

National Disability Forum: Developing and Assessing Medical Evidence for Extreme Limitations in the Ability to Focus on Tasks

Presentation materials by Kevin Liebkemann
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I appreciate the opportunity to participate in this National Disability forum. I come to the forum offering the perspective and observations of an attorney who has advocated for and represented people with disabilities in a variety of contexts for about 25 years. I now work at a not-for-profit company that provides free representation to people with low income and resources. I have represented many people in Social Security and Supplemental Security Income disability claims. I have also helped people with disabilities to obtain services, assistance, and accommodations to help them obtain, sustain, and maximize their ability to work.

These materials are offered in the spirit of aiding the debate and exploration of how a person's medical conditions can cause them to go off-task in a work situation. In my experience of representing many people with disabilities and speaking to other advocates who have done the same, the issue is common. It is well known that employers will not keep an employee who goes off-task too often, or for too long. For that reason, this topic is important in a variety of contexts, including disability adjudication and determining how to assist people with disabilities in obtaining the best services, assistance and accommodations to help them maximize employment. These materials cover more ground than time will likely permit me to discuss in the forum so I will use these materials to present a more detailed account.

One fair question is why the perspective and observations of an attorney who represents people with disabilities is useful on this topic. I am not a medical doctor or a vocational expert. However, in the course of representing hundreds of people with disabilities over more than 20 years, I have regularly listened to many medical doctors provide opinions and testimony on this topic. My work puts me in the position of often hearing vocational experts provide sworn testimony on the limits of employer tolerance for employees going off-task in the work place. I have also spent many hours speaking to people with disabilities who describe their own experience of how their medical conditions interfere with their abilities to remain on task, both in work situations and in their day-to-day lives. More than a few of them had been fired from jobs for going off-task too often. Finally, I have collaborated with other attorneys and advocates with similar experiences, some of whom have kindly offered their observations and input on these materials. We have noticed some issues which may not be obvious, and which can aid the exploration of this forum topic.

1. At what level do impairment-related limitations in attention, concentration, and persistence cause “off task” behavior to the extent a person can’t do any job?

This is actually two questions. First, when do impairment-related limitations in attention, concentration and persistence cause a person to go off-task? Second, how long must a person be

off-task, before they would be unable to perform any job? For purposes of my materials, I would like to narrow the inquiry somewhat.

-When do impairment-related limitations in attention, concentration and persistence cause a person to go off-task?

I start with the assumption that SSA does not need much assistance adjudicating claims involving people with permanent and constant extreme loss of attention and concentration. Those claims are rare and fairly obvious when encountered. Most such people will be in institutional settings and will meet Social Security's Mental Listings requirements. Standard psychiatric evaluation and psychometric testing is well suited to documenting such impairments.

However, most claims involve medical conditions which intermittently cause people to lose focus and go off-task in varying degrees. I defer to the mental health experts on the panel on the issue of how mental health evaluations and psychometric testing might aid in documenting such intermittent loss of focus.

Many disability claimants and beneficiaries experience intermittent symptoms that cause them to lose focus and go off-task. Even if they were able to attempt work tasks while so impaired their ability to timely and accurately complete the tasks could be significantly and noticeably impaired such that they do not meet employer expectations. These episodes often occur unpredictably and at inconvenient times. A small sample of examples includes people with:

- loss of consciousness (e.g. seizures, daytime hypersomnolence, narcolepsy)
- post-traumatic stress disorder while experiencing a flashback
- panic or anxiety disorders while experiencing attacks
- psychotic disorders, while experiencing hallucinations
- chronic bouts of nausea or other severe gastrointestinal symptoms
- strong prescription medications that affect the ability to focus for a time
- chronic severe sleep deficits significantly impairing ability to focus
- medical conditions which can intermittently produce pain severe enough to cause loss of focus on work-related activity
- bouts of severe mania and racing thoughts
- diabetes who have poor control over their blood sugar levels, while experiencing severe hyper- or hypoglycemic episodes.
- vertigo while symptomatic
- severe migraine headaches, while they are symptomatic
- other clearly distracting symptoms like severe muscle spasms

Such examples, if credibly and properly documented, could support a disability claimant's assertion that they would be off-task for a time. SSA adjudicators are directed to make such assessments when performing the symptom analysis required by 20 C.F.R. 416.929 and 20 C.F.R. 404.1529. When an adjudicator determines there is a medically determinable impairment that could cause a symptom, they then must assess the intensity, persistence, and degree to which the symptom limits capacity for work. Under that analysis adjudicators can and should

document when a credited symptom would reasonably produce time off-task in a work situation, and then note how often and for how long such off-task time would occur.

