court found several things mentioned in the company's own publications that indicated a need for a VE to employ additional research and analysis.⁶⁷

SkillTRAN advises VEs to "[k]now your data sources, data collection methods, and their limitations," "[u]se multiple methods to shape your opinion," "[h]ave an opinion about specific methods," and "[c]ompare the results of any estimation method to your knowledge and

⁶² *Id.*

⁶³ *Id.*

⁶⁴ U.S. Publishing, *Data Source References*, <https://www.uspublishing.net/references.html>, (last visited Mar. 30, 2022).

⁶⁵ *Id.*

⁶⁶ *Milner*, Civ. No. 20-1016-KK, 2022 WL 1125402 at *7-9.

⁶⁷ *Id.*

experience of real labor markets.”⁶⁸ SkillTRAN further advises VEs using its products to “[i]nvest some time in learning how and why [Job Browser Pro] works the way it does.”⁶⁹ Based on the VE’s testimony, the VE failed to follow these recommendations.⁷⁰

The court in *Milner* noted that neither Job Browser Pro/SkillTRAN, nor U.S. Publishing do their own labor market surveys. They rely on government publications that do not survey or report job numbers by DOT title. Rather they survey and report by NAICS industry or SOC code, both of which are considerably less numerous than DOT titles. One method they use to estimate numbers by DOT title is called the “equal distribution” method. The court used an example to describe how the equal distribution method works: “As a simplified example, suppose the DOT addresser job is one of eight DOT job codes associated with the Word Processors and Typists SOC code. Equal distribution would estimate that one eighth of all the Word Processors and Typists jobs were for addressers.”⁷¹

In *Milner*, the court stated that the equal distribution rests on an “illogical assumption that all job titles within a particular DOT job group exist in equal numbers in the national economy.”⁷² The court noted other reasons why blind reliance on such numbers would not constitute a reliable methodology without additional research and analysis from a VE when it stated:

⁶⁸ *Defending Your Use of Job Browser Pro Methodology*, SKILLTRAN, <https://SkillTRAN.com/index.php/support-area/documentation/223-jbp-defense>, (last visited Apr. 12, 2022).

⁶⁹ *Id.*

⁷⁰ *Milner*, Civ. No. 20-1016-KK, 2022 WL 1125402 at *7-9.

⁷¹ *Id.* at N. 11

⁷² *Id.* (citing *Chavez v. Berryhill*, 895 F.3d 962, 966–969 (7th Cir. 2018)) (noting that equal distribution “lacks any empirical footing”).

[T]his approach assumes that all jobs reported for a given SOC code must correspond to associated DOT jobs, and not to any new jobs that may have come into existence since the DOT was last published in 1991. But as SkillTRAN explains, achieving a more accurate apportionment would require a bespoke distribution developed by “[a] skilled vocational expert or other subject matter expert with deep knowledge” of the specific industries.” *SkillTRAN Process for Estimating Employment Numbers* at 6.

b. Court finds VE testimony did constitute substantial evidence.

In another case, a court found no error when an ALJ denied a disability claim based in part on VE testimony that there were 130,000 addresser jobs in the national economy that the claimant could perform.⁷³ The attorney at the ALJ hearing questioned the 130,000-job incidence number and asked the ALJ to subpoena the VE’s documents that he claimed supported his testimony. The ALJ did not grant the subpoena request, and the plaintiff appealed on the issue. The court in *Ford* rejected the plaintiff’s argument finding that, “[h]ere, the expert’s testimony cleared the low substantial evidence bar. Ford points to no indicia of unreliability in the expert’s testimony—she does not argue that the expert lacked the necessary qualifications, that his testimony was untrustworthy”⁷⁴

The Ninth Circuit in *Ford* further explained its decision: “Given its inherent reliability, a qualified vocational expert’s testimony as to the number of jobs existing in the national economy that a claimant can perform is ordinarily sufficient by itself to support an ALJ’s step-five finding.”⁷⁵

The Ninth Circuit, which considers VE testimony in SSD cases “inherently reliable,” was likely unaware that the national 130,000-job incidence number for addressers cited by the VE in

⁷³ *Ford v. Saul*, 950 F.3d 1141 (9th Cir. 2020).

