

SOCIAL SECURITY DISABILITY INSURANCE BENEFITS AND SUPPLEMENTAL SECURITY INCOME

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I. OVERVIEW.

A. Statutes, Regulations, and Helpful Sources of Information.

The Social Security Administration (“SSA”) maintains a very helpful web-site at www.ssa.gov. The site is searchable, and has links to rules, regulations, and forms.

The “Federal Old-Age Survivors, and Disability Insurance Benefits” portion of the Social Security Act can be found at 42 U.S.C.A. § 401, *et seq.* Supplemental Security Income for Aged, Blind, and Disabled is found at 42 U.S.C.A. § 1381, *et seq.*

Regulations relating to Social Security disability can be found at 20 C.F.R. Part 404. Appendix 1 to Subpart P of the C.F.R. is particularly helpful in setting forth the “Listing of Impairments.” <http://www.ssa.gov/disability/professionals/bluebook/listing-impairments.htm>

Another helpful tool for answering questions involving Social Security matters can be found on the internet at <http://www.severe.net>

The Social Security office also has many helpful booklets and fact sheets providing information on a variety of issues. The local Social Security office is at 1029 Camino La Costa Austin, TX 78752, (512) 206-3700. Hearings are generally held at 903 San Jacinto Boulevard, Homer Thornberry Building, Austin, Texas 78701.

B. Social Security Disability Insurance Benefits and Supplemental Security Income Distinguished.

The government pays disability benefits under two programs: Social Security Disability Insurance (“disability insurance”) and Supplemental Security Income (“SSI”). Disability insurance is, as the name suggests, an insurance program, for which people become eligible by working and paying social security taxes. In contrast, SSI is a cash assistance program, the eligibility for which depends upon a person’s income. SSI is meant to supplement low income levels. Some people can be eligible for both if they meet both the non-medical and the medical requirements.

1. The non-medical eligibility requirements for disability insurance and SSI.

a. Disability insurance. To be eligible for disability insurance, a person must have earned a sufficient number of “credits” toward benefits by working and paying social security taxes. These credits are calculated differently for people who are self-employed. Earning a sufficient number

of credits will qualify a person for insured status. The amount of benefits received will depend on a person's earnings history.

b. SSI. Eligibility for SSI is based on income, and people who have never worked at all (even children) can be eligible for SSI. To qualify, a person must meet certain income levels, which can vary from state to state. In addition to limited income, persons receiving SSI must have limited assets or resources (generally, under \$2,000.00 for individuals and \$3,000.00 for couples). Certain items such as a home, proceeds from a loan, and many personal belongings will not be counted toward resources. See <http://www.socialsecurity.gov/ssi/text-resources-ussi.htm> for a list of things that are counted toward resources.

2. Medical eligibility.

The medical eligibility is the same for both disability insurance and SSI. Under both programs, a person must meet the definition of "disability" under the regulations, discussed in more detail below.

II. THE ADMINISTRATIVE PROCESS.

A. Application.

The process starts with filling out an application. If there is any question about meeting the non-medical eligibility requirements for either program, a claimant should apply for both disability insurance and SSI. Usually, the SSA will be able to determine the non-medical eligibility requirements early on in the process.

For disability insurance, benefits cannot begin until five (5) months after the onset of disability. In some circumstances, a person may be entitled to benefits for months prior to the date of the application as long as both the disability and the insured status (earning sufficient credits) can be established.

There is no five-month waiting period for SSI benefits. On the other hand, SSI benefits cannot be awarded retroactively for months prior to the date of the application.

B. Appeals Process.

A decision denying an application can be appealed through four levels of the appeals process. There is a 60-day time limit for appealing to each subsequent level.

1. Request for reconsideration.

A Request for Reconsideration must be filed after an initial denial. At this stage, the claim is reviewed by someone who did not take part in the first decision. Additional documentary evidence (such as new medical records) can be submitted.

2. Hearing before an Administrative Law Judge.

This is an opportunity to present your case, together with any new medical evidence and live testimony from the claimant and any witnesses, before an administrative law judge (“ALJ”). See Section IV. below.

3. Review by Appeals Council.

An adverse decision by an ALJ may be reviewed by the Appeals Council. The Appeals Council may decline to review the case altogether, review the decision in its entirety and issue a new decision, uphold the ALJ’s decision in whole or in part, or return it to the ALJ for further review.

4. Federal District Court.

If the Appeals Council decides not to review the case or issues an adverse decision, the next and final step is filing a lawsuit in federal district court.

C. Additional Appeal Rights when a Decision Has Been Made That a Person Was But Is No Longer Disabled.

1. Disability hearing.

As part of the reconsideration process, a claimant can meet face-to-face with a person reconsidering the case, submit new evidence, and present witness. This type of hearing is less formal than one before an ALJ.

2. Continuation of benefits.

Benefits may be continued pending an appeal, but a claimant must request the continuation of benefits during the first 10 days of the 60-day appellate time limit. If the appeal is ultimately unsuccessful, the claimant may have to repay the benefits.

