

# **Disability within the Social Security System: An Overview of Law, Procedure, and Advocacy**

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A disabled person in the United States may be able to obtain cash benefits from either of two programs: **Social Security Disability** (also known as SSDI, Title II or OASDI) and/or **Supplemental Security Income** (also known as SSI or Title XVI).

**SSDI** is available to persons who have contributed sufficient sums into the Social Security system through the payment of payroll taxes. Eligibility is not based on financial need. The benefit is a monthly check, the amount of which is determined through the use of a mathematical formula that takes into account the past earnings of the recipient. SSDI also comes with eligibility for **Medicare**, the government health insurance program for the elderly. Eligibility for Medicare begins 29 months after the date the person becomes disabled.

**SSI** is available to persons of low income and resources. At the current time (2013), a person must have less than \$710\* per month in “countable” income and less than \$2,000 in assets to qualify for the program. The monthly payment in 2013 is \$710, but is reduced if the recipient has income from another source or is not responsible for all of her/his living expenses. If both members of a couple apply, the limits are \$1066 per month income and \$3000 resources. In North Carolina and many other states, SSI comes with eligibility for **Medicaid** (*not Medicare*), a joint federal-state health insurance program for low-income people. There is no waiting period for Medicaid.

To obtain either benefit, a person must establish that he/she is disabled. The standard for disability is the same in both programs, as is the process for establishing a disability. The remainder of this paper describes how a person establishes that he/she is disabled.

## **Administrative Procedures**

A person who wishes to obtain disability benefits starts by filing an application with the Social Security Administration. This can be done by phone, online, or in person at the local district office. No representative is needed for this application process. The applicant, or “**claimant**” will be interviewed at the office or by phone by a claims representative, sign releases so Social Security can get medical records, and later, perhaps, will be asked to submit to a medical examination by a doctor chosen by and paid by the Social Security Administration (a “consultative exam”).

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\* The income/payment amount increases annually.

When a person applies, he or she identifies a date when his or her disability began. This is known as the “**alleged onset date.**” This date can be any time, even years before the application, but a claimant can receive benefits for months no earlier than a year before the application date. If the application is for SSI, benefits are not payable until the first of the month following the month of application.

To assess disability, the Social Security Administration contracts with a state agency called **Disability Determination Services (DDS)**. DDS “**claims examiners**” make the initial determination about disability by collecting and reviewing the medical records. There is no face-to-face meeting between the DDS examiner and the claimant. The SSA evaluates all other aspects of eligibility (e.g. earnings, financial eligibility, etc.) It usually takes three to four months to get a decision on the initial application, but often it is longer.

After the initial disability determination is complete, a letter is mailed to the claimant from Social Security; it reports either an award of benefits or a denial. Advocates tend to see only letters that report denials.

Many people have **concurrent claims**; they have applied for both SSI and SSDI. This happens when SSA financial calculation indicate that if the person gets SSDI, it will be less than the SSI maximum payment, so he/she will be entitled to both payments. The two payments will total the maximum SSI payment plus \$20 (in 2013 \$730), assuming there is no other available income.

When there are concurrent claims, there will be two letters of denial. As far as the disability analysis is concerned, though, the substance should be the same. The cases will be consolidated for purposes of the appeal process, so although there will always be two claims, there will not be two separate proceedings.

**Medicaid:** For persons applying for Medicaid based on their disability, a Social Security disability denial will result in a Medicaid denial. If the Social Security claim is eventually approved, the Medicaid application will be retroactively approved. A person is permitted to appeal the Medicaid denial in a separate hearing system within the Department of Social Services, but does not have to. Our practice is to advise the client to appeal the Medicaid denial through the Department of Social Services. We assist clients with the Medicaid appeal so that they can access Medicaid care more easily during the long wait for a Social Security hearing.

If a disability claim is denied at the initial level, the claimant is entitled to have the application **reconsidered**.

### **Reconsideration**

An applicant has **60 days** from receipt of the notice of the SSA decision to file a **request for reconsideration**. (The date of receipt is presumed to be five days from the date of the letter, so the appeal period is effectively 65 days.) The request must be in writing, but often a

claims representative will accept a request by telephone and confirm the request with the written form. A Request for Reconsideration may also be completed online.

Reconsideration means that DDS will review the case and make a new decision. The case is assigned to a new claims examiner. Again, the disability evaluation is done entirely “on paper,” meaning there is no opportunity for the claimant to present testimony to the person making the decision. During reconsideration, however, the claimant can submit additional medical information and additional personal information related to daily activities and the functional limitations placed on the claimant by the disability. There is no time limit within which a decision on reconsideration must be issued. It can take as little as two months, and up to six months or more.

