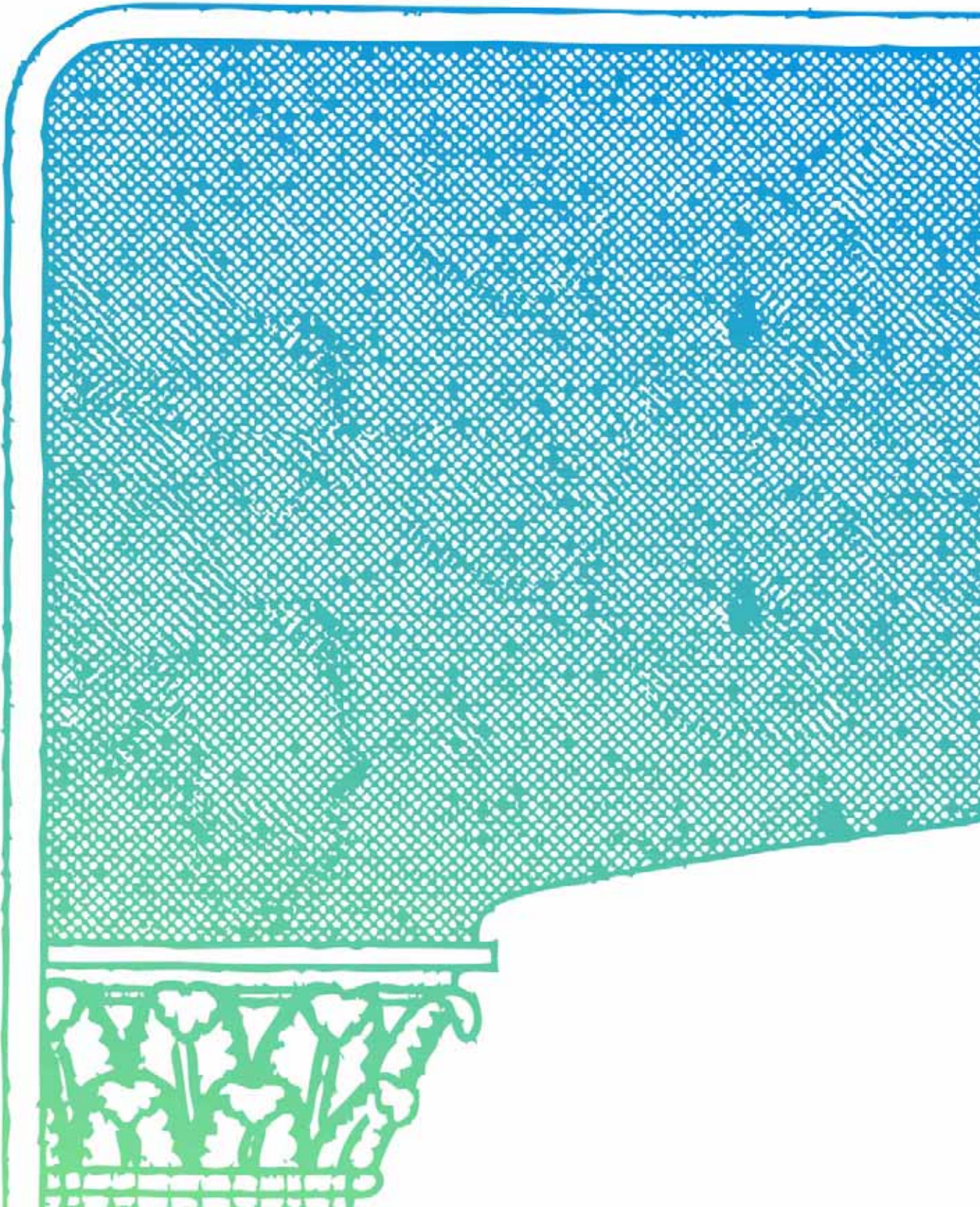


# 13

## Suggestions for Disability Claimants





# 1 • Are you disabled enough for benefits?

Disability lawyers are asked this question a lot: “Am I disabled enough to qualify for benefits from the Social Security Administration?”

