How to Fit the Pieces Together
and Win Your Claim

The Social Security DISABILITY Puzzle

MARC WHITEHEAD, Esq.

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Marc Whitehead Biography

Marc Stanley Whitehead is the founding partner of Marc Whitehead & Associates, Attorneys at Law, LLP which was established in 1992 in Houston, Texas. Marc was born on November 24, 1966 in Memphis, Tennessee and was raised in Normangee, Texas. He graduated in 1985 from Normangee High School as class valedictorian. Marc attended Texas A&M University where he graduated in 1989 with a Bachelor of Business Administration in Finance. Marc attended the University of Houston Law Center and received his law degree (J.D.) in 1992, graduating in the top quarter of his class. He was admitted to the State Bar of Texas in 1992. He is also admitted to practice before all U.S. Federal District Courts in Texas, the U.S. Court of Appeals-Fifth Circuit and the U.S. Court of Appeals for Veterans Claims.

Marc's areas of practice include personal injury and wrongful death, social security disability, long-term disability insurance denials, employee benefit denials, ERISA litigation and insurance claims.

He is also a former adjunct professor of Law at the University of Houston Law Center teaching Civil Trial Advocacy. He has also been an instructor for the National Institute of Trial Advocacy teaching Civil Trial Advocacy and an instructor for the National Business Institute teaching Social Security Disability Law.

Marc is double board certified in both Personal Injury Trial Law by the Texas Board of Legal Specialization and in Social Security Disability Law by the National Board of Trial Advocates.

Marc Whitehead was the 2009-2010 President of the Houston Trial Lawyers Association, a current member of the Board of Directors of the Texas Trial Lawyers Association, a former member of the Texas Trial Lawyers Board of Advocates, and a member of the American Association of Justice. He is a former HBA Social Security Section Chairman (2004-2005) and is a current member of the governing council. He is a member of the following organizations: Association of Civil Trial and Appellate Specialists, National Organization of Social Security Claims Representatives, Texas Aggie Bar

Association, Houston Volunteer Lawyers Association, College of the State Bar of Texas, and the Houston Bar Association. Marc is married and has four daughters.

Mr. Whitehead authored the following articles:

- *Tort Reform As It Relates to Strict Products Liability;*
- *A Lawyer's Guide for Determining Eligibility of Social Security Disability Claimants;*
- *Nuts & Bolts of Social Security Disability Law;*
- *The Five Step Sequential Evaluation Process Used in Determining Disability For Social Security Claimants;*
- *The Social Security Disability Puzzle-How to Fit the Pieces Together and Win Your Claim;*
- *Disability Insurance Policies-Solving the Mystery and Proving Your Case*

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THE SOCIAL SECURITY DISABILITY PUZZLE
HOW TO FIT THE PIECES TOGETHER AND WIN YOUR CASE

1. Introduction

Every year hundreds of thousands of American taxpayers become unable to work because of illness or injury. The financial hardships imposed on the disabled led to the institution of several safety net programs within the Social Security Administration (SSA). The most common programs being the Social Security Disability Insurance program (SSDI) under Title II of the Social Security Act and the Supplemental Security Income (SSI) program under Title XVI of the Act.

Within the disability programs set up by the SSA, are rules and procedures governing what constitutes being declared disabled and thus eligible for disability benefits. However, common sense does not always tell you what qualifies an applicant for disability. The confusion and difficulty is evident when you examine the extremely low initial approval rate for applicants (only 35 percent in 2008). It is the purpose of this book to give you a guide to the complex rules and procedures governing these types of claims so you can make informed decisions. The information is general and should not be used a substitute for the advice of an attorney familiar with your specific circumstances.

2. What Types of Disability Programs are Available

2.1 Social Security Disability

Social Security Disability is a program set up under the federal Social Security Administration. It is designed to help qualified disabled individuals who cannot work obtain their social security benefits earlier than they would normally be entitled to them, in other words, before their normal retirement age at 65. To be entitled to these benefits a person had to pay into the social security system for approximately five out of the last 10 years to be fully insured under the system. If the claimant wins his disability claim he is entitled to back due benefits that begin to accrue 5 months after the onset of the claimant's disability, plus monthly disability payments in the future.

Worker's Insured Status

The social security program for workers functions like an insurance plan. There are requirements that a claimant for disability insurance must have: 1) Contributed to the program (paid social security taxes) over a sufficiently long period to be fully insured and 2) Contributed to the program recently enough to have disability insured status.

In short, a worker must have paid social security taxes in order to be insured, just like paying the premiums for a private insurance policy. After stopping work (and stopping paying social security taxes), there will come a time when insured status will lapse, just like with a private insurance policy.

Contributions are counted in quarters of coverage, with minimum earnings requirements that, since 1978, go up every year. To be fully insured, as a rule, a claimant must have one quarter of coverage for every calendar year after the year in which he or she turned 21, up to the calendar year before becoming disabled. The rule for disability insured status for those over 31 years old is that they must have 20 QCs out of the 40 calendar quarters before they become disabled. This is referred to as the 20/40 rule. Significant work in five years out of the last 10 years usually satisfies this requirement. For a claimant with a steady work record, insured status will lapse about five years after stopping work. To receive any social security disability benefits, such a claimant will have to prove that he or she was disabled before the date last insured. For those who become disabled before age 31 there is a reduced quarter of coverage requirement.

Tip 2.1

If SSA says you aren't eligible for social security disability because you don't have enough quarters of earned credit, apply for SSDI and SSI anyway. Many people, especially the self employed, may be able to amend their tax returns to gain additional quarters of credit. You may be able to do this up to three years later. While your application is pending, use the time to seek the help of a tax professional or an attorney.

2.2 Supplemental Security Income (SSI)

The Supplemental Security Income (SSI) program is a federal welfare program for the disabled, blind and those over 65. In contrast to social security disability, benefits are paid out of general revenues, not out of the social security trust fund. Many states supplement the federal SSI benefit. Thus, the SSI benefit amount varies from state to state.

Financial Requirements

To meet all the requirements to receive SSI a claimant must:

- Be disabled using the same definition used for the social security disability program;
- Meet the income and asset requirements of the SSI Program;
- Be a U.S. citizen or fall into the group of limited exceptions to the citizenship rule; and
- File an application

The asset limitation beginning in 1989 is $2,000 for an individual and $3,000 for a couple. Several assets are

Tip 2.2: Common Law Marriage

Do not mistakenly claim a common law marriage. Many people assume that if they are living with someone that they are common law married and declare this to the SSA during their SSI application process. This may not be true. Just because you live with someone, does not make you common law married. Check the law in your state. This is important because the income of an actual legal spouse will likely prevent a claimant from being eligible for SSI.

excluded, the most significant of which are the home of any value and one car of any value if it is used for work or to obtain medical care.

3. What Benefits Might Be Available to Me?

Retroactivity of Applications and Waiting Period

3.1 Social Security Disability benefits

Social Security Disability benefits can be paid retroactively up to 12 months prior to a claimant's application date.

SSI benefits are not paid before the date of the application; in other words, there is no retroactive effect of an SSI application. Social security disability, on the other hand, may pay benefits for the 12 months preceding the date of application if all requirements are met. Claimants who are not currently eligible for social security disability benefits must be found entitled to at least one month of benefits during this 12 month period in order for a period of disability to be established. For example, if a claimant alleges a disability that ended more than about 14 months before the date of application, SSA will not even bother to investigate if the claimant really was disabled during this time because no benefits are payable.

For SSI applications there is an effective waiting period until the first of the next month after all requirements are met. For social security disability there is a five month waiting period after the onset date, the date disability began, during which no social security disability benefits are payable. Because only full months are counted, the actual waiting period is nearly always more than five months. Only when a person becomes disabled on the first day of the month is the waiting period exactly five months.

4. How Do I apply?

Claims are initiated by filing a claim in person at the local district and branch Social Security office or by telephone by calling (800) 772-1213. It is also possible to file online by going to www.SSA.gov. You will be asked a series of questions regarding your past work, medical conditions, education and you will need a list of your doctors and prescriptions.

Tip 4a: Be Descriptive

When describing your past work, emphasize the difficult physical nature of your work and do not underestimate the amount of time spent standing or walking and do not underestimate the heaviest weight you had to lift at work. If you do, this will work against you. Describe what you actually did, not what your title said, i.e "I mowed the grass and repaired the broken fixtures" not "I was Supervisor of Facilities." Don't fall in love with your job title.

Tip 4b: Filing Time

File your application immediately, especially if it is near the end of the month. SSA does not count partial months when calculating benefits. For example, if you file your application on September 2, instead of September 1, you have lost the whole month of September. You can prevent this by calling the number above and requesting a "Protective Filing Date" over the phone. This will act as your filing date. You can complete the paperwork later.

