Social Security Disability: From Start to Finish

CHANGES IN BENEFITS AND OTHER TOUGH CHALLENGES

Introduction

A. Changes in the Client's Physical Condition.

Unfortunately, delay is inevitable in Social Security disability cases. It is common that the claimant will have changes in his or her medical condition during the pendency of the Social Security disability claim.

I always try to emphasize to my clients the importance of keeping me up to date with medical developments in their cases. For reasons that are understandable, sometimes claimants are not as diligent about keeping me up to date with their medical condition as they should be. When someone has a medical crisis, his or her first response is not--and should not be--"quick, let me call my lawyer!"

Nevertheless, the onset of a new medical condition or the recent discovery of a condition that has been causing the claimant unexplainable problems is often very important in getting benefits for the claimant.

1. At the initial level

Disabilities began in different ways. Some can be the result of a sudden onset, an illness or accident that causes a person to be unable to continue working. This is a condition that the claimant will see as the disabling condition. For example, the claimant is in an accident, or has a heart attack, or stroke. This event will have an immediate impact on the claimant's ability to work.

Other disabling conditions come on gradually. In those cases it is often very difficult to pinpoint when the disability truly began. It is certainly not necessarily the last day that the claimant worked.

Many claimants suffered from pre-existing medical conditions that were not serious enough to prevent them from working. Those pre-existing conditions could nevertheless have vocational implications that need to be explored. Sometimes, these pre-existing conditions get worse after the new condition. It is important to make sure that the claimant knows to contact you and keep you up to date on all medical treatment, not just the condition that the claimant sees as causing his or her disability.

I tell my claimants that if they had a question about whether they should tell me something or not, then they should tell me. If it turns out I don't need the information all is wasted as a few minutes. But if it turns out that I didn't need the information and didn't get it the consequences could be much more serious.

When a claimant has a sudden onset of a disabling condition I usually recommend that the claimant go ahead and file. Sometimes the administration or the state agency will put off making a decision because it is impossible to tell whether a new condition will remain disabling for the required 12 months.

Of course, the determination at the first two levels is made by the state agency. The Arkansas Disability Determination for Social Security Administration has an agreement with the federal Social Security administration to determine eligibility for Social Security disability for individuals in Arkansas. It may surprise you to learn that Arkansas Disability Determination for the Social Security Administration is one of the better ones in the country. Because of that, the Arkansas state agency has been assigned disability claims from other states. Still, the process takes 3 to 4 months in the best of cases.

A functional capacity statement from a doctor at the beginning of the case can be useful. The state agency physicians are required to make functional capacity assessments. The reality is, of course, that the information in medical records seldom addresses functional capacity. One of the questions on the form that the state agency doctors fill out is whether there is a functional capacity assessment by a treating physician in the file and if so whether the state agency's assessment differs. If the state agency doctor's evaluation of the claimant's functional capacity does differ, the doctor is expected to explain why. As you can imagine, functional capacity information from a treating physician can be very helpful at this initial level.

The state agency request medical records from every Dr. the claimant identifies. The problem is, the state agency is limited in how much it can pay for the medical

records. When a claim is denied at the initial level, you will receive denials listing the evidence gathered. Very often, it will identify particular treating source and state "No report received." Because of the nature of the task that the state agency tries to do, it is impossible for the state agency to adequately determine disability without records. If there is no medical evidence of a condition, or if there is no medical evidence of the seriousness of the condition, the state agency is not going to find that it is disabling.

It is a somewhat official position of Disability Determination for Social Security that if there's sufficient medical evidence to justify awarding a claim, that is what they will do. There are some circumstances in which they will order a consultant examination. Certain circumstances will require a consultative exam.

- Evidence not available.
- Evidence cannot be obtained for reasons beyond claimant's control
- Highly technical or specialized evidence not available from source. E.g. IQ scores.
- Current severity not established. Records show history of problems but no records for 8-12 mos.
- Conflict, inconsistency, ambiguity or insufficiency.

There is a handbook for consultant examination physicians. Like much other information, it is now on the Internet. http://www.socialsecurity.gov/disability/professionals/greenbook/index.htm the handbook addresses the importance of records from treating physicians. “Timely, accurate, and adequate medical reports from treating sources accelerate the processing of the claim because they can greatly reduce or eliminate the need for additional medical

evidence to complete the claim." SSA, Consultative Examination Guide: www.socialsecurity.gov/disability/professionals/greenbook/ce-evidence.htm

If you have a claimant the initial level, it is important to try to get copies of medical records to the state agency. This will help you avoid having a check off list by the state agency physician that basically imposes little or no functional restriction on your client.

