

**SOCIAL SECURITY DISABILITY:
FROM APPLICATION, TO RECONSIDERATION, AND HEARING**

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I. DEFINITION OF DISABILITY

§ 404.1505 Basic Definition of Disability.

(A) The law defines disability as the inability to do 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. To meet this definition, [a claimant] must have a severe impairment, which make [the claimant] unable to do [the claimant's] previous work or any other substantial gainful activity which exists in the national economy. To determine whether [the claimant] are able to do any other work, [social security] consider [s] your residual functional capacity and your age, education, and work experience. [Social Security] will use this definition of disability if [the claimant is] applying for a period of disability, or disability insurance benefits as a disabled worker, or a child's insurance benefits based on disability before age 22 or, with respect to disability benefits payable for months after December 1990, as a widow, widower, or surviving divorce spouse.

There are different rules regarding disability for the blind as well as widows, widowers, or surviving divorced spouses. 20 C.F.R. § 404.1505 (b).

Also, Social Security will not consider disability that arises as the result of the commission of a felony or in connection with confinement in prison. 20 C.F.R. § 404.1506 (a) (b).

II. METHODS OF ESTABLISHING DISABILITY

§404.1508 What is needed to show an impairment?

If [the claimant is] not doing substantial gainful activity, [social security] always looks first at [the claimant's] physical or mental impairment(s) to determine whether [the claimant is] disabled or blind. [The claimant's] impairment must result from anatomical physiological or physiological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by [the claimant's] statement of symptoms.

§404.1510 Meaning of substantial gainful activity.

Substantial gainful activity means work that –

- (a) involves doing significant and productive mental duties; and
- (b) is done (or intended) for pay or profit.

A. Listings

Social Security provides many guidelines for establishing disability. Some impairments are set forth under what is referred to as “the listings”. The listings are fourteen groupings of body systems and physical or mental disorders with subcategories of specific conditions under each listing. The subcategory under a listing will set forth a definition for disability for that particular condition. If a claimant meets all of the requirements of a listed condition, then Social

Security must grant disability. These listings are not inclusive of all impairments and are not the only way to establish disability.

The listing for adults is found under 20 C.F.R. Pt. 404, Subpt. P, App. 1. The categories of impairments are as follows:

- 1.00 Muscular skeletal system.
- 2.00 Special senses and speech.
- 3.00 Respiratory system.
- 4.00 Cardiovascular system.
- 5.00 Digestive system.
- 6.00 Genito-Urinary system.
- 7.00 Hemic and Lymphatic system
- 8.00 Skin.
- 9.00 Endocrine system.
- 10.00 Multiple body systems.
- 11.00 Neurological.
- 12.00 Mental disorders.
- 13.00 Neoplastic disease, malignant.
- 14.00 Immune system.

The listing of children's impairments can be found under 20 C.F.R. pt. 404, Subpt. P, App 1, part B. The listing of impairments for children is as follows:

- 100.00 Growth impairment.
- 101.00 Muscular skeletal system.
- 102.00 Special senses and speech.
- 103.00 Respiratory system.
- 104.00 Cardiovascular system.
- 105.00 Digestive system.
- 106.00 Genito-Urinary system.
- 107.00 Hemic and Lymphatic system
- 109.00 Endocrine system.
- 110.00 Multiple body systems.
- 111.00 Neurological.
- 112.00 Mental disorders.
- 113.00 Neoplastic disease, malignant.
- 114.00 Immune system

B. Grids

Another method of determining impairment that is useful for claimants who are fifty years old or older is known as "the grids". The grids can be found under 20 C.F.R. Pt. 404, Subpt. P, App. 2. They are referred to as the medical vocational guidelines. These guidelines break up an individual's residual functional capacity based on the categories of sedentary work, light work, medium work, heavy work, very heavy work as well as the claimant's age.

Social Security defines the levels of work as follows:

- (a) *Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting and carrying articles like docket files, ledgers, and small books. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.
- (b) *Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten 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 and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, [a claimant] must have the ability to do substantially all of these activities. If someone can do light work, [social security will] determine he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.
- (c) *Medium work.* Medium work involves lifting no more than fifty pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five pounds. If someone can do Medium work, [social security will] determine that he or she can also do sedentary and light work.
- (d) *Heavy work.* Heavy work involves lifting no more than one-hundred pounds at a time with frequent lifting or carrying of objects weighing up to fifty pounds. If someone can do heavy work, [social security will] determine that he or she can also do medium, light, and sedentary work.
- (e) *Very heavy work.* Very heavy work involves lifting objects weighing more than a hundred pounds at a time with frequent lifting or carrying of objects weighing fifty pounds or more. If someone can do very heavy work [social security will] determine that he or she can also do heavy, medium, light, and sedentary work. 20 C.F.R. § 404.1567

