How to Win Disability Benefits for Multiple Sclerosis

By Marc Whitehead, Esq.

Introduction

Every year thousands of Americans become unable to work because of Multiple Sclerosis (MS) — a chronic inflammatory disease that occurs when the immune system attacks the central nervous system (CNS). This causes the death of nerve cells (apoptosis/necrosis) and destruction of the protective layer enclosing nerve fibers (demyelination) in the brain, spinal cord, and optic nerves.

MS can affect any part of the CNS and cause neurologic problems with muscle control and strength, spasticity, vision, balance, gait, sensation, pain, bowel and bladder control, emotional regulation, memory, fatigue, and mental disorders. MS also frequently causes autonomic dysfunction which affects breathing, heart rate, blood pressure, temperature, sweating, and blood glucose. These neurologic problems can lead to cognitive and/or physical defects and disability.

If your multiple sclerosis interferes with your ability to work, you may be eligible for various forms of disability benefits, either though federal disability programs under the Social Security Administration (SSA) or from private insurers.

And yet, the overwhelming majority of disability claims are initially denied—sometimes in error, sometimes due to insufficient information, sometimes unfairly. If you've experienced denial, please: Do not give up.

The purpose of this paper is to guide you through the complex laws, rules and red tape governing disability claims based on multiple sclerosis—so you can provide the right information in the right way, make informed decisions, and succeed in getting the benefits you need.

By knowing how claim decisions are made, you will understand what it takes to prove your MS disability claim initially or win on appeal.

> Never give up.
>
> Always follow up!

What Disability Benefits Are Available for Multiple Sclerosis?

Social Security Disability Benefits (SSDI & SSI)

To ease financial hardship imposed on American workers and families by chronic disabling conditions, the Social Security Administration instituted several safety net programs under the Social Security Act. The most common are the **Social Security Disability Insurance program (SSDI)** and the **Supplemental Security Income (SSI)** program.

SSDI is for disabled workers with sufficient work credits, whereas ***SSI*** benefits are designed for elderly, blind or disabled individuals with low income and few resources. While this paper deals more with SSDI for working individuals, medical eligibility for disability is evaluated in the same way for both SSA programs.

Applying for and winning SSDI is a complicated process. The difficulties are evident when you examine the extremely low initial approval rate for applicants – which is currently about 30 percent.

Long-Term Disability (LTD) Insurance

Many who develop disabling conditions are covered for income loss by **long-term disability insurance**, either through their employee benefits plan or privately purchased disability insurance policies.

LTD insurance companies—such as Liberty Mutual, Unum, The Hartford, MetLife, Prudential, Cigna and dozens more—sell disability policies that have various benefits and features. As a working individual with MS, you may have bought an LTD policy, either stand alone or to supplement a group plan, knowing that one day your probability of needing coverage is higher than most.

But LTD claims for multiple sclerosis are often denied and wind up in litigation or abandoned. Case law is littered with cases where insurance companies have wrongfully denied disability insurance claims based on MS.

How SSDI Benefits Affect Your LTD Benefits

SSDI and LTD benefits are often intertwined because many people will claim both benefits. SSDI is generally viewed as the primary disability benefit and LTD considered secondary or "supplemental."

The reason is because of how LTD benefits are structured. LTD benefits typically pay a claimant 60% or so of their former monthly salary minus "offsetable" SSDI benefits. In other words, SSDI pays first, then LTD pays secondarily to get the disabled claimant paid up to their 60% policy maximum.

The procedures and laws followed by SSA *vs*. insurance companies are different. Getting approved by SSA does not mean an insurance company will approve your LTD claim. But in terms of *proving disability*, the depth of medical and vocational criteria required to prove disability based on MS in a Social Security claim is a good measuring stick for how to prepare a solid LTD insurance claim or an appeal that will stand up in court.

For these reasons, this paper is divided into three primary sections: the first lays out challenges unique to MS disability claims with a checklist to refer to; the second deals with SSDI claims; and the third with LTD claims.

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I. Characteristics of Multiple Sclerosis Disability Claims

In terms of proving long-term disability, MS can be particularly difficult. In your disability claim for multiple sclerosis, it is important to be aware of the unique characteristics of the disease.

Multiple sclerosis can be hard to definitively diagnose. Equally important, while MS continually progresses, the symptoms of it tend to "wax and wane." The latter is usually referred to as episodic "remittance and relapses," and often complicates proving the severity of the condition. While "waxing and waning" is true in the general sense of the more notable symptoms, it is not entirely accurate when you get down to the functional changes that are occurring due to the pathologic state of MS.

Several patterns are possible in the way the onset of MS first presents and the way in which it manifests over time. The **four subtypes** of MS are:

- **Relapsing-remitting MS (RRMS)**: in this form, MS first occurs as a series of attacks interspersed with complete or partial improvement (remission), followed by some future relapse.
- **Secondary progressive MS (SPMS)**: begins as a relapsing-remitting (RRMS) form, then later becomes a primary-progressive (PPMS) form.
- **Primary progressive MS (PPMS)**: marked by a slow progression in clinical severity. You may have times when things are stable or seem to slightly improve; however, a progressive neurological decline is constant.
- **Progressive-relapsing MS (PRMS)**: from the onset, this form of MS presents as a steadily worsening disease with acute relapses.[1]

The *remitting stage* of RRMS and PRMS is a remission of readily perceived symptoms and a temporary halt in the noticeable progression of such symptoms. This is due to a halt in immune system attacks on nerve tissue. This does not equate to a halt in the progression of the disease itself, nor does it mean resolution of disease progression.

So, the use of the term **remission** in the case of multiple sclerosis is very different from its use in other medical diseases such as cancer.

To better explain: with MS, "relapse" occurs when the immune system stages an acute inflammatory attack on nerve tissue (think large scale). These attacks usually occur in new areas of the central nervous system than previous attacks, which causes new symptoms with varied manifestations.

Because it is an acute large-scale attack by the immune system, there is acute large-scale inflammation in the area of attack which causes profound and/or debilitating symptoms often including an acute cognitive decline. But when the acute large-scale inflammation dies down, the profound symptoms settle down as well. It may seem like your MS is getting better (remitting)—but in reality, the wound is still there.