The claimant may be represented during this process, though most are not. Before a claimant can be represented, he/she must appoint the representative on a special form, known as a “**1696**,” or “**Appointment of Representative**” form. Non-lawyers may represent claimants in the disability process as long as they are supervised by a licensed attorney. The Social Security Administration refers to both lawyers and non-lawyers as “**Representatives**.” You should think of yourself at all times as an “**Advocate**.”

## Hearing

If the individual is denied after Reconsideration, he/she has **60 days** from receipt of the notice of the decision to **request a hearing** before an **Administrative Law Judge (ALJ)**. The ALJ’s who hear disability appeals are employees of SSA and are not part of the Disability Determination Service. They hear only Social Security cases and are generally very knowledgeable about the rules and process. Although the ALJ has an obligation to assist the claimant in developing the record, it is extremely advantageous for a claimant to have a representative at the hearing.

After a hearing is requested, it will take well about a year, plus or minus, before a hearing is scheduled. Delays are currently running to about a year in the Raleigh hearing office. The claimant will receive at least three weeks notice of the actual hearing date. The hearing is usually scheduled for a 30-minute to one-hour time slot. It is a non-adversarial hearing; no one is there trying to prove that the claimant is not disabled.

Prior to the hearing, the appealing party or his/her legal representative may review and copy without charge the documents in the SSA file. All but a very few of Social Security’s files are now electronic, and the file will be provided on a CD.

Also prior to the scheduled hearing, the claimant (or his representative) may request a **decision “on the record.”** The judge is requested to enter a favorable ruling based on the evidence in the file at the current time without benefit of a hearing. A judge will never enter an

unfavorable ruling on the record, so there is no risk of losing without benefit of an in-person hearing.

If a hearing is scheduled, all written evidence must be submitted about a week prior to the hearing. This is done electronically through the “**Electronic Records Express**” (known as “**ERE**”). At the discretion of the judge, the record can be held open for submission of documents after the hearing. At the hearing, the ALJ will receive oral testimony from the claimant and other witnesses and will listen to oral argument. The ALJ will also accept a written argument on behalf of the claimant. The decision is de novo. The hearing is recorded and the recording, together with the documents in the file, make up the official record of the case if it is appealed further.

The ALJ will issue a written decision after the hearing and mail it to the appealing party and his/her representative. There is no time limit within which the ALJ must decide the case; it generally takes a month or two.

### **Appeals Council Review**

If the hearing decision is again unfavorable, the individual has **60 days to request review by the Appeals Council**. Sometimes the Appeals Council reviews the ALJ’s decision without being asked to. There is only one Appeals Council for the entire country, located in Arlington, Virginia. The review at this stage is done based on the record and written legal arguments; there is almost never an oral presentation.

The Appeals Council will issue a written decision and mail it to the parties involved. There is no time limit within which the Appeals Council must make a decision, and it often takes in excess of a year.

### **Judicial Review**

If the Appeals Council decision is unfavorable, the individual may file an **appeal in Federal District Court within 60 days** of the notice of the Appeals Council decision. The case will be reviewed by a judge or federal magistrate based on the evidence already submitted during the agency appeals process. The court’s duty is to determine if the law was properly applied and if the SSA decision was based on "substantial evidence" in the record.

### **Emergency Situations**

Social Security has special procedures for situations in which the claimant is **terminally ill** or in a **dire financial need**. Such cases can be given “**critical case**” status and expedited,

either through a quick on the record decision or being put at the front of the line for hearings. Any AIDS diagnosis qualifies as terminal illness (known as “**TERI**”). Clients who are homeless or in imminent danger of becoming homeless can be flagged as “Dire Needs” at the hearing level. Because of the long backlog of cases at Social Security, we try to identify cases that are appropriate for Critical Case status. The rules for critical cases are found at HALLEX Section I-02-1-40 (for cases at the hearing level) and POMS Section DI 11005.601 (initial and reconsideration levels). Note that “dire needs” is not considered prior to the hearing level.

## Disability Determination

The regulations that control the technical aspects of establishing a disability are found in **20 CFR Part 404 (Social Security Disability, or “Title II” benefits) and Part 416 (SSI, or “Title XVI” benefits)**. A number of resources are available in the clinic office to help you to understand the standards. Be sure to look at our library of resource materials on the bookshelf in the pod. You should become familiar with the various books and treatises. We have an extensive specialized collection of Social Security Practice materials. These are generally much more detailed and thorough than web references, but our web page also contains many useful links.

