

Meeting the Legal Needs of Clients Facing Serious Illness Through Pro Bono

Part 4: Social Security Benefits

Sponsors





SERVICES AND RESOURCES

LINC connects cancer patients, survivors and their families with resources that help ease the day-to-day challenges of cancer. www.cancerlinc.org

Areas of assistance include:

- Estate Planning
- Employment Issues
- Private Insurance Denials
- Medicare/Medicaid Coverage and Denials
- Landlord-Tenant Issues
- Foreclosure Prevention
- Bankruptcy
- Debtor's Rights
- Financial Planning

Virginia's Civil Legal Aid Offices

Legal Aid Pro Bono Opportunities. All of Virginia's legal aid offices have well-established private attorney involvement programs with pro bono coordinators who will help support your volunteer lawyering work. Please contact your local legal aid office for more information.

- [Blue Ridge Legal Services](#) – (540) 433-1830 (main office in Harrisonburg, offices in Winchester, Lexington, and Roanoke)
- [Central Virginia Legal Aid Society](#) – (804) 648-1012 (main office in Richmond, offices in Petersburg, and Charlottesville)
- [Legal Aid Justice Center](#) – (434) 977-0553 (main office in Charlottesville, offices in Richmond, Petersburg, and Falls Church)
- [Legal Aid Society of Eastern Virginia](#) – (757) 627-5423 (main office in Norfolk, offices in Hampton, Virginia Beach, Belle Haven, and Williamsburg)
- [Legal Aid Society of Roanoke Valley](#) – (540) 344-2088 (Roanoke)
- [Legal Services of Northern Virginia](#) – (703) 778-6800 (main office in Falls Church, offices in Arlington, Alexandria, Fairfax, Leesburg, and Manassas)
- [Rappahannock Legal Services](#) – (540) 371-1105 (main offices in Fredericksburg, offices in Culpeper, and Tappahannock)
- [Southwest Virginia Legal Aid](#) – (276) 783-8300 (main office in Marion, offices in Castlewood and Christiansburg)
- [Virginia Legal Aid Society](#) – (434) 528-4722 (main office in Lynchburg, offices in Danville, Farmville, and Suffolk)

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Part I.

SSDI V. SSI

Definition

42 USC § 423(d)(1)

Disability: the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”



SSDI v. SSI

SOCIAL SECURITY DISABILITY INSURANCE (aka DIB or SSD)

- 42 USC § 401 *et seq.*; 20 CFR Part 404
- Eligibility
 - Proof of Disability,
 - No SGA, and
 - Insured status

SUPPLEMENTAL SECURITY INCOME

- 42 USC § 1381 *et seq.*; 20 CFR Part 416
- Eligibility
 - Proof of Disability,
 - No SGA, and
 - Income/Resource evaluation

SSDI v. SSI

SOCIAL SECURITY DISABILITY INSURANCE (aka DIB or SSD)

- Five-month waiting period
- Benefits
 - Back benefits
 - 1 yr prior to app
 - Monthly income
 - dependent on taxes paid
 - Medicare
 - Additional 24-mo wait

SUPPLEMENTAL SECURITY INCOME

- No waiting period
- Benefits
 - Back benefits
 - to date of app
 - Monthly income
 - currently \$721 or less
 - Medicaid

SSDI Eligibility

42 USC. § 423(c); 20 CFR §§ 404.110-133

- Work credits (“quarters of coverage”), and
- 20 credits in 10 years prior to onset
- One credit = \$1,200 in FICA earnings in 2014
- Maximum 4 credits per 12 months

= DATE LAST INSURED

SSI Eligibility

20 CFR Part 416, Subpart K

- Means-tested
- Income = “anything in cash or in kind that you can use to meet your needs for food and shelter.” (§ 416.1100, *et seq.*)
- Includes earned & unearned income
 - pensions, UI, dividends, rental income, etc.
- but not loans (§ 416.1103)

SSI Eligibility

20 CFR § 416.1200, *et seq.*

- Resources = “cash or other liquid assets or any real or personal property that...could convert to cash to be used for...support or maintenance.”
- Limit = \$2000 per individual; \$3000 per couple if both are disabled
- Excludes: home value, car, household goods, etc. (§ 416.1210)

Other Benefits

- Child's SSI (42 U.S.C. § 1382(c))
- Auxiliary Benefits (20 CFR Pt. 404, Sbpt. D)
 - Disabled Widow or Widower
 - Divorced/Disabled Divorced
 - Spouse/Disabled Spouse
 - Parents'/Child's

Also consider...

- Early Retirement

Application Process

- SSDI application may be filed in person or online
- SSI application must be filed in person at local office

<https://secure.ssa.gov/ICON/main.jsp>

- Protective Filing Date

Three Steps

- Initial Application (DDS, state)
 - 36.3% of all applications approved in 2010
- Reconsideration (DDS, state)
 - 8.1% approved
- Hearing (ODAR, federal)
 - 76.1% approved

http://www.ssa.gov/policy/docs/statcomps/di_asr/2011/sect04.html

Part II.