⁷⁴ *Id.* at 1159.

⁷⁵ *Id.* at 1160.

Ford was an extreme outlier (a number significantly higher than those given by the VEs in all of the fifty cases we surveyed in section III above). However, it is highly unlikely that the VE in *Ford* would have been able to produce any credible documentation proving there are 130,000 addresser jobs meeting the description in the DOT title, if he were required to provide documentation.

The example in Section II.A., *supra*, provides links to U.S. Department of Labor data showing that the entire SOC group including the DOT addresser title and seven additional DOT titles only contain 41,990 jobs.⁷⁶ Thus, the ALJ and the Ninth Circuit likely based their decision on inaccurate VE testimony. Mr. Ford likely lost his case in part because both the ALJ and the court did not allow him to subpoena the VE's supporting documents, which would have exposed that inaccuracy.

By contrast, the ALJ in the *Milner* case permitted reasonable questioning of the VE and development of the record. That allowed sufficient information for the federal district court to weigh whether the VE testimony was based on a reliable basis and methodology and to allow a result based on the available facts.

VII. Analysis

The case survey results suggest that the SSA's current vocational evidence system is broken in ways that can hurt disability claimants. Some variance in VE job incidence number testimony may be reasonable. However, survey results document that VEs frequently gave markedly different national job incidence numbers for the same job around the same time, which indicates that the VE's methodologies employed were inconsistent and thus unreliable. Further,

⁷⁶ *Occupational Employment and Wage Statistics*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/oes/current/oes439022.htm> (last modified April 25, 2023).

study of cases involving other frequently cited DOT job titles could help determine how widespread this problem is. Some courts have already taken notice of such discrepancies regarding VE testimony of job incidence for other DOT titles.⁷⁷

The fact that SSA adjudicators accept markedly differing job incidence numbers for the same DOT title at the same time indicates that the SSA is not developing the record sufficiently in those cases to determine whether VE job incidence testimony is based on reliable methodologies and evidence-based practices. In the fifty cases surveyed in detail in the case study, researchers found only one where an ALJ rejected a job incidence number that a VE gave; in that case, the ALJ had to choose between job numbers given by different VEs.⁷⁸ That is concerning for several reasons. SSA adjudicators have a legal duty to develop the record and SSA has the burden of proof at Step 5 of the sequential disability evaluation. If SSA is not adequately testing VE job number testimony for reliability even as they are giving highly inconsistent testimony, then it is failing at its duty to develop the record and using unreliable evidence to uphold its step five burden.⁷⁹

Several factors confound oversight and accountability of VE testimony in SSA hearings. The first is that the tort system does not provide meaningful oversight or deterrence due to

⁷⁷ *Zacharopoulos v. Saul*, No. 19-CV-5075, 2021 WL 235630 (E.D.N.Y. 2021) (stating that different VEs gave numbers for the DOT title document preparer microfilm, ranging from 2.8 million to 25,000, with numbers “subject to wildly irrational variation This inexplicable variation in supposed learned opinions, offered under oath by contract vocational experts, renders such testimony entirely unreliable.”); *Thomas D. v. Kijakazi*, No. 20 C 2683, 2023 WL 2561614, at *9 (N.D. Ill. 2023) (stating that different agency VEs provided nut sorter national job numbers varying between 10,000 and 405,000).

⁷⁸ *Rivera v. Kijakazi*, No. 5:21-CV-623-JRK, 2022 WL 17665378 (M.D. Fla. 2022) (finding that different VEs testified at two hearings in the same case, one identifying 4,500 addressers and another identifying 71,708 addressers. The ALJ was required to choose between them).