2. At the Reconsideration level.

Reconsideration can seem like a waste of time. I've seen statistics that fewer than 10% of all cases are reversed on reconsideration. That seems consistent with my experience as well. Reconsideration is absolutely a waste of time unless you have new and material evidence to submit. Still, this is a good time to present any evidence that was not available at the time of the initial application.

3. At the hearing level

It takes a little under a year to get to a hearing. This is an improvement on the situation only a few years ago. In 2008, the average processing time to get to a hearing was 514 days. Last year it was 360 days, and this year it is projected to be 343 days. http://www.socialsecurity.gov/appeals/

A lot can happen in a year. In my experience, it does not do much good to send in updates while the case is pending. There can be exceptions, however. If you come across evidence that would justify an on-the-record decision, send it in, along with a brief explaining why it justifies an on-the-record decision.

As we start closing in on a year, I start gathering evidence again. I will frequently send my clients new functional capacity forms to present to their physicians. Functional capacity can deteriorate in a year.

Statistically speaking, your best shot at a favorable decision is at the Administrative Law Judge level.

4. After the Administrative Law Judge decision.

If you happen to have new evidence when the case is ready to go to the Appeals Council, send it in. After that, I'm really not sure whether you do yourself much good sending evidence to the Appeals Council or not. If it's particularly good, I would go ahead and send it. For one thing, it may be considered part of the record for any eventual appeal to Federal District Court.

5. At Federal District Court

It is a challenge to get a case remanded for reconsideration of new evidence at the federal court level, but there may be cases in which it is appropriate to try. The Eighth Circuit has explained that a court should "remand a case for the consideration of new evidence if the evidence is "material and ... there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g). Material evidence is that which is "non-cumulative, relevant, and probative of the claimant's condition for the time period for which benefits were denied." *Jones v. Callahan*, 122 F.3d 1148, 1154 (8th Cir.1997) (citation omitted). ; *Rehder v. Apfel*, 205 F.3d 1056, 1061 (8th Cir. 2000).

B. Representing Clients who are working

1. Claimants doing substantial gainful activity

To be eligible for disability benefits, a person must be unable to engage in substantial gainful activity (SGA). A person who is earning more than a certain monthly amount (net of impairment-related work expenses) is ordinarily considered to be engaging in SGA. The amount of monthly earnings considered as SGA depends on the nature of a person's disability. The Social Security Act specifies a higher SGA amount for statutorily blind individuals; Federal regulations specify a lower SGA amount for non-blind individuals. Both SGA amounts generally change with changes in the national average wage index.

Amounts for 2012
The monthly SGA amount for statutorily blind individuals for 2012 is $1690. For non-blind individuals, the monthly SGA amount for 2012 is $1010. SGA for the blind does *not* apply to Supplemental Security Income (SSI) benefits, while SGA for the non-blind disabled applies to Social Security and SSI benefits.

http://www.socialsecurity.gov/OACT/COLA/sga.html

This website gives the relevant amounts for the last several years.

The regulations tell us:

§ 404.1571. General.

The work, without regard to legality, that you have done during any period in which you believe you are disabled may show that you are able to work at the substantial gainful activity level. If you are able to engage in substantial gainful activity, we will find that you are not disabled. (We explain the rules for persons who are statutorily blind in § 404.1584.) Even if the work you have done was not substantial gainful activity, it may show that you are able to do more work than you actually did. We will consider all of the medical and vocational evidence in your file to decide whether or not you have the ability to engage in substantial gainful activity.

§ 404.1572. What we mean by substantial gainful activity.

Substantial gainful activity is work activity that is both substantial and gainful:

(a) Substantial work activity. Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.

(b) Gainful work activity. Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.

(c) Some other activities. Generally, we do not consider activities like taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, or social programs to be substantial gainful activity.

§ 404.1573. General information about work activity.

(a) The nature of your work. If your duties require use of your experience, skills, supervision and responsibilities, or contribute substantially to the operation of a business, this tends to show that you have the ability to work at the substantial gainful activity level.