Tip 4c: Filing Online

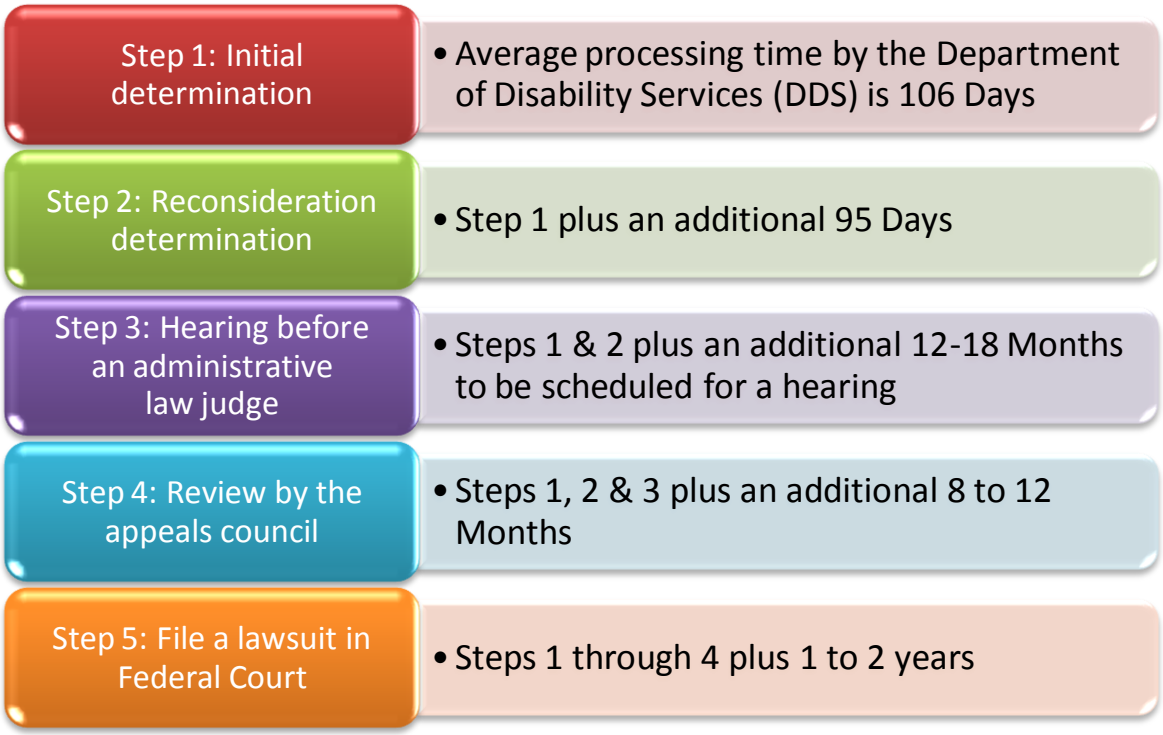
We do not suggest filing online without an attorney's assistance. The SSA's online system still has a few bugs to work out and you don't want your application lost in cyberspace. If you file in person at least you get the name of someone and a receipt for your application. Hopefully the online system will improve over time.

5. If I am Denied, What is the Appeals Process?

5.1 Appellate Levels

If a claim is denied at any level, you must appeal to the next level or your claim is dismissed and you must start over. There are four levels or steps of administrative appeals for social security disability claims. Finally, if all administrative appeals are exhausted, a Claimant may ask a local Federal Court, via a lawsuit, to review the matter to determine if they received a fair hearing. See the chart below. (Note: The processing times are approximate and may vary greatly.)

The Appeals Process



Tip 5.2: Don't Give Up

It has been our experience that most claims are denied at the first two stages of appeals process (i.e. the Initial Determination and the Reconsideration stages.) The biggest mistake claimants make is not appealing to the third level of appeal, the ALJ hearing. It is at this stage that the claimant will have their first live in person hearing before a judge. The claimant can present any evidence they have, including live testimony and they may argue their case to the judge. The ALJ hearing is basically a mini trial. Typically the ALJ will also call as a witness a Medical Expert and a Vocational Expert to testify. The claimant's attorney may cross exam these witnesses as necessary.

5.2 Time Limits

If all administrative appeals fail, a case may be filed in federal court. **The time limit for all appeals, except for one, is 60 days from the date of receipt of a decision**. This is extended 5 days because of the time it takes to receive a decision by mail. The one exception is appealing an Administrative Law Judge (ALJ) denial to the Appeals Council after there has been a federal court remand. A federal court remand is when you appeal your denial to the federal court and they agree you did not get a complete and fair hearing and they send it back to the ALJ for a new hearing. This time limit for an appeal is 30 days.

5.3 Reopening Time Limits if You Missed Your 60-Day Deadline

A significant procedural difference between the social security disability and SSI programs appears in the time limit for requesting reopening of earlier applications based on good cause, such as where there is new evidence or where the earlier decision was wrong on its face. For social security disability, that time limit is four years from the date of the notice of the initial determination. For SSI, that time limit is two years.

Tip 5.3

If you missed your deadline to appeal, act quickly. You or your attorney may be able to convince SSA to grant you a "good cause" exception and reopen you application. Your chances of receiving a "good cause" reopening are better the faster you act, especially if you are within a month or so of your deadline.

5.4 Prior Applications and *Res Judicata*

If a claimant receives a final denial, then the claimant may not reapply for benefits under the same set of facts. This is called to doctrine of *res judicata* (a legal doctrine meaning you cannot litigate the same issue twice.) A denial is considered final when the Claimant can no longer appeal, either because they have exhausted all possible appeals or they missed their deadline and cannot reopen their prior application. The SSA may dismiss a request for hearing or refuse to consider an issue under the doctrine of *res judicata* where:

1. There has been a previous decision;
2. About the same claimant's rights;
3. Under the same subpart of the regulations;
4. On the same set of facts;
5. On the same issues; and
6. The previous decision has become final.

Tip 5.4

If a Claimant Receives a final denial, they may still file a second application. If this is necessary, allege the date you became disabled is the day after the ALJ decision. This will constitute a different time period and thus get around the doctrine of *Res Judicata*. This is not as good a winning the first time, but it is sometimes necessary.

To get around the doctrine of *res judicata,* a claimant should be prepared to show the facts surrounding their claim are different this time. An example might be when new evidence is presented showing that a condition was more severe than originally thought or the period of disability has changed.

6. What is an ALJ Hearing?

6.1 The ALJ

The most important level of appeal before the Social Security Administration is what is known as an ALJ Hearing. The hearing is conducted by an Administrative Law Judge (ALJ). The judge's job is to issue an independent decision, which is not influenced by the fact that your case was denied at the time of your initial application and on reconsideration. In fact, judges do issue independent decisions,

with more than half of their decisions nationwide being in favor of the claimant. These are the best odds of winning at any step in the entire social security appeals system.

6.2 Informal Non-Adversarial Hearing

The informal social security hearing is not an adversarial hearing. That is, there is no lawyer on the other side who is going to cross-examine you. Judges usually do not cross-examine a claimant. The judge is not your adversary. The judge is not your opponent. The judge's job is to find out the facts. A social security hearing is usually conducted in a small conference room, not an official looking court room. Social Security hearings are informal and the normal rules of evidence applied in other courts will not apply. However, all testimony is taken under oath, on penalty of perjury, so you must tell the truth.

6.3 Persons at the Hearing

The hearing is recorded on a tape recorder by a person known as a hearing monitor. The ALJ may also call to testify a Vocational Expert to testify about job requirements, job availability and to answer certain hypothetical questions regarding your limitations, physical or mental. If the ALJ believes it would be helpful, the ALJ may also call to your hearing a Medical Expert to testify about the medical issues in your cases and render an opinion as to medical or psychological limitations evident in your medical records. Finally you, your attorney if you have one and any witnesses you may wish to call will attend the hearing. The hearing is private, so no one other than those mentioned above will attend without your permission.

6.4 Areas of Testimony

Questions are going to be asked of you at the hearing about your:

- Work history
- Education
- Medical history
- Symptoms
- Your estimate of your work limitations
- Your daily activities

6.5 Mental Limitations

Many people who have serious physical problems, especially if they are having pain for a long time, develop emotional aspects to their physical impairments. It is important that you describe any emotional problems, because it is often the emotional aspect of pain that interferes the greatest with the ability to work. Common problems include:

- Difficulty concentrating,
- Forgetfulness,
- Nervousness,
- A quick temper,

- Difficulty getting along with others,
- Avoiding other people
- Crying spells, and
- Depression.

If you have some of these problems, you may be asked about your ability to understand, carry out and remember instructions, to make judgments, to respond to supervisors, co-workers and usual work situations and how well you deal with changes in a routine work setting. You may be asked how well you deal with stress, which, you must remember, is an individual thing. Different people find different things stressful. If the judge asks you about how well you deal with stress, as part of your answer, be sure to tell the judge what sorts of things *you* find stressful, especially things at work.

Sometimes claimants have trouble putting their finger on exactly what it is about work that they find stressful. For this reason I am providing a list of examples of things some people find stressful in work:

- Meeting deadlines,
- Completing job tasks,
- Working with others,
- Working quickly,
- Trying to work with precision,
- Doing complex tasks,
- Making decisions,
- Working within a schedule,
- Dealing with supervisors,
- Being criticized by supervisors,
- Simply knowing that work is supervised,
- The monotony of routine,
- Getting to work regularly, and
- Fear of failure at work.

Sometimes people find routine, repetitive work stressful because of the monotony of routine, no opportunity for learning new things, little latitude for decision-making, lack of collaboration on the job, underutilization of skills, or the lack of meaningfulness of work. Think about whether you find any of these things particularly stressful. If so, discuss them with your lawyer.