[1] Morton, David A., *Medical Issues in Social Security Disability*, James Publishing, Revision 16, March 2019.

The acute inflammation and resulting profound symptoms settle into a chronic lesion that continues to disrupt transmission with nerve impulses causing further death and demyelination of nerve tissue, resulting in the chronic symptoms.

Each relapse means new, permanent brain damage/lesions, so it is impossible to return to your previous state of health. Additionally, the cognitive dysfunction caused by MS brain damage persists. Even when physical symptoms are less severe, the cognitive issues prevail.

Beware of the Disability Examiner's Perception of "Remission"

In reality, using the term "remission" in MS does a disservice to those affected by it, because it never really stops progressing nor does it ever go away. Years ago when MS was first described with established diagnostic criteria, the physicians who named the subtypes did not have the knowledge of its continuous progression that we have today. They did not know that the perceived remission was not true remission.

Check List – Issues Unique to Multiple Sclerosis Disability Claims

✓ The disability adjudicator, whether from the SSA or a private disability insurance company, is likely to:

- **Not understand or accept that the nature of *remission* in MS is very different from other medical diseases.** Multiple sclerosis never stops progressing even during periods of remission. With each relapse, there is never a complete recovery to pre-relapse baseline. You may perceive the chronic symptoms to be minor in comparison to the severe symptoms you were experiencing during the acute attack. The symptoms are still present, just must more subdued. Thus using the word "remission" is a serious misnomer, leading to the common misconception that MS comes to a full halt during such periods.

- **Underestimate claims of fatigue**.

- **Fail to develop your claim for a mental impairment**, unless you specifically allege the impairment. For example, because people with MS often experience depression, an adjudicator may fail to ask you specifically about depression or other mental problems.

- **Evaluate MS as a motor or sensory impairment alone**, with minimal consideration of mental impairment. Even if it is clear a mental listing would not be satisfied, routine neuropsychological testing may be useful in claimants with multiple sclerosis.

- **Fail to realize that exertion can increase the severity of MS signs and symptoms** (very different from the issue of fatigue).

- **Be unaware that hot environments, or getting hot from overexertion**, **can trigger a worsening** of either physical symptoms or cognitive abilities in individuals with MS. Consequently, SSA cannot realistically test for these RFC issues, and furthermore, the adjudicator may not propose adequate environmental restrictions, such as avoiding work at temperatures over 75°F.

- **Not comprehend the overall severity of a combination of impairments** that should result in a finding of equivalent severity to the listing.

- **Not realize the disabling effect of severe bowel or bladder incontinence** associated with MS.

- **Fail to understand that multiple sclerosis often causes autonomic dysfunction** – a condition in which the autonomic nervous system does not work properly. This can affect breathing, heart rate, blood pressure, temperature, sweating, and blood glucose.

You must be vigilant to provide explanations and evidence about these and other issues *unique to your MS claim* to ensure adjudicators properly value these facts during the decision process.

II. Filing for Social Security Disability Benefits for Multiple Sclerosis

Getting Started: The Initial SSDI/SSI Application

SSDI/SSI claims are initiated by

- filing a claim in person at the local district and branch Social Security office
- calling (800) 772-1213
- filing online at SSA.gov

You will be asked a series of questions regarding your past work, medical conditions, education, and you will need to list your doctors and prescriptions. However, filing for SSDI benefits is far more than filling out forms. With a 70% rejection rate, it is clear that most applicants do not suspect the **depth of evidence needed to actually win benefits**.

The bulk of this SSDI section illustrates the extent of information Social Security adjudicators need before they will make a decision to award benefits on the basis of multiple sclerosis, whether in the course of an initial filing or during the appeals process.

If SSA denies benefits, you can appeal that decision. The appeals process gives you the chance to perfect your claim and ask SSA to reconsider. Your chances of approval significantly improve during appeal. There are four levels of appeal: Reconsideration, ALJ Hearing, Appeals Council Review, and Filing a Lawsuit in Federal Court. We further explain the SSDI appeals process at the end of this section.

How SSA Defines "Disability"

SSA's statutory definition of disability has both a **medical** and a **vocational** component:

Medical: SSA defines disability as the inability to engage in any Substantial Gainful Activity (SGA) 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. "SGA" means work involving significant physical or mental activities and is typically performed for pay or profit.

Vocational: You will be found disabled only if your impairments are so severe that you are not only unable to do your previous work but cannot, considering your age, education, and work experience, engage in any other kind of substantially gainful work.

Building Your Case for Social Security Disability Benefits

It is your burden to prove you have an impairment that fits SSA's definition of disability. You must show you are unable to engage in SGA. This can be difficult to prove when adjudicators find multiple sclerosis cases where they believe the signs and symptoms are not "severe enough." You must help your case by documenting all symptoms, track worsening symptoms, record and explain issues regarding daily activities, include testimony of family, friends, co-workers, and list prescriptions for any assistive devices as an MS patient.

The Five Step Sequential Evaluation Used to Determine Disability

The SSA applies the above definition of disability by following a **Five Step Sequential Evaluation** in deciding whether you are *disabled* and therefore entitled to SSDI or SSI benefits. You must meet or equal SSA's medical listing for multiple sclerosis or prove that your MS has limited your functioning so much that you can no longer work.

The Sequential Evaluation is tough and complicated. It consists of a 5-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.

Flow Chart of the Five-Step Sequential Evaluation

STEP 1: Is claimant engaged in **Substantial Gainful Activity (SGA)**

NO: Go to Step 2 ↓ **YES:** Not Disabled STOP

STEP 2: Does claimant have a **severe impairment** expected to last 12 months or to result in death?

YES: Go to Step 3 ↓ **NO:** Not Disabled STOP

STEP 3: Does claimant's impairment **meet or equal a medical listing** described in the SSA Listing of Impairments?