(b) How well you perform. We consider how well you do your work when we determine whether or not you are doing substantial gainful activity. If you do your work satisfactorily, this may show that you are working at the substantial gainful activity level. If you are unable, because of your impairments, to do ordinary or simple tasks satisfactorily without more supervision or assistance than is usually given other people doing similar work, this may show that you are not working at the substantial gainful activity level. If you are doing work that involves minimal duties that make little or no demands on you and that are of little or no use to your employer, or to the operation of a business if you are self-employed, this does not show that you are working at the substantial gainful activity level.

(c) If your work is done under special conditions. The work you are doing may be done under special conditions that take into account your impairment, such as work done in a sheltered workshop or as a patient in a hospital. If your work is done under special conditions, we may find that it does not show that you have the ability to do substantial gainful activity. Also, if you are forced to stop or reduce your work because of the removal of special conditions that were related to your impairment and essential to your work, we may find that your work does not show that you are able to do substantial gainful activity. However, work done under special conditions may show that you have the necessary skills and ability to work at the substantial gainful activity level. Examples of the special conditions that may relate to your impairment include, but are not limited to, situations in which—

(1) You required and received special assistance from other employees in performing your work;

(2) You were allowed to work irregular hours or take frequent rest periods;

(3) You were provided with special equipment or were assigned work especially suited to your impairment;

(4) You were able to work only because of specially arranged circumstances, for example, other persons helped you prepare for or get to and from your work;

(5) You were permitted to work at a lower standard of productivity or efficiency than other employees; or

(6) You were given the opportunity to work despite your impairment because of family relationship, past association with your employer, or your employer's concern for your welfare.

(d) If you are self-employed. Supervisory, managerial, advisory or other significant personal services that you perform as a self-employed individual may show that you are able to do substantial gainful activity.

(e) Time spent in work. While the time you spend in work is important, we will not decide whether or not you are doing substantial gainful activity only on that basis. We will still evaluate the work to decide whether it is substantial and gainful regardless of whether you spend more time or less time at the job than workers who are not impaired and who are doing similar work as a regular means of their livelihood.

§ 404.1574. Evaluation guides if you are an employee.

(a) We use several guides to decide whether the work you have done shows that you are able to do substantial gainful activity. If you are working or have worked as an employee, we will use the provisions in paragraphs (a) through (d) of this section that are relevant to your work activity. We will use these provisions whenever they are appropriate, whether in connection with your application for disability benefits (when we make an initial determination on your application and throughout any appeals you may request), after you have become entitled to a period of disability or to disability benefits, or both.

(1) Your earnings may show you have done substantial gainful activity. Generally, in evaluating your work activity for substantial gainful activity purposes, our primary consideration will be the earnings you derive from the work activity. We will use your earnings to determine whether you have done substantial gainful activity unless we have information from you, your employer, or others that shows that we should not count all of your earnings. The amount of your earnings from work you have done (regardless of whether it is unsheltered or sheltered work) may show that you have engaged in substantial gainful activity. Generally, if you worked for substantial earnings, we will find that you are able to do substantial gainful activity. However, the fact that your earnings were not substantial will not necessarily show that you are not able to do substantial gainful activity. We generally consider work that you are forced to stop or to reduce below the substantial gainful activity level after a short time because of your impairment to be an unsuccessful work attempt. Your earnings from an unsuccessful work attempt will not show that you are able to do substantial gainful activity. We will use the criteria in paragraph (c) of this section to determine if the work you did was an unsuccessful work attempt.

(2) We consider only the amounts you earn. When we decide whether your earnings show that you have done substantial gainful activity, we do not consider any income that is not directly related to your productivity. When your earnings exceed the reasonable value of the work you perform, we consider only that part of your pay which you actually earn. If your earnings are being subsidized, we do not consider the amount of the subsidy when we determine if your earnings show that you have done substantial gainful activity. We consider your work to be subsidized if the true value of your work, when compared with the same or similar work done by unimpaired persons, is less than the actual amount of earnings paid to you for your work. For example, when a person with a serious impairment does simple tasks under close and continuous supervision, our determination of whether that person has done substantial gainful activity will not be based only on the amount of the wages paid. We will first determine whether the person received a subsidy; that is, we will determine whether the person was being paid more than the reasonable value of the actual services performed. We will then subtract the value of the subsidy from the person's gross earnings to determine the earnings we will use to determine if he or she has done substantial gainful activity.