These classifications become helpful to a Social Security claimant at age fifty or above because Social Security will begin to consider the lack of transferable skills into lighter work at that age. Then the only thing necessary to demonstrate disability to Social Security is the claimant's inability to perform work outside of work level (i.e. sedentary) that the claimant lacks the transferable skills to enter. For example, if a claimant is fifty to fifty four years old with a sedentary residual work capacity but lacks the education or transferable skills to enter that level of work, they will be considered disabled under the grids. See Pt. 404, Subpt. P, App. 2. However, the grids will not help that same claimant, if they have a light residual functional capacity. A claimant who is fifty-five to fifty-nine years old can be found disabled even though they have a light residual work capacity, if they do not have the transferable skills or education to enter that category of work. The grids are generally not helpful to those under fifty or who have a medium or better residual work capacity.

C. Analysis of Disability

A claimant is eligible to receive social security disability benefits when that person is unable 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." 42 U.S.C.A. § 423(d) (1) (A). Beyond that, the person:

[I]s not only unable to do his previous work but cannot, considering his age, education, and work experience, engaging in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him or whether he would be hired if he applied for work. For purposes of the preceding sentences (with respect to any individual) “work which exists in the national economy” means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.”

42 U.S.C.A. § 423(d) (2) (A).

The SSA has adopted a set of guidelines designed to achieve consistency in disability determinations. See, 20 C.F.R. § 404.1520. Under these guidelines the Commissioner must make the following five determinations in a sequential fashion: (1) whether the claimant is currently engaged in substantial gainful activity; (2) if not, whether he has a severe impairment; (3) if so, whether that impairment meets or equals a listed impairment in Appendix I of the applicable regulations; (4) if not, whether the impairment prevents the performance of any work. 20 C.F.R. § 404.1520 (b-f). If his impairment meets or equals a listed impairment, the claimant is “disabled.” 20 C.F.R. 404.1520(d). If this is not the case, then the claimant can still show he is disabled by showing that his impairment prevents him from performing his past relevant work. 20 C.F.R. § 404.1520(e) (1993).

By satisfying either step 3 or 4, the claimant establishes a prima facie case of disability. At most, the claimant in a social security disability case has only the burden of proving that he can no longer perform his former work. Then, the burden of proof is upon Social Security to show some other work that the claimant can perform despite his or her medical impairments. Grant v. Schweiker, 699 F.2d 189 (4th Cir. 1983). This is step 5 of the sequential evaluation process. When the burden shifts to the Commissioner, this leads to the fifth and final inquiry in the sequence; whether the impairment prevents the performance of any work existing in the national economy. Hall v. Harris, 658 F.2d 260, 264, (4th Cir. 1981); Hunter v. Sullivan, 993 F.2d 31, 35 (4th Cir. 1993). If the claimant reaches step five, the burden shifts to the commissioner to show that other jobs exist in the national economy that the claimant can perform considering his age, education and work experience. 20 C.F.R. § 404.1520(f).

D. Non-Exertional Impairments

A claimant’s nonexertional impairments further diminish the claimant’s work capability. Section 200.00(e) 2 of Appendix 2 provides that:

However, where an individual has an impairment or combination of impairments resulting in both strength limitations and nonexertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone and, if not the rule(s) reflecting the individual’s maximum residual strength capabilities, age,

education, and work experience provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations. Also, in these combinations of nonexertional and exertional limitations which cannot be wholly determined under the rules in this Appendix 2, full consideration must be given to all of the relevant facts in the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations, which will provide insight into the adjudicative weight to be accorded each factor.

SSR 83-10 stipulates that were a person cannot be found disabled through strength limitations alone, the rules which correspond to the person's vocational profile and maximum sustained exertional work capability will be the starting point to evaluate what the person can still do functionally. The regulations advised that in more complex situations, the assistance of a vocational resource may be necessary.

Regulation 404.1569 provides that:

The rules in Appendix 2 do not cover all possible variations of factors. Also, as we explained in 200.00 of Appendix 2, we do not apply these rules if one of the findings of fact about the person's vocational factors and residual functional capacity is not the same as the corresponding criterion of a rule. In these instances, we give full consideration to all relevant facts in accordance with the definitions and discussions under vocational considerations.