Example: Adjudicator finds that the evidence supports that a claimant's severe orthopedic condition requires him to take strong pain medication three times a day, which impairs his focus and causes him to be dizzy to the point of having to lie down for two hours each time after taking it until the effect subsides. The claimant's allegation is consistent with the medical record and known side-effects of the medication. At least one of those doses would have to be administered during the middle of the work day. A person experiencing such dizziness and having to lie down would be off-task. Thus, the claimant would be off task two hours a day in a normal 8 hour work schedule.

-How long must a person be off-task, before they would be unable to perform any job?

I start again with an assumption based on Social Security's current rules, namely that we're limiting the inquiry to ability to sustain performance of substantial gainful activity, e.g., work involving any full-time competitive job existing in significant numbers in the economy. Under current law that means no sheltered or accommodated work. Currently, with a very limited exception, Social Security rules do not take disability accommodations into account when adjudicating disability claims. I will use the term competitive employment to mean such non-sheltered, non-accommodated employment.

Representatives and Administrative Law Judges handling disability claims are aware that vocational experts often testify about employer tolerances for time off-task in Social Security Disability hearings. A quick search of recent Federal Court cases confirms that is so. The following search yielded over a thousand Federal Court Social Security Disability cases citing to vocational expert testimony and/or other evidence involving time off-task, using the Google Scholar search engine:

<http://tinyurl.com/offtaskcases>

The search terms were limited to only recent Federal Court cases in which the current Acting Commissioner Carolyn Colvin was named as defendant. Only a small percentage of disability cases reach Federal Court (the fourth level of appeal), so it's reasonably safe to assume that many more disability claims raise the time off-task issue. SSA has a wealth of vocational information on this topic, in the form of vocational expert testimony offered in thousands of such claims.

My review of a sampling of those Federal Court cases documented a significant consensus of vocational expert testimony, with some outliers, that **a person experiencing more than 10-15% of time off task would not be able to sustain substantial gainful employment.**

Representative cases include:

Mills v. Colvin, 959 F. Supp. 2d 1079, 1084 - Dist. Court, ND Illinois 2013

“The VE further testified that the general tolerance for off-task time is around 10-12%, and an individual who needed a ten-minute break every hour would exceed that tolerance... The VE testified that needing two days off work per month would preclude an individual from working any job.”

Lewis v. Colvin, 973 F. Supp. 2d 985, 992 - Dist. Court, ED Missouri 2013

“Mr. Breen [the vocational expert] responded that while the DOT does not discuss being off task, based on his fifteen years in placing people, Mr. Breen believed being off task about ten to twelve percent of the time to be the upper limit of what employers will typically tolerate.”

The percentage can be less in some cases if the time off-task occurs at unpredictable times outside of normal work breaks, when an employer might need or expect an employee to be on-task. If an employee is repeatedly observed to be off-task outside of scheduled breaks, despite prior warnings and reprimands for such, and shows no signs that such off-task behavior during expected work times will cease, employers in competitive work situations will terminate the employee. In other words, that employee will not be able to sustain employment.

If a person goes off-task during a scheduled break it is not as much of a problem. However, when a person goes off-task outside of scheduled break times (which SSA recognizes as fifteen minute breaks in the morning and evening and up to an hour for lunch) then they are typically subject to reprimand or warning in the first instance. If they are again observed to be off-task outside of break time after such reprimand or warning, then additional progressive discipline typically follows. If after two or three such warnings, they are again observed to be off task then their employment is usually terminated. Such employees are unlikely to pass any introductory or trial period of employment and could not sustain competitive employment.