III. MEETING THE DEFINITION OF DISABILITY.

A. Disability Defined.

In order to meet the medical eligibility requirements for both disability insurance and SSI, a person must be found to have a disability, which is defined as: 1) the inability to engage in any substantial gainful activity, 2) by reason of any medically determinable physical or mental impairment, 3) 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, and 4) which is the primary reason for the inability to work.

B. Steps in evaluating disability.

There are essentially five steps to determining disability:

- 1) Is the claimant engaged in substantial gainful activity? If no, go to Step 2.
- 2) Does the claimant have a severe impairment? If yes, go to Step 3.
- 3) Does the impairment meet or equal a listed impairment? If yes, disabled. If no, go to Step 4.
- 4) Does the impairment prevent claimant from doing past relevant work? If no, not disabled. If yes, go to Step 5.
- 5) Does the impairment, considering claimant's age, education and past work experience, prevent him or her from doing other work? If no, not disabled. If yes, disabled.

C. Inability to Engage in Substantial Gainful Activity.

Evidence of a demonstrated ability to engage in substantial gainful activity will preclude a finding of disability even with a sufficiently disabling impairment.

1. Significance of earnings.

The SSA uses earnings as a guideline for determining whether a person is able to engage in substantial work. These criteria serve as reasonable indications of substantial gainful activity, but they are not absolute. The SSA can go behind these earnings criteria and look at the nature of the work performed in determining whether it is substantial.

In general, earnings over \$980.00 per month will usually demonstrate substantial gainful activity. The amount is net of impairment-related work expenses, so some expenses may be able to be deducted from the gross earnings (see below). Generally, earnings below \$700 per month will not be considered to be gainful employment. Earnings between \$700 and \$980 per month will be determined on a case-by-case basis. Different amounts apply to people who are disabled because of blindness. The monthly substantial amount for statutorily blind individuals for 2009 is \$1,640.

In calculating earnings, the SSA will average the earnings during a calendar year. Income earned at a very lucrative job during a very short period of time, for example, will be averaged over a one-year period. If high enough, these earnings may demonstrate substantial work for the entire year even if there was no or minimal work activity during most of that year.

2. Deducting medical expenses from earnings.

Certain medical expenses and other impairment-related expenses can be deducted from earnings as long as they are necessary in order to perform the work. These can include prescription drugs, transportation to and from work, a personal attendant, a wheelchair, or any specialized work equipment.

3. Earnings must reflect actual productive work.

Work performed under special conditions such as a sheltered workshop will be treated differently, and only the earnings that are actually attributable to the individual's own efforts will be considered. In other words, if any earnings are really subsidies based on financial need or other non-work factors, they will be disregarded.

D. Medically Determinable Physical or Mental Impairment.

1. Medical evidence can establish the presence of an impairment that meets the "Listing of Impairments."

A mere diagnosis alone is insufficient; to be considered a Listed Impairment, it must have the symptoms, clinical signs, and laboratory findings specified in the Listing. The SSA will look at the combined effect of multiple impairments.

2. Medical evidence may establish that an impairment is medically equivalent to a Listed Impairment.

Even if a condition does not exactly meet a Listing, medical records and other evidence may establish that an impairment is equal in severity to one of the Listed Impairments.

3. Inability to do past or other work.

Even if a condition is neither a Listed Impairment nor the medical equivalent of one, it may still be determined to be a disability if it does, in fact, prevent a person from performing his or her past relevant work. Then the SSA will determine if the claimant can do any other work. In this evaluation, the SSA considers the person's functional capacity, age, education, and work experience.

Basically, a claimant must show an inability to engage in his or her previous work. Upon such a showing, the burden then shifts to SSA to show that the person has transferable skills to other types of work available in the national economy. This is where age, education, and training could play a critical role.

IV. HEARING BEFORE AN ALJ.

This section is primarily addressed to a representative (which can be an attorney or a non-attorney) who is acting as an advocate on behalf of a claimant seeking disability insurance or SSI.

Claimants can, of course, represent themselves. Although delays now are not as significant as in the past, the SSA is still fairly backlogged: it may be as long 6 months to a year between the initial application and a hearing before an ALJ.

A. Initial Meeting with Claimant.

1. Have the claimant describe, in his or her own words, all of the physical and/or mental limitations and conditions and daily activities. Have the claimant explain what he or she does in a typical day and what daily activities he or she cannot do anymore.
2. Get complete lists of all medications and health care providers, including doctors, hospitals, clinics, counselors, therapists, etc.
3. Have the claimant sign authorization forms for the release of medical records.
4. Have the claimant sign an Appointment of Representative form to indicate your authority. (Forms are available at the local SSA office and can be printed off the internet: <http://www.ssa.gov/online/ssa-1696.pdf>)

B. Gathering Medical Records.

1. Texas Health & Safety Code § 161.201, *et seq.*, prohibits a health care provider or health care facility from charging a fee for medical or mental health records requested by a patient or representative if the records are to be used to support an application for disability benefits. Upon a request, the health care provider or facility must provide the requested medical or mental health records within 30 days.
2. Gathering all medical and mental health records is critical to claim for benefits. Treating physicians in particular should be encouraged to fully document the claimant's condition in the records, including clinical findings, laboratory results, diagnoses, and any prescribed treatment, together with the response and prognosis.
3. If appropriate, the medical evidence should also describe any limitations on an individual's ability to perform work-related functions such as sitting, standing, moving about, lifting, carrying, hearing or speaking, etc. In cases of mental impairment, the medical records should note any limitations on a person's ability to reason or to make occupational, personal, or social adjustments

C. Gathering Letters or Reports from Treating Physicians and Others.

The actual medical records are the most significant evidence, but it may be helpful to get the claimant's treating physician to write a letter or report indicating the severity of the claimant's condition.

