

SOCIAL SECURITY DISABILITY LAW FOR THE NON-DISABILITY LAWYER

Presented by:

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I. DISABILITY AND OTHER AREAS OF THE LAW

A. Criminal law

1. Social Security Disability benefits will be suspended for any month in which a recipient is incarcerated as a result of a conviction for a felony or misdemeanor. 42 U.S.C. Sec. 402(x).

2. Supplemental Security Income Benefits will be suspended if the recipient remains incarcerated for any reason for an entire calendar month. 20 C.F.R. 416.211 and 1325.

B. Unemployment Law

Can a person receive unemployment benefits and apply for disability at the same time?

Answer: Maybe. Very tricky issue.

C. Worker's Compensation

1. Workers' Compensation settlements must consider the potential effect of monthly settlement payments on the worker's Social Security Disability payments. Most attorneys I know are well aware of this issue.

2. A disability claimant can receive a total of no more than 80 percent of the claimant's "average current earnings" per month from Social Security disability and Workers Compensation payments.

3. An attorney can avoid problems 90 percent of the time by prorating any settlement over the claimant's life expectancy and specifically identifying the amount related to expenses.

4. "Average current earnings" - generally defined as the highest annual earnings earned within the five calendar years prior to onset of disability.

D. Family Law

1. Child Support

SSDI payments are considered as income for calculation of child support. State ex rel. Moeller v. White, 216 P.3d 727 (Kan.App. 2009)

SSI payments are not considered income Id.

2. Social Security payments received by child due to non-custodial parent's disability can be credited towards non-custodial parent's child support obligation Andler v. Andler, 217 Kan. 538, 538 P.2d 649 (1975),

E. Employment Law

- See comments regarding ERISA below

F. Elder Law

1. Can spend the entire day discussing long term care planning and disability benefits

2. SSI eligibility/ Medicaid/ Medicare eligibility

G. Collection Law

1. All SSI and SSDI payments are exempt from garnishment or attachment by Federal Law with only a few exceptions.

2. New regulations adopted in 2011 prohibit banks from automatically freezing an account pursuant to a garnishment order. The bank must examine the account to ensure customers have access to SSI and SSDI deposits

-See 31 C.F.R. Part 212.

II. TYPES OF DISABILITY CASES:

A. Social Security Disability Insurance Benefits (SSDI) -where a claimant meets the non-medical eligibility rules for disability benefits based on his or her earnings record. 20 C.F.R. Part 404.

1. A claimant who has continuously worked for the past five years will generally have accumulated sufficient earnings to qualify.

2. "Insurance coverage" lapses after five years or more of no or non-significant work.

a. When is the date last insured (DLI)?

b. Past-due benefits payable for the 12 months preceding the date of application

3. There is a five month waiting period from date of onset during which no benefits are payable. Why?

4. Medicare eligibility 24 months after date of entitlement (onset date plus 5 months)

B. Supplemental Security Income (SSI) is one in which a claimant meets the non-medical eligibility rules for SSI benefits because of financial need. 20 C.F.R.

Part 416.

1. The basic monthly SSI check is the same in all states.
 - i. \$674 for one person
 - ii. \$2011 for a couple
2. Financial need requires that countable resources are no more than:
 - i. \$2,000 for one person;
 - ii. \$3,000 for a couple.
3. Income test - Income includes any an individual receives in cash or in kind that can be used to meet his or her needs for food an shelter. See 20 C.F.R. Sec. 416.1100-03
4. Past-due benefits payable only from date of application.
5. There is no waiting period for SSI.

C. A concurrent case is one in which a claimant meets the non-medical eligibility rules for both SSDI and SSI.

1. Typically occurs when work record is poor and the calculated SSDI payment is less than maximum SSI benefit
2. When both SSDI and SSI applications are filed, SS will process an SSI award of past-due benefits before paying SSDI benefits to ensure that a claimant's outstanding medical bills will be paid by Medicaid. In other words, SS processes an SSI award as if the claimant was never going to receive a SSDI award, though the latter would in many cases disqualify a claimant from receiving any SSI at all (because of the financial resources limitations). Several months later, in most instances, SS will then recoup the SSI overpayment out of the claimant's past-due SSDI benefits.
3. Can receive SSI payments during 5 month SSDI waiting period

D. A disabled child's case.

E. Auxiliary benefits are SSDI benefits paid based on the earnings record of a worker found disabled under the Act. These benefits are payable to:

1. A spouse. 42 U.S.C. 402(b), (c).
 - i. Present spouse or divorced within the past ten years. Must have been married for a minimum of ten years.
 - ii. Common law marriages are recognized for this purpose.
 - iii. Benefit amount is 50% of the PIA (primary insurance amount—the sum to which the disabled worker is entitled). Reduced by the family maximum amount.
2. A child. 42 U.S.C. 402 (d).
 - i. Natural, adopted, stepchild, illegitimate, dependent grandchild.
 - ii. Under age 18 or disabled prior to age 22.
 - iii. Benefit amount same as for spouse. 20 CFR Part 404.352.B1

- F. ERISA – Employee Retirement Income Security Act
1. Generally covers employer sponsored long term disability insurance policies.
 2. Appeal - Administrative appeals process with insurance company followed by suit in Federal Court claiming ERISA violations
 3. Potential remedies –
 - past due, current, and future benefits
 - Interest on amounts owed
 - attorneys fees
 - other
 4. Relationship with SSDI and SSI

III. THE 5-STEP SEQUENTIAL EVALUATION PROCESS (SEP): This is how medical disability is evaluated in a SS disability case.