Employers typically expect that workers will be engaged in their assigned work duties during non-break times. Supervisor duties include ensuring that workers are doing the work they are supposed to be doing during scheduled work hours. Employers are not paying their employees to not work. If a person has a medical condition that causes them to intermittently go off task at times that cannot be fit into the employer’s scheduled break time then they will be subject to warnings, reprimand, and they will eventually lose their job in competitive work. This progressive discipline approach typically involves a first warning or reprimand, then a second warning, perhaps with a discussion of how the problem might be eliminated. If the problem continues after that to a third or fourth instance, the employee is typically let go.

Such discipline is also typically used if an employee is observed to repeatedly make significant mistakes on the job or to fail to follow employer instructions despite repeated warnings and reprimands. Overall productivity loss can also instigate such discipline. In other words, an employee may appear to be on-task and nominally engaged in work activity, but their work product is flawed or otherwise not acceptable due to impaired attention and concentration.

People who cannot help but intermittently go off-task or make such mistakes because of their medical condition might initially get hired, but they will not be able to sustain competitive substantial employment. People with such problems will sometimes have a record of short

periods of employment in multiple jobs leading up to their disability benefit application. That is consistent with their problem. They repeatedly attempt work and then keep losing their jobs once it becomes clear to their employers that they would not be reliable in their ability to be on task during expected times, consistently follow instructions, and/or produce an acceptable work product.

Representative reported cases with relevant vocational expert testimony on this point include:

Harris v. Colvin, Docket No. 6:15-cv-06104 (MAT), WD New York 2016.

“When these limitations on concentration were included in the hypotheticals presented to the VE, the VE testified that an individual who is off task 10 percent of the work day would be unable to maintain competitive employment, which requires the worker to be on task virtually all of the time outside of normal work breaks.”

Bourinot v. Colvin, 95 F. Supp. 3d 161, 172 - Dist. Court, D. Massachusetts 2015

The vocational expert testified that “...if they required more than two fifteen-minute breaks and a lunch break due to their inability to get back to work, the person would be unemployable.”

Sharp v. Colvin, Docket No. 1:13-cv-01888-DKL-WTL Dist. Court, SD Indiana 2015

Vocational expert testified that with a loss of 40 minutes of productivity per day “no jobs would be available.”

The expert testimony in those cases is reasonably consistent with SSA policy, which lists “The ability to maintain concentration and attention for extended periods (the approximately 2-hour segments between arrival and first break, lunch, second break, and departure),” as one of the “mental abilities needed for any job.” POMS DI 25020.010 B.2 Mental Limitations.

Some vocational experts have indicated that employer tolerances for time off-task can be somewhat relaxed for employees in some skilled, exempt positions. However, for unskilled and non-exempt positions tolerances are strict. Many disability claims involve determinations at step five of SSA’s sequential disability evaluation, in which the issue is whether a person can do any other substantial gainful work. The issue in most cases at that fifth step of the evaluation is whether a person can do other unskilled work. Other skilled work is often not germane at that stage because the claimants ordinarily do not have the acquired skills necessary to do such work.

Those of us representing disability claimants find that SSA's Administrative Law Judges often consider the time off-task analysis, but that it is extremely rare for SSA adjudicators and state contractors (DDS) to consider time off-task at the initial and reconsideration claim levels. We believe that incorporating the time off-task analysis at those earlier levels could allow significantly more meritorious claims to be approved earlier in the claims process, helping to relieve the current claim backlog at the ALJ hearing level. To illustrate, in our experience, the example listed above involving the person off task for two hours per work shift would likely result in a loss at the initial and reconsideration levels due to time off-task not being considered,

but such a claimant would likely win on the same evidence at an ALJ hearing in which a vocational expert testified to employer tolerances.

2. What tests or questionnaires already exist for assessing attention, concentration, and persistence?

-Tests for assessing attention, concentration, and persistence

I would defer to mental health professionals on which tests are best for assessing attention, concentration, and persistence. I am aware that mental status examinations often include serial 3 or 7 testing and other mini-tests to assess a person's ability to maintain concentration on a task. Psychomotor vigilance testing can track a person's ability to accurately and timely perform simple tasks. Such tests can provide some helpful information in assessing disability claims. However, SSA has cautioned that ability to concentrate in a short-term mental status or psychological test by a clinician is not equivalent to the abilities needed "...to sustain attention or pace under the stress of competitive employment for a normal workday or workweek..." POMS DI 22511.05.D. Adjudicators should consider all the evidence in these situations and obtain a longitudinal history.