6.6 What Your Lawyer Does

Your hearing will last about an hour or an hour and a half. Seldom do hearings take more than two hours. In hearings with judges, who like to ask most of the questions, it's only where issues are not developed or your lawyer thinks that your testimony wasn't clear enough that your lawyer needs to ask you some questions at your hearing. Your lawyer will ask questions of any witnesses you bring along to the hearing; and it is the lawyer's job to question any expert witnesses called by the judge. The most important part of what your lawyer does usually takes place outside of the hearing. That is, your lawyer gathers medical evidence, gets reports from doctors, does legal and medical research, prepares witnesses to testify and possibly makes a closing argument either in writing or at the hearing.

7. Building Your Case

7.1. Claimant' Burden to Prove Disability

Generally, to establish disability under the Social Security Act, it is the claimant's burden to prove that he or she has an impairment that will last continuously for 12 months and that the disabling condition is supported by medical evidence. The application of burden of proof is particularly elusive in cases involving social security benefits, partly because the proceedings are not designed to be adversarial and certainly are not likely to be such when the claimant is unrepresented. The claimant must show they are unable to perform any substantial gainful employment. This burden is a heavy one, so stringent that it has been described as bordering on the unrealistic.

7.2 Evidence Considered in Determining Disability

The following four elements of proof are to be weighed in determining whether there is substantial evidence to support a disability decision:

1. Objective medical facts;
2. Diagnoses and opinions of treating and examining physicians;
3. Claimant's subjective evidence of pain; and
4. Claimant's educational background, age, and work history.

7.3 Effect of Treating Physicians' Opinions

Social Security is to give treating physicians' opinions great weight in determining disability. Furthermore, an ALJ is to give a treating physician's opinion controlling weight if it is well supported by medically accepted clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence. If an ALJ chooses to reject the opinions of a treating physician, the ALJ must show good cause as to why he or she rejected the opinion.

7.4 Duration of Impairments

The durational requirement is satisfied when either:

1. The disability can be expected to result in death;
2. The disability has lasted . . . for a continuous period of not less than 12 months; or
3. The disability can be expected to last for a continuous period of not less than 12 months.

8. The Five Steps to Proving Your Disability Claim – An Overview

8.1 Disability and the Sequential Evaluation

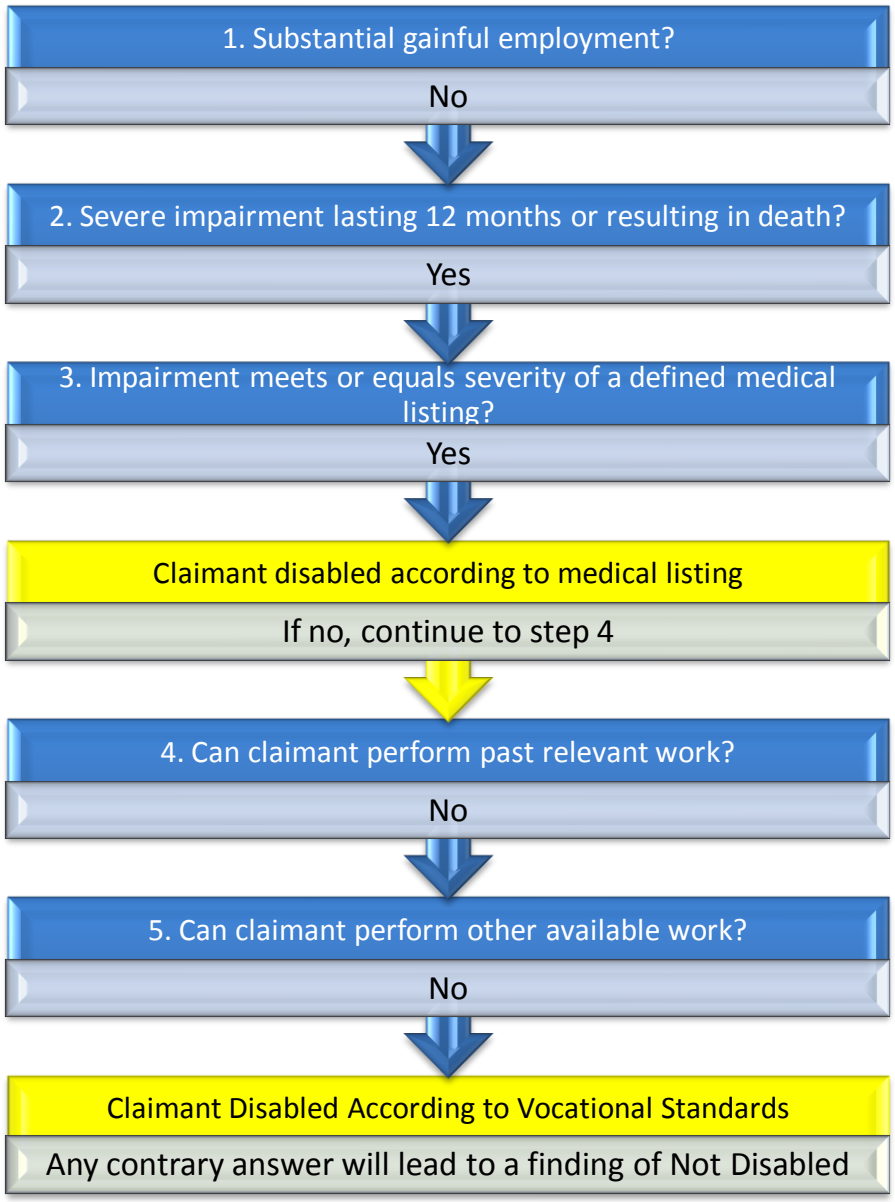
The Social Security Act provides that certain individuals who are under a disability shall receive disability benefits. The statutory concept of disability is comprised both of a medical and a vocational element. The Social Security Act defines the term disability as the inability to engage in any substantial 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. This is the *medical* component of the statutory definition of disability.

The Act also provides that a claimant will be found disabled only if his impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work that 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. This is the *vocational* component of the definition of disability.

The Social Security Administration (SSA) has implemented the foregoing definition of disability by applying the five-step sequential evaluation in deciding whether a claimant is *disabled* and therefore entitled to benefits under Title II (Social Security Disability Insurance) or Title XVI (Supplemental Security Income) of the Social Security Act. The process is commonly referred to as the Sequential Evaluation. It consists of a five-step inquiry, with questions asked in a specific order, until a question is answered affirmatively or negatively in such a way that a decision can be made that a claimant is either disabled or not disabled.

8.2 The Five Step Sequential Evaluation Used to Determine Disability

Flow Chart of the Five-Step Sequential Evaluation



8.3 What Does It Mean to be "Disabled?"

Disabled is defined as an inability 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.

Under the five-step sequential disability evaluation process the following must be proved by a claimant in order to be found disabled:

1. The claimant is not engaged in *substantial gainful activity*; ***and***
2. The claimant has a *severe* impairment; ***and***
3. The impairment meets or equals one of the impairments described in the social security regulations known as the *Listing of Impairments*; ***or***
4. Considering the claimant's *residual functional capacity*, that is, what the claimant can still do even with his or her impairments, the claimant is unable to do *past relevant work*; ***and***
5. Other work within the claimant's *residual functional capacity*, considering age, education and work experience, does not exist in the national economy in significant numbers.

9. Step One – You Are Not Working

9.1 Is the Claimant Performing Substantial Gainful Activity?

If claimant is working and the work is substantial gainful activity, SSA will find that claimant is not disabled regardless of the claimant's medical condition or age, education and work experience.

9.2 Definition of Substantial Gainful Activity

Substantial Gainful Activity (SGA) is defined as work which involves significant physical or mental activities and that is typically done for pay or profit, whether or not a profit is actually realized. Further, the level of income deemed to reach SGA status is different for blind and for non-blind claimants. SSA specifies a higher amount for statutorily blind claimants. For 2009, earnings exceeding $980 per month have provided a rebuttable presumption that a non-blind claimant is engaging in SGA.

Consequently, when a non-blind claimant admits to receiving income far in excess of $980 per month during the relevant time period, it becomes his or her burden to rebut the presumption that he or she has engaged in SGA by providing evidence that he or she was not earning the amount paid or that he or she could not adequately perform the jobs that he or she was paid for lengthy periods of time or without special assistance.

9.3 Self Employment

In cases of self-employed persons, the regulations provide that SGA is the claimant's activities and their value, not just the amount of income earned. For example a court found a claimant's seasonal tax preparation work, which earned less than $1,000 annually, was both substantial and gainful, noting that part-time work may be considered substantial work.

9.4 Part-Time Work as SGA

SSA may consider a self-employed person's part-time work to be substantial gainful activity. Although an ALJ may find the claimant engaged in a part-time job rising to the level of SGA, the ALJ may not automatically deny benefits. In one case for instance, an ALJ was free to consider the claimant's part-time work in determining whether the claimant could perform SGA, though he could not automatically deny benefits because of this part-time job, especially since the claimant's earnings were far below the annual threshold.