Exertional limitations, including pain, are those that affect the claimant's ability to meet the strength demands of jobs. 20 C.F.R § 404.156 a (b). Nonexertional limitations are those that affect the claimant's ability to the demands of jobs other than the strength demands. 404.156a(c). The performance of certain postural activities is a form of locomotion required to accomplish almost all forms of work. SSR 85-15. Further, in performing most sedentary and light jobs the person is required to crouch and stoop occasionally. SSR 83-14. The inability to stoop justifies a finding of disability as held in Hammon v. Heckler, 765 F.2d 424 (4th Cir. 1985).

If an individual must alternate between sitting and standing, that person is not capable of sedentary work. Wages v. Secretary of Health and Human Services, 755 F.2d 495 (6th Cir. 1985); Ferraris v. Heckler, 728 F.2d 582 (2d Cir. 1984); Deutsch v. Harris, 511 F.Supp. 244 (S.D.N.Y.) 1981. This principle stems from the Social Security Ruling 83-12 which provides that if a person's residual functional capacity does not coincide with the requirements for a full range of sedentary work, then the Commissioner should meet his burden of proof by obtaining testimony from a vocational expert. As stated in SSR 83-12:

I. Alternate Sitting and Standing

In some disability claims, the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that

the person must alternate periods of sitting and standing. The individual may be able to sit for a time, but must then get up and stand or walk for awhile before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated by most light work. (Persons who can adjust to any need to vary sitting and standing by doing so at breaks, lunch periods, etc., would still be able to perform a defined range of work).

There are some jobs in the national economy – typically professional and managerial ones – in which a person can sit or stand with a degree of choice. If an individual had such a job and is still capable of performing it, or is capable of transferring work skills to such jobs, he or she would not be found disabled. However, most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand a Vocational Specialist should be consulted to clarify the implications for the occupational base.

Pain is a sensory and nonexertional impairment, which precludes reliance upon the medical-vocational guidelines. Wilson v. Heckler, 743 F.2d 218 (4th Cir. 1984). In this Fourth Circuit decision, the court ruled that the ALJ erroneously applied the rules to find the claimant was not disabled and could perform a full range of sedentary work. The court held that the substantial evidence did not support a finding that Plaintiff could perform a full range of sedentary work and that since Plaintiff suffered both exertional and nonexertional limitations, the ALJ should not have relied upon the tables or grids to establish disability conclusively. Id

III. WHERE THE PAPERWORK LANDS

The claimant puts in an application at the local office for their county. The local office handles most of the administrative considerations for the file up through the reconsideration level. If an application is denied, an appeal is sent to a local office. The decision on reconsideration will be made at Division of Disability Services. If the appeal of the unsuccessful application (reconsideration) is denied, then it is appealed by sending a request for hearing to local office. When the request for hearing is received by the local office, then the file is sent from the local office to the Office of Hearings and Appeals. The Office of Hearings and Appeals handles the administration of the file from that point forward. If claim is denied at the hearing level, then it can be appealed to the Appeals Council. The Appeals Council can reverse, remand or deny appeals. If they appeal is denied then all administrative appeals are exhausted and the next action is to file in Federal Court.

There are offices in Birmingham, Alabama and Baltimore among others which handle payment questions. If the question is whether the claimant put in both a disability income benefit claim and a supplemental security claim (both are types of disability claims), then a local office would be able to help.

An Attorney may wish to get a copy of the file social security has already compiled on the claimant or wait until the file reaches the hearing level so they will have the most up to date copy of social security's file. The medical records should be reviewed with the claimant. Social Security will not get all of the medical records especially the most recent medical records. The burden is on the claimant and the claimant's representative to complete the file. Updated records should be forwarded as soon as possible. If social security has enough medical proof in the file, they can consider granting disability before a hearing. Since the advent of Hearing Process Improvement (HPI) and the back log it is created, Social Security had become more interested in granting cases before they go to a hearing. If a treating physician is willing to write a letter stating what the claimant's disability is and why it prevents them from working, this letter will carry weight with Social Security Administration and can help the claimant obtain a favorable decision before hearing.

IV. LAY WITNESSES

Effective use of lay witnesses to prove disabling pain is important in cases where there is marginal medical evidence. When there is significant medical evidence, a client with a compelling work history prior to the onset of their disability and a claimant who is a good witness the role of the advocate is primarily ministerial. When there are technical legal issues, the role of representative is more academic. When a client has little medical evidence to support their contentions of disability or where the medical evidence alone is not compelling, then the representative must assume the role of the trial advocate and prepare lay witnesses and the claimant properly to present a creditable history of on going disabling pain.

