

Title: Social Security Disability: An Attorney's View
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There are two federal government disability programs: SSD (Social Security Disability) and SSI (Social Security Insurance). Both programs are administrated by the Social Security Administration (SSA). SSD is the government program that is paid for by each employee for whom FICA is withheld from their paychecks. Those eligible for SSD include the employee, the employee's spouse, and the employee's minor dependents (who become disabled younger than age 22). The disability payment that can be obtained with SSD typically ranges from about \$650 to \$1000 per month, depending on the amount of FICA paid into the system o behalf of the disabled person. This program is not needs based, so even Ross Perot, if disabled, could obtain SSD payments. Perhaps even more important, those who have received SSD payments covering at least 24 months of disability become eligible for Medicare.

On the other hand, SSI is for disabled people who do not qualify for SSD. The amount of assistance is needs based, and so depends on assets and other income. If the disabled person is eligible, the assistance is about \$470 per month plus eligibility for Medicaid. The medical assistance paid by Medicaid can be much more valuable.

In either case, in order to be eligible the disability must either have been present for at least 12 months, or it must be expected to last for at least 12 months, or the disabled applicant must have terminal illness with a life expectancy of less than 12 months.

The first thing that applicants for SSD benefits must understand is that the Social Security system is not based on reality. One must play the Social Security system like a board game. There are a set of "made up" rules, and winning the game requires that the rules be followed. Like a Monopoly game, some of the spaces have the names of real places. That does not mean that the game square marked "Boardwalk" has any relationship to the real Atlantic City Boardwalk.

One example of this unreality: Someone could have worked for 26 years without ever taking a sick day. She then develops a serious disability following an auto accident. She wants to work but can't. One would think that such a pattern would demonstrate to the Social Security administrations that the disability sufferer is not "faking" it and would work if able. However, this set of facts would have nothing to do with the SSD application process (although mitigating factors might be brought up during appeal).

The rules state that in order to qualify for SSD, one "must be unable to do any substantial gainful employment." You could have been a surgeon or an electrician or a maid. It doesn't matter whether you are unable to perform your former job. If you have the use of your hands, you probably could do the job of a lens polisher in a telescope factory. If such jobs exist in substantial numbers in the U.S. economy (regardless whether they exist in your home state, and regardless whether such a factory owner would actually hire a mostly disabled worker), then you probably would not qualify for SSD. It also doesn't

matter that most SSD applicants would work if only they could find someone to hire them. The Social Security Administration does not need to find you a real job, only prove that such a job theoretically exists.

Assuming that you wouldn't be applying for SSD if you really couldn't find and perform a job, you can still win the SSD game if you know the rules.

There are five levels to the application process.

- Application Level (a paper application is sent in)
- Reconsideration Level (fill out the back side of your denial letter)
- Administrative Law Judge (the first "live" hearing where an attorney could help)
- Appeals Counsel (a paper appeal)
- Federal Court (the first level outside the SSA system)

A disabled person could be awarded SSD benefits at any of the levels. I have no experience with what percentage of applicants win at the first level. The winners don't come to me asking for legal assistance. Indeed, I don't believe that anyone who is mentally competent and who physically can fill out the application will need any outside assistance at the first or second level. There really is nothing substantive an attorney can do at these levels. Your first opportunity to cross-examine witnesses and experts is at the Administrative Law Judge(ALJ) level.

To start the process, you go to the nearest Social Security office and pick up the application form. You can phone the SSA (indeed, if you are totally disabled this may be your only option). However, you will have to be persistent to get past the busy signals. Most people will find phoning to be too great a hassle (some conspiracy theorists contend that the SSA will do things to discourage you from completing the process so that only the persistent and truly motivated people will actually cost the government money).

You will need to provide a complete medical history, including all of your medical records. The medical records are supposed to be obtained by the SSA. In fact, the SSA will send requests to each of the physicians you list on the form, but they will not actively follow up on the records not submitted to them. The SSA may or may not get the most important medical records. You, of course, can get all of your records and submit them with the rest of the paperwork. Federal law requires medical care givers to release all medical records to you, but they are allowed to charge you a reasonable amount for the cost of copying (including the salary of the person doing the copying). Texas (and perhaps other states, but I practice only in Texas), has a state law that requires physicians to make copies of your medical records available at no charge for those filing for disability benefits.

I don't know what percentage of people win their cases at the first level. I do know that about 80% of those who are turned down at the first level but persist through the third level eventually win their cases.

The second level commences about two to three months after the first level, when you receive a letter informing you that you have been turned down for SSD. You need to fill out the back of this letter requesting that your case be reconsidered. Basically, in my opinion, this process just gets you a place in line. The reconsideration request just goes to someone who probably sits in a cubicle next to the person who turned you down at the first level. Very few people win their cases at the reconsideration level. At any one time, there are about 400,000 people waiting for a hearing at the third (ALJ) level. Perhaps during the two to four months you waited to learn about your reconsideration, you get better or give up before the third level (more of this conspiracy theory).