Tip 9.4: Part-Time Work

Be prepared to explain to the judge the special accommodations made for you if you were working part time during your disability or explain the difficultly in performing work even on a part-time basis. For example, you could work for only one day and then need a day or more to recover.

9.5 Illegal Activity as SGA

Illegal activity can constitute SGA within the meaning of the regulations. Examples could include drug dealing, prostitution or burglary.

9.6 Unsuccessful Work Attempts

Tip 9.6

Submit your pay check stubs and other employment records to prove work was sporadic or you were frequently unable to work and absent.

Work effort that last less than three months is considered an unsuccessful work attempt when the claimant is unable to perform the work for more than a short period of time and must quit either due to an impairment or due to the removal of special conditions related to the impairment that are essential to the continued performance of the work.

Examples of the special conditions that may be present in work activity occur when claimants:

1. Require and receive special assistance from other employees in performing the job;
2. Are allowed to work irregular hours or take frequent breaks;
3. Are provided with special equipment or are assigned work especially suited to the impairment;
4. Are able to work only within a framework of specially arranged circumstances, such as where other persons helped them prepare for or get to or from work;
5. Are permitted to perform at a lower standard of productivity or efficiency than other employees; or
6. Are granted the opportunity to work, despite a handicap, because of a family relationship, past association with the firm, or other altruistic reason.

9.7 Work Performed for Over Three Months, but Less Than Six Months

Work efforts lasting between three and six months require an additional showing to be considered an unsuccessful work attempt: either there were frequent absences due to the impairment; the work

was unsatisfactory due to the impairment; the work was done during a period of remission; or the work was done under special conditions

9.8 Work Performed Under Special Conditions

In *Nazzaro v. Callahan*, the court held that work done under special conditions, requiring more assistance or supervision than is usually given other employees doing similar work, may, regardless of the stated level of earnings, imply that the claimant is not working at the SGA level.

The court also held that an ALJ has a duty to develop the facts and should have developed the facts provided by the claimant pertaining to the special conditions of his employment arising from the job coach assistance he received.

Tip 9.7: Disability Date

State your disability date as the first time your disability caused you to stop working, not the last. Frequently, people have several "failed work attempts" before they apply for disability. See sections 9.7 above. Since failed work attempts do not count as work, state in your application the first date that you had to stop working as your "disability onset" date. It may provide you several more months of benefits.

10. Step Two – Proving You Have a Severe Impairment

10.1 Is the Claimant's Impairment "Severe?"

A claimant must have a severe impairment. If the claimant does not have any impairment or combination of impairments that significantly limits the claimant's physical or mental ability to do basic work activities, SSA will find the claimant does not have a severe impairment and is, therefore, not disabled. SSA will not consider age, education, and work experience. However, it is possible for a claimant to have a period of disability for a time in the past even though the claimant does not now have a severe impairment.

10.2 Definition of Severity

An impairment may be found to be not severe if it is merely a slight abnormality or a combination of slight abnormalities that impose no more than a minimal effect on the individual's physical or mental ability(ies) to perform basic work activities.

Tip 10.2

Have your Doctors Describe in Your records your physical or mental limitations caused by Diagnosed conditions. For example "the patient has difficulty bending, lifting, walking."

The second step of the sequential evaluation is to determine whether the claimant's impairment at some time in the past or present significantly limited the claimant's ability to perform basic work activities, even if the impairment is not listed in the appendix. One court noted that basic work activities were defined in accordance with SSA as the abilities and aptitudes

necessary to do most jobs, and that the abilities could be significantly limited at present or could have been significantly limited in the past.

10.3 Severity: Requirement to Consider the Combined Effects of ALL of the Claimant's Impairments

The ALJ must consider how the combination of the claimant's impairments affects the claimant's ability to do basic work activities. The combination of the claimant's impairments can constitute more than a slight abnormality meeting the burden of showing severity at step two.

10.4 Severity: Requirement to Consider the Claimant's Subjective Symptoms, Including Pain

In one case, the ALJ improperly failed to consider the claimant's subjective symptoms in making the severity determination. The ALJ improperly rejected the testimony of the claimant and her family regarding her subjective symptoms of fatigue and pain. Additionally, a claimant's subjective symptoms, including pain, will be determined to diminish the individual's capacity for basic work activities if the alleged symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence in the case record.

10.5 Severity: ALJ's Duty to List ALL Severe Impairments

In *Haines v. Apfel*, the ALJ found that the claimant had severe impairments at step two, but failed to specify which of the alleged impairments he found to be severe. The court pointed out that in order for it to make a meaningful review it must know which of the claimant's impairments the ALJ considered to be severe. This was particularly true in this case where it was impossible to know whether the ALJ considered the diagnoses of fibromyalgia and depression as severe impairments.

11. Step Three – Proving You Meet or Equal a Medical Listing

11.1 Does the Claimant's Impairment(s) "Meet or Equal" an Impairment in the "Listings" of Impairments?

If a claimant has an impairment, or a combination of impairments, that meets the duration requirement, as listed in the Social Security Act's appendix, OR are equal to a listed impairment, SSA will find the claimant disabled without considering the claimant's age, education, and work experience. In other words, a claimant can skip proving steps four and five of the sequential evaluation described below.

11.2 Effect of an Impairment Meeting or Equaling a Listing

At the third step of the sequential evaluation process, a claimant is eligible for benefits if he or she has an impairment, or combination of impairments, which meets or equals the conditions found in the listing of impairments which describes impairments that are considered presumptively disabling.

A claimant bears the burden of proving his or her impairment(s) meets or equals a listed impairment, and in so doing, the claimant must satisfy all of the criteria of the listed impairment.

11.3 Meeting a Listing

A claimant bears the burden of proving his or her impairment(s) meets or equals a listed impairment, and in so doing, the claimant must satisfy all of the criteria of the listed impairment.

11.4 Medical Expert Opinions in Evaluating Whether a Listing Is Met

The SSA is entitled to rely on the opinions of reviewing physicians when considering whether a claimant meets the requirements of a listing.

11.5 Medical Equivalence to a Listing

When medical findings are found to be at least equal in severity and duration to a listed impairment, the SSA will determine that a claimant's impairment is medically equivalent to the listing. However, if the claimant's listed impairment: (1) does not exhibit one or more of the medical findings specified in the particular listing, or (2) does not exhibit all of the medical findings, but one or more of the findings is not severe as specified in the listing, the Commissioner will nevertheless find the applicant's impairment medically equivalent to the listing if he or she has other medical findings related to the impairment that are at least of equal medical significance.

11.6 The ALJ's Duty to Discuss Whether Impairments Meet or Equal a Listing

The ALJ is required to discuss the evidence and explain the reasons why the claimant's impairment did not meet or equal a listing. An ALJ's summary conclusion that a claimant's impairments do not meet or equal any listing is not sufficient.

11.7 Listing Categories

A free, adult listing of categories is found at ssa.gov. Categories include:

1.00 Musculoskeletal System
2.00 Special Senses and Speech
3.00 Respiratory System
4.00 Cardiovascular System
5.00 Digestive System
6.00 Genitourinary 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 Diseases
14.00 Immune System

12. Proving Your Residual Functional Capacity

12.1 Residual Functional Capacity (RFC)

At steps four and five of the sequential evaluation, your RFC is the maximum remaining ability you have to do sustained work activities in an ordinary work setting on a regular and continuing basis. A regular and continuing basis means work done for eight hours a day, for five days a week, or an equivalent schedule. Your RFC is expressed in terms of the exertional (see section 12.2) classifications of work. These classifications are described as sedentary, light, medium, heavy, or very heavy work.

12.2 Exertional Activities

Your RFC must be understood in terms of the seven primary strength, or *exertional*, activities of work. These consist of three work positions and four worker movements of objects, as follows:

Three work positions:

- Sitting
- Standing
- Walking

Four worker movements of objects:

- Lifting
- Carrying
- Pushing
- Pulling

12.3 Definition of Residual Functional Capacity ("RFC")

Residual Functional Capacity (RFC) is what the claimant can still do despite his or her physical or mental impairments. In making this determination, the Commissioner must consider all relevant medical and non-medical evidence, including medical records, observations by examining physicians, evaluations of the medical evidence by non-examining physicians, and the testimony of the claimant and others who have observed her.

12.4 RFC Levels

Each of the five *exertional* RFC levels—*sedentary*, *light*, *medium*, *heavy*, and *very heavy*—is defined in terms of the degree that the seven primary strength demands of jobs are required. To illustrate this, the degree that the seven primary strength demands are required in is set out below:

SEDENTARY WORK

- Sitting should generally total approximately six hours of an 8-hour workday.
- Periods of standing or walking should generally total no more than 2 hours of an 8-hour workday.
- Lifting no more than 10 pounds at a time.

- Occasionally lifting or carrying articles like docket files, ledgers and small tools.
- The term occasionally means occurring from very little up to one-third of the time.

LIGHT WORK

- Requires standing or walking off and on, for a total of approximately six hours in an 8-hour workday.
- May involve sitting most of the time, but with some pushing and pulling of arm-hand or leg-foot controls which require greater exertion than in sedentary work.
- Lifting no more than 20 pounds at a time.
- Frequent lifting or carrying of objects weighing up to 10 pounds.
- The term frequent means occurring from one-third to two-thirds of the time.
- If someone can do light work, SSA determines that he or she also can do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods.