(3) If you are working in a sheltered or special environment. If you are working in a sheltered workshop, you may or may not be earning the amounts you are being paid. The fact that the sheltered workshop or similar facility is operating at a loss or is receiving some charitable contributions or governmental aid does not establish that you are not earning all you are being paid. Since persons in military service being treated for severe impairments usually continue to receive full pay, we evaluate work activity in a therapy program or while on limited duty by comparing it with similar work in the civilian work force or on the basis of reasonable worth of the work, rather than on the actual amount of the earnings.

(b) Earnings guidelines—(1) General. If you are an employee, we first consider the criteria in paragraph (a) of this section and § 404.1576, and then the guides in paragraphs (b)(2) and (3) of this section. When we review your earnings to determine if you have been performing substantial gainful activity, we will subtract the value of any subsidized earnings (see paragraph (a)(2) of this section) and the reasonable cost of any impairment-related work expenses from your gross earnings (see § 404.1576). The resulting amount is the amount we use to determine if you have done substantial gainful activity. We will generally average your earnings for comparison with the earnings guidelines in paragraphs (b)(2) and (3) of this section. See § 404.1574a for our rules on averaging earnings.

(2) Earnings that will ordinarily show that you have engaged in substantial gainful activity. We will consider that your earnings from your work activity as an employee (including earnings from work in a sheltered workshop or a comparable facility especially set up for severely impaired persons) show that you engaged in substantial gainful activity if:

(i) Before January 1, 2001, they averaged more than the amount(s) in Table 1 of this section for the time(s) in which you worked.

(ii) Beginning January 1, 2001, and each year thereafter, they average more than the larger of:

(A) The amount for the previous year, or

(B) An amount adjusted for national wage growth, calculated by multiplying $700 by the ratio of the national average wage index for the year 2 calendar years before the year for which the amount is being calculated to the national average wage index for the year 1998. We will then round the resulting amount to the next higher multiple of $10 where such amount is a multiple of $5 but not of $10 and to the nearest multiple of $10 in any other case.

Table 1

For months:	**Your monthly earnings averaged more than:**
In calendar years before 1976	$200
In calendar year 1976	230
In calendar year 1977	240
In calendar year 1978	260
In calendar year 1979	280
In calendar years 1980-1989	300
January 1990-June 1999	500
July 1999-December 2000	700

(3) Earnings that will ordinarily show that you have not engaged in substantial gainful activity.

(i) General. If your average monthly earnings are equal to or less than the amount(s) determined under paragraph (b)(2) of this section for the year(s) in which you work, we will generally consider that the earnings from your work as an employee (including earnings from work in a sheltered workshop or comparable facility) will show that you have not engaged in substantial gainful activity. We will generally not consider other information in addition to your earnings except in the circumstances described in paragraph (b)(3)(ii) of this section.

(ii) When we will consider other information in addition to your earnings. We will generally consider other information in addition to your earnings if there is evidence indicating that you may be engaging in substantial gainful activity or that you are in a position to control when earnings are paid to you or the amount of wages paid to you (for example, if you are working for a small corporation owned by a relative). (See paragraph (b)(3)(iii) of this section for when we do not apply this rule.) Examples of other information we may consider include, whether—

(A) Your work is comparable to that of unimpaired people in your community who are doing the same or similar occupations as their means of livelihood, taking into account the time, energy, skill, and responsibility involved in the work; and

(B) Your work, although significantly less than that done by unimpaired people, is clearly worth the amounts shown in paragraph (b)(2) of this section, according to pay scales in your community.

(iii) Special rule for considering earnings alone when evaluating the work you do after you have received social security disability benefits for at least 24 months. Notwithstanding paragraph (b)(3)(ii) of this section, we will not consider other information in addition to your earnings to evaluate the work you are doing or have done if—

(A) At the time you do the work, you are entitled to social security disability benefits and you have received such benefits for at least 24 months (see paragraph (b)(3)(iv) of this section); and

(B) We are evaluating that work to consider whether you have engaged in substantial gainful activity or demonstrated the ability to engage in substantial gainful activity for the purpose of determining whether your disability has ceased because of your work activity (see §§ 404.1592a(a)(1) and (3)(ii) and 404.1594(d)(5) and (f)(1)).