As mentioned above, many disability claims involve medical impairments and symptoms that intermittently become severe enough to take a person off-task. Many mental illnesses typically wax and wane over time and can produce intermittently severe symptoms. The effect of those intermittently severe, waxing and waning symptoms on a person's ability to maintain attention and concentration typically won't be captured in mental status examinations or psychometric test results if the examinations and tests take place while those symptoms were not very active.

Consider the example of the person who gets dizzy for two hours after taking their pain medication to the point of having to lie down. That person would presumably perform quite differently on attention/concentration testing depending on whether or not the test was performed inside the two hour window in which he was symptomatic. Such a person may sometimes present to a mental health care provider with relatively intact attention and concentration when they are not as symptomatic. Indeed such a person would be likely to try to time medical appointments for when they were less symptomatic so they could function sufficiently to participate.

-Questionnaires for assessing attention, concentration and persistence

One disability treatise includes a question designed to solicit information from medical sources regarding medical conditions producing symptoms impairing a patient's attention and concentration needed to perform even simple tasks. The following language is found in the treatise Social Security Disability Practice, by Thomas Bush:

"How often during a typical workday is your patient's experience of pain or other symptoms severe enough to interfere with **attention and concentration** needed to perform even simple work tasks?"

__ Never __ Rarely __ Occasionally __ Frequently __ Constantly

For this and other questions on this form, “rarely” means 1% to 5% of an 8-hour working day; “occasionally” means 6% to 33% of an 8-hour working day; “frequently” means 34% to 66% of an 8-hour working day.” (notably, these quantifiers track those used by SSA in some other forms, like those used to track the frequency with which claimants can do postural activities).

Social Security Disability Practice, Thomas Bush, James Publishing, Ch. 2, form 258.1.

Attorney Charles Martin developed a questionnaire that requests that the medical source mark on a scale to show the percentage of an 8-hour work day that the patient can function satisfactorily in maintaining attention and concentration, and in other essential areas of work-related function.

Medical Assessment of Ability to Sustain Work-Related Activities (Mental)

To determine this individual's ability to **sustain satisfactory function in work-related activities** on a **8-hour day, 40 hour week basis** in a **regular competitive work setting**, please give an assessment, based on your examination and review of treatment records, of how the individual's mental/emotional capabilities are affected by the **impairment(s)**. Consider the medical history, the chronicity of findings (or lack thereof), and the expected duration of any work-related limitations, but not the individual's age, sex, work experience, or the effects of **drug abuse** or **alcoholism**.

For each activity shown below:

1. Mark the following scale with an "X" to reflect the **percentage of an 8-hour work day** the individual can be expected to sustain a **satisfactory** level of functioning.
2. Identify the particular medical or clinical findings (i.e., mental status examination, behavior, intelligence test results, symptoms) which support your assessment of any limitations. It is important that you relate specific medical findings to any noted limitation in capacity. The usefulness of this assessment depends on the extent to which you do this.

I. Making Occupational Adjustments

A. Mark the scale to show the percentage of the 8-hour work day the individual can function satisfactorily.

i. Follow work rules	<75% <input type="checkbox"/> 80 90 100%	v. Interact with supervisor(s)	<75% <input type="checkbox"/> 80 90 100%
ii. Relate to co-workers	<75% <input type="checkbox"/> 80 90 100%	vi. Deal with ordinary work stresses	<75% <input type="checkbox"/> 80 90 100%
iii. Deal with the public	<75% <input type="checkbox"/> 80 90 100%	vii. Function independently	<75% <input type="checkbox"/> 80 90 100%
iv. Use judgment	<75% <input type="checkbox"/> 80 90 100%	viii. Maintain attention/concentration	<75% <input type="checkbox"/> 80 90 100%

B. Describe any limitations and include the medical/clinical findings that support this assessment. If some of these actions cannot be sustained for an 8 hour work shift, explain why.