The hearing before the administrative law judge is typically the last opportunity to build a record. The advocate should remember that it is their responsibility to build a record and that they have the right to present lay testimony that is relevant and material to the claimant's case. Steadfastness in providing relevant and material lay testimony for the record, despite attempts by ALJ's to discourage the same, is important. ALJ's want to expedite their hearings. If the judge does not want to hear additional lay testimony, the judge should be willing to stipulate in the record that the additional lay testimony would be corroborative of your claimant's testimony. Where the ALJ does not appear to have problems with your claimants creditability and the ALJ seems less anxious to hear additional witnesses, there is no harm in asking for stipulation that your claimant was creditable and that the lay testimony would be corroborative regarding daily activities and pain. The personal preferences of each judge in regard to their desire for medical testimony and willingness to accept the creditability of your claimant and their witnesses should be carefully assessed. Where the claimant's case hinges on the creditability of the claimant and strong cooperative lay testimony, the advocate should not be easily dissuaded by the ALJ for providing ample, believable and focused lay testimony.

Typically, ALJ's want to appear neutral decision makers. As a practical matter however, the administrative law judges have predispositions just like everyone else, including a preference in favor of claimants and witnesses who have strong work histories. It is an effective way of presenting a case to have two or three non-relative lay witnesses who have strong work histories themselves, who are also willing to take a day off of work, travel to a hearing and testify that

their co-worker, friend or neighbor is no longer able to engage in routine daily activities and in their opinion can not work. The advocate should not forget that claimants with a strong work history who are suddenly unable to work become depressed. Lay testimony regarding from depression resulting from inability to work can be extremely effective.

The administrative hearing is an excellent opportunity to develop skills in eliciting direct testimony in an environment that is fairly forgiving when compared to full blown adversarial trials.

A. Evidence of Pain in Disability Cases

The Social Security Administration begins its interpretation of pain evidence with the code of Federal Regulations Subsection 404.1529 and United States code 423 (d) (3). The regulations and code look to medical history and laboratory findings to evaluate the intensity and persistence of the claimant's pain. However, the regulations also allow lay witnesses to testify about the claimant's symptoms. *Id.* Such witnesses may testify to the following: a claimant's daily activities, the intensity of the claimant's pain, activities which aggravates and/or precipitate the pain, the effectiveness of medical treatment, measures the claimant uses to relieve pain, and any other factors which demonstrate the claimant's functional limitations. *Id.* The language of the United States Code focuses on "objective" medical evidence. This enforcement on objective evidence color social security's approach to every disability case.

Objective evidence has become the focal point for the administration when considering arguments for disability claims. Social Security perceives the before mentioned code as a mandate intended to guard the system against "social leaching" by malingerers and thus the demand that a claimants disability be demonstrable. See, Wayne v. Finch, 313 F Supp. 898, at 903 (MD NC) (1969). Social Security has a policy that there must be objective evidence of pain to qualify for Social Security benefits. Social Security Practice Guide, Section 903 [1] (1993). The administration wants tangible signs of pain that are anatomical, physiological, or psychological. *Id.* From this mandate, social security had developed a "Doubting Thomas" approach. If they can probe the wounds and see the claimant's pain, they will believe the claimant's disability.

Social Security clings to "objective" evidence because it simplifies disability determinations. Relying on objective evidence produces consistent, all be it harsh results. Social Security Practice Guide, Section 903 (1993). Objective evidence allows an administrative law judge to rely on tangible medical reports and avoid creditability determinations. *Id.* Relying on medical evidence makes for smooth mechanical approach rather than having to weigh subjective factors. If the claimant can meet certain predetermined medical requirements, then they are disabled. Otherwise, the judge has to relay on the honesty of the claimant, an interested party, and there is the perceived danger of malingering.

Unfortunately, pain is not always objectively demonstrable, and relying heavily on objective evidence is an inadvisable approach. For example, fifteen percent of all victims of seizure disorders will have negative encephalograms. The Merk Manual of Diagnosis and Therapy, 1407 (Berklaw 13th Ed. 1977). Therefore, there is rarely subjective proof of this disorder for that fifteen percent. Social Security Practice Guide, Sec. 903. If the administrative lay judge relays solely on objective evidence, then this fifteen percent who will never be able to produce such evidence will go with out benefits. *Id.* The objective truth is that different claimants suffering from the same disorder will experience a range of impairments. Therefore,

the introduction of subjective evidence is necessary to clearly communicate information about the degree of disability for a particular claimant.