**Definition of Disability:** To be considered disabled for Social Security purposes, an individual must have a **severe mental or physical impairment** which:

- can be **verified by a doctor** on the basis of lab tests, physical examination, or other objective medical procedures, *and*
- has lasted, or is expected to last, a minimum of **twelve consecutive months** or result in death, *and*
- prevents the individual from doing his or her previous work or any other **substantial gainful activity** (defined as earning at least \$1040 per month in 2013)

The following are some things to notice about the definition:

- There must be an **impairment**. An “**impairment**” is a diagnosable medical condition. This is to be distinguished from a “**symptom**,” which is a sign of the medical condition. Symptoms include pain, fatigue, nausea, dizziness, etc. Symptoms alone, without a diagnosis of some disease or injury that could cause such symptoms, do not qualify.
- The claimant must have an impairment that is **severe**, meaning that it significantly limits the ability to do work-related activities, such as walk, sit, stand, lift, carry, think, use judgment, etc.
- The impairment must be documented, meaning there must be **objective medical evidence** and not just a self-history.

- The impairment must have lasted 12 months, or be expected to last 12 months, or be expected to result in death. HIV/AIDS is “expected to result in death” so no additional medical documentation of duration is required, but in most of our cases, HIV/AIDS alone is not disabling, so **duration** must be established for the other impairments, e.g. depression, back issues, etc.
- The impairment must **prevent work activities**. Having a particular disease or illness does not alone establish disability. To satisfy the SSA definition of disability, the impairments must interfere with the claimant’s ability to engaging in work activities. That is why, for example, a CD-4 (T-Cell) count is not dispositive in a disability application for a person with AIDS.

## Sequential Evaluation

To make a disability determination, the adjudicator must engage in what is known as the **five-step sequential evaluation**. This is a series of questions, which is asked in sequence, designed to obtain the information needed to determine if the disability meets the definition. The five-step sequential evaluation is as follows:

1) **Is the claimant engaging in substantial gainful activity?** i.e., is he working and earning more than \$1040<sup>†</sup> a month? If yes, then not disabled. If no, proceed to second question.

2) **Does the claimant have a severe impairment?** Does the impairment limit in some significant way basic activities: walking, sitting, standing, hearing, seeing, following instructions, concentrating, etc. (If no single impairment is severe, there can still be an affirmative answer to this question if the combination of the claimant’s impairments is severe.) If no, then not disabled. If yes, then proceed to next question.

3) **Does the impairment, or combination of impairments, meet or equal the listing of impairments in Appendix 1 of the CFR?** The “listing of impairments” is a list of conditions that are considered presumptively disabling. For persons with AIDS, the relevant “listings” are found in the section on the Immune System, at 20 C.F.R. §404, subpart P, Appendix 1, Part A Listing 14.00 et seq., Some additional explanatory material about the listings is found in the Overview of the Immune System Regulation. At Step 3, if the answer to the question is yes, a listing is met or equaled, then the claimant is disabled. If no, then proceed to the next question. (NOTE: Showing that a claimant’s impairment “equals” rather than “meets” the listings requires a doctor’s opinion that the symptoms experienced by the claimant are “medically equivalent” to those described in the listings. The symptoms experienced by the claimant must be equal in severity and duration to the listed impairments.)

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<sup>†</sup> This is the level for 2013. The substantial gainful activity (SGA) figure increases annually. Note that the question whether the claimant is engaging in SGA must be answered not only for the present, but from the time the claimant’s disability began. The SGA limit for the year(s) in question must be used, not the current SGA figure.

4) **Can the claimant perform “past relevant work”?** Past relevant work is work the client did in the 15 years prior to the date of adjudication. The work must have been done long enough to learn and at the SGA level. If the client can do the work either as actually performed by the client, or as it is generally performed in the national economy, then the claimant is not disabled. If the client can’t do past relevant work, then proceed to the next question.

5) Given the claimant’s age, educational level, skill level and “residual functional capacity,” **are there are still jobs in the national economy that the claimant can perform?** If yes, then not disabled. If no, then disabled.