Unfortunately, this is a hard question to answer directly because a lot of individual information is needed – severity of impairment, medical findings, symptoms, details of past work, whether you can read and write English, and more.

If you meet SSA’s medical standards for disability, you will win your case virtually instantly. But most who ask are not that disabled.

If you don’t meet SSA’s medical standards, you need to show that you cannot do any regular job you have done in the past 15 years. That job must have lasted long enough for you to learn how to do it, so a job you had for a few weeks probably won’t count. Your earnings from that job must not exceed SSA’s limit.

Once you cross the past work hurdle, if you are under age 50 you need to show that you are incapable of doing a really easy full-time job – usually some sort of sit-down job. It does not matter to SSA that you would not be hired for such a job. What counts is whether that job exists in “significant numbers.” But note this – there is no agreement on how many is a “significant number.”

So for most applicants, whether you are disabled enough comes down to two questions: (1) Are you still capable of doing a past job? (2) If not, are you

capable of working full-time at the easiest job that the SSA can think of?

Proof is a big factor in answering these questions, which is why there are hearings and why lawyers are so helpful in those hearings.

## 2.

# How to apply for disability benefits

The Social Security Administration (SSA) offers three ways for you apply for disability benefits: telephone, in person, or on the web. To use the web, go to [www.socialsecurity.gov/applyfordisability/adult.htm](http://www.socialsecurity.gov/applyfordisability/adult.htm).

If you want to apply for disability benefits by phone or in person, call SSA at 800-772-1213. If you visit an SSA office to complete the application, the person answering the 800 number will schedule your appointment, give you directions, and tell you what papers you need to bring.

If you choose to apply by phone, you will be given a date and approximate time to expect a phone call from someone at SSA. The caller will take your application over the phone and then mail it to you for your signature.

The most important question on the Disability Report, which is completed at the same time as your application, asks how your condition limits your ability to work. Keep it simple and be truthful, but if you are under 50 your answer should explain why you cannot (1) do any job you had in the past 15 years and (2) why you cannot do an easy sit-down job now. Be careful when answering not to exaggerate or minimize your disability.

It is also important that you provide on the Disability Report a complete medical history of treatment for your disabling impairment. The history should include names, addresses, and telephone numbers of all doctors, clinics and hospitals where you were treated, along with the approximate dates of treatment.

Lastly, SSA will ask for a list of all jobs you have worked in the last 15 years before you became disabled, along with a description of what you did on those jobs.

## 3.

# Completing the disability and work history reports

When you first apply for Social Security disability, you will need to fill out a Disability Report and a Work History Report. Here are a few tips on completing those reports:

**DISABILITY REPORT.** This form (SSA-3368-F6) asks for information on your impairments, treatment sources, medical tests, medications, vocational rehabilitation, work information, and educational background.

Included is space for an explanation of how your condition keeps you from working. Do not fall into the common trap of explaining only why you cannot do your current or most recent job – “I can’t lift 50 pounds.” To win disability you need to explain why – considering your age, education, and work

experience – you cannot do any jobs existing in “significant numbers.”

**WORK HISTORY REPORT.** This form (SSA-3369) is used by the SSA to gather information about your past relevant work. It asks you to describe all the jobs you held over the last 15 years.

What is most important in completing this report is not to underestimate the duties and the exertional and non-exertional requirements of each job. If you gloss over the requirements of a job on your Work History Report, but then your attorney elicits additional details from you at your hearing showing the job to be more difficult than initially described, the judge may be skeptical. Your eventual hearing testimony will be more believable if the difficulty of each job is described in detail on the initial report.

## 4.

# Disability treatment sources

The Social Security Administration (SSA) has a list of acceptable medical sources and “other” medical sources. Treatment obtained from other medical sources is given little weight by SSA.

Physicians, osteopaths, podiatrists, optometrists, and psychologists are acceptable medical sources. Nurse-practitioners, physician’s assistants, audiologists, physical therapists, occupational therapists, and chiropractors are not.