MEDIUM WORK

- Requires standing or walking off and on, for a total of approximately six hours in an 8-hour workday.
- As in light work, sitting may occur intermittently during the remaining time.
- Lifting no more than 50 pounds at a time.
- Frequent lifting or carrying of objects weighing up to 25 pounds.
- The term frequent means occurring from one-third to two-thirds of the time.
- If someone can do medium work, SSA determines that he or she also can do light and sedentary work.

HEAVY WORK

- Requires standing or walking off and on, for a total of approximately six hours in an 8-hour workday.
- Lifting objects weighing no more than 100 pounds at a time.
- Frequent lifting or carrying of objects weighing up to 50 pounds.
- If someone can do heavy work, SSA determines that he or she also can do medium, light, and sedentary work.

VERY HEAVY WORK

- Requires standing or walking off and on, for a total of approximately six hours in an 8-hour workday.
- Lifting objects weighing more than 100 pounds at a time.
- Frequent lifting or carrying of objects weighing 50 pounds or more.
- If someone can do very heavy work, SSA determines that he or she also can do heavy, medium, light, and sedentary work.

12.5 Sit/Stand Option and Its Impact on RFC

In *Smith v. Chater*, a Texas district court held that the ALJ properly sought Vocational Expert (VE) testimony given the fact that the claimant's ability to perform light work was limited to jobs that provided for a sit/stand option and that did not involve repetitive use of his hands. A Social Security Ruling provides that an individual who: may be able to sit for a time, but must then get up and stand or walk awhile [sic] before returning to sitting . . . is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work . . . or the prolonged standing or walking contemplated for most light work.

12.6 RFC: Requirement to Consider ALL Physical and Mental Impairments

In determining a claimant's RFC, the ALJ has a duty to establish, by competent medical evidence, after considering all of the claimant's impairments, the physical and mental activities that the claimant can perform in a work setting. The determination of RFC includes a consideration of all symptoms, including pain.

12.6 RFC: Requirement to Consider Effect of Mental Impairments

When mental impairments are alleged, the ALJ must determine whether these impairments further limit the exertional tasks the claimant is deemed capable of handling. The evaluation of RFC in claimants with mental disorders includes consideration of the ability to understand, to carry out and remember instructions and to respond appropriately to supervision, coworkers and customary work pressures in a work setting.

Evidence needed for making this determination includes:

- History, findings, and observations from medical sources (including psychological test results), regarding the presence, frequency and intensity of hallucinations, delusions or paranoid tendencies; depression or elation; confusion or disorientation; conversion symptoms or phobias; psychophysiological symptoms; withdrawn or bizarre behavior; anxiety or tension.
- Reports of the individual's activities of daily living and work activity, as well as testimony of third parties about the individual's performance and behavior.
- Quality of daily activities, both in occupational and social spheres.
- Ability to sustain activities, interests and relate to others over a period of time. The frequency, appropriateness and independence of the activities must also be considered.
- Level of intellectual functioning.
- Ability to function in a work-like situation.

12.7 RFC: Requirement to Consider Non-Medical Evidence

Non-medical evidence may be 'vital' in assessing the functional limitations of a mental impairment. Such sources explicitly include social workers and family members. The courts have noted that '[i]nformation concerning an individual's performance in any work setting (including sheltered work and volunteer or competitive work) . . . may be pertinent in assessing the individual's ability to

function in a competitive work environment.' Relevant evidence in assessing RFC includes subjective reports of pain testified to by the claimant in addition to medical facts, diagnoses and medical opinions based on such facts.

12.8 RFC Finding Must be Supported by the Record

Your RFC can only be determined when there is substantial evidence of each physical requirement listed in the regulations. In assessing RFC, the ALJ's closing statements concerning the claimant's abilities were not sufficient because his findings must specify the functions the claimant is capable of doing.

12.9 Absenteeism and Its Effect on the Ability to Work

The SSA should consider (1) the fact that a claimant would be absent from the workplace an inordinate amount of time due to physical or mental impairments, and (2) the treatment regiments of such impairments. A claimant is entitled to have a vocational expert evaluate his impairment-related excessive absenteeism.

13. Step Four – Proving You Can't Do Your Past Relevant Work

13.1 Is The Claimant Capable of Performing Past Relevant Work?

A claimant's impairments must prevent him from doing past relevant work. If SSA cannot make a decision based on the claimant's current work activity on medical facts alone, and if the claimant has severe impairments, SSA will then review the claimant's residual functional capacity and the physical and mental demands of the work claimant has done in the past. If the claimant can still do this kind of work, SSA will then find that the claimant is not disabled.

13.2 Definition of Past Relevant Work

When determining whether a claimant can perform his or her past relevant work, the SSA should normally only address work that meets the following criteria:

1. The claimant performed the work in the prior 15 years;
2. The work lasted long enough for the claimant to learn to do it; and
3. The work was substantial gainful activity.

13.3 The Claimant's Burden to Establish an Inability to Perform Past Relevant Work

The claimant bears the burden of proof for the first four steps, while at the fifth step the burden shifts to the SSA to show that the claimant can perform other work. A claimant has the initial burden of proving disability by establishing a physical or mental impairment lasting at least 12 months that prevents him from engaging in any work.

13.4 The ALJ's Duty to Make Findings Regarding Physical and Mental Demands of Past Relevant Work

In deciding whether a claimant can do his or her past work, the ALJ must review the claimant's RFC and the physical and mental requirements of the claimant's past jobs. When the claimant's impairment is a mental one, special care must be taken to obtain a precise description of the particular job duties which are likely to produce tension and anxiety in order to determine if the claimant's mental impairment is compatible with the performance of such work. In one case, the court noted that the record did not include a description of the job duties and associated mental demands of the job that was adequate to allow the court to review the ALJ's determination that the claimant could perform his or her past work.

13.5 Work Performed for Short Periods of Time

Work performed for a short period of time is not considered relevant.

Tip 13.4: Dictionary of Occupational Titles

The SSA and most vocational experts use a publication known as the Dictionary of Occupational Titles (DOT) to determine the RFC requirements and skill level of your past jobs. The DOT lists thousands of jobs and their requirements including their strength level and skill level.

An example of this in action is when a claimant's past job as a truck driver and auto mechanic is classified as a medium level job (per the Dictionary of Occupational Titles) and you prove that you physically could not stand or walk more than two hours in an eight hour day. Therefore, you are limited to no better than a Sedentary RFC (see 12.4 above). In such an example, the claimant has proven they can't do their past job by using the DOT.

Tip 13.7

On your initial application to SSA, list only the jobs performed within the last 15 years and only those you did long enough to learn how to do them. Avoid short-term or part-time jobs. Remember, be honest in your application, but the more jobs you list, the more jobs you will have to prove you can no longer do.

13.6 Job Training and Work Performed Under Special Conditions

Past work experience is relevant if it lasted long enough for claimant to learn to do it, involved significant physical or mental activities and is the kind of work usually done for profit.

13.7 Work Performed More Than 15 Years Prior to the Date of Adjudication

The regulations provide that only work performed by a claimant within the 15-year period prior to the adjudication should be considered in determining a claimant's past

relevant work since a gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply.

13.8 Work No Longer Available

Social Security provides that if a claimant can meet the physical and mental requirements of a past job, the claimant is still functionally capable of performing that job regardless of the fact the individual no longer resides in the country where the past work was performed. Only at the fifth step of the sequential evaluation process does the burden shift to the Commissioner to determine whether work is available in the national economy that the claimant can perform

13.9 No Need for Vocational Expert at Step Four

Vocational expert testimony is only an issue at the fifth step of the sequential evaluation process, when the burden of proof shifts to the SSA to prove that jobs exist that the claimant can perform. A Vocational Expert's testimony is not needed to determine whether a claimant can perform his or her past work.

13.10 Need for Past Relevant Work to be Substantial Gainful Activity

Previous work must rise to the level of SGA in order to be considered past relevant work. Capacity to do past work may indicate a claimant is capable of engaging in SGA when that work experience was at the SGA level.

14. Step Five – Proving You Can't Do Any "Other Work"

14.1 Does the Claimant's Impairment Prevent the Performance of Any Other Substantial Gainful Activity?

A Claimant's impairment must prevent him from doing *any other work*. If the claimant cannot do any work done in the past because the claimant has a severe impairment, SSA considers the claimant's residual functional capacity, his age, education and past work experience to see if the claimant can do other work. If the claimant cannot, SSA will find him disabled.

14.2 SSA's Burden to Establish Ability to Perform Other Work

While the claimant bears the burden of proof at the first four steps of the sequential evaluation process, at the fifth step, the burden shifts to the Commissioner to show that the claimant can perform other work.

Tip 14.2: SSA's Burden

At step five, you have to prove nothing. Unlike all the other steps where you have the burden of proof, at step five the SSA must prove there are other jobs you can do. Don't get too happy because the SSA is very good at getting Vocational Experts to find other jobs you can do. It is at this point where an experienced attorney is needed to cross examine the Vocational Expert.