Yes: *Claimant is disabled per Medical Listing* STOP

No: Go to Step 4 ↓

STEP 4: Can the claimant perform any of his or her **Past Relevant Work?**

(Considering the claimant's **residual functional capacity**, what the claimant can still do even with his or her impairments)

NO: Go to Step 5 ↓ **YES:** Not Disabled STOP

STEP 5: Can claimant do any **other work** available in the national economy, considering that person's age, educational background, work experience, and within the claimant's residual functional capacity.

NO: Claimant is disabled according to Vocational Standards STOP

Any contrary answer will lead to a finding of Not Disabled.

Step One: You Are Not Working

If you still work and engage in SGA, SSA will find that you are not disabled regardless of your medical condition, age, education, and work experience.

Step Two: Proving You Have a Severe Impairment

You must have a severe impairment. An MS disability 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 your physical or mental abilities to perform basic work activities.

Step Three: Proving You Meet or Equal SSA's Medical Listing for Multiple Sclerosis

To be found disabled at Step Three, you must prove that your impairment meets or equals SSA's medical listing under section 11.00 Neurological Disorders, and Multiple Sclerosis specifically under 11.09.

If you meet or equal a listing, SSA will find you are disabled without considering your age, education, and work experience. In other words, you can skip proving steps Four and Five of the sequential evaluation because a listed impairment is considered presumptively disabling.

Listing 11.09 – Multiple Sclerosis, Characterized by A or B:

There are two separate listing criteria for MS; you need to meet only one, A *or* B, as follows:[2]

A. **11.09A – Extreme Limits:** Disorganization of motor function in two extremities, resulting in an extreme limitation in the ability to stand up from a seated position, balance while standing or walking, or use the upper extremities; **or**

B. **11.09B – Marked Limitations:** Marked limitation in **physical functioning** ("persistent or intermittent symptoms that affect your abilities to independently initiate, sustain and complete work-related activities..." that include standing, balancing, walking, or using two extremities, **and** in one of the following **cognitive functions**:

   1. Understanding, remembering, or applying information; **or**
   2. Interacting with others; **or**
   3. Concentrating, persisting, or maintaining pace; **or**
   4. Adapting or managing oneself.

How Multiple Sclerosis Is Evaluated under Listing 11.09

The SSA listing states the following:[3]

"MS is a chronic, inflammatory, degenerative disorder that damages the myelin sheath surrounding the nerve fibers in the brain and spinal cord. The damage disrupts the normal transmission of the nerve

[2] Social Security Administration (SSA). *Disability Evaluation Under Social Security, Listing of Impairments, Adult Listings (Part A*) 11.00 Neurological Disorders. https://www.ssa.gov/disability/professionals/bluebook/11.00-Neurological-Adult.htm (accessed May 5, 2019).

[3] SSA. *Listing of Impairments*, 11.00 Neurological Disorders.

impulses within the brain and between the brain and other parts of the body, causing impairment in muscle coordination, strength, balance, sensation, and vision. There are several forms of MS, ranging from mildly to highly aggressive. Milder forms generally involve acute attacks (exacerbations) with partial or complete recovery from signs and symptoms (remissions). Aggressive forms generally exhibit a steady progression of signs and symptoms with few or no remissions. The effects of all forms vary from person to person."

SSA evaluates disability related to MS by looking at:

"...signs and symptoms, such as flaccidity, spasticity, spasms, incoordination, imbalance, tremor, physical fatigue, muscle weakness, dizziness, tingling, and numbness when determining someone's ability to stand, balance, walk, or perform fine or gross motor movements. When determining limitations of physical and mental functioning, SSA will consider other impairments or signs and symptoms that develop secondary to the disorder, such as fatigue; visual loss; trouble sleeping, impaired attention, concentration, memory, and judgement; mood swings; and depression."

Relevant Tests Regarding Multiple Sclerosis

Some of the medical tests the SSA wants to see in determining disability as a result of Multiple Sclerosis include:[4]

[4] Morton, David A. *Social Security Disability Medical Tests*. vol. 14. James Publishing, 2016.

- Dejerine's Sign
- Posturography
- Anorectal Manometry (ARM)
- Aquaporin-4 Antibodies
- Balance Error Scoring System (BESS)
- Cerebrospinal Fluid (CSF)
- Deep Tendon Reflexes (DTRs)
- Expanded Disability Status Scale (EDSS
- Magnetic Resonance Imaging (MRI) of Spinal Cord and Spine
- Magnetic Resonance Neurography
- Motor Evoked Potentials (MEPs)
- MRI Biomarker for Back Pain
- Myelography
- Somatosensory Evoked Potentials (SEPs)
- Straight Leg Raising (SLR) Test
- Sagittal Section of Brain

Questions from the Adjudicator to Your Doctors

Listed below are the types of questions the SSA adjudicator will ask your doctors. It may be helpful to give these to your doctor ahead of time:[5]

[5] Morton, *Social Security Disability Medical Tests*.

- Has this patient been diagnosed with multiple sclerosis (MS)? If Yes, please state whether the diagnosis is: Definite MS, Probable MS, Possible MS
- Date of diagnosis?
- Date of last examination?
- What is the type of multiple sclerosis diagnosed?
    - Relapsing-remitting
    - Primary-progressive
    - Secondary-progressive
    - Progressive-relapsing
- What imaging has been done?
- What is the size and location of lesion(s), if any?
- Have evoked responses been done? If so, what type?
    - Visual (VER)
    - Somatosensory (SEP)
    - Auditory evoked response (AER) ❑
- Describe other testing results or attach copy of reports.
- Has cerebrospinal (CSF) analysis been done? If Yes, did the analysis include:
    - Oligoclonal bands
    - Myelin basic protein
    - CSF IgG/Serum albumin ratio
    - IgG Index
    - IgG synthesis rate
- Describe the CSF results or attach report.
- At the date of your last examination, provide the following information (if known):
    - Motor aphasia? If Yes, please answer the following:
        - Writing: ❑ Good ❑ Moderately impaired ❑ Severely impaired
        - Verbal expression: ❑ Good ❑ Moderately impaired ❑ Severely impaired
        - Other (e.g., deficit in naming):
        - Sensory aphasia? If Yes, please answer the following:
        - Reading comprehension: ❑ Good ❑ Moderately impaired ❑ Severely impaired
        - Speech comprehension: ❑ Good ❑ Moderately impaired ❑ Severely impaired
        - Other (e.g., object identification by touch):
    - Muscle weakness or paralysis ❑ Yes ❑ No ❑ Unknown
    - Can the patient arise from a squatting position? ❑ Yes ❑ No ❑ Unknown
    - Can the patient walk on toes? ❑ Yes ❑ No ❑ Unknown
    - Can the patient walk on heels? ❑ Yes ❑ No ❑ Unknown
    - Lift left upper extremity above shoulder level ❑ Yes ❑ No ❑ Unknown
    - Lift right upper extremity above shoulder level ❑ Yes ❑ No ❑ Unknown
- On a scale of 0 (negligible) to 5 (normal), please rate muscle strengths in certain muscles groups
    - Does the patient have bowel or bladder dysfunction?
        - If Yes, please describe. ❑ Mild ❑ Moderate ❑ Severe
    - Is there sensory loss? ❑ Yes ❑ No ❑ Unknown
        - Is there spasticity?
          If Yes, describe the location and severity. ❑ Mild ❑ Moderate ❑ Severe
        - Is gait abnormal? If Yes, please describe (e.g., hemiparetic, wide-based).