The Federal Courts try to avoid the unduly harsh consequences of solely relying on objective evidence by recognizing the subjective nature of pain. Even medical science uses subjective complaints of patients to make proper diagnoses. Hayes v. Celebrezze, 311 F.2d 648, at 654 (5th Cir. 1963), Blake v. Gardner, 399 F.2d 532, at 540 (9th Cir. 1968). Some Federal

Courts take this a step further and recognize that pain, by its self, may be disabling. Garret v. Richardson, 363 F. Supp. 83 (D. SC 1973), Black v. Richardson, 356 F. Supp. 861 (D. SC 1973). Just as medical science must recognize subjective complaints to make an accurate diagnosis; the Social Security Administration needs to consider subjective complaints to make accurate disability determinations. The use of subjective evidence requires the administrative law judge to balance protecting the system from malingerers and preventing denial for the applicants who fall short of mechanical criteria.

The Federal Courts attempt to bridge the gap between objective medical evidence and subjective proof of pain. The Second Circuit of Court of Appeals states there is no imaginary objective scale available to measure an individual claimant's reaction to pain. Ber vs. Celebrezee, 332 F.2d 293 (2d Cir. 1964). The same disease affects individuals differently, Id., therefore, claimants may provide evidence of subjective pain to support their disability. Brandon v. Gardner, 377 F.2d 488 (1967). An Administrative Law Judge must consider subjective evidence of pain. Mode v. Celebrezee, 359 F.2d 135 (1966). The Federal Courts temper the requirement of subjective evidence by allowing subjective evidence to support disability claims.

The Federal Courts only require a "loose connection" between subjective claims of pain and objective medical evidence. In the Second Circuit, the courts require a "loose" nexus between the proven impairment and the pain. Luna v. Bowen, 834 F.2d 161 (2d Cir. 1987). The Third Circuit requires a "reasonable link" between objective medical findings and the claimant's subjective evidence to pain. Greene v. Schweiker, 749 F.2d 1066 (3d Cir. 1984). The Fourth Circuit only requires that the underlying impairment could "reasonably" be considered to cause the subjective pain. Hyatt v. Heckler, 807 F.2d 376 (4th Cir. 1986). The Forth Circuit does not require a direct tie between the objective evidence and the specific level of pain the claimant is experiencing. Id. If it is a possibility that a claimant's physical impairments could cause pain, then the Administrative Law Judge must consider the subjective evidence of pain.

The core of a disability determination is whether health limitations prevent a claimant from engaging in substantial gainful activity. Miranda v. Secretary of Health, Education and Welfare, 415 F.2d 996, at 998 (1975), Lewis v. Weinberger, 541 F.2d 417 (4th Cir. 1976). If objective medical evidence is not available to show that the claimant is unable to work, then lay witness's testimony about the limitations that pain causes the claimant is the only proof left. The Federal Courts consider it a reversible error for an ALJ not to consider subjective evidence of pain. White v. Califano, 464 F. Supp. 696 (W.D. N.C. 1969). An Administrative Law Judge cannot ignore subjective evidence in favor of weak objective evidence. Thorne v. Weigner, 530 F.2d 580 (4th Cir. 1976). In Thorne, subjective evidence was part of the foundation of the successful appeal of a disability claim. Id. Proof of disability may depend on more than clinical findings. See, Underwood v. Ribicoff, 298 F.2d 850 (4th Cir. 1962), Mode v. Celebrezze, 359 F.2d 135 (1966). It is often the pain accompanying a disability which prevents a claimant from working. The best evidence of this is the claimant's subjective reports, and the court requires the Social Security Administration to give weight to a claimant's word.

Federal Courts require that Administrative Law Judges hear all of the evidence and evaluate it. Not only must a judge consider all the evidence, but they must specifically evaluate pain testimony. Montgomery v. Schweiker, 529 F. Supp. 124 (D Maryland 1981), King v. Califano, 615 F. 2d 1018 (4th Cir. 1980). The Fourth Circuit requires an Administrative Law Judge give weight to subjective evidence and makes a specific findings in order to reject subjective evidence. Combs v. Weignberger, 501 F. 2d 1361 (4th Cir. 1974). It is an error for a judge to disregard subjective evidence of pain. Garrett v. Richardson, 363 F. Supp. 83 (D. SC. 1973), Black v. Richardson, 356 F. Supp. 861 (D SC 1973). An Administrative Law Judge cannot disregard lay testimony, even if it only corroborates a single aspect of the claimant's testimony. Breeden v. Weinberger, 493 F. 2d 1002 (1974). The ALJ must also consider corroborating subjective evidence from the claimant's family and neighbors. Mode v. Celebrezze, 359 F. 2d 135 (1966). These decisions throw open the door to allow subjective evidence from lay witnesses including the relatives, former employees and co-workers.