SEQUENTIAL EVALUATION PROCESS

Five-Step Process

20 CFR §§ 404.1520 ; §§ 416.920, *et seq.*

- Whether the claimant is engaged in Substantial Gainful Activity
- Whether the claimant suffers from a severe impairment
- Whether the severe impairment meets a listing
- Whether the claimant is able to perform Past Relevant Work
- Whether the claimant could adjust to other work

SGA, part I

- Earnings over \$1070/month in 2014
- average monthly income from wages
- number of hours worked per week
- subtract work expenses
- account for accommodations, time missed
- If claimant is performing SGA, not disabled. If not, go to step 2

Is Impairment Severe?

20 C.F.R. § 404.1521; § 416.921

- “an impairment...is not severe if it does not significantly limit your physical or mental ability to do basic work activities”
 - Physical functions, senses, mental capacities, judgment, changes in work setting, responses to public/co-workers/supervisors
- *De minimus* test

Impairment, cont'd

- Must be medically determinable
 - Lab testing, x-rays, etc.
 - Clinical techniques & diagnoses by acceptable source
- Must last or be expected to last 12 months or result in death
- Testimony of Medical Expert may be needed
- If no severe impairments, not disabled. If yes, step 3

Listings

20 C.F.R. § Pt. 404, Spbt. P, App. I

- Adult Listings

<http://www.socialsecurity.gov/disability/professionals/bluebook/AdultListings.htm>

- Proper proof still required
- Meeting v. Equaling
- If met or equaled, disabled. If no, step 4

PRW

20 C.F.R. § 404.1560; § 416.960

- Testimony from Vocational Expert may be needed
- SGA, part II
 - Consider number of weeks/months claimant worked at the job
 - Amount of money earned
 - but Unsuccessful Work Attempt



PRW, cont'd

- Residual Functional Capacity – what claimant can do
- If claimant can perform PRW, not disabled. If not, step 5

Adjust to Other Work?

- Burden on SSA to prove (20 CFR § 404.1512(f))
- VE testimony may be needed
- Jobs must exist in significant numbers in *national* economy
- No consideration for
 - Whether employers are hiring
 - Whether employer would hire this claimant
 - Whether claimant is trained for the position

Vocational Profile

20 CFR § 404.1563-1568; § 416.963-968

- Age
- Education
- Exertion level
- Skill required

Using

- Dictionary of Occupational Titles

Other Work, cont'd

- Medical-Vocational Guidelines
 - AKA “Grid” rules
 - 20 C.F.R. § 404.200, *et seq.*

http://www.socialsecurity.gov/OP_Home/cfr20/404/404-app-p02.htm

RULE	AGE	EDUCATION	Previous Work	DECISION
201.01	Advanced Age (55-59)	Limited or Less	Unskilled or None	Disabled
201.02	“	“	Skilled or semi- skilled –skills not transferable	Disabled
201.03	“	“	Skilled or semi- skilled – skills transferable	Not Disabled

Grid Rules, cont'd

Examples:

1. 52 years old with 11th grade education, no GED & light PRW
2. 55 years old with HS education, sedentary PRW

Part III.

THE HEARING

Hearing: *Where?*

- Office of Disability Adjudication and Review (ODAR)
 - Within 75 miles of claimant's home
 - 20 days notice unless waived
- Administrative Law Judge
 - In person, video or telephone
 - Impartial

Pre-Hearing Preparation

- Objections must be prior & in writing to
 - Issues to be adjudicated
 - Type of hearing
 - Location of hearing
- Pre-Hearing Memo (OTR request)



Pre-Hearing Preparation

- Examine & compare claim folder (ERE or paper)
- Supplement with relevant medical evidence
 - Burden on claimant to prove (§ 404.1512(a))
 - But SSA responsibility to develop (§ 404.1512(d))
- And other evidence

Relevant Evidence

- Medical evidence
 - Complete medical history
 - Objective medical evidence
 - Medical Source Statements/Opinions
 - Consultative Examinations/Tests
- Other evidence
 - Lay opinion statements/forms
 - Function reports/daily activities questionnaires
 - Employment file
 - School records, education level, IQ testing
 - Medication lists, calendars
 - VA ratings

What Constitutes Evidence?

20 CFR §§ 404.1512(b) & 416.912(b)

- Includes evidence otherwise inadmissible
- Anything material to the issues (§ 404.944)
 - Recent prior work activity
 - Severe impairment
 - Medical treatment w/in 12 months of AOD or after PFD
 - Drug or alcohol abuse
 - NOT dental work, etc. (HALLEX I-2-6-58)



Weight of Evidence

20 CFR § 404.1527

- Acceptable Medical Sources
 - 20 CFR § 404.1513
 - NOT nurse practitioner or therapist
 - NOT helpful to just countersign documents
- ALJ decides weight
 - Is opinion from actual treater who's a specialist?
 - Consistency with other substantial evidence
 - Length & frequency of treatment

Evidence, cont'd

- Deposition, Interrogatories, Affidavits
- Subpoenas may be issued by ALJ for witness attendance or documents
- ALJ or rep may ask for post-hearing evidence
- Rep may supply evidence until record closes
- Post-hearing evidence from source other than claimant must be proffered