### **Residual Functional Capacity**

In order to answer the questions at Step 4 or Step 5, the SSA must assess the claimant’s “**residual functional capacity,**” or **RFC**. This is essentially a “**step 3.5.**” RFC is an assessment of the claimant’s remaining capabilities to perform physical and mental activities after considering the full restrictions resulting from the individual’s impairment. This is different from whether the claimant is disabled, but is a question used as the basis for determining the particular type of work the claimant may be able to do despite his impairment.

RFC is an assessment of the claimant’s physical abilities, mental abilities and certain other abilities. Note that the claimant must be able to perform “**sustained**” **work-related activities on a “regular and continuing basis”** – essentially a standard work week of 8 hours per day, 5 days per week or the equivalent. In addition to physical and mental abilities, the RFC considers such factors as environmental restrictions, manipulative and postural limitations,

Part of the RFC addresses **exertional limitations**. (20 CFR 404.1567) Exertional limitations are those that affect **strength**. Persons are classified as either being able to do:

- **Sedentary work** – lifting no more than 10 pounds, sitting most of the work day – no more than 2 hours of walking or standing.
- **Light work** – lifting no more than 20 pounds; walking and standing up to six hours a day.
- **Medium work** – lifting no more than 50 pounds; involves frequent carrying of objects weighing up to 25 pounds.
- **Heavy work** – lifting no more than 100 pounds; involves frequent carrying of objects weighing up to 50 pounds.
- **Very heavy work** – lifting more than 100 pounds occasionally, 50 pounds frequently.

The second part of the RFC assesses **non-exertional** limitations. These include mental limitations, as well as limitations that are postural, manipulative, or environmental. For Duke

Legal Project clients, mental limitations are often important. Some of the **basic mental demands of work** include the ability to:

- understand, carry out, and remember simple instructions;
- make judgments that are commensurate with the functions of unskilled work, i.e., simple work-related decisions.
- respond appropriately to supervision, coworkers and work situations; and
- deal with changes in a routine work setting.

### **Use of the RFC at Step 5: The “Grids”**

At Step 5 – which addresses the ability to do any work for which the claimant is suited based on RFC, age, education, and work experience – the burden of proof shifts to the Social Security Administration. (It has been on the claimant up until now.) To meet that burden, SSA makes use of the **Medical-Vocational Guidelines**, found at 20 C.F.R. §404, subpart P, Appendix II, Part B. These Guidelines are also known as “the grids.” The “grids” are a series of charts that direct decisions of “disabled” or “not disabled” for various combinations of RFC and vocational factors.

The younger the claimant, the harder it is to get a finding of disability on the grids. **Only claimants age 50 and over have a reasonable chance on the grids.**

There is a separate grid for persons in each of the exertional categories (sedentary, light, medium, etc.). To be placed on a grid, a person must also be categorized by age, educational level and work experience (looked at in terms of transferability of work skills). When a person is “plotted” on the grids, the grids dictate a result.

If a person has “**non-exertional limitations**,” the grids do not mandate a result and can only be used as a “framework” for determination. If the grids do not mandate a result, then the SSA must otherwise show that there are jobs in the national economy that the claimant can perform, given the claimant’s residual functional capacity (that is, what the claimant has the ability to do.) At the hearing level, this is done through testimony of a vocational expert.

For younger persons, who lose on the grids, a favorable decision requires evidence of non-exertional limitations that are not accounted for in the grids. Younger clients often can win when they have serious mental limitations or limitations such as pain or fatigue that make it impossible for them to work on a continuous basis, 8 hours a day, 5 days a week, without attendance problems due to their health.

**Pain** is considered an “exertional impairment” when it arises when performing an activity, such as walking, lifting, reaching, etc. It is considered a non-exertional impairment

when it exists regardless of whether the claimant is exerting himself. If pain is nonexertional, the grids cannot be used to dictate a result of nondisabled.

### **Vocational Assessment at a hearing**

At a hearing, the Administrative Law Judge will often have a **vocational expert** to assist in determining vocational issues, including what the client's past relevant work was, and whether there are jobs the client can do. If the claimant does not win on a listing or the grids, the vocational expert's testimony will be key in the judge's decision. The judge and representative pose "**hypothetical questions**" to the vocational expert, based on a claimant with the residual functional capacity and vocational profile of the claimant.

### **The Role of the Advocate in Social Security Disability Cases**

The job of an effective advocate is to **gather and present evidence** to the Social Security Administration sufficient to prove that the claimant is disabled based on the answers to the questions in the sequential order of evaluation. The best theory is that the claimant's condition meets one of the listed impairments, which stops the process at question 3. Because of advances in the treatment of HIV, fewer of our clients qualify at step 3. For this reason, even if we hope to win at step 3 (on a "listing" argument), we need to develop a back-up theory that offers a route to success on steps 4 and 5.