Social Security regulations do not preclude the use of subjective evidence. Miranda, 514 F. 2d 966 (1975). Even the Federal Rules of Evidence allow some opinion testimony from lay witnesses. See, F.R.E. 701. Most ALJ's will open a hearing by commenting on the fact that the Federal Rules of Evidence are relaxed in Social Security hearings. The path has been left wide open not only to admit lay witnesses' opinion testimony but, to give it significant weight. The Fourth Circuit Courts have even used objective evidence to overturn a denial of disability benefits where the only objective evidence supporting a denial was the opinion of a non-examining doctor. Martin v. Secretary of Department of Health, Education and Welfare, 492 F. 2d 905 (4th Cir. 1974). The Social Security Administration should not deny disability benefits simply because a claimant's disease has not reached a tangible end damage stage. Subjective evidence can supplement disability evidence to create a complete and balanced picture of a claimant's impairment. Lay witness testimony does not create an unreasonable risk of improperly granting benefits, rather it provides ALJ's with a wider variety of evidence upon which to base their decision.

Once a claimant proves that they are not capable of performing past relevant work, the burden of proof shifts to Social Security. If the claimant presents "credible" subjective evidence that they cannot perform past relevant work, then the Secretary must show that there is work available for the claimant, before making a decision to deny disability benefits, Thorne v. Weinberger, 530 F. 2d 580 (4th Cir. 1976). Where solid medical evidence of disability is scarce, subjective evidence can be used to show that the claimant is not capable of doing past work. This shift in the burden of proof is extremely beneficial to those claimants who cannot afford medical treatment and therefore, cannot produce extensive medical evidence. This also benefits those claimants who suffer from disabilities which do not produce objective medical evidence. Both types of claimants have only friends and family members to substantiate the impact that impairment had on their daily lives. If a lay witness can testify that a claimant cannot do household chores or adequately care for their personal needs, then it is less likely the Administration will be able to prove that there is a job the claimant can perform. It becomes easy to see that lay witness testimony can play an important role in a disability hearing.

B. Preparing Lay Witness Evidence

There are four types of evidence that an Administrative Law Judge should consider when making a disability determination. The four types of evidence are: clinical findings, expert opinions, subjective evidence and a claimant's residual functional capacity. Cornett v. Califano,

590 F. 2d 91 (4th Cir. 1978). An attorney can do little more than diligently gather most of these types of evidence. However, lay witness testimony can be honed to make an effective presentation. It is usually the only evidence that a claimant's representative has the responsibility for developing. An effective presentation of this evidence can make a strong impression on an Administrative Law Judge.

Social Security regulations allow the use of lay witnesses. 20 CFR sec.404.929 (1991). A lay witness can be one of the most effective tools an attorney has to corroborate a claimant's disability. If there is little useful objective medical evidence of pain, then the use of lay witness testimony is the only way to substantiate a claimant's subjective complaints. A good lay witness is someone who has a great deal of contact with the claimant, and can report how pain limits the claimant's activities. This is important evidence that must be presented to the judge. Evidence of pain goes to the heart of proving why a claimant can no longer engage in substantial gainful activity.

Pre-hearing conference with all witnesses is vital. The attorney should know the answer to every question that they are going to ask in front of the Administrative Law Judge before it is asked. One unexpected answer could create a sizable problem in the presentation of your claimant's case. An attorney should not be trying to put a case back together after bad testimony when they are in control of what testimony will be presented to the judge. Pre-hearing conference also allows the attorney time to explain to their witnesses how the hearing will proceed to put them at ease with the situation. It is important to control even the well intention witness. Witnesses need to listen to the question asked and answers only that question. There is no rush in getting out testimony and the witness needs to know that the attorney will bring out all of the important points.

Set out the foundation for your lay witnesses' ability to testify immediately, and then get to the point efficiently. Establish that your lay witness has enough contact with the claimant, so that they can credibly testify about the claimant's disability from their personal knowledge. If used affectively lay witnesses can significantly help a case where there is no strong objective evidence.