(iv) When we consider you to have received social security disability benefits for at least 24 months. For purposes of paragraph (b)(3)(iii) of this section, social security disability benefits means disability insurance benefits for a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability. We consider you to have received such benefits for at least 24 months beginning with the first day of the first month following the 24th month for which you actually received social security disability benefits that you were due or constructively received such benefits. The 24 months do not have to be consecutive. We will consider you to have constructively received a benefit for a month for purposes of the 24-month requirement if you were otherwise due a social security disability benefit for that month and your monthly benefit was withheld to recover an overpayment. Any months for which you were entitled to benefits but for which you did not actually or constructively receive a benefit payment will not be counted for the 24-month requirement. If you also receive supplemental security income payments based on disability or blindness under

title XVI of the Social Security Act, months for which you received only supplemental security income payments will not be counted for the 24-month requirement.

(c) The unsuccessful work attempt—(1) General. Ordinarily, work you have done will not show that you are able to do substantial gainful activity if, after working for a period of 6 months or less, your impairment forced you to stop working or to reduce the amount of work you do so that your earnings from such work fall below the substantial gainful activity earnings level in paragraph (b)(2) of this section, and you meet the conditions described in paragraphs (c)(2), (3), (4), and (5), of this section. We will use the provisions of this paragraph when we make an initial determination on your application for disability benefits and throughout any appeal you may request. Except as set forth in § 404.1592a(a), we will also apply the provisions of this paragraph if you are already entitled to disability benefits, when you work and we consider whether the work you are doing is substantial gainful activity or demonstrates the ability to do substantial gainful activity.

(2) Event that must precede an unsuccessful work attempt. There must be a significant break in the continuity of your work before we will consider that you began a work attempt that later proved unsuccessful. You must have stopped working or reduced your work and earnings below the substantial gainful activity earnings level because of your impairment or because of the removal of special conditions that were essential to the further performance of your work. We explain what we mean by special conditions in § 404.1573(c). We will consider your prior work to be "discontinued" for a significant period if you were out of work at least 30 consecutive days. We will also consider your prior work to be "discontinued" if, because of your impairment, you were forced to change to another type of work or another employer.

(3) If you worked 3 months or less. We will consider work of 3 months or less to be an unsuccessful work attempt if you stopped working, or you reduced your work and earnings below the substantial gainful activity earnings level, because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work.

(4) If you worked between 3 and 6 months. We will consider work that lasted longer than 3 months to be an unsuccessful work attempt if it ended, or was reduced below substantial gainful activity earnings level, within 6 months because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work and—

(i) You were frequently absent from work because of your impairment;

(ii) Your work was unsatisfactory because of your impairment;

(iii) You worked during a period of temporary remission of your impairment; or

(iv) You worked under special conditions that were essential to your performance and these conditions were removed.

(5) If you worked more than 6 months. We will not consider work you performed at the substantial gainful activity earnings level for more than 6 months to be an unsuccessful work attempt regardless of why it ended or was reduced below the substantial gainful activity earnings level.

(d) Work activity in certain volunteer programs. If you work as a volunteer in certain programs administered by the Federal government under the Domestic Volunteer Service Act of 1973 or the Small Business Act, we will not count any payments you

> receive from these programs as earnings when we determine whether you are engaging in substantial gainful activity. These payments may include a minimal stipend, payments for supportive services such as housing, supplies and equipment, an expense allowance, or reimbursement of out-of-pocket expenses. We will also disregard the services you perform as a volunteer in applying any of the substantial gainful activity tests discussed in paragraph (b)(6) of this section. This exclusion from the substantial gainful activity provisions will apply only if you are a volunteer in a program explicitly mentioned in the Domestic Volunteer Service Act of 1973 or the Small Business Act. Programs explicitly mentioned in those Acts include Volunteers in Service to America, University Year for ACTION, Special Volunteer Programs, Retired Senior Volunteer Program, Foster Grandparent Program, Service Corps of Retired Executives, and Active Corps of Executives. We will not exclude under this paragraph, volunteer work you perform in other programs or any nonvolunteer work you may perform, including nonvolunteer work under one of the specified programs. For civilians in certain government-sponsored job training and employment programs, we evaluate the work activity on a case-by-case basis under the substantial gainful activity earnings test. In programs such as these, subsidies often occur. We will subtract the value of any subsidy and use the remainder to determine if you have done substantial gainful activity. See paragraphs (a)(2)-(3) of this section.
>
> (e) Work activity as a member or consultant of an advisory committee established under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. If you are serving as a member or consultant of an advisory committee, board, commission, council, or similar group established under FACA, we will not count any payments you receive from serving on such committees as earnings when we determine whether you are engaging in substantial gainful activity. These payments may include compensation, travel expenses, and special assistance. We also will exclude the services you perform as a member or consultant of an advisory committee established under FACA in applying any of the substantial gainful activity tests discussed in paragraph (b)(6) of this section. This exclusion from the substantial gainful activity provisions will apply only if you are a member or consultant of an advisory committee specifically authorized by statute, or by the President, or determined as a matter of formal record by the head of a federal government agency. This exclusion from the substantial gainful activity provisions will not apply if your service as a member or consultant of an advisory committee is part of your duties or is required as an employee of any governmental or non-governmental organization, agency, or business.

