



Social Security Disability Claims - An Insider's Perspective

By: Andrew Bernstein

While those in the private disability insurance world may understand the broad outlines of the Social Security disability claims process, the requirements for establishing entitlement to SSDI or SSI benefits are much more complex. Take it from someone like me, who spent 20 years in the private disability insurance business and the last 2+ years representing Social Security disability claimants, almost all of whom had no concurrent LTD coverage. Although a short article is insufficient to cover the complexity of the SSDI (I will use "SDDI" to encompass all Social Security disability claims) rules, I will provide information about SSDI and a summary of insights and challenges related to proving an SSDI claim.

Each claimant must prove that they qualify for SSDI benefits under the 5 step process, unless they can satisfy Step 3 (Listings) as discussed below. Except for Step 5, the burden of proof rests with the claimant.

Step 1: What is the claimant's last "SGA" work?

SGA means "substantial gainful activity," which Social Security Administration ("SSA") rules define as a job in which the claimant earns \$1000 or more a month. If the claimant has worked more than 30 quarters in their lifetime, they become insured for SSDI. If they work long enough, when they stop work, their SSDI coverage continues for several years at least. If the person becomes disabled while still insured for SSDI, that person can make a claim for SSDI benefits, even if they are unemployed. An SSDI benefit pays a monthly amount based on yearly past earnings, and no reductions or offsets can be taken. If the person is not insured when he becomes disabled, he can only seek SSI (supplemental security income) benefits, which are capped at \$674 per month. SSI benefits will be reduced by a

portion of a spouse's income, a spouse's Social Security disability benefits, the value placed on the claimant being able to live with someone else rent free and many other sources of income.

Step 2: Does the claimant have at least one "severe medical impairment"?

A "severe medical impairment" is any physical or mental condition that has at least a minimal effect on the claimant's residual functional capacity ("RFC," a term that has basically the same meaning as in the private disability insurance world).

Step 3: Does the claimant "meet" or "equal" a Listing?

Private disability insurers sometimes refer to these as presumptive disabilities. That is actually a misnomer. The SSA has established a Listing for pretty much every known condition, except fibromyalgia and obesity. These Listings are grouped by category, such as Listing 12.00 (for mental disorders) or Listing 1.00 (for musculoskeletal disorders). Each Listing contains a set of specific criteria. If the claimant's condition satisfies each of the stated criteria, the claimant will "meet" that Listing. If the claimant doesn't satisfy all of these criteria, but satisfies most of them, and has other severe co-morbid impairments, he may "equal" that Listing. Once the SSA or an administrative law judge (ALJ) determines a claimant meets or equals a Listing, the claim must be approved.

So, for example, Listing 1.02(A) is for impairments affecting a weight bearing joint. The criteria for this Listing can be satisfied if there are (a) objective findings of disc herniation or severe degenerative disc disease with evidence of nerve root compression, causing chronic instability, and (b) the inability to ambulate effectively.

Generally, to prove that he or she meets or equals a Listing, a claimant needs written opinion evidence from a claimant's "acceptable medical source" (MD, DO, psychologist, and/or DC, but does not include nurse practitioners, physicians assistants, or licensed counselors) and/or testimony from a medical expert that the ALJ has appear at a hearing.

Step 4: Can the claimant perform any of his "past relevant work"?

For past relevant work, the SSA looks at the jobs the claimant did in the past 15 years. Work that was not at an SGA level is excluded.

Step 5: If the answer to Step 4 is "No," can the claimant perform any other job in the national economy, taking into consideration the claimant's age, education and work history?

This is the only step where the burden of proof is with the SSA (i.e., the SSA must prove that there are jobs that the claimant can perform). Normally, although it's not mandated, the analysis in this step requires the testimony at the hearing of a vocational expert.

HOTLY CONTESTED ISSUES

THE GRIDS

The SSA has established a set of Medical-Vocational Rules known as the GRID Rules. Most often, these rules come into play with a claimant who is over the age of 50. The SSA considers claimants between 50 and 55 to be persons "closely approaching advanced age," anyone over 55 is considered a person of "advanced age." (This is one of those times it helps to be older!)

