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Social Security Disability Insurance Nuts & Bolts

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Nuts & Bolts

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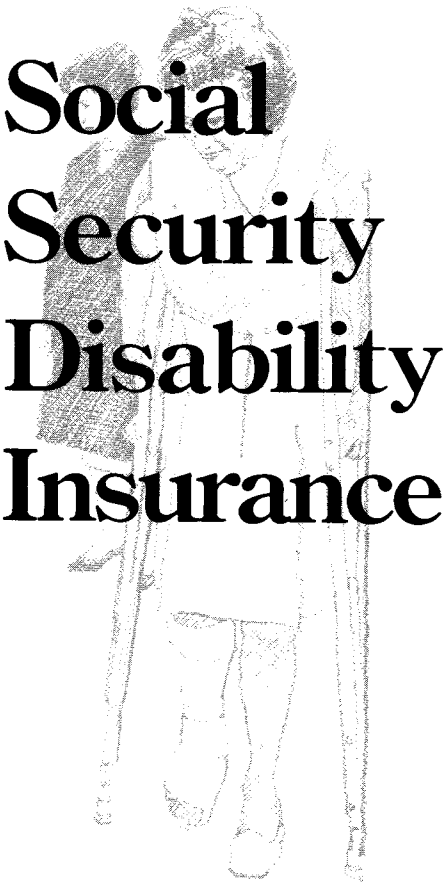


by Steven C. Emens

The Social Security Administration awarded, in 1983 alone, over $106,000,000 in attorneys' fees to lawyers representing persons with claims against the Social Security Administration. This figure should awaken the Alabama attorney to the fact there is money to be made in representing individuals concerning their Social Security benefits.

Over 80% of the $106,000,000 paid in fees last year concerned disability claims. For that reason, this article concerns itself primarily with the representation of a client seeking disability benefits under the Social Security Act.

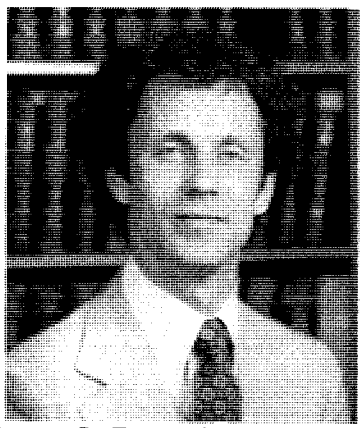
The Social Security Act defines disability as an "inability to engage in any substantial gainful activity, by reason of a medically determinable physical or mental impairment, which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months" (20 CFR §404.1505).

Disability benefits are available under either Title II or Title XVI of the Social Security Act. Eligibility under Title II is acquired when a worker has achieved "insured status." Generally, this insured status is determined by the number of quarters of coverage the worker has obtained. An individual acquires a quarter of coverage for each quarter of a year he works under employment which is covered by the Social Security Act.

If a person cannot qualify for coverage under Title II then he may apply for benefits under Title XVI. This title is known as the Supplemental Security Income Act and is a federally administered cash assistance program available to the general public. It provides all citizens, and legally admitted aliens, have a right to a minimum income if they qualify as aged, blind or disabled and have limited resources.

The first step in representing someone seeking disability benefits is to determine what actions to obtain benefits they may have taken prior to arriving at one's office. There are five possible stages through which an application for benefits may pass. These stages are an initial application, a reconsideration review, an administrative hearing, an Appeals Council hearing and a trial in a federal district court. Benefits may be granted at any one of these levels; however, if the benefits sought are denied then the application must be appealed to the next level within sixty (60) days, or the denial becomes permanent as to that application.

In the majority of cases, the client only seeks an attorney after he has made both an initial application and a request for reconsideration, with both



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being denied. Because this is the status of the normal application when it is brought to an attorney, this article focuses upon the administrative hearing stage.

The Administrative Hearing

At no stage of the process, prior to an administrative hearing, is the client afforded his "day in court." Only before an administrative law judge is a claimant allowed to present testimonial and documentary evidence. This is the first stage at which the claimant's attorney is permitted to object to evidence already in his file. An attorney should approach the hearing before an administrative law judge just as if he were trying any civil law suit involving injuries and damages.

The burden of proof in submitting evidence to support his claim for disability is on the client. Therefore, it is essential for the attorney to offer the most persuasive evidence available, including as much live testimony as possible. This evidence can be secured only through substantial pre-trial effort.