        - Is there a tremor? If Yes, please describe location and severity.
    - Is there a reproducible decrease in motor function with substantial muscle weakness on repetitive activity, demonstrated on physical exam? ❑ Yes ❑ No ❑ Unknown
    - Does the patient have a mental disorder? If Yes, please describe.
    - Does the patient have visual deficit of any kind?
    - Does the patient have vertigo?
    - Does the patient have seizures? ❑ Mild ❑ Moderate ❑ Severe
    - Does the patient have pain?
    - Does the patient have a history of easy fatigability?

Residual Functional Capacity – Your Path to Winning Your Case if You Don't Meet SSA's Medical Listing for Multiple Sclerosis

When MS symptoms are not severe enough to meet or equal SSA's listing at Step 3 of the Sequential Evaluation, SSA will look at your **Residual Functional Capacity (RFC)** to assess if you are disabled at Steps 4 and 5.

Residual Functional Capacity is what you can still do despite your physical or mental impairments. It 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.

RFC is expressed in terms of **five exertional** classifications of work: se*dentary, light, medium, heavy,* and *very heavy* work.

The five exertional RFC levels are further defined in terms of the degree that the **seven primary strength** demands of jobs are required:

- three work positions (sitting, standing, and walking) and
- four worker movements of objects (lifting, carrying, pushing and pulling.)

Common RFC Issues with Multiple Sclerosis

SSA will assess your ability to perform the following tests in regards to MS symptoms of fatigue and weakness with motor function, significant trouble using your hands, limbs, or walking and balance, and visual or mental impairment:

- Exertional Limitations (lifting, carrying, pushing, pulling, sitting standing walking)
- Postural Limitations (climbing, balancing, stopping, crouching, crawling)
- Manipulative Limitations (reaching, handling, fingering, feeling)
- Visual Limitations (near and far acuity, depth perception, field of vision)
- Communicative Limitations (hearing, speaking)
- Mental Faculties (concentration, understanding and remembering instructions, coping in work situations and interacting with supervisors or coworkers)

- Environmental Limitations (extreme temperatures, humidity, lighting, heights)

Step Four: Proving You Can't Do Your Past Relevant Work

In light of your RFC, at Step Four of the process your impairments must prevent you from doing *past relevant work*. The SSA will normally only address work that meets the following criteria:

- you performed the work in the prior 15 years;
- the work lasted long enough for you to learn to do it; and
- the work was substantial gainful activity

Step Five: Proving You Can't Do "Any Other Work"

Your multiple sclerosis and related impairments must prevent you from doing *any other work*. If you cannot do any work you have done in the past because you have a severe impairment, SSA considers your residual functional capacity, age, education, past work experience, and transferrable skills in the case of semi-skilled or skilled occupations, to see if you can do other work. If you cannot, SSA will find you disabled.

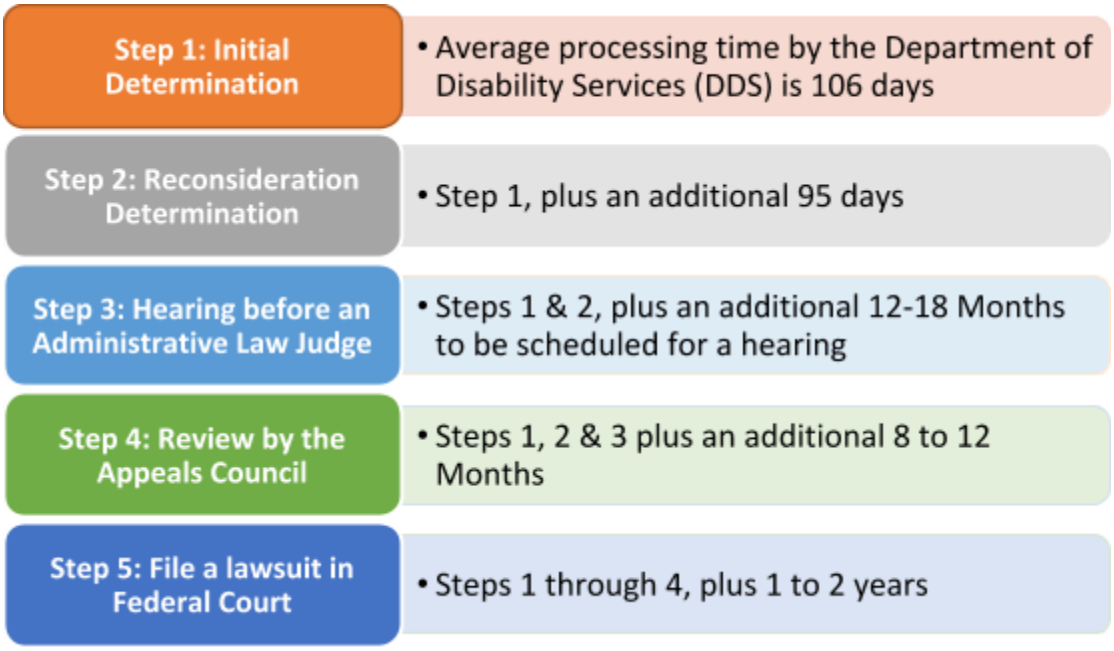
While you bear the burden of proof at Steps 1–4 of the sequential evaluation process, at the fifth step, the burden shifts to the SSA Commissioner to show that you can perform other work.