14.3 Use of the Medical-Vocational Guidelines (Grid Rules)

If a claimant's impairments are found to be solely exertional (meaning just physical and not mental or emotional), then use of the Grid Rules is warranted. The court noted that the SSA may rely exclusively on Grid Rules when determining whether there is other work the claimant can perform, when the claimant suffers only from exertional (physical) impairments or the nonexertional (mental) impairments do not sufficiently affect the RFC.

14.4 Using the Grid Rules to Direct a Finding of "Disabled" or "Not Disabled"

To apply the Grid Rules, the SSA will make a finding of fact as to a claimant's *RFC, age, education and previous work experience*. Assuming the claimant does not have mental or emotional impairments, then the Grid Rules will direct the SSA in making a determination of disability

14.5 Effect of Age on the Application of the Grids

The regulations provide that older age is an increasingly negative vocational factor for persons with severe impairments. In other words, the SSA recognizes that as someone gets older it become more difficult to both overcome severe impairments and adapt to the work place with such impairments. In short, the standard to be found disabled by SSA gets easier the older you get. The chronological ages 45, 50, 55 and 60 are the critical ages to a decision. However, the regulations also provide that age categories are not applied mechanically in borderline situations.

Tip: Age Borderlines

For example, a rule for an individual of advanced age (55 or older) could be found applicable, in some circumstances, to an individual whose chronological age is 54 years and 11 months (closely approaching advanced age). No fixed guidelines as to when a borderline situation exists are provided since such guidelines would themselves reflect a mechanical approach.

There are four "age" categories underlying the grid rules. They are:

Younger Individual—under age 50

- Ages 45 through 49
- Ages 18 through 44

Closely Approaching Advanced Age

- Ages 50 through 54

Advanced Age

- Ages 55 through 59

Closely Approaching Retirement Age

- Ages 60 through 64

14.6 Evaluation of Education and Illiteracy

There are six "education" categories underlying the grid rules. They are:

Inability to Communicate In English

Since the ability to speak, read and understand English is generally learned or increased at school, SSA may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn't speak and understand English to do a job, regardless of the amount of education the person may have in another language. Therefore, SSA will consider a person's ability to communicate in English when SSA evaluates what work, if any, he or she can do. It generally doesn't matter what other language a person may be fluent in.

Illiteracy

Illiteracy means the inability to read or write. SSA considers someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name. Generally, an illiterate person has had little or no formal schooling.

Marginal Education

Marginal education means ability in reasoning, arithmetic and language skills that are needed to do simple, unskilled types of jobs. SSA generally considers formal schooling at a 6th grade level or less a marginal education.

Limited Education

Limited education means ability in reasoning, arithmetic and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. SSA generally considers a 7th grade through the 11th grade level of formal education a limited education.

High School Graduate or more – Does Not Provide for Direct Entry Into Skilled Work

High school education and above means abilities in reasoning, arithmetic and language skills acquired through formal schooling at a 12th grade level or above. SSA generally considers that someone with these educational abilities can do semi-skilled through skilled work. The criterion of high school graduate or more—provides for direct entry into skilled work is met when there is little time lapse

between the completion of formal education and the date of adjudication, and where the content of the education would enable individuals, with a minimal degree of job orientation, to begin performing the skilled job duties of certain identifiable occupations within their RFC.

High School Graduate or More –Provides for Direct Entry Into Skilled Work

High school education and above means abilities in reasoning, arithmetic and language skills acquired through formal schooling at a 12th grade level or above. SSA generally consider that someone with these educational abilities can do semi-skilled through skilled work.

14.7 Job Skill Levels

Unskilled

Unskilled work is work that needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. For example, I consider jobs unskilled if the primary work duties are handling, feeding and offbearing (that is, placing or removing materials from machines that are automatic or operated by others), or machine tending, that a person can usually learn to do in 30 days, where little specific vocational preparation and judgment are needed. A person does not gain work skills by doing unskilled work.

Semiskilled

Semiskilled work is work that needs some skills, but does not require doing the more complex work duties. Semiskilled jobs may require alertness and close attention to watching machine processes; or inspecting, testing or otherwise looking for irregularities; or tending or guarding equipment, property, material or persons against loss, damage or injury; or other types of activities that are similarly less complex than skilled work, but more complex than unskilled work. A job may be classified as semiskilled when coordination and dexterity are necessary, as when hands or feet must be moved quickly to do repetitive tasks.

Skilled

Skilled work requires qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality or quantity of material to be produced. Skilled work may require laying out work, estimating quality, determining the suitability and needed quantities of materials, making precise measurements, reading blueprints or other specifications, or making necessary computations or mechanical adjustments to control or regulate the work. Other skilled jobs may require dealing with people, facts or figures or abstract ideas at a high level of complexity.

14.8 Effect of Impairments of the Hands and Fingers on the Ability to Perform Unskilled, Sedentary Work

If a claimant is limited by his or her exertional and/or non-exertional limitations, education and vocational background to the performance of unskilled, sedentary work, the claimant must retain good use of his or her hands and fingers to engage in most unskilled, sedentary jobs. Most unskilled sedentary jobs require good use of the hands and fingers for repetitive hand-finger actions. Hence, if a claimant's impairments prevent the use of his or her hands, fingers and/or arms for repetitive hand-finger actions, and if the claimant is limited to unskilled, sedentary work, the job base may be so eroded for the claimant that he or she may be deemed unemployable.

14.9 Previous Work Experience

A person's work experience may be none, not vocationally relevant, unskilled, semiskilled, or skilled. To meet the criterion of skilled or semiskilled—skills transferable, a person must have performed work that is above the unskilled level of complexity, must have identifiable skills and must be able to use these skills in specific skilled or semiskilled occupations within his or her RFC.

Experience—The jobs a person has done, the length of time spent at them and the recency of the work are major factors in determining his or her ability to work. Work experience is relevant when it was performed within the pertinent 15-year period, lasted long enough for the individual to learn the job and consisted of SGA. Work experience must be examined in the light of available knowledge of the physical and skill demands of different kinds of work in order to evaluate the effect of the impairment on the person's ability to return to past relevant work or to utilize remaining capacities in other jobs.

14.10 Requirement of Vocational Expert Testimony When Grids Not Utilized

When utilization of the Grids in decision making is not warranted the SSA may only sustain her burden of proof by producing expert vocational testimony concerning the existence and availability of jobs in the national economy which the Plaintiff can perform.

14.11 Significant Number of Jobs in National Economy

To find that a claimant can perform other work, the work must exist in significant numbers in the national economy.

14.12 Structure of the Medical-Vocational Guidelines (Grids)

Reflecting their column-and-row structure, the medical-vocational guidelines became known as the grids. The grids reflect, at step five of the sequential evaluation, SSA's analysis of the impact of the statutory vocational factors of disability—age, education, and previous work experience—in combination with the medical factor—residual functional capacity (RFC)—on an individual's ability to perform other work. Each medical-vocational rule within a grid table is comprised of two elements:

- A medical profile, i.e., an exertional RFC—(Sedentary, Light, or Medium), and
- A vocational profile—(Age, Education, and Previous Work Experience).

The grid rules resolve the step five issue by taking administrative notice of the fact that given a claimant's sedentary, light, or medium RFC, and also considering his age, education and work experience, the claimant can or cannot engage in work that exists in significant numbers in the national economy. For a claimant whose medical-vocational profile (RFC, age, education and previous work experience) matches that of one of the grid rules, that grid rule conclusively determines whether or not the statutory definition of disability is satisfied. In other words, when a claimant's medical-vocational profile matches that of a grid rule, that grid rule establishes an irrebuttable presumption that a claimant either is disabled or is not disabled, and the particular grid rule must be used in making a determination. Where a grid rule directs a finding of disabled, vocational expert testimony may not rebut the conclusion directed by the grid rule.

The grids consist of three tables of numbered rules and one general rule, which are based on the full range of the five physical exertional RFC levels—sedentary, light, medium, heavy and very heavy. This RFC component of the tables incorporates the medical element of the definition of disability. Of the 82 numbered grid rules in the three medical-vocational tables, only 17 rules direct a finding of disabled. They are as follows:

14.13 Maximum RFC Permitted for Disability Finding

Age	**Education**	**Previous work experience**	**Max. RFC**	**Rule**
60-64	6th grade or less	Unskilled	Medium	203.01
	7th to 11th grade	Unskilled	Light	202.01
	11th grade or less	None	Medium	203.02
	11th grade or less	Skilled/semiskilled. Skills no transferable	Light	202.02
	High school grad or more. Does not provide for direct entry into skilled work.	Unskilled or none	Light	202.04
	igh School grad or more does not	Skilled/semiskilled. Skills not transferable	Light	202.06

	provide for direct entry into Skilled work.			
55-59	11th grade or less	None	Medium	203.10
	11th grade or less	Unskilled	Light	202.01
	11th grade or less	Skilled/semiskilled. Skill not transferable	Light	202.02
	High school graduate or more does not provide for direct entry into skilled work	Unskilled or none	Light	202.04
	High school graduate or more does not provide for direct entry into skilled work	Skilled or semiskilled. Skills not transferable.	Light	202.06
50-54	Illiterate or unable to communicate in English	Unskilled or none	Light	202.09
	11th grade or less – at least literate and able to communication in English	Unskilled or none	Sedentary	201.09
	High school graduate or more, does not provide for direct entry into skilled work	Unskilled or none	Sedentary	201.12
	High school	skilled/semiskilled	Sedentary	201.14

	graduate or more does not provide for direct entry into skilled work.	Skills not transferrable		
45-49	Illiterate or unable to communicate in English	Unskilled or none	Sedentary	201.17
	All education levels, Literate and able to communicate in English	Unskilled, none, or skilled or semiskilled – skills not transferable	Sedentary occupational base must be significantly eroded.	201.00(h)
18-44	All educational levels including illiterate or unable to communicate in English.	Unskilled, none, or skilled or semiskilled – skills not transferable	Sedentary occupational base must be significantly eroded.	201.00(h)

14.14 Grids as a Framework for Decision Making

If a claimant's exertional RFC differs from the technical full range definitions of sedentary, light or medium work upon which the three medical-vocational tables are based—for example the claimant's RFC for exertional activity falls between sedentary and light work—then the claimant has exertional limitations that are not described by the grids. For such claimants, the grids are used as a framework for decision making.