V. FEDERAL COURT

A. Introduction

Prior to the Federal Court, anyone can represent a Social Security Disability Claimant. This includes claimant's friend, neighbor, a legal assistant or an individual who is an independent representative not associated with any law office. However, representation of a Social Security Claimant at the Federal Court level would be restricted to attorneys licensed in that particular Federal Court Jurisdiction. This is the level where an attorney can truly make a difference that the friend, neighbor, or legal assistant cannot.

There are local rules for each district. Usually each district will produce a booklet of local rules. Local rules mean just that, they apply locally not necessarily anywhere else. These rules can vary. You can find out from other practitioners about the local rules in your jurisdiction. The North Carolina Academy of Trial Lawyers has a Social Security Disability Advocacy Section that is also a good resource for such information.

There are three Federal District Court Districts in North Carolina. Those are the Western, Middle, and Eastern Districts. Practitioners have to be admitted into each District they wish to practice before. If you want to practice in front of all three districts, that would mean three separate admissions.

B. Filing the Complaint

An appeal from a denial by the Appeals Council must be filed within sixty (60) days of the receipt of the denial. 20 C.F.R. § 404.981 Social Security assumes that the letter is received within five (5) days after the date stamped on the denial letter. It is possible to get an extension of the sixty (60) days to appeal if you can show good cause. The reasons for the request for the extension must be set forth clearly. The complaint must be filed in the United States District Court for the judicial district the claimant resides in.

The complaint names the Commissioner of Social Security as the Defendant. The complaint normally includes the claimant's Social Security Disability Number. There was a rule proposed to redact Social Security Numbers. However, that was going to be time consuming and unduly burdensome in Social Security cases and that rule did not pass. However, it demonstrates how the rules of practice change frequently and a practitioner must be up to date on the rules.

Federal Court has jurisdiction to review Social Security denials under Section 205(g) and 1631(c) (3) of the Social Security Act as amended (42 U.S.C. 405(g) and 1383(c)(3)).

The complaint needs to be served on the Commissioner of Social Security, the United States Attorney for the district in which you filed, and the Attorney General of the United States of America.

There are different approaches as how detailed a complaint should be. If your complaint is very detailed then you may have a leg up on the work for your brief. Conversely this gives the U.S. Attorney a free look early on at your position.

III. Record on Appeal

The Record on Appeal is compiled by the U.S. Attorney's Office. It needs to be reviewed for accuracy and completeness. If the attorney represented the claimant below then they will have a good idea of what should be in the record.

IV. Motion for Judgment on the Pleadings

Each side will file a Motion for Judgment on the Pleadings. Some basic headings for each section would be as follows:

Statement of the Case
Statement of the Facts
Statement of Issues
Medical Documentary Evidence
Standard of Review
Argument
Conclusion.

V. Basics of the Argument

The review of a final decision of the Social Security Administration concerning disability benefits pursuant to the Social Security Act, 42 U.S.C. 39-406, is limited to two determinations. First, whether the Social Security Administrations findings of fact are supported by substantial evidence. Second, whether the correct law was applied. Hayes v. Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1990). Section 405 (g), governing judicial review of final decisions of the Social Security Act relating to disability benefits, provides that the Social Security Administration's findings of fact shall be conclusive if supported by substantial evidence. 42 U.S.C. 405(g) (Supp. 1993).

The United States Supreme Court defines substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971). The Fourth Circuit has further defined substantial evidence to be more than a “mere scintilla” but it can be less than a “preponderance”. Hayes v. Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1996) (quoting Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1990).

The standard of review may leave an attorney wondering if the appellate review burden is a Sisyphean task. An attorney might be left feeling like a mythical Sisyphus, pushing a bolder up a mountain that is simply going to roll back down so that they have to start back over in the morning pushing the boulder back put the mountain. However, we can take heart because:

“...[T]he substantial evidence standard requires the court to review the record itself to determine whether it substantiates the story the agency would have it tell. Granted, this level of review is a deferential one but it is no less through-going for being so.” Butler v. Barnhart, 353 F.3d 992, 999 (2004).

The argument for the Motion should start with the Five Step Analysis. The Commissioner must make the following five determinations in a sequential fashion: (1) whether the claimant is currently engaged in substantial gainful activity; (2) if not, whether he has a severe impairment; (3) if so, whether that impairment meets or equals a listed impairment in Appendix I of the applicable regulations; (4) if not, whether the impairment prevents the performance of any work. 20 C.F.R. §404.152 (b-f). If an impairment meets or equals a listed impairment, the claimant is “disabled.” 20 C.F.R. §404.1520(d). If this is not the case, then the claimant can still show they are disabled by showing that their impairment prevents them from performing their past relevant work. 20 C.F.R. §404.1520(e) (1993). This is the 4th step of the sequential evaluation process.

