



HOW TO WIN DISABILITY BENEFITS FOR

# RESPIRATORY DISORDERS

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## INTRODUCTION



*Never Give Up.  
Always follow up.*

Respiratory disorders include a host of illnesses that affect one's ability to breathe, causing lung obstruction, reduced airflow, and shortness of breath. The World Health Organization reports that chronic lower respiratory diseases—including COPD, asthma, occupational lung disease, and pulmonary hypertension—were the fourth leading cause of death in 2019.

Uniquely for 2021 and beyond, we face the unsettled science of the coronavirus (COVID-19) pandemic, where both short- and long-term complications of the lungs, heart, brain and nervous systems can impede a person's ability to work and function normally. Physicians worldwide are still learning how it spreads and the severity of illness it causes.

Millions of Americans suffer from some form of breathing impairment. Breathing disorders generally get worse over time—often to the point of disability.

Many of us take the simple act of breathing for granted. Only those who suffer from respiratory diseases fully understand how traumatizing these health conditions can be. Living with lung disease is difficult, scary, and can change a person's life forever. When your body is not getting enough oxygen, even the simplest tasks, such as getting dressed or walking a short distance, can be a huge challenge.

When a respiratory disorder disrupts your ability to work, you may be eligible for important forms of disability benefits, through federal programs under the Social Security Administration (SSA) or from private insurers.

### **What Are Your Chances of Getting these Benefits?**

Proving disability based on respiratory conditions carries unique challenges. You may be surprised to learn that most claims are initially denied—sometimes in error, sometimes because you need more or better evidence, and sometimes unfairly.

If your disability claim was denied by the SSA or an insurance company, please: Do not give up. There are proven steps you can take to increase your chances of winning disability benefits at every stage of your claim. You just need to know what they are.

This paper will guide you and your family through the laws, rules, and red tape that govern disability claims based on respiratory disorders—so you can provide the right information in the best way and succeed in getting the benefits you need.

Once you see how claim reviewers make their decisions, you will know what it takes to prove your disability claim initially or win on appeal.

## WHAT DISABILITY BENEFITS ARE AVAILABLE FOR RESPIRATORY DISORDERS?



### Social Security Disability Benefits (SSDI & SSI)

Under the Social Security Act, the Social Security Administration provides federal safety net programs to help relieve the financial strain on American workers and their families who must suddenly cope with chronic disabling conditions. The most common programs are Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI).

SSDI is insurance for workers with sufficient work credits who are no longer able to work because of a disability. SSI benefits are designed for elderly, blind, or disabled individuals with low incomes 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.

Winning SSDI is not easy, especially for complex conditions like respiratory disorders. Historically, Social Security disability applicants who do not enlist qualified help throughout the process have faced a low approval rate, which is currently about 30 percent.

### Long-Term Disability (LTD) Insurance

In addition to SSDI, you may also have disability income protection through long-term disability insurance, either from your employer's group benefits plan or a privately purchased LTD insurance policy.

Disability insurance companies—such as Liberty Mutual, Unum, The Hartford, MetLife, Prudential, Cigna, and dozens more—sell private disability policies to individuals, offering various disability benefits and coverage options. Unfortunately, many insurance companies wrongfully deny valid claims as a means to contain costs and protect profits.

Once denied, LTD claims based on respiratory problems are often abandoned. Claimants give up because they do not know how to fight back. To collect your rightful benefits, you must understand how your policy works, submit the right supporting evidence of your condition, and be ready and able to counter the tactics insurers use to avoid paying benefits.

## 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 is 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 for a respiratory disorder does not mean an insurance company will approve your LTD claim.

But in terms of proving you cannot work based on a respiratory illness, the extent of medical and vocational criteria required to prove disability in a Social Security claim is a good benchmark for how to prepare a solid LTD insurance claim or an appeal that will stand up in court.

This paper is divided into three main sections: the first lays out challenges unique to respiratory disorder disability claims with a checklist to refer to; the second deals with SSDI claims, and the third with LTD claims.

## TABLE OF CONTENTS

*And remember: if you or a loved one are struggling with a disabling respiratory condition, there are legal resources available to you!*

### I. Characteristics of Respiratory Disorder Disability Claims

1. How SSA Evaluates Respiratory Disorders
2. There Are Many Different Respiratory Disorders, with Different Presentations.
3. Do LTD insurance companies like Cigna, Unum, Guardian, or Liberty Mutual Use the SSA Listing of Impairments?
4. Getting Disability Benefits for COVID-19
5. Check List

### II. Filing for Social Security Disability Benefits for a Respiratory Disorder

### III. Filing for Long-Term Disability Insurance Benefits for a Respiratory Disorder

### IV. Hire a Disability Attorney or Go It Alone?

*The information in this paper is general and is not intended as legal advice on your case or specific circumstances, nor does it create an attorney-client relationship.*

# I. CHARACTERISTICS OF RESPIRATORY DISORDER DISABILITY CLAIMS



In terms of proving long-term disability, respiratory disorders can be particularly difficult. To win your claim, it is important to be aware of the unique characteristics of your particular impairment or combination of impairments.

The respiratory system is the network of organs and tissues that help you breathe. It includes your airways, lungs, and blood vessels. The muscles that power your lungs are also part of the respiratory system. These parts work together to move oxygen throughout the body and clean out waste gases like carbon dioxide.

When your respiratory system does not work properly, you have to work harder to breathe. Your body does not get the oxygen it needs to function. Waste gases like CO<sub>2</sub> are not sufficiently removed. Excess carbon dioxide can increase blood pressure and heart rate, and cause other long-term health issues. When oxygen levels drop and carbon dioxide levels rise excessively, this can lead to respiratory failure, and vital organs like the heart and brain can be affected.

Let's take a closer look at the unique characteristics of respiratory disorders, and what you need to prove from both a medical and functional standpoint that you are disabled.

## 1) How SSA Evaluates Respiratory Disorders

The Social Security Administration publishes a medical guide for their representatives and other physicians to determine if a claimant medically qualifies for disability benefits. This publication is the SSA Listing of Impairments (aka the Blue Book).

Listing 3.00 Respiratory Disorders has some of the most complex entries in the Blue Book. To qualify for benefits, each separate lung disease or breathing disorder has specific criteria that a claimant must satisfy in terms of the severity, frequency, and duration of symptoms, cycles, and episodes.

## 2) There Are Many Different Respiratory Disorders, with Different Presentations.

To begin, SSA considers respiratory disorders as follows:

- Disorders that result in obstruction (you have trouble moving air out of your lungs)
- Disorders that result in restriction (you have trouble moving air into your lungs)
- Disorders that interfere with diffusion (gas exchange) across cell membranes in the lungs (i.e., your lungs are not processing air)

With that in mind, SSA separates respiratory disorders into seven categories, which are shown in the following chart.