**The support of the treating physician (or other provider) is the single-most important piece of evidence that a representative can procure and submit.** The treating physician's opinion is entitled to great weight. We seek to obtain the treating physician's opinion as to whether the claimant meets a listing, and also as to the claimant's residual functional capacity.

### **What an Advocate Must Know and Learn to Handle a Social Disability Case Effectively**

Like all cases, Social Security Disability cases require the advocate to master both **law** and **facts**. Also, as in all cases, the advocate must master the **technical domain** in which the case resides. In Social Security Disability cases, these domains include **medicine, psychiatry, and vocational evaluation**.

**Law:** The law in disability cases is set forth directly in **federal statutes** (in the Federal code) and **regulations** (in the Code of Federal Regulations). There is naturally **case law** interpreting these sources in each federal circuit, but this is of little use or influence in administrative proceedings. More important are the other governing administrative law sources. When proceeding within the Social Security Administration, these administrative sources are the ones to cite. They include the following:

- **Social Security Rulings (SSR)** – These are the Social Security Administration's interpretations of governing law. They are binding on disability adjudicators. **SSRs** are published electronically on the SSA website (ssa.gov).

- **Program Operations Manual System (POMS)** -- This is a huge online manual used by Social Security employees in implementing all of Social Security's programs. This manual is the bible for all local office employees. It is published on the SSA website.
- **Hearings, Appeals, and Litigation Law Manual (HALLEX)** – This much smaller manual is used by Administrative Law Judges and Hearing Office staff. It is found on the SSA website.

You will be assigned readings in some of these sources, but **you must not limit your learning of the law to materials that are assigned for class.** The law in this field is simply too extensive for you to assume that the class readings will be sufficient. You are responsible for researching the governing sources of law and finding the law that will best advance your client's claim.

### **Facts:**

The "**facts**" in Social Security disability cases relate to the client's medical conditions, functional limitations, work experience, and education. Some of these facts are discovered in documents, such as medical, work, or school records. Other facts are contained in the administrative record, which includes the claimant's application and the many pages of questionnaires and forms generated as part of the administrative process. Still other facts must be obtained from witnesses, including the client, their friends, family members, medical providers, social workers, employers, and others with knowledge of relevant facts. It is the advocate's job to identify sources for facts and to obtain them through document requests, witness interviews, and other factual investigation.

### **Domain Knowledge:**

As stated above, disability cases involve several technical domains that must be mastered in order for the advocate to develop and present a legal theory for disability. First, the advocate must gain a thorough understanding of the client's **medical and psychiatric conditions.** This requires extensive medical background reading. While a disability advocate is not expected to go to medical school, he or she must attain a sufficient understanding of the underlying **anatomy, physiology, disease process, diagnostic procedures, and treatment** to intelligently discuss the client's medical issues with the client's doctor. There is simply no substitute. Gaining this domain knowledge may seem a daunting task, but is one that must be undertaken by every lawyer in every case. It can be done, and is done each semester by clinic students.

Most cases will also require that the advocate gain an understanding of the details of the client's **vocational history.** This involves identifying the client's past jobs and

understanding the work setting, processes, skills, and requirements of those jobs. This task is generally less technically demanding than the medical knowledge, but it can present challenges.

### **A Final Word**

Most students find the work on their disability case to be some of the most intellectually challenging and time-consuming of the clinic experience. Students are faced with the need to learn law, facts, and domain knowledge, all at the same time. This can feel overwhelming at the beginning. The only way to succeed in handling a disability case is to get past that feeling – and quickly. The semester is too short for you to simply dip your big toe in the ocean that is disability. You have to dive down deep, from the start. Qualities that will help you succeed are: curiosity, attention to detail, organization, good note-taking/outlining, persistence, and ability to fit details into the big picture.

The Clinic provides numerous resources to help you jump-start your advocacy and learning. These include:

- Social Security Disability Protocols and Checklist
- Guidelines for Medical Charting, Drafting Affidavits
- Charts for taking notes on medical records, the Social Security file, and for developing your case theory.
- Online Resources on the course webpage, including the Benefits Page and Sequential Evaluation Page.
- In-house library materials, including Social Security Disability Practice Guides (Bush, Travers, Hall, Morton), and medical texts.
- Your supervising attorneys, who are here for consultation, but expect you to take advantage of these other resources, too.