SSA Denied Your Claim: How to Appeal

With only a 30% approval rate of initial claims, do not be surprised if the SSA denies yours. Now it is time to appeal the denial, and the clock is ticking. You must file the appeal within 60 days of the date on the denial letter. Chances of winning multiple sclerosis disability benefits significantly improve under the Social Security appeals process.

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. As shown in the following chart, there are four steps, or levels, of administrative appeals for Social Security disability claims. In Step 5, if all administrative appeals are exhausted, you may file a lawsuit in federal court to review your case and determine if you received a fair hearing.

Steps in the SSA Appeals Process



***The processing times are approximate and may vary.**

What Is an ALJ Hearing?

The most important level of appeal before the Social Security Administration is the ALJ Hearing (Step 3 in the SSA Appeals Process). The hearing is conducted by an Administrative Law Judge (ALJ) whose 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.

More than half of ALJ decisions nationwide are in the claimant's favor. **These are the best odds of winning at any step in the entire Social Security appeals system.**

Areas of testimony at the ALJ Hearing include: Your work history, education, medical history, symptoms, your work limitations, and how your condition affects daily activities.

Do You Need Legal Support to Win an SSDI Appeal?

Statistically, SSDI claimants who retain a Social Security Disability attorney to represent their appeals are much more likely to win than claimants who are not represented. Experienced lawyers will also have the resources that can help a borderline claim based on multiple sclerosis be successful. Please see Section IV. *Hire a Disability Attorney or Go It Alone?* for more about attorney representation.

III. Filing for Long-Term Disability Insurance Benefits for Multiple Sclerosis

Like many living with this progressive disease, you may have worked for years with your condition and now need to claim your benefits under your LTD insurance policy. Your insurer may not understand your multiple sclerosis and how it impedes your ability to work. You will need to show the insurance company how your MS has worsened over time, and prove that you cannot work any longer.

Types of Disability Insurance Coverage: Short-Term & Long-Term

Disability insurance is often offered and paid for, at least in part, by employers as a group benefit to employees. Individual, or private, disability insurance is purchased directly from an insurance broker by an individual.

Short-Term Disability (STD)

Short-term disability insurance helps replace lost wages when a disability such as MS keeps you from working for a limited span of time. Generally, STD benefits are:

- paid anywhere from one week to six months
- paid for by your employer
- usually 100 percent of your salary.

STD benefit claims are often the first step in the long-term disability insurance claims process.

Long-Term Disability (LTD)

Long term disability insurance provides financial coverage in the event your multiple sclerosis symptoms and related loss of function prevent you from working for quite a long time, even permanently. Most LTD policies have an "elimination" or waiting period. This means you must first apply for and receive all the STD benefits available, or satisfy a waiting period by being disabled for up to six months before you can even apply for LTD benefits.

LTD benefits are generally paid for 24 months if you cannot perform your **own occupatio**n. After this 24-month "own occupation" period, most policies require you to prove that you cannot perform **any occupation** to continue to receive benefits, potentially until age 65 or as defined in the policy.

How Are Long-Term Disability Benefits Paid?

Salary Percentage

Most policies pay 60 percent of your salary. If you work on a commission or other non-salaried basis, the insurance company will use a calculation described in the policy to arrive at a benefit amount.

Total Disability vs. Partial or Residual Disability

Most LTD policies will provide definitions of Total and Partial disability and the requirements of both. Generally, you are considered totally disabled if you cannot work at all. Your policy may also allow you

to work part-time or work at a lighter duty job because you are unable to work full-time due to your multiple sclerosis.

Partial benefits are payable if your MS causes your income to fall, usually 20 percent below your regular income. If you think you may be able to work part time and plan on filing for partial disability, you need to look at the mathematical formulas and limits very carefully.

The Social Security Offset

Most policies have a Social Security offset. This means if you receive a monthly Social Security Disability (SSD) benefit, the amount of the SSD check is "subtracted" from the monthly LTD check.

> **Example:** If you receive an LTD check for $2,000 a month and then begin to receive an SSD check for $1,000, the insurance carrier will reduce the LTD check amount to $1,000. You still receive a total of $2,000 a month, but $1,000 from SSD and $1,000 from LTD.

Other Possible Offsets

Other offsets may include worker's compensation benefits, certain retirement benefits, settlements from lawsuits, and state disability benefits. If the total of the offsets is higher than the monthly LTD benefit amount, most policies have a minimum payment of at least $100 per month or in some cases, 10 percent of the monthly LTD benefit.

Limitations and Exclusions: Does Your Policy Cover Your Condition?

Self-Reported Symptoms Limitation

Disability insurance companies are always looking for ways to reduce their liability in disability claims based on multiple sclerosis. One way is to continually ask for "objective evidence" meaning diagnostic tests like MRIs, X-rays or CSF analysis. Unfortunately, some MS symptoms, like pain, dizziness, numbness, and fatigue, do not show up on any "objective" tests, but rather are diagnosed by the doctor based on examination and patient reports.

Non-exertional limitations are also largely self-reported and therefore ignored for the most part by the insurance company. Common examples in multiple sclerosis claims include fatigue, intellectual and cognitive limitations, memory loss, mood swings, depression, and medication side effects.

Mental Health Limitation

Most policies have a 24 month mental health limitation. Suppose you develop depression secondary to chronic pain due to MS. Insurance companies often use this to try to classify your impairment as mental so that benefits will be paid for only 24 months. Insurers also try to limit benefits to 24 months for impaired memory or other cognitive problems caused by multiple sclerosis, especially when the disease is in the early stages and less medically identifiable.