### Summary of Respiratory Disorders—SSA Listing 3.00

Disorder	Characterized by:
<b>(3.02)</b> <b>Chronic Respiratory Disorders</b>	Respiratory disorders due to any cause - except 3.04 cystic fibrosis. Examples include: Chronic obstructive pulmonary disease (COPD), chronic bronchitis and emphysema, pulmonary fibrosis and pneumoconiosis, asthma in the form of chronic asthmatic bronchitis, and bronchiectasis when associated with other conditions like COPD, emphysema, and chronic bronchitis.
<b>(3.03)</b> <b>Asthma</b>	Asthma is a chronic inflammatory disorder of the lung airways. SSA evaluates asthma under 3.03, prolonged, and severe asthma attacks. Alternatively, chronic asthmatic bronchitis is evaluated under Listing 3.02 (above). If you have respiratory failure resulting from chronic asthma, SSA will evaluate it under 3.14 Respiratory Failure.
<b>(3.04)</b> <b>Cystic Fibrosis (CF)</b>	CF is a genetic disorder that results in abnormal salt and water transport across cell membranes in the lungs, pancreas, and other body organs. A chronic respiratory disorder that is characterized by abnormal and irreversible dilatation (enlargement) of the airways below the trachea, which may be associated with the accumulation of mucus, bacterial infections, and eventual airway scarring. SSA will evaluate your bronchiectasis under 3.02 criteria, or 3.07 if you are having exacerbations or complications (for example, acute bacterial infections, increased shortness of breath, or coughing up blood) that require hospitalization.
<b>(3.07)</b> <b>Bronchiectasis</b>	Chronic pulmonary hypertension is high blood pressure that affects the arteries in your lungs and the right side of your heart. If pulmonary hypertension is not adequately treated, it can eventually result in right heart failure. All cases of cor pulmonale are caused by pulmonary hypertension. Chronic pulmonary hypertension is usually diagnosed by catheterization of the pulmonary artery.
<b>(3.09)</b> <b>Chronic Pulmonary Hypertension (Due to Any Cause)</b>	If you receive a lung transplant (or a lung transplant simultaneously with other organs, such as the heart), SSA will consider you to be disabled under 3.11 for 3 years from the date of the transplant. After that, SSA evaluates your residual impairment(s) by considering the adequacy of your post-transplant function, the frequency and severity of any rejection episodes you have, complications in other body systems, and adverse treatment effects.
<b>(3.11)</b> <b>Lung Transplantation</b>	Respiratory failure is the inability of the lungs to perform their basic function of gas exchange. SSA evaluates respiratory failure under 3.04D if you have CF-related respiratory failure, or under 3.14 if you have respiratory failure due to any other chronic respiratory disorder.

SSA also evaluates the following respiratory disorders under separate listings:

- Cancers affecting the respiratory system such as malignant mesothelioma and lung cancer, are evaluated separately in listing 13.00 Cancer.
- SSA evaluates the pulmonary effects of neuromuscular and autoimmune disorders under 3.00 Respiratory listings or the listings in 11.00 Neurological Disorders or 14.00 Immune System Disorders, respectively.

You may be thinking, “My condition may not meet or equal the medical criteria of any of the above disorders.” That’s OK. In that case, your disability claim would continue through SSA’s evaluation process on its vocational merits. This is very common.

We explain the importance of developing the vocational component of your Social Security Disability claim in Section II.

### **3) Do LTD insurance companies like Cigna, Unum, Guardian, or Liberty Mutual Use the SSA Listing of Impairments?**

No. There is no universal medical manual used by the disability insurance industry. Most disability companies base their decisions on whether they think you can perform your job, and sometimes even if you can perform any job.

This is why we stress that if you have applied for both SSDI and LTD, and Social Security approves your claim, that in no way means the insurance company will approve also.

LTD insurance is very different. You are dealing with insurance companies, legal contracts, and either state contract laws or strict Federal ERISA laws. The insurance carrier sells the policies, decides to award or deny benefits, and then pays only those claims it decides to approve.

Each group disability plan or private insurance policy has its own criteria for determining whether an insured is disabled. Each policy has its own definition of “disability” and its own coverage limitations and exclusions. An insurance company’s claims examiner might agree you have a respiratory impairment, but still say you can work and earn a living.

Nevertheless, by understanding and following SSA’s process, you will be off to a good start in developing a solid LTD claim. In Section III we explain the laws and strategies that prevail in LTD claims.



## 4) **Getting Disability Benefits for COVID-19**

### **What about Long Term Effects of COVID-19? Can You Collect Disability?**

If you are a survivor of COVID-19 and shortness of breath keeps you from working, you may be eligible for long-term disability benefits. Our disability attorneys represent individuals who can no longer work due to coronavirus complications. We handle their SSDI or LTD claim applications and represent them throughout the life of their claims.

Cases continue to surface where recovering COVID-19 patients suffer lingering breathing problems as well as secondary problems beyond respiratory distress. The CDC is actively working to learn more about the whole range of short- and long-term health effects associated with COVID-19. As the pandemic unfolds, it is becoming clear that organs besides the lungs are affected by COVID-19 and there are many ways the infection can affect someone's health. i

Permanent lung damage and loss of breathing function are of primary concern for people recovering from COVID-19. Additionally, brain fog, secondary infections, chronic fatigue, heart problems such as arrhythmias (abnormal heart rhythms) or myocarditis (inflammation of the heart muscle), kidney damage and liver damage are some of the documented conditions that persist after recovery. All are secondary complications of coronavirus that potentially could render someone disabled for years if not a lifetime.

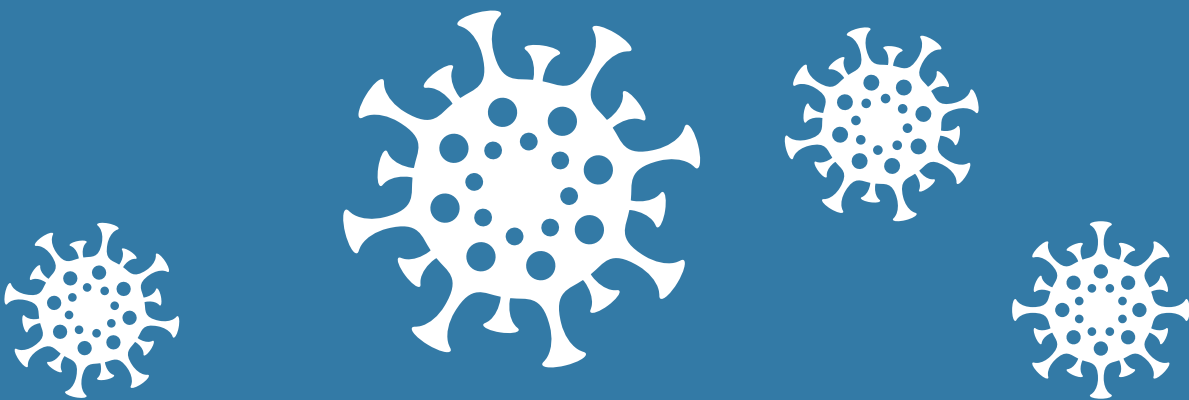


**COVID-19 is officially a respiratory disease, caused by SARS-CoV-2. The CDC reports the most common long-term symptoms include:**