The third (ALJ) level is the first chance you have to actually have your case heard and the first chance an attorney has of helping you present your case. It has taken you about half a year after your disability starts to get to this point. You will hear back on your request for an ALJ hearing in about three to four months. In my opinion, you should retain an attorney who specializes in government benefits soon after receiving word that you have been scheduled for an ALJ hearing. Your actual hearing will not place for another eight to ten months (or about a year and a half after first filing for SSD). During that time, you and your attorney will collect all of your medical records. You will "map out" the limits of your ability to work and try to frame them in a manner that corresponds with the system's rules. Sometimes, the attorney will suggest that you find and bring to the hearing one or a few people who will testify about what you used to be able to do and now can't. These people might be co-workers, neighbors, spouse, or other relative.

Present at the ALJ hearing will be you and your attorney (if you retain one), the judge, and vocational and medical experts. The medical expert may know a lot about your specific disability or could be pediatrician without any real knowledge of this disease. The vocational expert will testify about the potential jobs available to you, given your current limits and residual abilities.

There is a book full of regulations (The Impairment Listing) which, if met exactly, can define that you are disabled. For instance, if you have diabetes and two out of three other specified limitations, the medical expert will testify that you are certainly disabled (under the law).

The method most FM sufferers will have to use is the one in which you must prove that you are unable to perform any full time work. The medical and vocational experts will testify as to your Residual Functional Capacity (RFC), which is related to the work you used to do and your present condition. The vocational expert will use the Dictionary of Occupational Titles to find an occupation that can be performed with your RFC. The expert will determine how much strength, education (math skills, reading ability, etc.), flexibility, etc. you have, and your age if retraining is required, and compare that to the capacities required by each job in the Dictionary of Occupational Titles.

Each vocational expert tends to have favorite job titles that almost anyone can do. For instance, it may be as a ticket taker at the ticket booth, a wooden-toy assembler, a security system monitor, or an envelope addresser. Remember that the system is not

related to the real world. It doesn't matter whether you can get yourself to the job (either because it is out of town or because you are too disabled to drive); whether the owner of the business would hire you, given your disabilities; or whether such a job pays less than the amount SSD would pay.

This is where careful preparation by your attorney can make all the difference. The attorney has the opportunity to cross-examine the experts and show how your disability is such that you couldn't do the theoretical job proposed by the vocational expert. Perhaps your disease or disability prevents you from concentrating on the security monitor in that job, or you can't sit or stand in one place long enough to be a ticket taker. Perhaps you have days where you could work, but too many "bad" days when you can barely get out of bed. Each of these factors may make you unable to hold the jobs proposed by the vocational expert at the hearing.

The medical expert also has to determine whether you are disabled. The system (again, a game not always based on the real world) requires you to have a objective criteria of disability. Pain is subjective ("it hurts"), without any objective lab tests that can prove pain exists. Your own doctor may have made conclusions that you need disability benefits, but you will not win your case without hard medical facts to back up this opinion. Your attorney should work with your doctors to present your case in the strongest light.

As an attorney, I always try to win cases at the ALJ level. Remember that about 80% of all cases taken to the ALJ are eventually won by the disabled person. The ALJ judge usually takes several months before rendering a decision, so that it might be 20 to 24 months before you learn whether you will get any money. If you are disabled and eligible for SSD, you become eligible for Medicare 24 months after first filing for SSD. Therefore, if you win your case at this level, you will receive a first check covering all months from when you were first disabled, and will soon (if not already) be eligible for Medicare.

The fourth level is the Appeals Counsel, which is a written appeal only. The Counsel can either reverse the ALJ, in which case you win, or may remand the case back for another ALJ hearing. An attorney is probably necessary to prepare this appeal.

The final level is to use the federal court system court system, where you can carry your case all the way to the Supreme Court if necessary (at great cost in time and money).

What is you can and do work part time? In my practice, everyone who comes to me for help on a disability claim wants to work if they can. I tell them that the law allows for a "Trial Work Period." It is OK to work during this period. Maybe it proves to you that you can work at least part time and that you can earn much more money than the SSA would pay you. Perhaps you find out that you can't work enough hours or enough days, and this information will strengthen your case that you can't do any full-time job.

Finally, what attorney fees should you expect to pay? The federal government has set up two ways for the attorney to calculate the fee: "expedited fee proceed" and "normal." Almost all attorneys use the expedited fee process, in which the government withholds from the first benefit check the smaller of 25% of that check or \$4000. So, if your first check covers 19 months at \$800 each (total \$15,200), the government would send 75% of that (\$11,400) to you and 25%(\$3,800) to your attorney. In addition, you would need to pay any direct expenses such as costs for medical records. The attorney would not receive anything from each additional monthly check you receive thereafter. There is also the "normal" process where the attorney can petition the court to set higher fees, but this is seldom done. Some of these costs may also be covered by private disability insurance (if you are lucky enough to have that), because most disability insurance policies state that they scale back what they owe you by a percentage of any government benefits. It might save the insurance company money if they pay for your representation or expenses.