If a claimant has an impairment that limits his or her ability to work without directly affecting his or her exertional abilities, that claimant is said to have a non-exertional limitation. Non-exertional limitations include mental, sensory, postural, manipulative or environmental (e.g. inability to tolerate dust or fumes) limitations. The grids are not fully applicable to claimants with such limitations, i.e., they do not direct a finding of disabled or not disabled. For these claimants, too, the grids are used as a framework for decision making.

14.15 RFC for Less Than a Full Range of Sedentary Work

For a claimant under age 50, the grid rules requires proof that they can do much less than a full or wide range of sedentary work, described as a *significance compromise of the sedentary occupational base*. This means, that jobs for claimants under age 50 do not exist in significant numbers. Although this is difficult, it is not impossible.

For most claimants under age 50, you must be able to show that you can do neither Sedentary nor Light work. It is presumed if you can do neither then you cannot do Medium or Heavy work. See 12.4 for the full definitions of each. To accomplish this difficult proof issue, you will usually look for a combination of exertional and nonexertional impairments. Each additional impairment whittles away the range of sedentary work that a claimant is capable of doing to arrive at the point where jobs do not exist in significant numbers.

Tip 14.15: Common Impairments

Common impairments used to prove the inability to perform at the Sedentary level include: the inability to stand or walk more than two hours/day, side effects of medication, inability to lift and carry 10 lbs for 1/3 of an eight hour day, the need for frequent unscheduled breaks or high absenteeism.

14.16 Nonexertional Limitations

Exertional abilities involve sitting, standing, walking, lifting, carrying, pushing and pulling. A limitation of any other work-related ability is a nonexterional limitation. A list of categories and examples follows:

Category	Example
Postural:	Need to alternate sitting and standing; Need to elevate leg; Difficulty turning head; Balance problems; Difficulty bending, stooping or squatting; Use of a cane or walker
Manipulative:	Difficulties with reaching, grasping, handling, fingering.
Environmental:	Difficulties working around fumes, dust, etc.; Difficulties tolerating noise, heights, humidity or temperature extremes; Inability to be around dangerous machinery.
Mental:	Difficulties relating with others; Difficulty understanding, remembering or carrying out simple instructions; Inability to maintain attention, concentration, pace, persistence, accuracy; Poor stress tolerance.
Sensory:	Difficulties speaking, hearing feeling or seeing.

Pain: Effects of cognitive abilities as described above in the mental category.

Many impairments have both exterional and nonexertional implications. For example, amputation of an arm will limit the weight a claimant can lift, an exterional impairment, and will limit bimanual dexterity, a nonexterional manipulative impairment. Vocational expert testimony is often necessary for evaluating the impact of such limitations.

Tip 14.16

This list is by no means exhaustive, as many others exist. As demonstrated above when examining the mental and pain categories, nonexterional impairments may impose more than one type of nonexterional limitation. Some impairments, such as certain gastro-intestinal impairments, impose nonexertional limitations by forcing a worker to be absent from the work area to lie down or go to the restroom, etc.

14.17 Transferable Work Skills

A complicating factor when using the Grids to determine disability is the issue of *transferrable work skills*. The Medical-Vocational Guidelines indicate that a claimant is never disabled if the claimant has skills transferable to jobs within his or her RFC that exist in significant numbers. A finding of no transferable work skills may lead to a finding of disability in cases where a claimant otherwise meets the grid listing.

If a claimant is age 50 or older and is limited to sedentary work, the claimant wins or loses the case based upon whether or not the claimant has skills transferable to sedentary work. If a claimant is age 55 or older, this rule extends to light work – a claimant wins or loses based on whether or not the claimant has skills transferable to a significant range of semi-skilled or skilled light work.

Tip 14.17

It is important to not overstate your job title, training or education because of the complicated issue of transferrable skills. The more skills the SSA thinks you have, the harder it is to show you have no transferrable skills.

Since an unskilled work background produces no transferable skills, the rules about transferability apply only to claimants with histories of semi-skilled or skilled work. You also may need a vocational expert to help you manage the complex problem of transferability of work skills.

15. Using an Attorney

15.1 Do I Need an Attorney?

In a word, no, but consider the following: In a conversation I recently had with several fellow trial lawyers, I mentioned that I regularly represented claimants in their disability claims before the Social Security Administration. The consensus response from the group was it was almost impossible to win one of these cases. The comment that if you could pick up a pencil and fill out the application you weren't going to be found disabled seemed to express the group's sentiment.

A recent survey by the *Houston Chronicle* partially confirms this notion, but at the same time reveals good lawyering can go a long way towards helping the good and honest taxpayers get the disability payments that they deserve and have paid for through their years of payroll deductions. The *Chronicle* found that while less than a third of all non-represented claimants prevailed before the Social Security Administration, the survey also found that roughly two-thirds of all attorney-represented claimants prevailed.

Tip 15.1a: Non Attorneys

Beware of Non-Attorney representatives. You do not have to be an attorney to represent someone before the SSA, but why would you want a non attorney representative? Social Security law is complex. The fees set by the SSA are the same for both attorneys and non attorneys! Also, Non attorneys cannot represent you in Federal Court if necessary. Believe it or not, there are non attorney representative that advertise on national TV. Always ask if they are attorneys before hiring anyone.

My own conversations with ALJs are also revealing. Without exception, the ALJs who I talk to prefer claimants who are represented by experienced social security disability attorneys. The reason is simple: it makes the ALJ's life easier. Experienced attorneys end up doing most of the work that the ALJ would otherwise have to do if they were dealing with a claimant without an attorney. The *Houston Chronicle*'s article speaks for itself.

Tip: 15.1b: Disability Insurance Companies

Look out for firms recommended by your Disability Insurance Company. Their purpose is to win your case and collect your back due benefits to reimburse your insurance company. This is an obvious conflict of interest. The most common firm used by the Disability Insurance Companies boasts on its Web site about how much money it collects for the insurance companies. They don't boast about how much money they recover for you! You want someone on your side.

15.2 How Can I Afford an Attorney?

Social Security Disability claims can be difficult to pursue because of the complexity of the social security regulations and the appeals process. Recognizing this

problem, the social security regulations allow for claimants to be represented by attorneys on a contingent fee basis. In other words, a legitimate claimant can hire an attorney to represent him with no money up front, the attorney gets paid a percentage of the past due benefits only if the claimant wins their case. The standard contingency fee arraignment set by SSA pays the attorney 25 percent of all past due benefits up to a maximum of $6,000 if the case is won before appealing to the federal district court. If a case must be appealed to federal district court the $6000 maximum cap is lifted and the fee is up to 25 percent of all past due benefits. Although I may be biased, I believe that a claimant's chances of winning their claim is tremendously increased by having an attorney represent them.

15.3 What About Litigation Costs or Out-Of-Pocket Expenses?

In addition to the contingent legal fees, there are various charges that must be paid to prepare your disability claim. Currently, many states including Texas have laws requiring free medical records for claimants in Social Security Disability claims; however if you have out-of-state medical treatment, it may cost money to obtain your out-of-state medical records. Additionally, it may cost money to obtain your file from SSA and frequently doctors charge a monetary fee to fill out our medical questionnaires.

These out-of-pocket expenses are not legal fees, and are the responsibility of the claimant.

15.4 What Will My Attorney Do For Me?

Every client is different and has different needs, but below are some of the things experienced attorneys may do to help you with your Social Security Disability claim:

1. Aid you in filling out all SSA forms;
2. Evaluate your claim and advise you on the law and your options;
3. Review your medical records and make suggestions for any additional testing required to prove your case;
4. Supplement your claim file with additional medical records;
5. File any appeals necessary and handle all SSA paperwork;
6. Obtain medical reports and opinion evidence regarding your disability;
7. Consult with qualified vocational experts to get opinion evidence rebutting the ALJ-called vocational experts;
8. Obtain and develop evidence regarding your Residual Functional Capacity, which is the key to your disability claim;
9. Correctly calculate your benefits;
10. File a legal brief arguing the legal, medical and vocational issues in your case;
11. File a lawsuit in Federal Court if necessary; and/or
12. File Your Motion for Summary Judgment and respond to the government's Motion for Summary Judgment filed against you.