- Fatigue
- Shortness of breath
- Cough
- Joint pain
- Chest pain
- Difficulty with thinking and concentration (sometimes referred to as “brain fog”)
- Depression
- Muscle pain
- Headache
- Intermittent fever
- Fast-beating or pounding heart (also known as heart palpitations)

**More serious long-term complications have been noted to affect different organ systems in the body. These include:**

- Cardiovascular: inflammation of the heart muscle
- Respiratory: lung function abnormalities
- Renal: acute kidney injury
- Dermatologic: rash, hair loss
- Neurological: smell and taste problems, sleep issues, difficulty with concentration, memory problems
- Psychiatric: depression, anxiety, changes in mood



To understand your eligibility for disability benefits linked to COVID-19, let's break out the requirements for both Social Security Disability and Long Term Disability Insurance. Each form of disability coverage is detailed further in this paper.

## **Social Security Disability and COVID-19**

If you develop COVID-related complications that disable you from working for a year or longer, you may be eligible to collect Social Security Disability.

SSA's Blue Book has no specific mention of COVID-19 at this time. However, COVID-19 cases may be evaluated under 3.00 Respiratory Disorders listings such as **chronic respiratory disorders or respiratory failure.**

For example, a serious symptom of COVID-19 is pulmonary fibrosis, the scarring or inflammation of the tissue around the air sacs of the lungs, which leads to fatigue and shortness of breath. Another is acute respiratory distress syndrome (ARDS), a life-threatening disorder affecting both lungs,

Others may experience permanent damage to their heart, kidneys, or brain that may affect their ability to function sufficiently to work, particularly if they already had diseases or disorders of those organs before the pandemic.

As with any serious impairment – whether “listed” or not – SSA offers two paths to an award of benefits:

1. You are disabled through medical evidence alone (this means you meet or equal the medical criteria of a listed impairment in SSA's Blue Book), or
2. You are disabled through a combination of medical and vocational factors. The good news here is, you may ultimately qualify for SSDI under SSA's medical-vocational allowance. This is done by proving you are unable to do past work, or that you cannot even work in a very light or sedentary job.



## Long Term Disability (LTD) Insurance and COVID-19

When you file a long term disability claim, your insurance policy should cover COVID-19 in the same way it would cover any other established illness. Long term disability plans typically don't exclude coverage for pandemics like coronavirus. The pivotal factor with disability insurance is that you are medically unable to work.

As we anticipate more long term disability insurance claims due to coronavirus, we recommend that potential claimants obtain copies of their disability insurance policies and contact us without delay. We will discuss your options and help you take action swiftly.

Benefits may be available through group coverage or an individual disability insurance policy. If you are a medical professional who has been disabled by the virus, you may also have an association disability policy such as AMA or a combination of plans on which to file a claim.

Each LTD policy has a definition of disability; that is what must be satisfied for you to collect the policy's benefits. The insurance carrier is going to investigate the following things:

- What your policy's **definition of disability** is;
- What the **duties of your occupation** are;
- If you contract the coronavirus, how does that affect your **ability to complete those duties**, and for **how long**?

Eligibility for disability would remain possible as long as your disability extends beyond the elimination (waiting) period stated in your policy or group plan. Most policies have 90-day waiting periods, but it could also vary from 180 days to a year. Policies with shorter waiting periods will maximize benefits in these cases. We'll help you review plan documents carefully for all exclusions and limiting clauses.

Note: Being quarantined, furloughed or unable to work due to COVID-19 concerns, without a disability, does not qualify for long-term disability benefits.

**These are challenging times for any disability claim.** Our attorneys are here to help as you enter these uncharted waters. The best way to effectively deal with matters of COVID-19 disability coverage is to get out in front of them and stay as legally protected as possible. Our technology allows us to operate at full capacity even as we work remotely. We take care of everything for you, as this is no time for you to have to fight against your insurance company or get lost in the Social Security appeals process.

## CHECK LIST - ISSUES TO WATCH FOR IN RESPIRATORY DISORDER DISABILITY CLAIMS



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

### **1. Not understand your respiratory impairment and its nuances before rendering a decision.**

For instance, in certain COPD cases, DLCO studies may not be useful; but other times the DLCO tests can generate the results that produce an allowance of benefits on a medical-vocational basis even though not meeting or equaling a listing. Yet such testing is likely to be overlooked by the adjudicator who lacks the necessary knowledge of pulmonary disease to appropriately judge when additional testing is indicated.

To expand on this point, SSA purchases countless spirometric tests to evaluate respiratory-based claims. Third-party examining doctors/technicians are contracted to perform spirometry tests on claimants. A consequence of various consulting examiners is the SSA has to contend with maintaining test quality. If an SSA adjudicator does not have the expertise to evaluate spirometry results, then errors both for and against the disabled claimant are prone to increase.

In still other respiratory disability claims, medical understanding of certain cancers, immune system disorders, and neurological disorders is required. All the more reason you must include as much material evidence as possible in your claim.

### **2. Fail to find in favor of disability when you have more than one disorder.**

The medical term for more than one disorder is “comorbidity.” It means you have multiple diagnoses existing at the same time and is often seen in disability claims involving respiratory impairments. Proving disability based on lung and breathing disorders may require a specialized understanding of the impact of co-existing conditions. Insurers may attempt to disregard the “whole picture” of disability in these cases. You must make sure your case contains the input it takes to show that the combination of your chronic respiratory disorder plus another long-term disorder is what renders you disabled.

**Example 1:** Many diagnosed with COPD also suffer from sleep apnea, a condition which not only impedes your ability to get essential rest but can bring about pulmonary hypertension, chronic heart failure, and disturbances in mood, cognition, and behavior.

**Example 2:** Cystic Fibrosis may affect other body systems such as digestive or endocrine. If your CF-based disability does not meet or medically equal a respiratory disorders listing, an adjudicator should evaluate your CF-related impairments under the listings in the affected body system.

**Example 3:** A person may have symptoms and tests that suggest a combination of obstructive and restrictive disease (for example, when a person has both COPD (obstructive) and pneumoconiosis (restrictive) which refers to lung damage from inhaling small particles or toxic chemicals.

We often find that when a claimant does not substantiate such specific facts in their disability claim, the SSA or insurance company will not proactively seek out and evaluate the impact of co-existing conditions on your overall inability to work.