Prior to the hearing, the attorney should learn everything about the client regarding medical impairment, work history, ability to function mentally and physically, medical treatment and other general data that might have a bearing on the issue of disability.

The attorney should also review the Social Security Administration's file concerning his client. This file will be available at the administrative law judge's office and will contain a number of earlier medical narratives which were the basis upon which the initial application and reconsideration denial were handed down. In most instances, the medical evidence in the client's file is months old and will not indicate the permanency of his impairment. A physician, for example, who once stated the client to be "not disabled" may have since changed his opinion and failed to supplement his original report.

After reviewing the file and discussing its contents with the client, it then is time for the attorney to establish contact with and interview the physicians involved in the claim. Considerable time should be spent in assisting the physicians in conforming their testimony to the terminology used by the act in defining disability. Many doctors, for example, may not immediately have an appreciation for a question regarding whether the claimant can perform "light work." The attorney should translate such a term into the more practical question: "Can Mr. Smith frequently lift or carry boxes weighing more than 10 pounds?"

The hearing is held in accordance with the Administrative Procedures Act and is *de novo*. The proceedings are directed by the administrative law judge and attended by the court reporter, the claimant, the claimant's attorney and the various witnesses. The atmosphere is one of relative informality. The judge begins the proceedings by making a short statement for the record indicating who is present and offering a short statement of the law concerning the claimant's application. It is then discretionary with the judge as to whether he conducts the hearing himself by questioning the claimant and witnesses or if he allows the attorney to do the questioning.

In the event the administrative law judge allows the attorney to present his own case, he begins by calling his first witness. This should be one of the strongest witnesses — perhaps the claimant himself. It should be kept in mind this is the judge's first opportunity to see the claimant and, if his disability is one which is readily apparent, it is recommended his disability be highlighted. Like any trial involving the recovery of damages for injuries, the attorney must use his imagination to present his claimant's injuries in as demonstratively and persuasively a manner as possible. If the claimant is required to use a brace, corset, cane, an inhalator or other equipment or apparatus at his home, then these items should be available for demonstration so as to emphasize the claimant's inability to work and earn a living.

Generally, any and all evidence may be received at the hearing even though such evidence would be inadmissible under the Federal Rules of Evidence. The Administrative Procedures Act provides that in an administrative hearing such as this, the test for evidence is not as to its admissibility but the weight to be given such evidence. As a practical matter, the claimant's attorney should place into evidence every document, statement, narrative or other item which would help sustain his client's burden of proof. The attorney continually should remember, if there is an adverse decision by the administrative law judge, his subsequent appeal will be decided primarily on the basis of the record made at the administrative hearing.

In determining whether the evidence supports a finding or disability, the regulations require the administrative law judge to follow a five-step process. These five steps must be followed in sequence regardless of the nature of the claimant's impairment. If a determination an individual is or is not disabled can be made at any one of these steps, evaluation under a subsequent step is unnecessary. This "sequential analysis" must be followed by the administrative law judge in writing his opinion and, therefore, the attorney should follow this analysis in developing and presenting the case at the administrative level.

Sequential Analysis

The first step in the sequential analysis is to determine whether the claimant currently is engaged in substantial gainful activity. This means, as a general rule, if the client is working and expects to earn more than $300 per month he conclusively is presumed to be non-disabled and his claim will be denied. (20 CFR §404.1574)

Assuming the hurdle of the first step is surmounted successfully, the focus of the second step is to determine whether the client has a "severe" impairment. A severe impairment is one which significantly limits the physical or mental capacities to perform basic work-related activities, such as standing, walking, lifting, seeing, hearing, speaking and following instructions. If the claimant is found not to have a severe impairment, the claim will be denied without further consideration. (20 CFR §1520)

The third step of the process requires a comparison of the claimant's severe impairments with a detailed listing of impairments found at 20 CFR §404, subpt P, Appendix 1. These are

impairments of such severity the Social Security Administration deems them to be disabling. If there exists an impairment which meets or equals any one or more of these "listed" impairments, then a finding of disability will be made without further consideration. In determining whether the medical equivalent of a listed impairment exists, the Social Security Administration may require a physician, selected by them, agree the client's impairment is the equivalent of one listed. (SSR 83-19)

If the client's impairment is not severe enough to meet or equal one listed, the proceedings go forward to the fourth step of the sequential evaluation. This stage of the process focuses upon a determination of whether the claimant is able to return to any work performed within the past 15 years. Before a decision can be made on this issue, specific findings must be made concerning the client's "residual functional capacity."