- A. Step 1. Is the claimant engaging in substantial gainful activity?
- Substantial gainful activity is roughly defined as earning \$900 per month
- B. Step 2. Are the medical impairments “severe.” SSR 85-28
1. A *de minimus* severity standard applies at Step 2.
Hawkins v. Chater, 113 F.3d 1162, 1169 (10th Cir. 1997). And SSR 85-28
 2. For example, depression vs. dysthymia
 3. There is a durational requirement that the impairment has lasted or may be expected to last for a continuous period of 12 months.
- C. Step 3. Does the impairment meet or medically equal a Listing? (Part A)
1. The SEP stops here if the impairment meets or equals.
 2. The listing of Impairments is a set of medical diagnostic criteria for various specific physical and mental conditions found at Appendix 1 of the regulations. 20 C.F.R. Part 404, Subpart P, Appendix 1. The ability to perform past work is irrelevant if the impairment meets or equals a listing.
- Medical equivalence requires objective medical proof. 20 C.F.R. 404.1526(b).
- D. Step 4. Can the claimant perform past relevant work?
1. In effect, the advocate must prove that the claimant can not perform the “easiest” job done in the last 15 years, or in the 15 years before the claimant’s disability insured status requirement was last met. ALJ must determine demands of PRW.
 2. If the claimant retains the capacity to perform his past work as it is ordinarily done, the claimant is not disabled though he actually performed the work at a higher exertional level.
- E. Step 5. Does the claimant retain the capacity to do any other work?

1. Burden shifts to the Commissioner.

2 . Consideration is given to the claimant's residual functional capacity (RFC) to work, his age, education and work experience. At the ALJ hearing, the Judge poses hypothetical questions to the vocational expert (VE) based on different RFCs that may be supported by the objective evidence and claimant's testimony. One RFC will be chosen for the final decision based on the ALJ's view of the substantial evidence of record as a whole.

a. Use of the Medical-Vocational Guidelines (Grids) - Review specific requirements of the Grids and definitions of terms. See Appendix A.

i. Age

ii. RFC

iii. Education

- Illiteracy. When a claimant reaches age 45, the Grids require a finding of disability for an illiterate claimant limited to sedentary work. Rule 201.17.

- Inability to communicate in English. Same result.

iv. Work Experience

b. A claimant's impairments may impose functional limitations that effectively preclude a full range of sedentary work without meeting or medically equaling a Listing. *See* 20 C.F.R. 404, Subpart P, App.2, 201.00(h), SSR 96-9p. A medical source statement or opinion from a treating source may effectively limit the claimant's functioning capacity so as to preclude all work.

Presenting a disability case for claimants under age 50 is more difficult because the Grids define those persons as younger individuals, and, in cases of solely exertional impairments, nearly always lead to a finding of non-disability. The advocate should explore the following limitations recognized by SS as significantly eroding the sedentary occupational base:

i. Manipulative limitations. SS recognizes that most

unskilled sedentary occupations require good use of both hands and fingers, i.e., bilateral manual dexterity. SSR 96-9p. An individual who has lost the use of an upper extremity “would generally not be expected to perform sedentary work...”SSR 83-12.

ii. Postural limitations.

iii. Sitting. A full range of sedentary work requires the capacity for prolonged sitting. 20 C.R.F. 404.1567(b). “Sitting should generally total approximately six hours of an eight-hour workday.” SSR 83-12.

iv. Standing and walking. Even sedentary jobs require one to stand or walk periodically throughout an eight-hour workday for about two hours total. SSR 83-10. Use of a “medically required hand-held assistive device” (a cane for instance) does not automatically equal disability. On the other hand, use of a cane may direct a finding of disability because sedentary jobs generally require two free hands to carry things around, or if the assistive device is used for balance. SSR 96-9p; *Walker v. Bowen*, 826 F.2d 996, 1003 (11th Cir. 1987) (one needs two free hands to carry objects encountered on sedentary jobs); *See Listing 11.04B*.

v. Need to elevate. SS does not address this specifically in administrative rulings, but the adjudicator may be persuaded that claimant requires elevation by objective or subjective evidence. How high?

vi. Inability to stoop. A complete inability to stoop significantly erodes the sedentary occupational base, and usually dictates a finding of disability. SSR 96-9p.

IV. FILING A CLAIM

A. Timing – Counsel should give significant thought to when the initial application is filed.

1. Too early – if a person applies shortly after engaging in SGA, claimant will likely receive a quick durational denial and can lead to a long application

process. In many cases it is difficult to wait but it may be in the best interests of claimant.

2. Too late
 - a. For SSDI claims, can only receive benefits dated back to one year prior to the protective filing date.
 - b. For SSI claims – every month the claimant waits is a possible month in missed benefits.

B. Procedure

1. Online filing preferred method
2. Phone interviews are still the most frequent
3. Discuss alleged onset date with client before application
4. Review standard forms with client –
 - a. Disability Report form – SSA-3368
 - b. Function Report – SSA-3373
 - c. Work History Report- SSA-3369

C. Stages

1. Initial application.
2. Request for Reconsideration
3. Request for Hearing.
4. Review by Appeals Council.
5. Federal Court

D. Multiple Applications

1. Important to find out about any prior applications
2. Might be able to reopen prior applications
 - may reopen for any reason within 12 months – 20 C.F.R. 404.988a
 - may reopen for good cause within 4 years of initial denial

of SSDI claim and within 2 years of SSI claim – 20 C.F.R.
404.988b, 416.1488b

E. How long?

- Average time from initial application until hearing date is about 1 ½ years.
- Average time from initial application until first decision is about 4 months.