

FEDERAL COURT:
GETTING OFF THE PORCH

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I. Introduction

Prior to Federal Court, virtually 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 is restricted to attorneys licensed in that particular Federal Court Jurisdiction. This is the level where an attorney can truly make a difference.

There are local rules for each district. Typically each district will produce a booklet of local rules. Local rules are just that, they apply locally not necessarily in any other jurisdictions or district. These rules vary. You learn 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 separately. Thus, if you want to practice in front of all three districts, you would require three separate admissions.

II. 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 in which the claimant resides.

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 to how detailed a complaint is required. 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. The following is a *sample complaint*:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

John Doe,)
SSN: XXX-XX-XXXX)
Plaintiff,)
)
)
vs.)
)
)
JO ANNE B. BARNHART,)
COMMISSIONER OF)
SOCIAL SECURITY,)
Defendant.)

CIVIL ACTION NO. _____

COMPLAINT

The Plaintiff, complaining of the Defendant, would respectfully show unto the court:

I.

That the Plaintiff is a citizen and resident of the United States of America and the State of North Carolina, County of _____.

II.

That the Defendant is the Commissioner of Social Security, Social Security Administration of the United States of America.

III.

That jurisdiction is provided by Section 205(g) of the Social Security Act, as amended, 42 U.S.C.405(g).

IV.

That after initial and reconsideration denials of the Plaintiff's claim for relief this matter was heard by an Administrative Law Judge, who ruled that Plaintiff was not entitled to any of the benefits sought in their application.

V.

That the Plaintiff subsequently sought review of the Administrative Law Judge's decision by the Appeals Council of the Social Security Administration. The request for review was denied in an action dated _____, making the Administrative Law Judge's decision the final administrative decision of the Social Security Administration and exhausting the Plaintiff's administrative remedies.

VI.

That the Plaintiff believes that the factual findings of the Social Security Administration are not supported by substantial evidence and that the Social Security Administration has not properly interpreted and applied the law to the facts to their case.

VII.

That this action is brought before the Court to review, in the manner of judicial review, the final administrative decision upon the Plaintiff's application for a period of disability and disability insurance benefits based upon disability.

WHEREFORE, the Plaintiff prays that the Court review the final decision of the Defendant and order both the reversal of that decision and the payment of those benefits sought according to applicable law, or alternatively, for a remand of this case to the Defendant for further adjudicatory proceedings, and for such other and further relief as the Court deems appropriate and just.

Respectfully submitted this the _____ day of _____, 2004.

BY: _____

Attorney for Plaintiff
NC State Bar No.:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the below listed documents:

1. PLAINTIFF’S COMPLAINT AND SUMMONS

were served upon all counsel of record by mailing a copy thereof by first-class mail, postage paid, addressed as follows:

Civil Process Clerk
United States Attorney
310 New Bern Avenue, Suite 800
Raleigh, NC 27601-1461

John Ashcroft
Attorney General
Main Justice Building
10th and Constitutional Avenue
Washington, DC 10530

Jo Anne B. Barnhart
Commissioner of Social Security
Office of the General Counsel
Room 611 Altmeyer Building
Baltimore, MD 21235

This the _____ day of _____, 20_____.

BY: _____

Attorney for Plaintiff
NC State Bar No.:

III. RECORD ON APPEAL

The Record on Appeal is compiled by the U.S. Attorney's Office. The record needs to be reviewed for accuracy and completeness. If the attorney represented the claimant at the previous stages of administrative review then that attorney 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, 90 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 up 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 longer perform their past relevant work. Then the burden of proof shifts to 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 perform their past relevant work and that the claimant is not currently working, then there is no argument that the burden shifts to Social Security. However, the shift cannot be solely relied upon and an attorney needs to use the final step to show that their claimant cannot perform any substantial gainful activity.

VI. COMMON ERRORS

There are common errors to look for that occur at this 5th step in the sequential analysis process. 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 a 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 reversible error. Id. Murphy v. Bowen, 810 F.2d 433, 438 (4th Cir. 1987).

Another common error is for an Administrative Law Judge to rely solely 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 the 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, and severity, need not of itself be independently proven 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 not an exhaustive list and each case will have its own individual issues. This is simply a good place to start in analyzing a case for its appealable issues.

VII. 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).