### **3. Underestimate the severity of fatigue or exhaustion in respiratory disorder claims.**

COPD patients, for example, are at risk of becoming anemic, leaving a person too tired and weak to function in work situations. The anemia is caused by the red blood cells preventing the body's organs and tissues from getting enough oxygen-rich blood. However, SSA or an insurance company will not routinely evaluate COPD patients for anemia unless you specifically allege the impairment. It is up to each claimant to make sure anemia is front and center in the claim.

### **4. Underestimate claims of anxiety.**

Anxiety is a well-known symptom that is prevalent among those who suffer from COPD, asthma, and other severe respiratory diseases, to the extent that it prolongs and increases risk of hospitalization. Along with anxiety, patients with respiratory disease may suffer from debilitating depression and panic attacks. Yet, if you do not substantiate anxiety, depression, or panic attacks in your disability claim, you cannot assume a reviewer to proactively consider these symptoms as disabling factors.

### **5. Underestimate claims of cognitive impairment.**

Patients with chronic respiratory disorders may suffer impaired cognitive functioning due to hypoxemia (low levels of oxygen in your blood), hypercapnia (too much CO<sub>2</sub> in your blood), and exacerbations (flare-ups). ii Obstructive sleep apnea is associated with cognitive impairment and is a modifiable risk factor for dementia. Yet these devastating symptoms are frequently underrated or ignored.iii

All of the above are examples of potential sources of error or bias claims examiners. By knowing these facts and more, you can take the action needed to prove disability and avoid many pitfalls. **You must also ask yourself the questions:**

## Is My Claim Under Developed?

Your insurance company or the SSA may be skeptical of the severity of your symptoms, or not understand the ways your symptoms impair you from working. The more clearly your disability claim presents your history from prior and current physicians, and also family and colleagues, the better a claims examiner can assess the severity of your lung disorder and overall disability.

Treating doctors are busy and may fail to send your actual treatment records to the reviewing examiner. As a result, an examiner may not have all the information needed to assess how you will function in a work setting. Don't assume an insurance company or SSA to follow up or try to develop this information.

- Examiners will try to deny claims based on a snapshot of a disorder. No respiratory can be judged in that matter!
- Attorney representation can be invaluable for developing all of the information necessary to prevail in an initial disability claim and to fight a wrongful denial of benefits on the cases.

To make matters worse, your medical providers will have only a general knowledge of your work activities. Their treatment records may not contain the vocational-based details needed by an examiner to create an accurate picture of your daily activities, your remaining functional capacity, or problems with stamina, pace, or concentration.



## **A fully developed claim should include:**

- Written statements and evidence from your treating physician.
- Complete medical records, including all applicable imaging tests, clinical and laboratory tests, pulmonary function studies, and use of supplemental oxygen.
- Testimonial letters from family, friends, caretakers, co-workers, and peers explaining in their words how your respiratory illness affects your ability to function.
- Proof of ongoing doctor's visits, treatment, or prescriptions.
- A daily journal of your symptoms, discomfort levels, and how your respiratory disorder compromises daily functional abilities. Does your illness affect any daily self-care activities such as getting dressed, or housekeeping? From a work standpoint, can you do tasks at a steady pace? Is it hard for you to concentrate, or remember things? Record as many examples as possible. Until you spell it out, it will not be given a second thought by a reviewer.

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

- Do your best to follow the doctor's orders. This means sticking with the treatment protocols that your doctor prescribes, including prescriptions, therapy, and regular treatment regimens. There may be times when you have a valid reason to not comply with treatment. But when you follow your doctor's orders, an examiner is more likely to view your disorder as severe.



## II. FILING FOR SOCIAL SECURITY DISABILITY BENEFITS FOR A RESPIRATORY DISORDER



### 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 win benefits.**

The bulk of this SSDI section illustrates the extent of information Social Security adjudicators need before they will decide to award benefits based on a respiratory disorder, 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 an 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) due to 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. Federal Court. We further explain the SSDI appeals process at the end of this section.



## 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 claim examiners believe that 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 the testimony of family, friends, co-workers, and list any prescriptions and treatments for your respiratory impairments.

### *What does the SSA adjudicator need to decide your claim?*

#### **Medical Evidence:**

The most important information to support your disability claim for a lung disorder is a complete set of medical records that include x-rays or CT scans, physical exams, and lung function tests that show your lung capacity and the extent of your lung disease. This includes particularly relevant tests (for example, a sleep study test to support a claim based on sleep apnea.) SSA also wants to review your prescribed treatments and your reaction to those treatments.

#### **Terms and tests that can impact your case include:**

- **Imaging tests** - Diagnostic imaging such as X-ray and computerized tomography (CT) imaging.
- **Pulmonary Function Studies** - Nearly all who suffer a respiratory disease will need to undergo a pulmonary function test to measure lung capacity, strength, and breathing ability. Pulmonary function studies (PFS) are also known as pulmonary function tests (PFT) and lung function tests (LFT). These include:
  - **Spirometry** - measures how well you move air in and out of your lungs, by exhaling quickly and hard as you can into a tube attached to a spirometer.
  - **Diffusing Capacity of the Lungs for Carbon Monoxide (DLCO)** - measures gas exchange across cell membranes in your lungs. Wearing a mask with a mouthpiece, you will take in a deep breath of a special gas mixture, hold your breath, and then the air that you exhale will be measured.
  - **Arterial Blood Gas (ABG)** - measures oxygen and carbon dioxide in the blood. It also measures your body's acid-base (pH) level, which is usually in balance when you're healthy. Blood is drawn from an artery, allowing oxygen and carbon dioxide levels to be measured before they are absorbed into the body tissues. SSA may use a resting and/or an exercise ABG measurement to evaluate your respiratory disorder.

- **Pulse oximetry** – This is a needle-free test to measure oxygen saturation in your blood, showing whether your heart and lungs supply enough to meet your body’s needs. Pulse oximetry helps determine whether you need supplemental oxygen or other treatment for a lung or a heart problem.

**Tissue biopsy** – may be used to diagnose certain fibrotic lung diseases, such as pulmonary fibrosis and pneumoconiosis.

### **Residual Functional Capacity (RFC)**

You also need to document your residual functional capacity (RFC). Respiratory disorders may cause physical and mental limitations that affect what you can do in a work setting. Your residual functional capacity identifies the most you can still do despite your breathing impairments. We explain this important element of your respiratory claim further in Section II, page 19.

### **The Five-Step Sequential Evaluation Used to Determine Disability**

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 claim examiners believe that 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 the testimony of family, friends, co-workers, and list any prescriptions and treatments for your respiratory impairments.

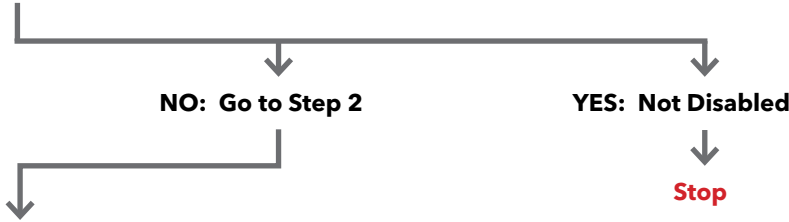
### ***What does the SSA adjudicator need to decide your claim?***

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 your respiratory disorder or prove that your impairment or combination of impairments has limited your functioning so much that you can no longer work.