It is hard enough to get disability benefits for people who are actually doing no work at all. In my opinion, if an employee is earning enough to qualify as substantial gainful activity, there is very little reason to pursue the claim.

To be fair, there is a contrary opinion out there. In Social Security Disability Practice, Charles T. Hall states:

> It is not uncommon for individuals to filed disability claims and pursue appeals while working. Many attorneys just turn away all such claimants. It is certainly tempting to not bother with any of these folks. Even if work is not deemed Substantial Gainful Activity (S. G. A.), it may have an effect on how and ALJ perceives the case. Still, working claimants are

> frequently approved for Social Security disability benefits. An attorney who turns away all claimants who are doing any work is turning away many good cases.

Charles T. Hall, Social Security Disability Practice, §1:21.

I don't think I am turning away "many good cases" because I don't get that many people who are doing any work at all, let alone SGA.

2. Claimants working but doing less than substantial gainful activity

a. Part-time work

As those regulations above demonstrate, part-time work can be substantial gainful activity. Nevertheless, considering the rates of pay available, part-time work frequently does not constitute substantial gainful activity.

I am not reluctant to take a case just because the claimant is performing part-time, non-SGA work, but I insist on knowing the details.

b. Work which may indicate an ability to do SGA

It is important to recognize that sometimes the claimant's ability to do non-SGA work will be seen by the administration and by Administrative Law Judges as evidence of ability to do more than the minimum for substantial gainful activity. It is always important to explain why the claimant is unable to do more than he or she is.

c. Impairment related expenses

Also remember that in order to determine whether a claimant is doing substantial gainful activity or not you must consider the possibility of impairment related work expenses reducing the effective income. There is a fairly detailed regulation covering this as well. 20 CFR §404.1576

3. Drawing sick pay/vacation pay, etc.

Remember that substantial gainful activity requires that the claimant actually work for the money. If a claimant is entitled to an extended period of sick pay, vacation pay, or other payment that does not require that the claimant actually perform work in order to receive it, that payment should not be deemed gainful activity at all. Nevertheless, Social Security is often withheld from sick pay or vacation pay and as far as reports to the government are concerned, sometimes it is unclear that the climate is receiving sick pay or vacation pay. For this reason, it is important to let the Social Security Administration know that you are receiving sick pay or vacation pay.

The Social Security Administration does investigate fraud among Social Security disability claimants. One thing that can trigger the fraud investigation is a report that the claimant is earning money.

4. **"Subsidized employment."**

As the regulations above show, work that is not really work at all, or is of less value than the work being paid for should not be counted as substantial gainful activity solely on the basis of the amount of the paycheck. *See above,* 20 CFR §404.1574 (a)(3).

C. Addressing Claimant's Expectations and Misinformation

It is rare to have a Social Security disability client who does not know someone who is barely sick at all but is receiving disability benefits. Of course, your client usually does not know the person's medical history, but what your client will know about the

person is that they seem to be active and seem to be able to do whatever they want to do. All you can do is explain that Social Security disability is not a comparative disability program. They do not compare your claimant's disability to that of someone else.

It should not surprise us that most claimants are shocked by the delays inherent in the Social Security disability program. We've all been taught that we have a safety net in this country. If our claimant has listened to much talk radio he or she is aware that the United States has an extremely generous, in fact wasteful welfare system. Yet when our particular client is seeking the benefit that “those other people” get with little effort at all they find that they are rebuffed.