⁷⁹ Unrepresented claimants especially rely upon SSA to develop the record, as they would likely lack the knowledge and means to cross-examine a VE regarding job incidence numbers.

witness and/or judicial immunity doctrines.⁸⁰ The contract of employment between SSA and VEs does not include disability claimants as a party.⁸¹ Agency hired VEs have a potent argument that they owe no legal duty of care to disability claimants in SSA hearings due to the lack of any contract between them.⁸² Consequently, due to immunity doctrines and the absence of contractual duty, even if it was undisputed that an agency hired VE committed malpractice that harmed a disability claimant the VE could likely escape all legal responsibility.

While professional organizations certify some VEs and typically have codes of ethics,⁸³ their role in enforcing those codes in Social Security Disability claims is confounded by at least two circumstances. First, any unreliable VE testimony given in an SSA claim will not likely come to a licensing or certification authority's attention because the administrative records of SSA claims are not publicly accessible without consent.⁸⁴ Aggrieved SSA disability claimants have little incentive to file complaints against VEs with professional certification or licensing organizations in situations where sanction remedies do not include compensation for their

⁸⁰ See Cappellina, A. Can an Expert Witness Be Found Negligent? Expert Institute, (describing history of witness and judicial immunity doctrines) <https://www.expertinstitute.com/resources/insights/can-an-expert-witness-be-found-negligent/> (last visited May 8, 2024); Hughes v. Long, 242 F.3d 121 (3d Cir. 2001)

⁸¹ Social Security Administration, Blanket Purchase Agreement, P. 3-6 (<https://www.ssa.gov/foia/resources/proactivedisclosure/Vocational%20Expert%20Blanket%20Purchase%20Agreement.pdf>) (last visited May 8, 2024)(the only parties to the agreement are the VE and the Social Security Administration).

⁸² The few cases that have found court appointed expert witnesses potentially liable to the parties involved situations where the expert contracted with one or both parties and none of them were cases involving Social Security claims. Levine v. Wiss & Co., 478 A.2d 397 (N.J. 1984); Politi v. Tyler, 751 A.2d 788 (Vt. 2000).

⁸³ The Commission On Rehabilitation Counselor Certification's (CRCC) Code of Ethics requires competence from vocational rehabilitation counselors in forensic settings. Code of Professional Ethics For Certified Rehabilitation Counselors, Section G, <https://www.crc certification.com> (last visited May 8, 2024). However, the SSA does not require VEs testifying in disability claims to be certified by that organization (See Social Security Administration, Blanket Purchase Agreement, supra). States may also impose their own licensing requirements on vocational rehabilitation counselors providing particular services. U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, Rehabilitation Counselors, www.bls.gov/ooh/community-and-social-service/rehabilitation-counselors.htm (last visited May 8, 2024).

⁸⁴ 20 C.F.R. 401.5 et. seq.

losses.⁸⁵ As a result, VE testimony in SSA hearings lacks significant oversight and accountability from the systems traditionally in place to protect the public from harm caused by malpractice (e.g. the tort system and meaningful scrutiny and enforcement from certification and licensing organizations).

That leaves only SSA oversight and court review of SSA decisions to protect the public in cases involving questionable VE testimony. SSA is in the best position to exercise its stewardship duty to oversee the quality of testimony from the VEs that it hires with public funds, and to protect disability claimants from being harmed by unreliable VE testimony. However, as covered above, SSA does not currently have adequate rules or enforcement in place to protect the public from the problem documented in the study data, namely VEs giving extremely disparate job incidence numbers for the same DOT title. The study data and case review found that SSA ALJs accepted those disparate numbers. The SSA's Office of Inspector General that is charged with searching for and reporting systemic weaknesses in SSA programs has not yet issued any investigation reports on the reliability of VE methodologies for determining job incidence numbers.⁸⁶

There are several root causes that SSA and the courts could address. First, SSA rules and guidance documents currently do not specifically require that adjudicators explore whether VE job numbers testimony is scientifically sound and evidence-based. Adjudicators must ask VEs about consistency of their testimony with the DOT and provide an explanation for inconsistency

⁸⁵ For example, the CRCC's Code of Ethics does not describe any authority to require a vocational counselor it certifies to make damaged person whole in its sanctions process. See CRCC Code of Ethics, *supra*.