(form excerpt used with author's permission)

Mr. Martin's form also solicits explanations for the percentages indicated. Such medical opinions are typically weighed by SSA adjudicators using factors described in 20 C.F.R. 416.927 and 20 C.F.R. 404.1527.

Social Security has forms which address attention and concentration issues. SSA's Disability Determination Explanation (DDE) form solicits a basic rating of “difficulties in maintaining concentration, persistence or pace.” Possible responses include none, mild, moderate, marked, or extreme.

On the same form, a more detailed “Mental Residual Functional Capacity Assessment” is solicited with the same range of possible responses. Relevant categories rated include “The

ability to maintain attention and concentration for extended periods” and “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.” Sometimes the form asks the source to “explain in narrative form the sustained concentration and persistence capacities and/or limitations.” These questions are asked in the section on mental impairments, but not for physical impairments.

SSA’s Psychiatric Review Technique form contains the same basic rating of “difficulties in maintaining concentration, persistence or pace.” It uses the same scale mentioned in the DDE form.

SSA’s “Medical Source Statement of Ability to do Work-Related Activities (Physical),” Form HA-1151, does not solicit information for impairments to attention, concentration, or time off-task.

These questionnaires warrant discussion. One notable drawback of the SSA questionnaires is that they use rating categories that are too vague to capture sufficient information to determine how often a person would be off task. If a person’s loss of focus is sometimes inarguably extreme, let us say, while experiencing a full-fledged anxiety attack, but is at other times mild, how should that be rated? Mild? Extreme? Split the difference and call it moderate? There is little guidance on that point. Use of the none-mild-moderate-marked-extreme scale removes information needed to make important findings. The missing information is the duration the person would be off-task, and whether the person could be expected to repeatedly be off-task outside of normally scheduled breaks. This deficit could be cured by adding additional questions.

The Bush and Martin questionnaires actively solicit important information which the SSA questionnaires currently do not, namely, how often a person’s medical conditions would likely impair their attention and concentration down to unsatisfactory levels, thus quantifying off-task time. Any such opinions would need to be supported by the medical evidence to receive significant weight under the regulations (20 C.F.R. 416.927 and 20 C.F.R. 404.1527). Requesting explanations from the medical source for any such opinions could help identify such supporting evidence.

The quantifiers used in the Bush questionnaire (which are also used by SSA in some contexts) are not as helpful as the percentage scale used in the Martin form for purposes of the time off-task analysis. That is because the quantifier for “occasionally” used in the Bush and sometimes in SSA questionnaires is defined at between 6% and 33% of the time. If the employer tolerance threshold for time off-task is around 10-15%, then it would be impossible to say whether a person rated as “occasionally” off-task would be within or outside of employer tolerances. An average percentage of time off-task or a narrower range of percentages would be more useful.

3. With whom should we consult to help us gauge a person’s capacity to focus on job-related tasks?

Input from mental health care providers, consultative examiners, and psychometric testing can be useful in documenting ability to focus on job-related tasks with the limitations discussed above. Treating physicians can often provide important input as well, with the following caveat.

With a few exceptions involving those treating some mental impairments, treating health care providers are not in the business of documenting whether their patients sometimes experience loss of focus for job-related tasks. A typical principal care provider, orthopedist, GI doctor, etc., is not likely to explicitly note an "intermittent loss of focus" or words to that effect, in medical treatment progress notes even if such is actually present. The reason is because the degree of impairment to attention and concentration is often only tangentially relevant to the diagnosis and treatment of their patient's medical condition. This is particularly true with physical impairments which could intermittently impair the patient's focus in work situations and in activities of daily living.

Treating sources will much more likely document reported symptoms and signs which could reasonably cause such a loss of focus. Examples:

- Patient experiences 8/10 pain several times per week
- Patient reports severe anxiety attacks 3 times per week.
- Patient reports daily bouts of vertigo

The treating health care provider, if asked, may credibly opine that their patient would be off-task due to impaired focus when experiencing such symptoms (see the Bush and Martin form excerpts in section 2 above). Treating health care providers with a longitudinal history of treatment are often the professionals most likely to have observed the effects of intermittently severe symptoms in their patients. However, such information is not usually volunteered in progress notes because of its relatively tangential relevance for medical diagnosis and treatment purposes.