The purpose of the residual functional capacity assessment is to determine to what extent the impairment keeps the individual from performing particular work activities on a sustained basis. These work-related activities are adopted from the Dictionary of Occupational Titles and are divided into five broad categories. These are defined at 20 CFR §404.1567 as follows:

1. Sedentary Work — Work which involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers and small tools. Primarily it must be a job which can be performed sitting although limited amounts of walking and standing may be required.
2. Light Work — Work which involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing or pulling of arm or leg controls.
3. Medium Work — Work which involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds
4. Heavy Work — Work which involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds
5. Very Heavy Work — Work which involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more

The administrative law judge, after considering all relevant evidence, attempts to place the client's ability into one or more of these classifications. This finding then will be compared with jobs performed by the claimant over the last 15 years to see if he retains the capacity to return to any of them. If it is found he can return to any of these previous jobs the claim will be dismissed without further consideration.

Once a claimant is able to survive this fourth step, a *prima facie* case of disability is established, and the burden of proof shifts to the Social Security Administration to show, despite the presence of the defined impairment, jobs do exist which the claimant can perform.

This proof is offered in the fifth and last step of the sequential analysis. The Social Security Administration is required to determine whether the client is able, despite an inability to perform prior work, to perform other substantial gainful activity considering his age, education, work experience and residual functional capacity. The

Social Security Administration, to assist in this determination, has established a system of tables or "grids," interrelating the factors of residual functional capacity, age, education and work experience. This grid system is designed to serve as the basis for the Social Security Administration's rebuttal of the client's *prima facie* case.

The Grids

The grid system requires the administrative law judge to determine four vocational factors before a conclusion can be reached concerning disability. These factors are age, education, skill level and residual functional capacity. Each factor is divided further into various broad sub-classes.

When the findings of fact as to each sub-class coincide with all criteria of a particular classification within the grid system, the grid directs a conclusion as to whether the claimant is or is not disabled. (20 CFR §404, Subpt P, App 2)

The administrative law judge possesses wide discretion in making findings of fact as to these sub-classes. This gray area of broad discretion allows the resourceful attorney an opportunity to lessen the adverse effect the grid system may have upon the client's claim for benefits. A summary of these vocational factors and the areas of discretion associated with each is given below:

I. Age (20 CFR §404.1563)
   A. 18-49 years; younger individual, (age not significant)
   B. 50-54 years; approaching advanced age, (age significant if combined with other relevant factors)
   C. 55 years and up; advanced age, (age a significant factor)

This delineation of age represents vocational expectancies only and is not intended to be applied mathematically in borderline situations. Unfortunately, the regulations do not set any guidelines as to what is a borderline situation. Recently, the court in *Broz v. Heckler,* 721 F.2d 1297, (11th Cir. 1983) found the age classification of the grid system invalid as the secretary currently is applying them. The court found in disability hearings the effect of age on an individual's ability to work must be determined on a case-by-case basis in that it is improper to group all individuals within these three broad sub-classifications.

II. Education (20 CFR §404.1564)
   A. Illiterate — no formal schooling
   B. Marginal — 6th grade or less
   C. Limited — 7th grade through 11th
   D. High school and above

The regulations allow the presentation of evidence the client's effective education may be less than his numerical grade level; however, in the absence of evidence to the contrary, the numerical grade level will be used. Therefore, the attorney should always inquire as to the claimant's present ability to read, write, perform simple math skills, communicate effectively with others and engage in general reasoning ability.

III. Skill (20 CFR §404.1565)
   A. Unskilled — no acquired or transferable skills
   B. Semi-skilled — limited acquired skills
   C. Skilled — independent judgment required

Where prior work required very specialized skills not readily usable in other jobs, the claimant may be considered unskilled. The use of vocational expert testimony should be considered where transferability of skills is material, and claimant's skilled or semi-skilled work functions are not readily recognizable as transferable.

IV. Residual Functional Capacity

Determination of the client's residual functional capacity, as either sedentary, light, medium, heavy or very heavy, was made in step four of the sequential analysis.

Beyond the Grids

If it appears the grids will direct a determination adverse to the claimant then it becomes necessary to argue why they should not control in certain cases. Even where the client appears to meet the assumptions of the grids, there are many factors which, if developed properly, may remove him from within the scope of the grid.