⁸⁶ Social Security Administration, Office of the Inspector General, Audits and Other Publications at www.oig.ssa.gov (last visited May 8, 2024).

with that document.⁸⁷ Unfortunately, despite SSA’s continuing administrative notice of the DOT’s accuracy,⁸⁸ that document does not address job incidence numbers at all and it is over thirty years out of date.

Some administratively noticed U.S. Department of Labor sources do report job incidence numbers,⁸⁹ but invite serious errors in translation since none of them provide up-to-date job incidence data categorized by DOT title.⁹⁰ The private services that provide DOT national job number estimates—like Skilltran/Job Browser Pro and U.S. Publishing—indicate that their numbers should not be relied upon without significant additional research and analysis by VEs, and admit that their job numbers do not account for obsolescence of DOT title descriptions.

SSA could begin to address these problems by issuing rules that require meaningful inquiry from adjudicators as a part of its legal obligation to develop the record. SSA could also issue rules requiring that VEs divulge a reliable basis for job incidence number testimony, including methodology, specific identification of sources, and production of documents relied upon.⁹¹ SSA could monitor whether such efforts were effective by periodically conducting

⁸⁷ Social Security Administration, HALLEX I-2-6-74, https://www.ssa.gov/OP_Home/hallex/I-02/I-2-6-74.html (last visited Mar. 28, 2024); Social Security Administration, Social Security Ruling 00-4p, https://www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (last visited Mar. 28, 2024).

⁸⁸ 20 C.F.R. § 404.1566 (2024)

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ SSA published an “SSA Vocational Expert Handbook” that advises its VEs, “You should also be prepared to answer questions about the number of jobs in each occupation you cited and the basis for your estimates of the number of jobs.” Social Security Administration, et.al., *Vocational Expert Handbook*, SOC. SEC. ADMIN. 38 (Mar. 2023) [https://www.ssa.gov/appeals/public_experts/Vocational_Experts_\(VE\)_Handbook-508.pdf](https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf). However, the Handbook is not binding. ALJs are not required to inquire about the basis for estimates, and in the author’s approximately 30 years of experience handling disability claims, they almost never do.

studies similar to the one mentioned in this article, for jobs VEs frequently cite that they hire to testify.⁹²

SSA could also clarify its rules to ensure the right of disability claimants and their representatives to thoroughly cross-examine vocational experts and discover documents forming the basis of their opinions. SSA's current rules are sufficiently vague, and therefore allow for unfortunate results like what occurred in the *Ford* case.⁹³ The SSA Hallex Litigation Manual currently has two rules regarding the claimant's right to question the VE. Firstly, "[t]he claimant and the representative have the right to question the VE fully on any pertinent matter within the VE's area of expertise."⁹⁴ While that rule appears to permit liberal inquiry into the basis of a VEs job incidence numbers, it is qualified by the following rule: "[h]owever, the ALJ will determine when they may exercise this right and whether questions asked or answers given are appropriate."⁹⁵

SSA rules do not specifically address what happens when a claimant's right to question the VE fully in the first rule conflicts with the ALJ's broad discretion to influence the questions asked and answers given in the second rule. SSA could resolve that by clarifying its rule to make it clear that questions about the VEs methodology and the basis of their opinions (and the answers given) are always appropriate and that the ALJ must liberally permit inquiry into them.⁹⁶

⁹² SSA also has access to many thousands of administrative claims records and ALJ decisions that document VE job incidence number testimony, enabling it to do more thorough research.

⁹³ *Ford v. Saul*, 950 F.3d 1141, 1169 (9th Cir. 2020) (e.g., clearly wrong VE job incidence number testimony influencing the outcome of a disability claim)

⁹⁴ *Supra* note 59.

⁹⁵ Hallex I-2-6-74, Testimony of a Vocational Expert, SOC. SEC. ADMIN., https://www.ssa.gov/OP_Home/hallex/I-02/I-2-6-74.html (last visited Feb. 29, 2024).