Adjudicators should weigh such medical opinions in accordance with existing agency regulations and policies (20 C.F.R. 416.927 and 20 C.F.R. 404.1527). Furthermore, the symptom analysis (20 C.F.R. 416.929 and 20 C.F.R. 404.1529) allows for fair consideration of reported symptoms that could produce time off-task.

SSA also considers non-medical evidence in adjudicating disability claims. Disability claimants who exhibit off-task behavior in their normal daily activities might also do so in work situations. I encourage SSA to continue considering such proof because it is sometimes provides compelling support to the medical evidence. Problems indicating a loss of focus can include:

- missing appointments
- problems consistently following medical treatment regimens
- reliance on support network, e.g. family remembers have to remind to take medication, check chores they have done, provide frequent reminders, etc.
- difficulty maintaining routines without assistance
- makes more mistakes than expected
- misses deadlines

- takes longer to get things done
- unable to keep jobs more than a short time

When disability claimants have support networks to provide assistance, the people providing such support are often excellent sources who can corroborate the claimant's reported deficits. Former employers who had to let the claimant go can also sometimes provide helpful information.

4. What does previous research tell us about employer expectations around productivity?

I addressed this issue in section 1 above. There is a consensus of a large number of testifying vocational experts that employers would not keep employees who are off-task more than 10-15% of the time. According to these experts a corresponding drop in productivity would negatively affect a person's employability. Furthermore, in competitive employment, employers do not tolerate repeated instances of time off-task outside of normally scheduled break times.

There are related issues. Vocational experts often testify that when employees repeatedly make mistakes in the work place, or fail to complete required work tasks, employers often respond with progressive discipline leading to job termination. Deficits in attention and concentration can cause people to make mistakes more often and fail to complete required work tasks. Therefore, SSA should consider employer expectations and reactions in those situations.

5. Should we consider other limitations besides attention, concentration and persistence that could affect a person's ability to focus on tasks?

Yes. From the employer's point of view in competitive work it likely makes little difference if an employee is off-task due to attention and concentration deficits or for some other reason. The important thing is that the employee is not working when they are paid to be working and the work is not getting done. There are many medical conditions and symptoms that might not seriously impair attention, concentration and/or persistence, but nevertheless can force people to take their focus off work-related tasks or otherwise be off-task. A person who is necessarily occupied in a non-work related task made necessary by a medical impairment will not be able to focus on required work related tasks. Also, medical impairments which force people to leave their work stations result in time off-task. Some common examples include:

- Need to periodically administer medical treatments during work hours (nebulizer treatments for asthma, diabetic checking blood sugar and administering medication). While doing so, the person is off-task for work purposes.
- Need to leave work unexpectedly for emergency medical treatment. While away from work, the person is off-task.
- A medical treatment regimen that would significantly interrupt a normal 8 hour per day, five day per week work schedule. While away from work, the person is off-task (e.g. a three to five day per week intensive outpatient mental health treatment program).

-Symptoms of urinary frequency, urgency, and/or incontinence causing the need for many bathroom breaks outside of normal break times. While away from the work station, the person is off-task.

-A person requiring a sit-stand-walk option that requires them to sometimes move away from a fixed work station. While away from the work station, the person is off-task.

-A person experiencing swelling in their lower extremities that sometimes requires them to elevate their legs above hip level or lie down. For that time the person must recline or lie down, the person is off-task.

-A person with chronic migraine headaches must sometimes lie down in a dark, quiet place until symptoms subside. Regardless of the extent that pain interferes with their attention and concentration (which should also be assessed), the person will be off-task during the time they need to lie down in a dark quiet place. In a work situation, that usually means leaving the job site and going home because there is no place they can lie down.