The grid system is based upon two intertwined administrative notices: first, jobs are available in the national economy, and second, there are specific exertional factors required to perform these jobs. The jobs administratively noticed are classified strictly according to their exertional requirements. Consequently, where a client has non-exertional impairments, the Social Security Administration must consider the additional effect these non-exertional impairments will have upon his ability to perform the noticed jobs. Circumvention of the conclusive nature of the grid system is available to the claimant who shows his impairment is a non-exertional impairment or a combination of exertional and non-exertional impairments.

If the claimant can show non-exertional impairments, the administrative law judge must determine if these limitations significantly narrow the range of work for which he is qualified, based on exertional impairments alone. [20 CFR §404, subpt P, App. 2, §200.00 (e)]

Just what is a non-exertional impairment? The original Social Security Regulations recognized their existence, but did little to provide a test or measure of what constituted a non-exertional as compared to exertional impairment.

Individual courts generally have approached this definitional problem on a case-by-case basis. Impairments such as pain, *Diorio v. Heckler,* 721 F.2d 726 (11th Cir. 1983); impaired dexterity and low intelligence, *Grant v. Schweiker,* 699 F.2d 189 (4th Cir. 1983); psychiatric problems, *McCoy v. Schweiker,* 683 F.2d 1138 (8th Cir. 1982); alcoholism, *Ferguson v. Schweiker,* 641 F.2d 243 (5th Cir. 1981); medication side effects, *Cowart v. Schweiker,* 662 F.2d 731 (11th Cir. 1982); and environmental restrictions, *Roberts v. Schweiker,* 667 F.2d 1143 (4th Cir. 1981), have been treated as non-exertional impairments.

The Social Security Administration recently issued SSR 83-13, which attempts to provide more guidance in this area. It lists five general areas of non-exertional impairments: mental impairments, posteral-manipulative impairments, hearing impairments, visual impairments and environmental restrictions. This ruling should be compared to an earlier ruling, SSR 83-10, which defines exertional activity as

one of the primary strength activities such as sitting, standing, walking, lifting, carrying, pushing and pulling.

In cases with only non-exertional impairments, such as mental impairments, the grids are not applicable, and the case will be determined without reference to them. In cases of combined exertional and non-exertional impairments the grids do not control the outcome, but the administrative law judge still must use them in relation to the exertional portion of the claimant's impairment and then determine if the non-exertional impairments further restrict or narrow working ability. [20 CFR §404, subpt. P, App 2 §200.00 (e) (2)]

Regardless of the exact definition given these impairments, it is clear most cases will have some form of non-exertional impairments associated with them and thereby prevent a conclusionary application of the grid system.

Judicial Review

If the attorney is unsuccessful at the administrative hearing level then he may request the Appeals Council in Washington, D.C., review the administrative law judge's decision. An adverse ruling by the Appeals Council can be appealed to the federal district court where the claimant resides.

Attorneys' Fees

The Social Security Act requires an attorney obtain approval from the Social Security Administration for any fee the attorney charges his client for representation in a Social Security proceeding. Contrary to general opinion the fee is not automatically 25% of past due benefits. The regulations state the amount of the fee approved by the Social Security Administration will be the smallest of: 25% of total past due benefits; or the amount as set by the Social Security Administration; or the amount agreed upon between the attorney and the client. (20 CFR §404.1730)

The Social Security Administration in Title II disability cases withholds 25% of any past due benefits awarded the client pending evaluation and approval of the fee petition. The approved fee then will be paid directly to the attorney by the Social Security Administration, and any remaining funds will be paid to the client. In Title XVI cases (Supplemental Security Income) the Social Security Administration does not withhold past due benefits, and the attorney must look directly to his client for payment of approved fees.

Upon receipt of a favorable decision from the administrative law judge, the attorney should submit form SSA-1560, which is the Social Security Administration's standard fee petition, within 60 days of receipt of the favorable decision. This form may be obtained at any Social Security district office and should include as much detailed information as possible concerning the attorney's representation.

Conclusion

The handling of social security disability claims is a fast growing source of income for an attorney with an understanding of the regulatory disability process. □

NOTICE

ALL ADS AND ARTICLES FOR THE
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MARCH 29, 1985

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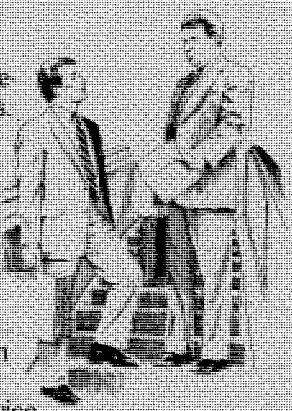

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