D. Preparing for the Hearing.

1. Develop a theory of the case. For example, which listing or listings will you try to meet? How will you be best able to demonstrate to the judge that your claimant is disabled?
2. Prepare the claimant and any witnesses for the hearing.
3. Be prepared to cross-examine the medical expert (if present).
4. Be prepared to cross-examine the vocation expert (if present).

E. Attend the ALJ Hearing.

1. A hearing before an ALJ is less formal than a court proceeding but more formal than other meetings with SSA personnel or a disability hearings examiner. The persons attending a hearing will be the ALJ, his or her clerk, the claimant, the claimant's representative, if any, any witnesses called by the claimant, and possibly a medical and/or vocational expert. The notice of hearing will state whether such expert(s) will attend.
2. Generally, the ALJ will ask questions of the claimant first, and then allow the representative an opportunity to ask further questions. Occasionally, the ALJ will simply turn it over to the representative to ask initial questions.
3. If a medical expert or a vocational expert is present, the ALJ will ask the expert questions based on information in the record. The representative will have an opportunity to cross-examine the experts. The experts will not ask the claimant any questions.
4. If, at the end of the hearing, it appears that further information might be helpful to the ALJ, a request can be made to keep the record open for a short period of time to supplement the record. This is helpful if, for example, there is any missing documentation or an upcoming doctor's appointment that may provide information to support the claim.

V. RETURNING TO WORK WHILE RECEIVING BENEFITS.

A. Trial Work Period.

1. The SSA allows a trial work period as an incentive for people receiving disability benefits to attempt to return to work. The trial work period consists of nine months of services (meaning earnings over \$700.00) within a 60-month period. The nine months need not be consecutive. During the trial work period, benefits will continue no matter how much is earned.
2. Only one trial work period is allowed for each period of disability.
3. Earnings during the nine-month trial work period are disregarded in determining whether a disability has ceased during the trial work period. However, all work and earnings during the trial work period will be considered in determining whether the disability has ceased after the end of the trial work period. In other words, trial work period earnings will be averaged out over an entire calendar year and may demonstrate an ability to perform substantial work for that year. Medical expenses that are necessary in order to perform the work are deducted from countable earnings.
4. Although earnings alone will not affect the right to benefits during the trial work period, a disability may cease during the trial work period if the medical evidence demonstrates that the impairment has sufficiently improved.

B. Extended Period of Eligibility.

1. If the disabling impairment continues after a trial work period, a person will receive an extended period of eligibility immediately following the nine-month trial work period. This extended period lasts for 36 months.
2. During these 36 months, benefits will continue for each month in which earnings are below the level considered to constitute substantial work (\$980.00 per month). Earnings will be calculated on a month-to-month basis, instead of being averaged over an entire year. Again, certain medical expenses can be deducted as long as they are necessary for work.
3. No new application is required to resume benefits at any time during the 36 month period of extended eligibility. However, a new application will be required in order to receive benefits after the end of 36 months.

C. Rehabilitation/Training Programs.

The SSA may approve participation in a government-sponsored or private rehabilitation or training program. Social security may pay for the costs of the services if a person is successfully rehabilitated. In the meantime, benefits will continue until the program is over even if the disability ceases during the program.

D. Sheltered Workshop.

Earnings from work performed under the special conditions of a sheltered workshop will be treated differently. Only those earnings that are attributable to the individual's own efforts will be considered. Subsidies based on financial need or other non-work factors are disregarded.

E. Medicare Coverage.

If disability insurance benefits stop because of substantial gainful activity, but a person is still disabled, Medicare can continue for at least 39 months after the trial work period ends. In other words, during an extended period of eligibility, Medicare coverage may continue even for those months when earnings are too high to receive disability insurance benefits.

F. Special Rules for SSI.

1. Earnings will have the effect of reducing monthly SSI benefits. There is not, however, a dollar-for-dollar reduction based on earnings. In general, the first \$85.00 in earnings per month will not be counted; one-half of any amounts earned over \$85.00 will be deducted from the monthly SSI check.

2. Countable income can include in-kind support as well as monetary earnings. These include food, clothing, and shelter received from a friend or relative. The SSA has special rules for valuing in-kind support. If in-kind support is actually a loan instead of a gift, however, it will not be counted as income. A written loan agreement between friends, partners, or relatives can help document such an arrangement.