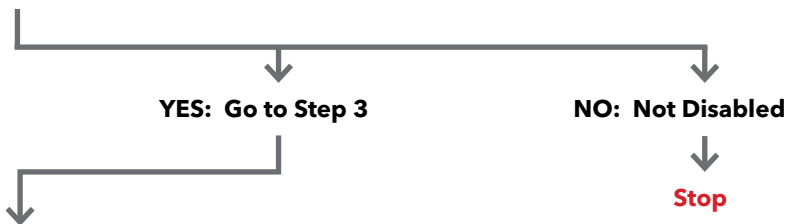
The Sequential Evaluation is strict and complicated. It consists of a 5-step inquiry, with questions asked in a specific order until a question is answered affirmatively or negatively in such a way that a decision can be made that a claimant is either disabled or not disabled.

## Flow Chart of the Five-Step Sequential Evaluation

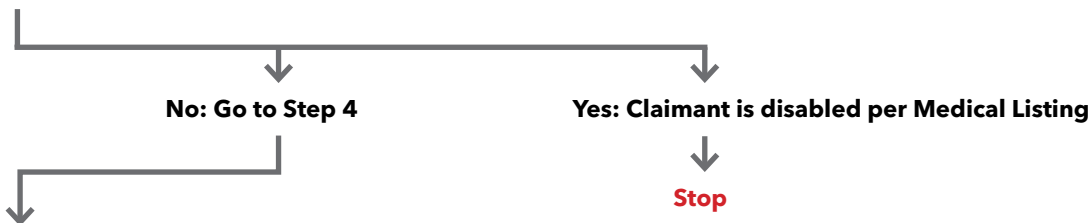
**STEP 1: Is claimant engaged in Substantial Gainful Activity (SGA)**



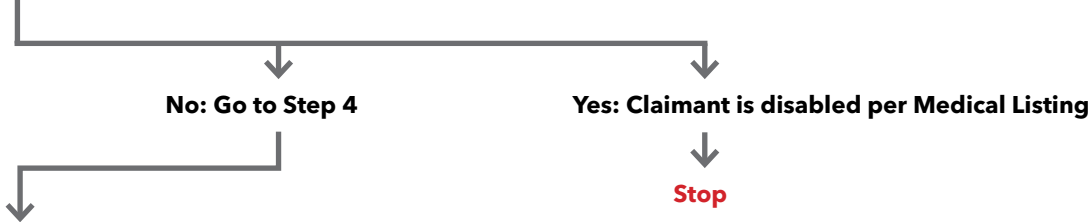
**STEP 2: Does claimant have a severe impairment expected to last 12 months or to result in death?**



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



**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)**



**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.**



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

Your goal is to give the SSA the information and evidence it needs to be able to conclude that your condition meets or equals that listing - or - prove that your respiratory impairment has limited your functioning so much that you can no longer work.

### **Step 1: 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 2: Proving You Have a Severe Impairment**

You must have a severe impairment. A respiratory disorder 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 3: Proving You Meet or Equal SSA's Medical Listing for a Respiratory Disorder**

The SSA respiratory disorder listing is public and accessible online: [SSA Listing of Impairments: 3.00 Respiratory Disorders](#).

## **3.00 - Respiratory Disorders**

As discussed in Section I, the SSA categorizes respiratory impairments into the following 7 numbered sections under Listing 3.00:

- Chronic Respiratory Disorders (3.02)
- Asthma (3.03)
- Cystic Fibrosis (3.04)
- Bronchiectasis (3.07)
- Chronic Pulmonary Hypertension (due to any cause) (3.09)
- Lung Transplant (3.11)
- Respiratory Failure (3.14)

If you satisfy the appropriate medical listing criteria of Step 3, you are considered disabled and need to go no further in the evaluation process.

What if your disorder does not exactly match the medical criteria for a disorder? If you can prove that your disorder does have features that are equivalent to the **level of severity and duration** of a listed impairment—this would result in you being judged “disabled” and awarded benefits.

But if neither is true for you, your next step is to continue to Steps 4 and 5 that consider the nonmedical factors, such as your remaining functional capacity (RFC), age, education, and work history. We explain this in detail further in this Section. **Steps 4 and 5 are the steps in which most SSDI cases are won.**

## **What Exactly Does the SSA Want to Know On My Initial Application for Step 3?**

To understand Step 3 of the Five-Step Evaluation, we'll use a fictional claim. For our example, we will work with the number one lung disease reviewed by the SSA, Chronic Obstructive Pulmonary Disease, a.k.a. **COPD**.

This is a chronic lung condition that damages the lungs, obstructs airflow in-and-out of the lungs, causing difficulty with breathing, cough, mucous production, wheezing, and shortness of breath. COPD is a series of lung diseases, the two most common being emphysema and chronic bronchitis.

You will find COPD under SSA's **listing 3.02** - Chronic Respiratory Disorders.

### **Listing 3.02 - Chronic Respiratory Disorders due to any cause except Cystic Fibrosis (CF) with A, B, C, or D:**

To prove your COPD satisfies SSA's Chronic Respiratory Disorder listing, you must provide SSA with specific evidence. The listing for Chronic Respiratory Disorders has four parts, designated A, B, C, and D.

#### ***What do Parts A, B, C, and D look at?***

Your COPD must satisfy the requirements of any parts A, B, C, or D, as follows:

**Part A: FEV1** measured by spirometry. FEV stands for forced expiratory volume. FEV1 is the amount of air you can force from your lungs in one second.

**Part B: FVC** measured by spirometry. FVC is a measurement of the greatest amount of air you can forcefully breathe out after breathing in as deeply as you can.

Note: A COPD diagnosis requires a calculation involving both FEV1 and FVC. A normal FEV1/FVC ratio is 70% to 80% for an adult. COPD is diagnosed when the FEV1/FVC ratio falls below 70 percent.