Thus, for example, most administrative law judges will give little weight to a chiropractor’s explanation that your back problem is due to spinal misalignment. You will need an opinion

about your back problem from a doctor.

If you have already seen a chiropractor, those treatment records can still be used to show that you were in enough pain to seek chiropractic manipulation. Similarly, your pharmacy’s list of pain medication refills can also be evidence of your pain.

If the medical person treating you is on SSA’s list of acceptable medical sources, SSA will evaluate the weight to be given his or her opinion by considering:

- Nature and extent of the treatment relationship
- How well the treating source knows the claimant
- Number of times the treating source has seen the claimant
- Whether the treating source has obtained a detailed longitudinal picture of the claimant’s impairment
- Treating source’s specialization
- Kinds and extent of examinations and testing performed by or ordered by the treating source
- Quality of the treating source’s explanation
- Degree to which the opinion is supported by relevant evidence, particularly medically acceptable clinical and laboratory diagnostic techniques
- Its consistency with other evidence.



# 5.

## When to apply for disability benefits

Applying for Social Security disability benefits too early can be a mistake. Waiting too long also creates problems, but both problems can usually be overcome.

Some claimants believe they should apply for benefits while they are working so they can get a jump on the lengthy disability evaluation process before they stop working. This is not a good idea because the Social Security Administration (SSA) will deny your claim simply because you are still working. SSA won't even look at your medical issues. If your earnings average more than \$1,000 per month (after SSA subtracts out-of-pocket medical expenses), you will get a denial letter within days of applying.

Some folks apply for disability benefits on the day they stop working. This approach causes disability examiners to wonder how you knew you wouldn't be able to work for the next 12 months and will view your claim with suspicion. Unless your case is one of an obvious disability, SSA will put it on the back burner to see if you end up disabled for an entire year.

On the flip side, if you wait more than about 17 months after you become disabled to apply, you will not receive all of your back benefits. Social Security disability only pays benefits for 12 months before the date of application. SSI, on the other hand, only pays benefits from the month after you apply.

When is the best time? Applying for disability benefits 6-9 months after you stop working increases the possibility that your claim will be successful at the initial or reconsideration steps.

# 6.

## Why disability claims are denied

Almost two-thirds of initial claims for Social Security disability are denied.

Perhaps the most common single reason for an erroneous denial is that the state agency overestimated your residual functional capacity (RFC). For example, the state agency may have determined that you are capable of medium work while you are actually limited to light work. This new RFC may, if you are old enough, lead to a finding of disabled under the Medical-Vocational Guidelines.

Other common examples of erroneous reasons for denial are:

- An impairment was determined to be "not severe"
- Additional impairments were not considered
- The claimant's allegations of pain were not properly evaluated
- The state agency did not gather evidence showing that the claimant's impairment meets the Listings
- The claimant was determined to be capable of past work, but the state agency underestimated the exertional level of the past work both as the claimant actually performed it and as the occupation is usually performed
- The state agency used the claimant's years of formal schooling for establishing educational level, but testing showed the claimant's educational level to be considerably lower.

Other possibilities are virtually limitless.



## 7. Filing a disability appeal

You only have 60 days after receiving a denial letter to appeal. The Social Security Administration (SSA) assumes you received the letter 5 days after mailing, so you actually have 65 days from the date on the letter to file your appeal.

If you don't appeal on time, SSA will usually make you start over. That means you have to file a new application for benefits. Starting over with a claim may result in the loss of back benefits, and sometimes SSA will require new evidence of disability. Starting over also means more delay. This makes it triply important that you timely file your appeal.

Do not wait while you gather additional evidence of disability. Do not delay in order to write an explanation of why the denial is wrong. Don't even wait while you hire an attorney. Appeal online at [www.socialsecurity.gov](http://www.socialsecurity.gov) or better yet, go to the Social Security office with your denial letter. Be sure that the Social Security representative gives you a signed copy of your appeal paper showing you appealed on time.

## 8. Disability hearing delays

A hearing before an administrative law judge (ALJ) is necessary to win many kinds of Social Security disability cases.