Pre-existing Condition Exclusion

Most policies have pre-existing condition exclusions – guidelines that prevent someone from receiving benefits if certain illnesses or injuries occurred in the past. This is a favorite strategy of insurance carriers

who seek to deny claims based on multiple sclerosis. These exclusions usually kick in when you have been eligible for benefits for less than a year, but sometimes the stated period is two years.

There is also a "look back" period, usually the three months prior. If you apply for LTD benefits less than a year after you sign up for the benefit, the insurance company will look at your medical and pharmacy records for the entire year plus the look back period.

Do You Have an Individual or a Group Disability Policy?

- Coverage purchased on your own behalf is referred to as **privately purchased disability insurance**, or **individual disability insurance (IDI)**.

> **Example:** You were prescribed a medication for the treatment of anxiety during the look back period. Later, you develop serious problems with muscle spasms as your MS progressed. The same medication that was prescribed to treat your anxiety is now being prescribed to treat muscle spasms. Your insurer gets your pharmacy records and claims that you were being treated for muscle spasms because you took the medication. Your insurer now refuses to pay benefits based on the pre-existing condition exclusion.

- If your disability policy is sponsored by or offered through your workplace as part of an employer's group insurance plan, you likely have a **group disability insurance policy**.

Why is this difference important? There are major disparities in how they work—especially if you need to appeal a claim you believe has been wrongfully denied.

- **Individual policies are regulated under state insurance laws** regarding bad faith and contract law. These laws are designed to protect the insured from unfair practices by insurers.
- **If you have a group policy through your employer,** a whole different set of laws apply. These are complex federal laws under the Employee Retirement Income Security Act and known by the acronym "**ERISA**." To challenge a disability denial under an ERISA governed plan or policy, you must bring the claim according to ERISA regulations and procedures.

Unfortunately, ERISA law gives insurance companies many outlets to delay or deny a valid disability insurance claim based on multiple sclerosis. Insurers face no real penalties for denying ERISA claims. With nothing to lose, they often use this to their advantage to unfairly avoid paying out disability benefits. Possible exceptions to ERISA include government employees, church plans, self-employed individuals, some partnerships and pass-through plans.

Protections ERISA Plans Don't Have

The following chart illustrates exactly what protections you have in an individual claim dispute under state law, and what protections you lose when you have a group disability plan covered by ERISA laws.

Difference Between Group (ERISA) & Individual (non-ERISA) Disability Claims

Group Disability Insurance (ERISA)	Individual Disability Insurance (Non-ERISA)
Employer-sponsored group benefit plan	**Privately-purchased policy covering only you**
Claims are governed by strict federal ERISA law that favors the insurer, not the claimant. If your claim is wrongly denied: ● **You can only sue for what the insurance carrier should have paid you in the first place**. ● **You must appeal to the same company** that denied your claim. ● **Attorney fee reimbursement is rare.** ● **No Right to Jury Trial:** Juries are the great equalizer in the civil justice system. In an ERISA case, the insurer does not worry about a jury holding them accountable. ● **No new evidence is allowed** once the internal administrative appeals are exhausted. ● **No Treating Physician Rule:** Insurer can ignore your own doctor's opinions and rely on their own doctor's opinions as they see fit. ● **Little Government Regulation** as to how the insurance policy must be written; insurers are free to write the policy as they wish. ● **You Must Prove the Insurer "Abused Its Discretion":** In most *ERISA* claims, you must prove the insurance carrier "abused its discretion" when it denied your claim—a tough standard requiring you to show the insurance company had "No Reasonable Basis" for denying your claim.	Claims are governed by state insurance & contract laws designed to protect insureds. If your claim is denied: ● **You are entitled to all relevant procedural rights and remedies available to you in your state:** ✔ Deceptive trade acts or unfair practices ✔ Bad faith ✔ Punitive damages ✔ Emotional distress ✔ Consequential (or special) damages ✔ Loss of credit claims ✔ Prejudgment interest for breach of contract ✔ Tortious interference with contract ✔ Statutory insurance violation claims ✔ Mandatory attorney fee reimbursement ● **You have the right to a jury trial**. ● **You have the right to present evidence and cross-examine** any witnesses testifying for the insurance company. ● **"More likely than not" standard**: A civil trial generally observes a more favorable standard of review known as the "more likely than not" rule, a.k.a. "preponderance of the evidence." ● **Often no offset of other benefits:** Most higher-end individual policies will not allow for benefit offsets.

Getting Started: Appling for LTD Benefits based on Multiple Sclerosis

- Group policy claim forms are available at your employer's Human Resources department.
- Private policy claim forms are available to you directly from the insurance provider.

- Request a copy of your disability policy or plan.
- Take the provided Attending Physicians Statement form to your doctor who will indicate that you are disabled.
- Send completed forms to the insurance carrier along with a list of all your treating doctors and health care providers.
- Once the insurance carrier receives all the medical records, it will begin investigating the claim.

As with SSDI claims, filing for LTD benefits for multiple sclerosis is far more than filling out application forms.

The Definition of Disability

There is no single legal definition of disability. Every insurance company has its own definition and none are the same as the Social Security Administration's definition. The definition of disability is explained in your policy. *Remember:* the insurance company defines disability, interprets the terms in its definition and decides whether you are disabled or not. Because they decide whether you will receive benefits, this often creates an inherent financial conflict of interest.

"Own Occupation" Definition – Usually Limited to the First 24 Months

For the first 24 months or as defined in the policy, you only have to be unable to perform your "own occupation." Usually the definition is akin to, "due to sickness or injury the insured is unable to perform the material and substantial duties of his or her own occupation."

"Any Occupation" Definition

After your short term disability period ends, ongoing or progressing multiple sclerosis symptoms may rule out returning to work. If LTD is a separate policy, now it's time to file for long-term benefits. After 24 months, you must prove that you cannot perform "any occupation." This is a pivotal shift in the definition of disability that many insurers use as an opportunity to deny or terminate valid claims based on MS. Usually the definition of disability resembles "The insured is unable to engage in any occupation that he or she can perform based on education, background, and skills." Insurers will find you are no longer disabled because you can do some form of sedentary or less strenuous occupation.