Hearing: *Who Will Attend?*

- Claimant
- Representative
- Claimant's Witnesses
- Vocational Expert
- Medical Expert

Hearing: *What to Expect*

- Testimony taken under oath...
- ...but very informal in style
- Audio recording is made
- Non-adversarial
- Rules of Evidence do not apply
- Closed, not public
- One non-witness observer usually allowed
- Appear even if client doesn't

Hearings: *The Basics*

- Introduction of Evidence & Issue Reading
- Opening Statement by representative
- Testimony of Claimant
- Testimony of Experts
- Closing Statement (or Brief)
- Closing the Record

Hearing: *Intro & Issue Reading*

- Introduction of participants
- Purpose of hearing & procedures explained
- Type of claim, protective filing date, alleged onset date confirmed
- Issue reading usually waived by rep
- Is additional info needed?
- Ruling on preliminary matters
- Exhibits introduced into evidence

Testimony

- VE or ME will be paid as in federal court
- How testimony proceeds depends on ALJ
- Claimant testifies first, then witness, then VE
- Rep can question or cross-examine

Testimony: *medical expert*

- Unusual
- Clarifies medical issues for ALJ
 - Whether impairment meets/equals a listing
 - Whether failure to treat affects impairment
 - Whether substance abuse affects impairment
 - Whether symptoms correlate to impairment
 - Severity of Impairment
 - What is claimant's Residual Functional Capacity
- Cannot be treater or CE

Testimony: *Vocational Expert*

- Very common
- Must not have had prior contact with claimant
- Assists ALJ with vocational issues
 - Whether impairment affects ability to work
 - Whether jobs exist in national economy given claimant's exertional & non-exertional restrictions, age, education & prior work experience

Hearing: *Conclusion*

- Closing statement or letter brief by rep
- ALJ closes record
 - Unless additional info is needed
 - Consultative examination
 - Outstanding medical records
 - Other info may be submitted

Post-Hearing

- If post-hearing development
 - Rep may offer additional evidence, write brief, or request supplemental hearing
- Written decision
 - Mailed to claimant & rep
 - No time limit

Decision Types

- Fully Favorable
- Unfavorable
- Partially Favorable
 - Amendment of onset date
 - Date Last Insured may be implicated

ALSO

- Continuing Disability Review
- Representative Payee

APPEALS

20 CFR § 404.970

- Due within 60 days
- Two types:
 - Requested by claimant
 - Own motion
- Form HA-520 (Request for Review)

Appeals, cont'd

- File Request for Review
- Reviewed for
 - Abuse of discretion
 - Error of law
 - Findings or conclusions not supported by substantial evidence
 - Public policy
- Within 25 days of Request for Review
 - request forwarding of claim file
 - provide “new and material” evidence
 - write brief (aka “comments”)
 - Additional time available upon request

Appeals, cont'd

- Material evidence will be considered if it relates to the time on or before the date of the ALJ decision (20 CFR § 404.970(b))
- Then Federal Court review in USDC where claimant resides (20 CFR § 404.981)
 - Within 60 days of decision
 - Bench trial (MFSJ)
 - Then 4th Circuit, etc.

Part IV.

SCREENING YOUR CASE

Remember...

- Claimant must have a severe impairment lasting or expected to last one year or result in death
- that alone or in combination precludes SGA
- considering claimant's vocational profile (age, education, work history)

Also remember...

- Blindness
- Compassionate Allowances
- Listings
- Grid Rules

How to Determine Onset Date

- date last worked v. date condition began
- SGA after onset?
 - Earnings v. Vacation Pay, Retirement, LTD, etc.
- Unemployment Insurance benefits
- Medical Proof
- Date Last Insured

Usual Suspects

- Heart conditions
- Orthopedic conditions
- Neurological conditions
 - neuropathy
 - migraines
 - seizures
- Psychiatric conditions

Vocational Profile

- The older the claimant,
- The less educated the claimant, and
- The higher the exertion level of prior work
- The fewer jobs must be excluded

Inability to Perform SGA

- Exertional (claimant is physically incapable)
- Too many rest breaks
- Too many days missed
- 8 hour day/40 hour week

Ask about...

- Age
- Highest education/training (not on-the-job)
- Work history 15 years prior to onset & current
 - Insured status & grid rule
- Medical condition since onset
- Treatment/medical support from MDs?
- Previous applications/attys?
- Worker's Comp/STD or LTD/UI/VA

Bibliography

- 42 USC §§ 401, *et seq.*; 42 USC §§ 1381, *et seq.*
- 20 CFR Part 404; 20 CFR Part 416
- Program Operation Manual Systems
<https://secure.ssa.gov/apps10/>
- HALLEX
http://ssa.gov/OP_Home/hallex/hallex.html
- Social Security Rulings/Acquiescence Rulings
http://ssa.gov/OP_Home/rulings/rulings.html

THANKS!

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Upcoming VSB/LINC Webinars

- **Part 5: Housing Law (Landlord –Tenant), July 23, 2014**
- **Part 6: Housing Law (Foreclosure), Date TBD**

For more information go to

http://www.vsb.org/site/pro_bono/resources-for-attorneys