**Part C: Chronic impairment of gas exchange** demonstrated by:

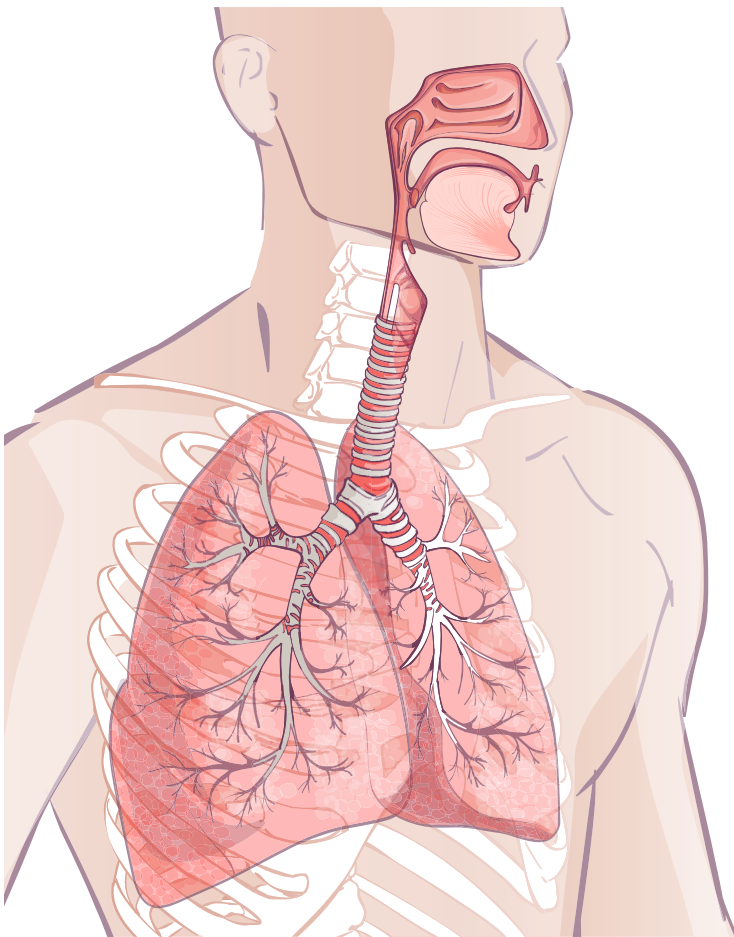
- Diffusing Capacity of the Lungs for Carbon Monoxide (DLCO) - or -
- Arterial Blood Gas (ABG) - or -
- SpO2 (the percentage of oxygen saturation of blood hemoglobin) measured by pulse oximetry.

**Part D: Exacerbations or complications** requiring three hospitalizations within 12 months and at least 30 days apart. Each hospitalization must last at least 48 hours, including hours in a hospital emergency department immediately before the hospitalization.

An important feature of all parts A through D is that (1) chronic impairment must be present, and (2) all pulmonary diseases can potentially qualify.

### ***Relevant Tests Regarding COPD and other Chronic Respiratory Disorders***

Medical tests the SSA wants to see when determining disability due to respiratory impairments include:



- **Arterial Blood Gas Study (ABGS), Exercise**
- **Arterial Blood Gas Study (ABGS), Resting**
- **BODE Index**
- **Bronchial Challenge Test**
- **Bronchoscopy**
- **Carbon Dioxide Challenge Test**
- **Carbon Monoxide Diffusing Capacity (DLCO)**
- **Chest X-ray (CXR)**
- **Computerized Tomographic (CT) Scanning of the Chest**
- **Endothelial Microparticles (EMPs) in Emphysema**
- **Functional Residual Capacity (FRC)**
- **Lung Subdivisions**
- **Peak Expiratory Flow**
- **Pulse Oximetry**
- **Serum Surfactant Protein A**
- **Spirometry**
- **Sputum Collection**
- **Thoracic Gas Volume (TGV)**
- **Ventilation-Perfusion (V-P) Lung Scans**
- **Six Minute Walk Test (6MWT)**

## 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.

### I. Please provide the date of diagnosis of chronic pulmonary insufficiency.

Date of diagnosis:

Is the patient's pulmonary condition:                      Acute                      Chronic

### II. What is the diagnosis?

### III. Please specify the clinical abnormalities present

Have height and weight been measured?                      Yes                      No                      Unknown

### If Yes, please provide the numbers (do not use patient-provided numbers).

Height:                      (inches without shoes)	Weight:                      (lbs)		
Prolonged expiration	Yes	No	Unknown
Respiratory effort at rest	Yes	No	Unknown
Retractions	Yes	No	Unknown
Clubbing of fingers	Yes	No	Unknown
Cyanosis (resting)	Yes	No	Unknown
Cyanosis (exercise)	Yes	No	Unknown
Increased A-P diameter of chest	Yes	No	Unknown
Heart disease	Yes	No	Unknown
Flaring of nostril in breathing (infants)	Yes	No	Unknown
Flattening of diaphragms (by chest imaging)	Yes	No	Unknown
Lung hyperlucency (by chest imaging)	Yes	No	Unknown
Wheezing	Yes	No	Unknown
Hyper-resonance to percussion	Yes	No	Unknown
Pulmonary cavitation (by chest imaging)	Yes	No	Unknown
Scarring in lungs (by chest imaging)	Yes	No	Unknown
Pursing of lips	Yes	No	Unknown
Rales (crackling, fine, Velcro )	Yes	No	Unknown
Hemoptysis (more than blood-streaked)	Yes	No	Unknown

If Yes, what is the frequency of hemoptysis and volume of blood?

Other clinical abnormalities:

**IV. Pulmonary Function Studies**

Does the patient smoke?	Yes	No	Unknown
What are the hemoglobin and hematocrit?			

<b>A. Has spirometry been done?</b>	Yes	No	Unknown
-------------------------------------	-----	----	---------

If Yes, please provide copies of tracings, as Social Security regulations prohibit favorable determinations of disability without tracings to independently review. If electronic spirometry was done, please include calibration.

Flow-volume loop	Time-volume curves	Tested with bronchodilators?
------------------	--------------------	------------------------------

Please provide the value and date of the patient’s most current and highest FEV1:  
 Please provide the value and date of the patient’s most current and highest FVC:

<b>B. Have resting ABGS been done?</b>	Yes	No	Unknown
--	-----	----	---------

If Yes, please give the value and date of the patient’s most current room air ABGS or attach lab report.

Testing done in absence of heart failure or acute respiratory illness?

Yes	No	Unknown
-----	----	---------

**Date:**

FIO2:  
 PaO2 (PO2):  
 pH:  
 PaCO2(PCO2):  
 HCO3:  
 SaO2 (not by pulse oximetry):

<b>C. Has pulse oximetry been done?</b>	Yes	No	Unknown
---	-----	----	---------

If Yes, please give the value and date of the patient’s most current room air values or attach lab report.

Testing done in absence of heart failure or acute respiratory illness?

Yes	No	Unknown
-----	----	---------

**Date:**

SpO2:





**D. Has DLCO been done?**

Yes                      No                      Unknown

If Yes, please give the value and date of the patient's most current values or attach lab report.

Date:

DLCO: (ml CO/min/mm Hg)

Corrected for smoker?

Yes                      No                      Non-Smoker

**D. Has DLCO been done?**

Yes                      No                      Unknown

If Yes, please describe results or attach report.