> **Example**: Nursing is considered a "medium work" occupation. Medium work requires a person to lift up to 50 pounds at a time, and stand or walk about six hours in an 8-hour workday. If you are a nurse and you develop MS, you may soon find that you are no longer able to lift objects weighing over 5 or 10 pounds and you cannot walk or stand for more than 1–2 hours during an 8-hour span. In this case, you would not be able to perform your own occupation.

Tips to Help You Win Disability Insurance Benefits for Multiple Sclerosis on Your Initial LTD Application

1. **Read your policy; learn how your coverage works.**

   How do your STD and LTD benefits work together? What pre-existing conditions or other impairments are excluded (avoid basing your claim on them!) What income offsets will impact the dollar amount of your disability payments? In some cases, STD and LTD benefits will have separate polices, make sure you get a copy of each policy. Observe all filing and appeal deadlines to the letter.

2. **Fill out forms carefully.**

   Watch out for misleading questions. Expect insurers to ask you to provide the same information over and over, and be consistent in your statements. Never use absolutes to describe your multiple sclerosis-related limitations. Statements like "I can never lift 10 lbs." or "I always require a cane to walk" can easily be contradicted. Once you are contradicted, you will no longer be believed. Instead use words like "frequently, occasionally or seldom." The Attending Physicians Statement must be completed with specific detail or it will almost always result in a claim denial. List all medical providers, their current contact information, and prescriptions and side effects of each medication.

3. **Make a working copy of your application.**

   The application you submit should be neat, clean and present a well-reasoned theory of disability. It may be necessary to do several versions before it's perfect.

4. **Get ready to file for Social Security Disability.**

   Most insurers require you to apply for Social Security Disability benefits within a year of your disability. The insurer gets to offset (subtract) any SSDI benefits from what they owe you.

5. **Watch out for Social Security "firms" recommended by your LTD Insurer:**

   Their purpose is to collect your back due SSDI benefits to reimburse your insurance company. *This is an obvious conflict of interest.* Don't be fooled. Get your own lawyer that answers to no one but you.

6. **Prepare your doctors to support your claim.**

   Alert them to look for forms or calls from the insurer, and ask them to respond promptly to meet deadlines. Provide updated contact information for your doctors, so the insurance company can't say they couldn't contact them.

7. **Write down your job description and compare it to your employers' version of your job description.**

   Your employer's version may not match what you really do. During the initial *own occupation* term of your disability claim, it is critical that you have a written job description that describes all physical, mental and travel requirements of your "own" job. Your doctor's explanation of your limitations caused by multiple sclerosis must clearly show that you can't do that job any longer.

8. **Be prepared for video surveillance and unannounced home visits.**

   Insurers put great effort into trying to catch you doing something you've previously said you can't do. Surveillance creates illusions and is up to interpretation—and has cost many MS claimants their benefits. A disability lawyer can prove in court that any video footage unfairly representing the claimant is unreliable and misleading. If an investigator makes an unscheduled visit to your home, it is your right to refuse and ask them to reschedule at *your* convenience.

9. Work with attorneys who know ERISA and state insurance law.

Very few attorneys are familiar with ERISA law. To maximize your chances of a successful disability claim, talk to an experienced disability attorney before filing your application— preferably one who has successfully handled multiple sclerosis cases, and definitely do so before you file an appeal of a denied claim.

If Your Disability Claim is Denied: The Administrative Appeal

If the claim is denied, you will receive a denial letter. This letter is important because it will list what evidence the insurance company reviewed when making its decision, and who reviewed the evidence—such as an in-house Nurse Case Manager, a doctor hired as a consultant, or only non-medical reviewers such as a Senior Claims Adjuster.

The denial letter should state the reasons the claim was denied and what medical evidence you need to prove disability. The denial letter also gives important information for an appeal, including where and when the appeal must be received.

Appeal Process - Group LTD Claims (ERISA)

Under federal law, you cannot bring a claim under judicial review until an internal review is carried out. You appeal to the insurance company. This internal review, or pre-suit *administrative appeals* procedure, begins when you submit your proof of loss. At that point, the Plan (i.e., the insurance company) has a set amount of time to carry out an internal review before the claim is taken to a judicial court.

The Time Limits for Filing Your Appeal

The denial letter will give the time limits for filing the appeal. If the policy is a group benefit to employees and therefore governed by ERISA, the appeal deadline is 180 days.

- The Plan has **45 days** to make a decision on your claim.
- The Plan may use **two 30 day extensions** based on elements outside of their control, such as a claimant's failure to submit documents necessary to make a decision based on their claim.
- You must appeal a denial within 180 days of that denial.

  Do not skip this step! If you do you will lose your right to file a lawsuit.
- The Plan has **45 days** to resolve any appeal with **one 45 day extension**.

Appeals Process - Individual LTD Claim (Non-ERISA)

Most non-ERISA policies also give the claimant 180 days to appeal. You are not required to exhaust the administrative appeals before filing a lawsuit.

What applies to all state law (non-ERISA) claims is that you should give your insurer every opportunity to do the right thing and put it in writing. If the insurer fails to comply with your requests by the statutory deadlines, litigation would proceed to a jury trial in state court.

The Statute of Limitations for Civil Action

Multiple sclerosis claimants need to pay close attention to the timeline for filing a lawsuit. While ERISA sets rigid internal deadlines for the appeals process, ERISA does not recognize a time limit, known as a statute of limitations, to bring a lawsuit for wrongfully denied benefits.

However, your ERISA plan may contain a limitation provision that goes into effect as soon as you file your claim. This would be a **contractual statute of limitation** and is measured from the time you file your claim.

The appeals process can take up a great deal of your limited time to file a lawsuit. If you think that the Plan is dragging out the appeal procedure to stop you from filing a lawsuit within the applicable limitations period, meet with an ERISA attorney as soon as possible.

Load the Record While You Can!

Many times, the medical record itself is not enough to fully support an administrative appeal. How the medical evidence is presented and expressed, or how an injury or illness has been detailed and explained is what really makes a difference.