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The SSA assumes that once a claimant hits 50 years of age, it becomes less likely that the person has the residual functional capacity or transferable skills to work, especially if that person's education level is high school or below. Thus, for example, if a claimant is 53, has a "limited" education (meaning lower than high school level), has an unskilled work history (e.g. retail, call center, construction) and degenerative disc disease, that claimant will be found to be disabled. On the other hand, if the claimant has a college education or a skilled work history (e.g. business owner), the application of the GRID Rules will not result in a finding of disability.

OPINIONS FROM NON-TREATING MEDICAL SOURCES

As noted above, Social Security Ruling 06-02p treats mental health counselors (including licensed social workers) and nurse practitioners as "other medical sources," even though nurse practitioners can prescribe medicine under Maine law, and in Maine as in many rural states, many practices have to use their nurse practitioners as the primary care providers.

As such, the ALJ does not have to give these health care providers' opinions significant, or even any, weight in his/her evaluation of whether the claimant is disabled. However, if the counselor has treated the claimant for a long period of time, his/her treatment records are consistent with the written opinions expressed by the counselor, and the counselor has a particular expertise in the treatment of patients with mental illnesses, Ruling 06-02p requires the ALJ to give this "other medical source's" opinion meaningful weight. Further, case law requires the ALJ to articulate in his/her decision those facts in the record that support the ALJ giving no weight or little weight to the opinions of an "other medical source."

DRUG AND ALCOHOL ABUSE

Social Security regulations state that if the claimant has a history of drug/alcohol abuse ("DA&A") which is "material" to the claimant's disability, the claim is not payable. From a public policy perspective,

this rule makes sense. Claimants should not be rewarded for abusing alcohol and drugs with resulting symptoms that contribute to why the claimant is disabled.

However, it is a much more complex issue when applied to actual claims. The regulations define "materiality" as follows: In the absence of the claimant's drug and alcohol abuse, is the claimant disabled from his or her physical/mental illness symptoms? It gets challenging when a claimant's disability began while he was still using illegal drugs/drinking excessively, but sometime after the disability onset date, the claimant stopped using/drinking, and the medical records, which usually include the results of random drug and alcohol urine testing, show the claimant has been clean and sober since that date. In these cases, the critical way claimants can overcome the DA&A materiality issue is to obtain written opinion evidence from the claimant's treating psychologist or psychiatrist. The specialist treating the claimant would state his/her opinion that the claimant's past drug/alcohol abuse - which has ended - is not material to the residual functional limitations resulting from the claimant's other physical/mental impairments.

The other major challenge the DA&A issue poses for claimants is that the SSA almost always either sends the claimant to a consultative examination by a psychologist or psychiatrist has the medical evidence reviewed by an SSA psychologist or psychiatrist. It is not uncommon for these SSA specialists to conclude that the claimant's past DA&A is material to the impairments that disable him. The best ways to overcome these SSA doctors' opinions are:

(A) Use the claimant's treating psychologist's or psychiatrist's opinions to the contrary to try and convince the ALJ that because this treating specialist has a long term treatment relationship with the claimant, he/she is in a much better position to determine if the claimant's DA&A is material or not, and that therefore, the opinions of the SSA psychologist or psychiatrist should be given no weight.

(B) Point out that (as is often the case) the SSA provided an incomplete set of the

claimant's medical records and that opinions of the SSA psychologist or psychiatrist are thus inadequate and equally incomplete.

(C) Demonstrate that (again as is usually the case) there are significant treatment records on this question from the claimant's treating psychologist or psychiatrist which post-date the isolated one time report of this SSA psychologist or psychiatrist. Hence, because this SSA doctor did not have the benefit of these later records and the later written opinion evidence from the claimant's treating source, the SSA doctor's opinion should be given no weight.

CONCLUSION

The topics and issues covered in this article are just a few of the important issues that claimants must address effectively in order to convince an ALJ of the merits of their positions and to prevail on their SSDI and SSI claims. Hopefully, this article has offered some insights and analysis that will provide you with a greater understanding of the complexities of the Social Security disability claim process.

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