**V. Pulmonary Imaging and Procedures**

Please specify which of the following have been done (please attach report if available)

Plain chest x-ray	Yes	No	Unknown
Thoracic CAT scan	Yes	No	Unknown
Bronchoscopy	Yes	No	Unknown
Thoracic MRI	Yes	No	Unknown
Sputum collection and culture	Yes	No	Unknown
Ventilation-Perfusion (VP) scan	Yes	No	Unknown
Bronchial washings	Yes	No	Unknown
Other (describe)	Yes	No	Unknown

**VII. Current Functional Limitations and Capacities**

In respect to the patient's pulmonary disease, please give your opinion in response to the following questions:

A. Is the patient able to stand and/or walk 6 - 8 hours daily on a long term basis?

Yes                      No                      Unknown

If No, how long can the patient stand and/or walk (with normal breaks) in a 6 - 8 hour work day without severe SOB or other symptoms?

B. What maximum weight can the patient lift and/or carry occasionally (cumulatively not continuously)?

Unknown	Less than 10 lbs.
10 lbs.	20 lbs.
50 lbs.	100 lbs.
Other (lbs.)	



**C. What weight can the patient lift and/or carry frequently (cumulatively not continuously)?**

Unknown                      20lbs.  
Less than 10 lbs.            50 lbs. or more  
10 lbs.                         Other (lbs.)

**D. Work environment temperature restrictions**

1. Aside from exertional considerations such as lifting and carrying, does the patient have restrictions against exposure to extreme heat or cold?            Yes            No            Unknown

Check the appropriate boxes:

“Concentrated exposure” means 1/3 to 2/3 of 8 hour workday.

“Moderate exposure” means very little up to 1/3 of 8 hour workday.

	Unlimited	Avoid Concentrated Exposure	Avoid Even Moderate Exposure	Avoid All Exposure
Extreme cold				
Extreme heat				
Dust or fumes				

2. Would the patient’s exertional capacities for lifting and carrying (as described in B and C above) be further reduced by work in extremely hot or cold environments?

Yes            No            Unknown

If Yes, please state your opinion in regard to the maximum weight that can be lifted and carried:

Frequently    Occasionally:

**VIII. Additional Physician Comments (Also list other disorders of which you are aware.)**



## RESIDUAL FUNCTIONAL CAPACITY - YOUR PATH TO WINNING YOUR CASE IF YOU DON'T SATISFY SSA'S MEDICAL LISTING FOR YOUR RESPIRATORY DISORDER



When symptoms of respiratory disease 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 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.

You may still present a strong case if your breathing difficulties and overall weakness prevent you from doing even a sedentary job. RFC is expressed in terms of five exertional classifications of work: sedentary, 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 Respiratory Disorders*

SSA will assess your ability to perform a battery of tests in regards to symptoms of lung disease and breathing difficulties, including shortness of breath (dyspnea), fatigue, cough, mucous production, difficulty catching your breath, and wheezing. Attention should be paid to limitations caused by exertion and by environmental factors. Heat, cold, dust, fumes, moisture, and other environmental factors may adversely affect the ability of a COPD sufferer to function in the workplace.

RFC tests will assess your ability in the following work capacities:

- Exertional Limitations (lifting, carrying, pushing, pulling, sitting standing walking)
- Postural Limitations (climbing, balancing, stooping, 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 4: Proving You Can't Do Your Past Relevant Work**

In light of your mental and physical RFC assessments, 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 5: Proving You Can't Do "Any Other Work"**

Your respiratory disorder 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.

With progressive conditions, such as COPD, symptoms become worse as you age. If you're over 50, SSA's grid rules may make it easier for you to show that you're unable to perform full-time work. The "grids" are a detailed set of uniform rules followed by SSA claim reviewers during step Five, after they determine you can't do the jobs you've done in the recent past.

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.

## What If SSA Denies Your Claim? Here's 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 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.

<b>Step 1: Initial Determination</b>	<b>Average processing time by the Department of Disability Services (DDS) is 106 days</b>
<b>Step 2: Recommendation Determination</b>	<b>Step 1, plus an additional 95 days</b>
<b>Step 3: Hearing before an Administration Law Judge</b>	<b>Steps 1 &amp; 2, plus an additional 12-18 Months to be scheduled for a hearing</b>
<b>Step 4: Review by the Appeals Council</b>	<b>Steps 1, 2 &amp; 3 plus an additional 8 to 12 Months</b>
<b>Step 5: File a lawsuit in Federal Court</b>	<b>Steps 1 through 4, plus 1 to 2 years</b>

*\*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 Help 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 a respiratory disorder or a combination of respiratory and other disorders 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 A RESPIRATORY DISORDER



*For these situations and more, the law is there to protect you.*

Disability insurance companies don't always make it easy for policyholders to get the disability benefits they deserve. When asthma, bronchiectasis, pneumoconiosis, or other lung disease make it impossible to carry out the duties of your work, be prepared for the insurer to either misjudge the severity of your condition or look for ways to deny your claim.

- Your insurer may not understand your condition and how it impedes your ability to work. This often results in a wrongful denial based on an assumption that your condition is not sufficiently severe to prevent you from working in your usual occupation.
- Likewise, the insurer finds no reason you cannot work in a sedentary capacity;
- The insurance company says there is no objective basis for the restrictions and limitations imposed by your doctor;
- When an insurance company reviews an application, it will look for reasons in that person's medical history to deny coverage. For instance, a common reason insurance companies deny benefits for cystic fibrosis disability is because of a preexisting condition.
- Insurers often deny benefits based only on a paper review of the medical records. If your claim for long-term disability benefits is denied and the insurer did not conduct a medical exam, you may have a case of improper denial.
- Denial is often caused by an insurer's blind adherence to the Dictionary of Occupational Titles (DOT) - an antiquated database of occupations maintained by the Department of Labor. If an insurer makes a determination about the material duties of your usual occupation without discussing this with you or your employer, you may have a case of improper denial.
- The insurer has videotaped you participating in activities that your disability should prevent you from doing, and contradicts your doctor's restrictions.
- The insurance company may at first award LTD benefits only to retract them later.

You may feel like the insurance company has the upper hand, and there's no one in your corner fighting for you. Insurance companies often take advantage of an unrepresented claimant. This is when an attorney experienced in ERISA and disability insurance law can become your powerful advocate.

A disability lawyer with the legal resources to match the insurance company will develop the medical and vocational facts that will prove your case and defeat an unfair denial.

## **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 keeps you from working for a limited period. 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 respiratory disorder 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 occupation. 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 res and any co-existing physical impairments.

Partial benefits are payable if your disabling condition 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

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 total of \$2,000 a month, but \$1,000 from SSD and \$1,000 from LTD.

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.

### 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*

Insurance carriers are always looking for ways to reduce their liability. In matters of respiratory disability claims, one way is to continually ask for “objective evidence” meaning diagnostic tests like MRI, X-ray, or CT imaging. The strategy is that most self-reported symptoms that arise from respiratory conditions—such as depression, anxiety or panic attacks, even impaired cognitive functioning—do not show up on any objective tests, but rather are diagnosed by the doctor based on examination and patient reports. Additionally, disability plans often limit coverage for conditions based on self-reported symptoms to 24 months.