⁹⁶ Such protections are especially important in Social Security Disability ALJ hearings, since claimants are given no pre-hearing discovery of the VE testimony. Their only opportunity to cross-examine the VE is at the hearing, or in some limited cases by post-hearing interrogatory.

Disability claimants have the right to request a subpoena to a VE for documents forming the basis of an opinion given at the hearing. However, cases like *Ford* and *Biestek* demonstrate that SSA ALJs are willing to deny such requests.⁹⁷ The reason that the court in *Ford* gave for permitting such denials was that it considered VE testimony “inherently reliable.”⁹⁸ The Supreme Court in *Biestek* indicated that a disability claimant may need to show on a case by case basis that the VE testimony lacks other markers of reliability and that there was no good reason for the VE to keep information private before the VE would need to produce underlying data to support an opinion.⁹⁹ A look at cases in the Seventh and Eleventh Circuits demonstrates how courts have dealt with these issues after the *Biestek* decision.

The Seventh Circuit’s approach contrasts with that of the Ninth Circuit in *Ford*. In *Ruenger v. Kijakazi*, the court found that in the context of job-number estimates, substantial evidence requires the ALJ to ensure that the vocational expert’s estimate is the product of a reliable methodology.¹⁰⁰ A methodology is reliable when it is based on “well-accepted” sources and the vocational expert explains her methodology “cogently and thoroughly.”¹⁰¹ When the claimant challenges the job-number estimate, the ALJ must compel the vocational expert to offer a “reasoned and principled explanation” of the methodology she used to produce the estimate.¹⁰²

⁹⁷ VEs are supposed to be ready to provide vocational resource materials that they rely upon. *Vocational Experts Handbook*, *supra* note 63. However, the Handbook’s advice is not binding and neither VEs nor ALJs are currently required to follow it.

⁹⁸ *Ford*, 950 F.3d at 1169.

⁹⁹ *Biestek v. Berryhill*, 139 S. Ct. 1148, 1157 (2019).

¹⁰⁰ *Ruenger v. Kijakazi*, 23 F.4th 760 (7th Cir. 2022) (referencing *Brace v. Saul*, 970 F.3d 818, 821–22 (7th Cir. 2020)).

¹⁰¹ *Id.* at 763.

¹⁰² *Id.* (citing *Chavez v. Berryhill*, 895 F.3d 962, 970 (7th Cir. 2018)).

The expert's explanation must be sufficient to instill some confidence that the estimate was not “conjured out of whole cloth.”¹⁰³

The Eleventh Circuit, while following the rule in *Biestek*, exhibited a willingness to scrutinize the basis of vocational job-incidence testimony closely in *Goode v. Commissioner*.¹⁰⁴ In *Goode*, the record showed that the VE’s job-incidence numbers were overinflated due to inappropriately converting a DOT code for a bakery worker into an SOC code.¹⁰⁵ Furthermore, the VE appeared to give the job number for an entire SOC group that contained sixty-five DOT titles, to represent the job-incidence number for just one of those sixty-five DOT titles.¹⁰⁶ The court in *Goode* found error and remanded the case, carefully noting that “we do not suggest (and certainly do not hold) that vocational experts at Social Security hearings must satisfy Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993)...But here the mistake—the use of the wrong SOC group—at the beginning of the analysis is so substantively fundamental and serious that it tainted the testimony that followed. The fact that vocational expert testimony is admissible does not necessarily mean that it constitutes substantial evidence.”¹⁰⁷

Both the “inherently reliable” rule in *Ford* and the U.S. Supreme Court’s standard in *Biestek* appear to rest on a foundation of the courts’ confidence that SSA is acting reasonably to ensure that VEs are giving good, evidence-based testimony and employing sound methodologies. Unfortunately, the case study results show that, at least with regards to VE testimony about job-

¹⁰³ *Id.* (citing *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002)).

¹⁰⁴ *Goode v. Comm’r*, 966 F.3d 1277 (11th Cir. 2020).

¹⁰⁵ *Id.* at 1282.

¹⁰⁶ *Id.* at 1283.