SSA rules require its adjudicators to consider the combination of a claimant's impairments when making a disability determination. Thus, whether time off-task is caused by focus deficits or other medically related causes, adjudicators should consider how much time in aggregate a person would be off-task so that an accurate determination can be made on whether the total time off-task would exceed employer tolerances. Many claimants have more than one medical condition that could intermittently cause such time off task.

Another metric often considered in disability claims at the hearing level is days absent from work due to medical conditions. Some medical conditions, whether through limitations in focus or other causes, would result in a person being absent for an entire day as opposed to being off-task for just a portion of a day. Vocational experts at Social Security Disability hearings often testify regarding employer tolerances for days absent, and there are numerous Federal cases citing such vocational expert testimony. While there is some variation amongst vocational expert opinions on this point, the majority state that **employers will not tolerate absenteeism averaging two or more days per month** in competitive employment (some outlier vocational expert opinions place the employer days absent tolerance threshold lower at more than 1 day, while some place it higher at more than 2 days). Representative examples from Federal cases include:

Conner v. Shalala, 900 F.Supp. 994, 1003-4 (ND Ill. 1995) "In this case, Connor's attorney asked the VE to testify generally about the extent that an employer would tolerate an employee being absent from work. . . . The VE responded that in unskilled work the tolerance level would not exceed two absences per month on a consistent basis."

Dennis v. Astrue, 655 F.Supp.2d 746, 753 (W.D.Ky.2009) (VE testified that employers typically will tolerate no more than two absences per month on a consistent basis)

Milam v. Colvin, 794 F.3d 978, 982 (8th Cir. 2015) (“According to the VE, ‘generally when you miss two days or 10 percent on a consistent basis employers would not tolerate it; however, on[e] day a month ... for a long-term employee—employers would tolerate that, your honor.’”)

Spillers v. Colvin, 24 F. Supp. 3d 818, 823 (S.D. Iowa 2014) (“Finally, the vocational expert testified that if an individual were unable to attend work on a regular basis, missing work two days per month, then full time competitive work was precluded.”)

The Bureau of Labor Statistics documents that absences in full-time employment in the United States average 2.9 per year. <http://www.bls.gov/cps/cpsaat47.htm>. Notably, a person missing two days per month on average would be absent 24 days per year. A review of other available information from large employers demonstrates that they are restrictive on maximum number of absences allowed.

-This undated article indicates that Wal-Mart’s policy is a maximum of three days absent over any six-month period, which averages to only ½ day per month.

<http://www.wthr.com/story/5624949/wal-marts-attendance-policy-criticized>

-This McDonalds corporate site indicates that employees are allowed 10 sick days and 2 personal days per year.

http://www.aboutmcdonalds.com/mcd/corporate_careers/benefits/highlights_of_what_we_offer/balance_work_and_life.html

-IBM indicates that it allows 15 days off after a year. http://m.ibm.com/http/www-03.ibm.com/employment/ca/en/newhire/regular_faq.html

Another point is that the concept of work pace is usually lumped in with concentration and attention in the disability analysis when it sometimes should be considered separately. Sometimes there is a relation, as a person with impaired concentration and attention might be off-task frequently enough to effect the overall pace of their work. That would be the equivalent to a runner in a race stopping at certain intervals. The runner will take longer to finish the race because of the stops. However, sometimes the analysis is different. Some medical impairments may not cause people to go off-task but they do cause them to perform mental and physical work activities at a slower pace which might not be consistent with employer tolerances. That would be equivalent to a runner who may not stop during the race, but runs at a slower pace. Certain cognitive impairments affect the speed at which people can perform mental tasks and how long they can do so at a given time. Pace of physical tasks can be negatively impacted by many mental and physical impairments. I recommend more study of employer tolerances regarding work pace for both mental and physical activities and consideration of how SSA can better document such deficits in disability claimants.

In conclusion, the Social Security Administration could benefit from developing policies encouraging assessment of time off-task and days absent caused by medical impairments. A review of currently available information suggests that the following profiles exceed employer tolerances and would be consistent with a finding of inability to do substantial gainful activity:

- Off-task more than 10-15% of the work day on average
- More than just rarely off-task outside of regular employer break times, on an ongoing basis
- Absent from work two or more days per month on average

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