Arguably, at most a claimant in Social Security Disability case has only the burden of proving that they can no perform their former work. Then the burden of proof is on Social Security to show some other work that the claimant can perform despite their medical impairments. Grant v. Schweiker, 699 F.2d 189 (4th Cir. 1983). This is step 5 of the sequential evaluation process. When the burden shifts to the Commissioner, this leads to the fifth and final inquiry in the sequence; whether the impairment prevents the performance of any work existing in the national economy. Hall v. Harris, 658 F.2d 260, 264(4th Cir. 1981); Hunter v. Sullivan, 993 F.2d 31, 35 (4th Cir. 1993). The Commissioner must show that other jobs exist in the national economy that the claimant can perform considering their age, education and work experience. 20 C.F.R. §404.1520(f).

If an Administrative Law Judge stipulates that a claimant can no longer do their past relevant work and that the claimant is not currently working, then there is no argument that the shift in burden has occurred. However, the shift cannot be solely relied on and an attorney needs to use the final step to show that their claimant cannot perform any substantial gainful activity.

There are common errors that occur at this 5th step in the sequential analysis process to look for. An ALJ must consider or at least explain the weight given to significant evidence that favors the claimant's case. Young v. Barnhart, 284 F.Supp. 2d 343 (2003). Therefore, if the ALJ has simply ignored favorable evidence, this is grounds for remand so that favorable evidence can be considered. If an ALJ fails to explain the weight assigned to relevant evidence that is contrary to the ALJ's decision, then that is reversal error. Id. Murphy v. Bowen, 810 F.2d 433, 438 (4th Cir. 1987).

Another common error is for an Administrative Law Judge to rely on the Social Security Grids to deny a claimant who has non-exertional limitations in addition to exertional limitations. Social Security Ruling 83-10 stipulates that where a person cannot be found disabled through strength limitations alone, the rules which correspond to the person's vocational profile and maximum sustained exertional work capability will be the starting point to evaluate what the person can still do functionally. Section 200.00(e)(2) of Appendix 2 provides that:

However, where an individual has an impairment or combination of impairments resulting in both strength limitations and non-exertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone and, if not the rule(s) reflecting the individual's maximum residual strength capabilities, age, education, and work experience provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by non-exertional limitations. Also, in these combinations of non-exertional and exertional limitations which cannot be wholly determined under the rules in this Appendix 2, full consideration must be given to all of the relevant facts in the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations, which will provide insight into the adjudicative weight to be accorded each factor.

Exertional limitations are those that affect the claimant's ability to meet strength demands of jobs. 20 C.F.R. §404.156a(b). Non-exertional limitations are those that affect the claimant's ability to meet the demands of jobs other than the strength demands. 20 C.F.R. §404.15a(c).

It is also reversible error for an ALJ not to consider subjective evidence of pain. White v. Califano, 464 F. Supp. 696 (W.D.N.C. 1969). An ALJ must consider corroborating subjective evidence from the claimant's family and neighbors. Mode v. Celebrezze, 359 F.2d 135 (1966). Once the connection has been made between the underlying condition and the pain, subjective evidence can be used to document the intensity of the pain. The claimant need only show that he suffers from pain and that it is as a result of the medical impairment. The pain, or its extent, need not of itself be independently proved by objective findings.

An Administrative Law Judge must give great weight to the opinion of a treating physician or clearly distinguish why weight is not accorded. It is long been held in Social Security Disability matters that the opinion of a treating physician when accompanied by clinical and diagnostic techniques is entitled to controlling weight. Ward v. Chater, 924 F.Supp. 53, 55 (W.Va. 1996). Pursuant to 20 C.F.R. §404.1527, the opinion of a treating physician is entitled to more weight than the opinion of a non-treating physician. The treating physician is “able to provide a detailed, longitudinal picture of medical impairments.” Winford v. Chater, 917 F. Supp. 398, 400 (E.D. Va. 1996).

These common errors are certainly not an exhaustive lists and each case will have its own individual issues. These are simply a good place to start in analyzing a case for its appealable issues.

F. Conclusion

If the motion is scheduled for oral argument, then your brief will have you prepared to make the argument. If you are not familiar with the Judge, it is always a good idea to find out from other practitioners about the Judge’s style and how to present the best argument to the Judge.

If you are successful in getting the case reversed and/or remanded do not forget to apply for attorney’s fee under the Equal Access to Justice Act (EAJA).

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