¹⁰⁷ *Id.* at 1283.

incidence number, the basis for confidence in the testimony has crumbled considerably. Not only are VEs giving highly inconsistent job-numbers testimony for the same job, which should cause a rational trier of fact to consider them unreliable, there is also no good reason for the VEs to keep the basis of their opinions private. The case data suggest that SSA adjudicators accepted widely varied job numbers close in time and used those numbers to deny disability claims. In light of this information, courts may wish to reconsider the standards and assumptions they make in these cases to promote decisional accuracy.

The next major issue is that SSA has not yet adequately dealt with the DOT's obsolescence problem and how it can affect VE job-numbers testimony. The only services that provide DOT national job-number estimates, Skilltran's Job Browser Pro and U.S. Publishing, acknowledge that their published data does not account for changes in jobs since the DOT was last updated decades ago. The SSA has no published rule on how to ensure that VEs appropriately exclude jobs with requirements that have significantly changed since the DOT was last updated when they give job-numbers testimony.

For the DOT job title addresser selected for our case study, there is considerable authority that the job is obsolete as described in the DOT. The DOT title, which VE's often cite as an example of a simple, sedentary, and unskilled job, was last updated in 1977 and describes the job as someone who "[a]ddresses by hand or typewriter, envelopes, cards, advertising literature, packages, and similar items for mailing."¹⁰⁸ In 2011, SSA researchers determined that the DOT job title addresser might be obsolete and not exist in any significant numbers.¹⁰⁹

¹⁰⁸ DICTIONARY OF OCCUPATIONAL TITLES, <https://occupationalinfo.org/20/209587010.html> (last visited Feb. 29, 2024).

¹⁰⁹ SOCIAL SECURITY OFFICE, OCCUPATIONAL AND MEDICAL-VOCATIONAL CLAIMS REVIEW STUDY (2011).

Multiple federal courts considering the issue have found the DOT job title addresser to be obsolete, and/or not to exist in significant numbers.¹¹⁰ In litigation, the SSA recently conceded that the occupation of addresser was obsolete in a Ninth Circuit case.¹¹¹ However, in many cases, such as those in our survey, it did not. Several months after admitting to the Ninth Circuit that the DOT title for addresser was obsolete, SSA published a You Tube video for VEs that suggested that they respond to obsolescence questions by stating that the jobs cited had changed since last published in the DOT but the requirements did not, citing their “years of experience” in the field.¹¹² However, the video’s advice may do more harm than good on DOT obsolescence issues, because it did not suggest that VEs describe any reliable methodology backing such an assertion in meaningful detail.¹¹³ It is perplexing why the VEs that the SSA hires continue to cite the DOT title for addresser in hearings, often without mentioning its obsolescence.¹¹⁴ Yet, more

¹¹⁰ *Alaura v. Colvin*, 797 F.3d 503 (7th Cir. 2015) (“[D]oes anyone use a typewriter anymore?”). *See Skinner v. Berryhill*, 253 Soc. Sec. Rep. Service 77 (Cal. C.D. 2018) and cases cited therein:

As other courts have found, common sense (bolstered here by the information presented in the Study and on the SSA website itself), casts doubt on the reliability and credibility of the VE's testimony and on the ALJ's reliance on that testimony to conclude that the occupation of "addresser" currently exists in significant numbers.

¹¹¹ *Luchsinger v. Kijakazi*, No. 22-55599 (9th Cir. 2023).

¹¹² Social Security Administration, Vocational Expert Handbook Update 2023, (at 17:30 to 17:55) <https://youtube.be/IY1YX-Qplyo?feature=shared> (last visited May 8, 2024). One of the example jobs mentioned in the video was addresser (Id. at 15:38).

¹¹³ For example, if a VE’s “years of experience” constituted placing only several people in addresser positions in a single area, that might not constitute a sufficient sample size to state with any reasonable degree of confidence how the job is performed in thousands of addresser positions across the country. The SSA video did not suggest more potentially reliable methodologies such as consulting U.S. Dept. of Labor data with more up-to-date job requirement information than the DOT (e.g. the Occupational Requirements Survey, Occupational Outlook Handbook and O*NET).