### *Mental Health Limitation*

Like self-reported symptoms, most policies cover mental health issues for only 24-months. This enables insurers to limit benefits for long-term cognitive problems. Insurers may also allege that side effects of your prescribed medications are the cause of your mental confusion or anxiety - and not the illness itself that requires taking the medication.

### *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 respiratory disorders.

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. For example, your claim could be denied if you have a history of COPD or asthma, or cystic fibrosis for which you were being treated by a doctor during the “pre-existing condition period” stated in your policy. The insurer could say that your current disorder was caused by your pre-existing lung disease, and benefits would be denied.

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 lookback period.

## Do You Have an Individual or a Group Disability Policy?

- Coverage you purchase from an insurance agent is referred to as **privately purchased disability insurance**, or **individual disability insurance (IDI)**.
- 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 are 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 claim based on a respiratory condition. 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.



Group Disability Insurance (ERISA)	Individual Disability Insurance (Non-ERISA)
Employer-sponsored group benefit plan	Privately-purchased policy covering only you
<p>Claims are governed by strict federal ERISA law that favors the insurer, not the claimant. If your claim is wrongly denied:</p> <ul style="list-style-type: none"> <li>• <b>You can only sue for what the insurance carrier should have paid you in the first place.</b></li> <li>• <b>You must appeal to the same company</b> that denied your claim.</li> <li>• <b>Attorney fee reimbursement is rare.</b></li> <li>• <b>No Right to Jury Trial:</b> 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.</li> <li>• <b>No new evidence is allowed</b> once the internal administrative appeals are exhausted.</li> <li>• <b>No Treating Physician Rule:</b> Insurer can ignore your own doctor’s opinions and rely on their own doctor’s opinions as they see fit.</li> <li>• <b>Little Government Regulation</b> as to how the insurance policy must be written; insurers are free to write the policy as they wish.</li> <li>• <b>You Must Prove the Insurer “Abused Its Discretion”:</b> 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.</li> </ul>	<p>Claims are governed by state insurance &amp; contract laws designed to protect insureds. If your claim is denied:</p> <ul style="list-style-type: none"> <li>• <b>You are entitled to all relevant procedural rights and remedies available to you in your state:</b> <ul style="list-style-type: none"> <li>• Deceptive trade acts or unfair practices</li> <li>• Bad faith</li> <li>• Punitive damages</li> <li>• Emotional distress</li> <li>• Consequential (or special) damages</li> <li>• Loss of credit claims</li> <li>• Prejudgment interest for breach of contract</li> <li>• Tortious interference with contract</li> <li>• Statutory insurance violation claims</li> <li>• Mandatory attorney fee reimbursement</li> </ul> </li> <li>• <b>You have the right to a jury trial.</b></li> <li>• <b>You have the right to present evidence and cross-examine</b> any witnesses testifying for the insurance company.</li> <li>• <b>“More likely than not” standard:</b> 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.”</li> <li>• <b>Often no offset of other benefits:</b> Most higher-end individual policies will not allow for benefit offsets.</li> </ul>



## **Getting Started: Applying for LTD Benefits based on Respiratory Disorders**

- 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 is far more than filling out application forms. You will also see that LTD cases are language-dependent. Long term disability insurance claims based on respiratory health problems hinge on the policy's provisions, including how the term "total disability" is defined.

As with SSDI claims, filing for LTD benefits is far more than filling out application forms. You will also see that LTD cases are language-dependent. Long term disability insurance claims based on respiratory health problems hinge on the policy's provisions, including how the term "total disability" is defined.



## **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 something like, "the inability to perform your own occupation" due to a physical or psychological impairment

### ***"Any Occupation" Definition***

After your short term disability period ends, ongoing or progressing respiratory 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 respiratory disorders.

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.

That means that if you're medically capable of performing virtually any job that exists in the economy, your LTD benefits may be denied or terminated. It may not even matter whether such jobs are available where you live, only that they exist.

### ***Insurers may terminate benefits based on other policy provisions.***

Your private disability policy or group LTD plan may contain additional language that could impact your claim. For example, your policy may require that you participate in "return to work" programs. But what happens if you try to return to work as directed, and find that it was a mistake? While some insurers will do the right thing and put you back on long term disability, others may use this as a means to stop paying benefits.

## **Tips to Help You Win Disability Insurance Benefits for Respiratory Disorders 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 policies, make sure you get a copy of each policy. Observe all filing and appeal deadlines to the letter.

### **2. Fill out all 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 limitations related to your respiratory disorder. Statements like “I can never lift 10 lbs.” or “I always require a cane to walk” should be avoided. Once you are contradicted, you will no longer be believed. Instead use words like “frequently, occasionally, or seldom.”

Just as important, the Attending Physicians Statement must be completed with specific detail or it will almost always result in 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 insurance provider 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 your treating medical professionals to expect forms or calls from the insurance company, and ask them to respond promptly to meet deadlines. Provide your insurer with updated contact information about 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.**

Sometimes an employer's version of your job description may not match what you really do. During the initial own occupation term of your disability claim, you must make sure 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 your respiratory condition 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 claimants their benefits. A disability lawyer can prove in court that any video footage unfairly representing a disabled individual 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 lawyer before filing your application—preferably one who has successfully handled respiratory disorder 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 you are disabled. The denial letter also gives important information for an appeal, including where and when the appeal must be received.



## 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 decide 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 appeal 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

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 limitations 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.

**Remember:** Once all appeals are “exhausted,” the record is closed. This means when a lawsuit is filed, new evidence in support of your 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.

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 respiratory disorder and any other impairments can be submitted and made part of the “record.”

## 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 respiratory disorder claim, the medical and vocational criteria required by SSA are the most comprehensive. If an insurance carrier has denied your claim, you must improve and develop the claim. It will serve you well to follow the scope and 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 claimants, and the enormous strains people living with a respiratory impairment encounter along the way. To win a claim, players on both sides must carry out vital 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’re able to 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 disability application based on a respiratory disorder to gathering the documentation needed to support your claim, to appealing a claim denial at all levels of the appeal process including Federal Court.

## **What about LTD Benefits for a Respiratory Disorder Claim to 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 respiratory impairment. Some insurers strong-arm claimants into believing their options are limited. Others even earmark legitimate claims based on a respiratory health issue 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 the respiratory disorder 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?**

**The 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 upfront, 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 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 respiratory disorder 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.

**Do you have questions about your respiratory disorder disability claim? Feel free to give our office a call at 713-228-8888 or email Marc at [Marc@marcwhitehead.com](mailto:Marc@marcwhitehead.com). Please visit our website at [DisabilityDenials.com](http://DisabilityDenials.com).**

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