During the administrative appeal process, medical records, medical literature and articles, doctor's opinions, letters from friends or employers, photographs and all other types of evidence that document your multiple sclerosis and related impairments can be submitted and made part of the "record."

Remember: Once all appeals are "exhausted" the *record is closed*. This means when a lawsuit is filed, new evidence in support of your MS-based disability case cannot be added to the record. That is why it is so important to **fully load the record during the appeals process**. An experienced attorney will understand the importance and ensure that the record is loaded.

Strengthen Your Claim with Medical and Vocational Evidence

The procedures and laws followed by the SSA vs. insurance companies are quite different. But as for *how to prove your multiple sclerosis claim,* the **medical and vocational criteria** required by SSA are most comprehensive. If an insurance carrier has denied your claim for MS disability benefits, you must improve and develop your claim. It will serve you well to emulate the scope of evidence and the extent of information required during the SSDI process.

Additionally, you want to factually rebut every reason for denial listed by the insurer in the denial letter. This is the path to the strongest LTD appeal.

IV. Hire a Disability Attorney or Go It Alone?

In an ideal world, you would never need a lawyer to help you fight for the benefits you have paid for and deserve. The problem is the complexity that the disability process has dropped upon all disability claimants, and the enormous strains people coping with multiple sclerosis encounter along the way. To win a claim, players on both sides must carry out vitals steps correctly and not everyone is on your side.

The following may help you see the benefits of attorney representation, especially if your initial claim has been denied or terminated.

Do You Need an Attorney to Help You Win Social Security Disability Benefits?

Technically, no, but consider this: In talking with several fellow trial lawyers recently, I mentioned that I routinely represent claimants in their disability claims before the Social Security Administration. The united reaction from the group was, "It's almost impossible to win one of these cases. If you could pick up a pencil and fill out the application, you aren't going to be found disabled. "

A survey by the *Houston Chronicle* partially confirms this view, but also reveals how good lawyering can go a long way towards helping honest taxpayers get the SSDI payments they deserve and have earned through their years of payroll deductions. The *Chronicle* found that—while less than a third of all non-represented claimants prevailed before the SSA—roughly two-thirds of all attorney-represented claimants won.

My own discussions with Administrative Law Judges are also revealing. Without exception, the ALJ's who I talk to prefer claimants who are represented by experienced Social Security disability lawyers. 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.

A Social Security disability attorney can help you throughout the application process from filing the application based on multiple sclerosis disability, to gathering the documentation needed to support your claim, to appealing a claim denial at all levels of the appeal process including Federal Court.

Tip: 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?

- The fees set by the SSA are the same for both attorneys and non-attorneys!
- Non-attorneys cannot represent you in Federal Court.
- Social Security law is complex. If a non-attorney mishandles your case, they are not held accountable; they are not regulated by state bars nor subject to the same disciplinary measure as lawyers.

Believe it or not, there are non-attorney reps that advertise on national TV. Always ask if they are attorneys before hiring anyone.

What about LTD Benefits for Multiple Sclerosis from an Insurance Company? Do You Need a Lawyer?

Insurance carriers are in business for profit. It's to their benefit to collect premiums while denying as many claims as they can. Many insurers will insist the claimant does not have a severe enough form of multiple sclerosis. Some insurers strong-arm claimants into believing their options are limited. Others even earmark legitimate claims based on multiple sclerosis as targets of denial. Big insurance is a tough opponent.

It is my experience that an attorney who regularly takes on billion-dollar insurance companies in settlements and lawsuits is essential to developing an appeal capable of reversing a denial and winning benefits.

Likewise, lawyers who are not familiar with disability insurance laws, the insurance industry, and the issues of MS itself will not always understand what has to be proved.

An experienced lawyer will anticipate unfair denial tactics, deal efficiently with medical and vocational experts, and is in his or her element arguing ERISA regulations and appearing before the federal judicial system. A good law firm is going to make things easy for you, and the insurance company will know they cannot run over you.

How Can I Afford an Attorney?

T**he SSA recognizes a claimant's need for legal help** and therefore has put regulations in place to allow for claimants to be represented by attorneys on a contingency fee basis. This means a claimant pays no money up front, and the attorney gets paid a percentage of the past due benefits only if the claimant wins their case.

The standard contingency fee arrangement 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 $6,000 maximum cap is lifted and the fee is up to 25 percent of all past due benefits.

In a long-term disability insurance case, many attorneys also accept cases on a contingency fee basis. The percentage paid on back due and future benefits varies from firm to firm and will often be a different percentage if won in the administrative appeal level rather than if the claim has to be litigated.

Disability claims are controlled by a complex set of laws and procedures, full of traps for the unwary and tangled with the unique challenges of proving a multiple sclerosis disability case. Although I may be biased, I believe that your chances of winning your claim are tremendously increased by having an attorney specializing in disability insurance represent you.

To your success,

Marc Whitehead, Esq.

About the Author

Marc Whitehead is the founding partner of Marc Whitehead & Associates, which he established in 1992 in Houston, Texas. Born on November 24, 1966, in Memphis, Tennessee, Marc was raised in Normangee, Texas and graduated in 1985 from Normangee High School as class valedictorian.

Marc attended Texas A&M University where he graduated in 1989 with a Bachelors 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 and is admitted to practice before all U.S. District Courts in Texas, the United States Court of Appeals for Veterans Claims and the United States Court of Appeals-Fifth Circuit.

Marc Whitehead served as President of the Houston Trial Lawyers Association (2009-2010), is a member of the Board of Directors of the Texas Trial Lawyers Association, and a member of the American Association of Justice.

Marc is also a member of the Texas Aggie Bar Association, the Texas Association of Civil Trial and Appellate Specialists and the Houston Volunteer Lawyers Association. Marc Whitehead is a Past Chairman of the Houston Bar Association Social Security Section and is a frequent lecturer on the topic of Social Security and Disability Law.

Any questions about your Multiple Sclerosis disability? Feel free to give our office a call at 713-228-8888 or email Marc at Marc@marcwhitehead.com. Please visit our website at DisabilityDenials.com.

Endnotes