¹¹⁴ One possible explanation is that SSA ALJs always ask VEs if their testimony is consistent with the DOT as required by the SSA Hallex. I-2-6-74, TESTIMONY OF A VOCATIONAL EXPERT, https://www.ssa.gov/OP_Home/hallex/I-02/I-2-6-74.html (last visited Mar. 31, 2024). Thus, VEs may feel they can respond with an obsolete job, as long as it is a title included in the DOT. That problem highlights the need to also inquire about obsolescence.

perplexing, is why SSA adjudicators have continued to deny disability claims based on the DOT title for addresser for over a decade after SSA's own researchers determined that the DOT description is likely obsolete. While the SSA still relies on the DOT, it needs a better procedure to identify obsolete DOT titles and to stop using them to decide disability claims.¹¹⁵

There is substantial disagreement on what constitutes a “significant number of jobs” due to an absence of policy guidance from the SSA, which has led to inconsistent standards across Federal Circuits, as described earlier. Additional policy guidance from the SSA could help improve decisional consistency and uniformity.

The SSA should also identify methodologies that VEs commonly employ to arrive at job incidence numbers, and consider drafting policies on methods that are controversial and which may not be evidence-based or scientifically sound. For example, some VEs employ the equal distribution method (described *supra*), that assumes that all DOT job titles in an SOC group have the same number of jobs without any proof of the truth of that assertion. Claimant representatives report repeatedly encountering instances of the same error the VE made in *Goode*.¹¹⁶ Such methodologies are controversial, and the SSA should weigh in on whether job numbers based on such methods are acceptable for SSA adjudication purposes.

An ALJ may receive any evidence at the hearing that he or she believes is material to the issues, even though the evidence would not be admissible in court under the rules of evidence.¹¹⁷

¹¹⁵ For over a decade SSA has been working on plans to convert from the DOT to a new SOC based classification system using up-to-date Department of Labor data in its ONET database, Occupational Requirements Survey data, and other sources. SSA OCCUPATIONAL INFORMATION SYSTEM PROJECT, https://www.ssa.gov/disabilityresearch/occupational_info_systems.html (last Visited Feb. 2, 2024). However, the status of those efforts is unclear.

¹¹⁶ *Goode*, 966 F.3d at 1277.

¹¹⁷ 20 C.F.R. § 404.950(c)(2019).

However, VE job numbers opinion testimony that the SSA should know is not evidence-based or the result of a reliable methodology does not constitute substantial evidence and cannot reasonably support a disability claim decision.¹¹⁸ The results of the study support a call for inquiry and action to assess why the SSA is accepting such wide-ranging job incidence numbers for the same job, and why VEs are not required to reveal their methodologies and show the basis for their testimony in more detail.¹¹⁹

The SSA is already underfunded and understaffed for the work it must do, so asking for more development in claims should not be done lightly. However, the ongoing harm done to disability claimants must weigh against that. Disability claimants can be financially devastated when they legitimately cannot work but lose their claims because of VE testimony based on an unreliable methodology. People who cannot work to earn money and cannot collect their disability benefits can quickly go through their savings and become unable to support themselves and their families. Protecting claimants and the integrity of the disability adjudication system requires identifying and weeding out opinion testimony that is not evidence-based and the result of reliable methodologies. In the case of VE testimony on job incidence numbers, the Social Security Administration's garden needs some weeding.

The author would like to thank Legal Services of New Jersey 2023 Intern Oluwatobi Omotoso for research done on the addresser case survey, and Lawrence Rohlfing, Esq., and others for volunteering their time and expertise.

¹¹⁸ Substantial evidence “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” 20 C.F.R. § 404.901 (2019).

¹¹⁹ VEs who use unreliable methodologies to generate job incidence numbers for the addresser DOT title are likely using the same unreliable methodologies to generate incidence numbers for other DOT titles. If SSA does not identify and prevent the use of such unreliable methodologies, then errors like the ones documented in *Goode, supra* will continue to occur, and negatively impact disability claimants.