It is not really possible to overcome decades of media conditioning and explain to our client that the United States in fact has the stingiest social welfare program in the civilized world (and perhaps a stingy social welfare program compared to some former second world countries). All you can do is explain that this is the way the system works as far as they are concerned, and as unfair as it may be, it is the only system that we have. Some sources recommend handing the claimant a sheaf of papers and disclaimers. I do not think this works. Recall that you are already providing the claimant was quite a bit of information and material.

One Social Security disability claimant's attorney that I know has a wonderful system which I would like to put into place. He calendars his clients’ cases and calls the claimant every month to tell them that nothing is going on but he hasn't forgotten them. He usually makes the calls in the evening, and he finds that they usually do not take very much of his time. I have admired that strategy for a long time and more than once I've told myself that I'm going to implement it. I still haven't done it-- yet.

D. Handling Adverse Evidence

As in any other area of the law, you're going to run across adverse evidence from time to time. Do not let the absence of an opposing attorney lull you into a false sense of security. The Social Security Administration is likely to stumble upon unfavorable evidence, if it looks like you have hidden or sought to bury unfavorable evidence it is not going to do you any good.

"Virtually all ALJs believe that attorneys have an obligation to submit to SSA all medical evidence that comes into their possession. ALJ's believe that an attorney is ethically required to submit as evidence not only reports that are helpful to the client's case, but also reports which might be damaging to the case." Charles T. Hall, Social Security Disability Practice §2:54 (2011). Hall notes that there is substantial support for the Administrative Law Judge's expectation that claimant's attorneys will submit all medical records. The Arkansas Rules of Professional Conduct, Rule 3.3 (d) requires a lawyer or to provide the tribunal of "all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

Adverse evidence you sometimes have to deal with is a medical record in which a doctor has made some observation that the claimant is "not disabled" or could work, or has released the claimant to work. The doctor's opinion that a claimant is not disabled is not the kind of evidence that should be given weight. SSR96-5p states:

> Under 20 CFR 404.1527(e) and 416.927(e), some issues are not medical issues regarding the nature and severity of an individual's impairment(s) but are administrative findings that are dispositive of a case; i.e., that would direct the determination or decision of disability. The following are examples of such issues:

1. Whether an individual's impairment(s) meets or is equivalent in severity to the requirements of any impairment(s) in the listings;
2. What an individual's RFC is;
3. Whether an individual's RFC prevents him or her from doing past relevant work;
4. How the vocational factors of age, education, and work experience apply; and
5. Whether an individual is "disabled" under the Act.

> The regulations provide that the final responsibility for deciding issues such as these is reserved to the Commissioner.

If the Administration feels free to routinely disregard opinions of a treating physician that a claimant is “disabled”—and it does—it should also disregard any conclusory opinion that a claimant is not disabled.

The most important thing is that you not make the mistake of sticking your head in the sand. You have to confront adverse evidence directly. Don’t ignore it and hope it’ll never be seen in the record. It probably will.

E. Trial Work Period in SSD Claims (An Overlooked Opportunity for your Client)

A trial work period gives a disabled worker an opportunity to test the ability to work. It allows the worker up to nine months, within a consecutive 16 month period, to try to work. The worker's right to benefits continues during the trial work period. While this does not prevent continuing disability review, any work done and earnings made during the nine-months is supposed to be disregarded in determining whether disability ended.

Work under a trial work period can be appropriate for some claimants. The employee must report to work to the Social Security administration in order to be eligible for the benefits of a trial work period. *See* 20 CFR §404.1592.

F. Cessation of Social Security Benefits

There's no time frame for how long the claimant can remain on disability. However the administration does engage in continuing disability review. The standard for continuing disability review is medical improvement. The benefits can also be terminated when the claimant reaches the age of 65 or retires at the age 62 or whatever age it is available with regular Social Security retirement benefits.

Disability can also be terminated if it is shown that the claimant committed fraud.

Disability benefits also end, of course, with death.

G. Overpayment of Disability Benefits

If the administration alleges overpayment of benefits, you should challenge the overpayment determination if there is a reasonable ground for doing so. You can do so by requesting reconsideration of the overpayment determination and then going through the regular process of requesting a hearing.

Another thing you should do is seek waiver of the overpayment. Waiver of the overpayment requires a showing that the overpayment was not the fault of the claimant and that it would work an undue hardship for the claimant to have to pay the money back. There is a form that you can use to request a waiver of repayment of any overpayment. SSA-632-BK.