15.5 How do I find an Experienced Attorney?

1. Look no further than the bottom of this page or my resume in the front of this E-Book. If we can't service your location, we will gladly refer you to someone qualified who can help.
2. Look at the National Board of Legal Specialty Certification Webs site at www.nblsc.us.
3. The National Organization of Social Security Claims Representatives (NOSSCR) operates a national referral service for its members. Go to NOSSCR.org.

16. What Happens If I Win?

In this final chapter, I will attempt to answer some of the common questions that people have after receiving a favorable social security disability decision. The answers are general in nature and you should consult a knowledgeable attorney about your specific situation.

16.1 Do I have to make a trip to the Social Security office or fill out forms in order to get paid if I win my case?

No. Payment is automatic for your benefits. However, if you have children who were under age 18 (or under age 19 and still in high school) at any time after your "date of entitlement," you will need to put in an application for them to receive benefits.

16.2 How long will it take for SSA to pay me?

Usually, it takes one to two months for back benefits to be paid and monthly benefits to begin in a social security disability case in which no SSI application was ever filed. (When there is SSI involved it takes considerably longer.) In some cases, it takes as long as three months for back benefits to be paid. If it takes more than 90 days for back benefits to be paid in a social security disability case, there may be a problem that you should investigate by going to your local SSA field office.

16.3 How far back will SSA pay me benefits?

You must first determine your "date of entitlement," which is generally the date SSA determined you became disabled. If your date of entitlement is not on the first day of the month (i.e. January 1, February 1, etc...) then proceed to the first day of the following month and then you count off five (5) full months. Your disability payments will begin after the expiration of the five full month waiting period. Social security disability benefits never begin on the date one becomes disabled because of the waiting period of five full calendar months. Another rule limits payment of back benefits to 12 months before the date of the application. Therefore, your benefits begin either 12 months before the date of application or five full months after the date you were found to be disabled, whichever is later.

16.4 What will the amount of my monthly benefits be?

The Payment Center will contact you regarding the monthly amount; however, SSA may recalculate your benefit amount before it pays you. If SSA recalculates, it may come up with a higher benefit amount

because, for example, all of your earnings might not have been posted when the original calculation was made. Also, there are cost of living increases that are applied every December.

16.5 Will I receive a notice from SSA explaining my benefits?

Yes. That notice is usually called a Notice of Award. This notice will show the "date of entitlement" and the amount of benefits for all months of back benefits. It will show the total amount of benefits to be paid to you. It will tell you when you will receive your money each month. It will show the amount of benefits withheld for direct payment of attorney's fees. It may also give you information about your Medicare eligibility and monthly Medicare premium. It may also give you some information about when to expect a "continuing disability review."

16.6 When will I get the Notice of Award?

The Notice of Award will come around the time that you receive your check for past due benefits. It often comes after you receive your check for past due benefits.

16.7 If I get the check first, should I wait until I receive the Notice of Award before I cash my check for past due benefits?

No. There is no need to wait; however, it is best that you deposit your check in an interest bearing savings account and not spend it all until you receive the Notice of Award so that we can make sure that attorney's fees were withheld and that you have not been overpaid. It is a good idea to make two photocopies of the check before you deposit it. Send one copy of the check to your attorney and retain the other for your records.

16.8 Why would there be a problem if I were overpaid?

If you are paid too much, SSA almost always figures it out eventually. Then, after you have already spent all of the money, it will send you a letter demanding that you repay the overpayment. If you do not have the money to repay the full amount of the overpayment, SSA may threaten to cut off your checks until the overpayment is recouped. Usually, however, it will accept a more reasonable reduction of your monthly checks. However, this is still a hassle and you may have trouble making ends meet during the time that your check is reduced. Under some circumstances it may be possible to get repayment of all or part of the overpayment waived; but this is not something to count on.

16.9 When will my regular monthly benefits begin?

Usually regular monthly benefits begin the month after you receive your check for past due benefits, although occasionally people get a check for regular monthly benefits first. Such checks pay benefits for the previous month. Thus, for example, the check for January's benefits will come in February.

16.10 Will I be eligible for Medicare?

Medicare eligibility begins after you have received 24 months of social security disability benefits. Please note that to receive Part B of Medicare (which pays for doctor visits), you pay a premium that will be deducted from your social security disability monthly check.

Disabled people with relatively low income and assets may be eligible for other programs that pay for medical expenses not covered by Medicare and/or pay the Medicare premium for you. To find out if you are eligible for any such programs, you need to check with your county welfare department.

If you have health insurance coverage already, you need to figure out how Medicare works with your health insurance. Many health insurance policies state that Medicare is to provide the primary coverage. Thus, your present health insurance may pay only for what Medicare does not cover. You need to check with your health insurance company when you get your Medicare card.

16.11 The decision cover sheet says that the appeals council may review the decision "On Its Own Motion." What does this mean?

In a very small number of cases the Appeals Council in Falls Church, Virginia, will decide on its own to take away benefits awarded by the decision of the administrative law judge. If it is going to do this, the Appeals Council almost always will send you a notice within 60 days of the date of the judge's decision. (In an extremely small number of cases the Appeals Council will reverse a decision after the 60 days have run.)

16.12 Will I have to pay taxes on the social security disability benefits I receive?

Probably not; but this depends on the amount of your total income. Most people won't have to pay taxes on their social security disability benefits. Couples whose combined income exceed $32,000 and individuals with income exceeding $25,000 will pay income tax on a portion of their social security disability benefits. But if a child receives benefits on a parent's account, those benefits count only for determining if the child must pay taxes on social security benefits received.

If you fall into the group of people who may be taxed on social security disability benefits only because you received a large check for past due benefits during the year, you still may not have to pay tax on your social security benefits. The IRS has set up a way to recalculate your back benefits and consider them received in the year you should have gotten them rather than in the current year. Ask the IRS for a copy of Publication 915.

Those people whose social security disability benefits end up being taxable should note that a portion of the attorney's fee may be deductible; but this depends on the "2% of adjusted gross income" ceiling on miscellaneous itemized deductions. Those people who have to repay a long term disability insurance carrier because of receipt of social security disability benefits may get special tax relief. They should as the IRS for Publication 525.

SSA is supposed to send you a Form 1099 by February 1 of the year after your back benefits were paid. If you will have to pay taxes on your social security disability benefits, be sure to compare the information on the Form 1099 with the information on your Notice of Award. The Form 1099s from SSA are often wrong. You will need to bring any errors to the attention of your tax preparer.

Tax law is very complex. The information in this section is general in nature. Please talk to a tax specialist if you have any questions about taxes on your social security benefits.

16.13 What is a "continuing disability review"?

SSA is required periodically to review the cases of all people who are receiving disability benefits. Usually cases are reviewed every three years; but some cases are reviewed more often. Sometimes the decision will direct SSA to conduct a review at a certain time. Often the Notice of Award will tell you when to expect a review.

16.14 What will I have to do for a "continuing disability review"?

You will be asked to complete a form about your medical treatment or work and how your condition has changed since the time you were found eligible for disability benefits.

16.15 What if SSA finds that my disability has ceased, but I'm still not able to work?

The notice that you will receive from SSA following a "continuing disability review" will explain your appeal rights. Read this notice carefully. If you appeal within 10 days of the date you receive the notice, your benefits will continue during your appeal. So be sure to act quickly.

16.16 Is there anything that I can do now to help insure that my benefits will continue?

The very best thing you can do is to continue seeing your doctor. A lot of people with long-term chronic medical problems stop seeing their doctors because no treatment seems to help. This is a mistake for two reasons. First, it means that when SSA conducts its review, no medical evidence will exist to show that your condition is the same as it was when you were first found disabled. Second, and perhaps even more importantly, doctors recommend that even healthy people after a certain age periodically have a thorough physical examination. This is even more important for people who already have chronic medical problems.

16.17 Is SSA going to make it as difficult to keep my benefits as it did to get them in the first place?

No. Not at all. The disabilities of the vast majority of people are found to continue at the initial evaluation. Few people have their benefits stopped.

16.18 Is there anything I can do to make dealing with SSA easier?

You shouldn't expect as many problems dealing with SSA while receiving benefits as you had trying to get benefits in the first place. Sometimes, though, some people have problems. Here are some things you can do to try to minimize the hassle:

- Keep all decisions, letters, and notices you receive from SSA in a safe place.

- Read everything you get from SSA. The booklets that come with award letters and notices are well written and informative.
- When reading the booklets you receive from SSA, pay special attention to the kind of information you are required to report to the Social Security Administration. Report promptly and in writing and keep a copy with your social security papers.

SOURCES

Bohr, Sarah H. and Harrington, Chantal J., Bohr's Social Security Issues Annotated (Summer, 2000)

Wilborn, Ralph, Wilborn's, Social Security Disability Advocate's Handbook, *The Process of Unification Rulings*, (1997, 1998)

Bush, Thomas E., Social Security Disability Practice (2d ed. 2/92)

Morton II, M.D., David A, Medical Issues In Social Security Disability (March 2004)

*O'Connor's Federal Rules * Civil Trials* (2010)

United State Code of Federal Regulations