Although an individual hearing only lasts an hour or so, it takes nearly 18 months or so from the time a hearing is requested until the hearing is held and a decision is issued. Since more than half of hearings result in favorable decisions, your odds of success are good, but the lengthy waiting time is painful.

The only time SSA holds hearings earlier is when a claimant is terminally ill, suicidal or homicidal, or unable to obtain food, medicine or shelter and has no means to remedy the situation. Living in a homeless shelter is not sufficient reason, although "expiration of shelter stay" is sufficient under SSA's rules. In actual practice, though, people living in homeless shelters can usually have their cases expedited because SSA personnel know that most homeless shelters have time limits.

SSA has been hiring ALJs and staff to reduce the wait. It has worked to identify cases in which favorable decisions can be issued without a hearing. It has allowed ALJs to issue favorable decisions from the bench. And it is using more technology.

All new claims have electronic rather than paper files. SSA is using these electronic files to allow ALJs who are ahead of the average delay to hold hearings by video for other regions behind the national average.

Unfortunately, the flood of additional applications that

arrived during the recession has overwhelmed these improvements and a lengthy wait is still the norm.

## 9. Your disability attorney's most important job

The most important task your disability attorney can do for your case is getting an opinion from your doctor about the nature and severity of your impairments – symptoms, diagnosis, prognosis, your physical and mental restrictions, and what you can still do despite your impairment.

Under Social Security regulations, your doctor provides the most important medical opinion evidence in your case. Your doctor's opinion might even be given "controlling weight," meaning it will be decisive. To be decisive, your doctor must have treated you rather than just evaluated you. And his or her opinion must be well supported by medically acceptable clinical and laboratory diagnostic techniques.

However, decisive refers to the degree of medical impairment, not whether you are disabled. The Social Security Administration takes the position that it is the one to determine disability, which it sees as a legal conclusion based on age, education, and work experience as well as medical evidence.

Thus, your attorney will never ask your doctor if you are disabled, but instead will focus on the degree to which you are impaired. The forms found on my website under specific types of impairment can be useful for eliciting that information.

## 10. Preparing for your disability hearing #1

The most common problem claimants have at their hearings is their own nervousness. I have found that spending sufficient time explaining what will happen at the hearing can work wonders at calming nerves. I describe the hearing room, the judge, and the judge's assistant who will run the recorder. I explain the necessity for answers audible to the microphones.

I also outline the areas of inquiry: education and training, work experience and work skills, medical condition, treatment history, physical abilities, mental abilities, and daily activities.

I typically meet with my clients a day or so before the hearing to discuss my theory of disability, go through the issues in their cases, and prepare them to testify. My goal is to prepare them to give relevant, honest testimony which neither exaggerates nor minimizes their impairments. The best claimant testimony is filled with anecdotes, details, and examples of limitations. It provides facts about strengths as well as weaknesses in a straightforward manner.

When claimants have difficulty describing things in detail, I encourage them to think about how their impairments have changed their lives. Completing an activities questionnaire can be helpful. You will find one in the forms section of this website.

# 11.

## Preparing for your disability hearing #2

When I am preparing a claimant to testify at his or her disability hearing, I describe my theory of the case.

So if you were my client, I would explain to you that I will be attempting to prove two things with your testimony:

First, that you cannot do any of the jobs you have had in the past 15 years; and second, that you are not able to do any other jobs which exist in significant numbers. For the first element of proof, I would ask you to describe the easiest job you've had in the past 15 years and explain why you cannot do it now. I would help you refine your explanation by weeding out any reasons Social Security Administration (SSA) has determined are irrelevant. For example, "The company went out of business." "They'd never rehire me with all my medical problems." And so on.

For the second element of proof, I would explain that you don't have to be bedridden to be incapable of performing jobs existing in significant numbers. I would describe how Social Security regulations help with this proof by rather explicitly setting forth what needs to be shown, especially in an exertional impairment case.

For example, for a 50-year-old, poorly educated claimant with an unskilled heavy work background, I would explain that in addition to proving that he cannot do his former heavy job, he must also prove that he cannot do a light job, e.g., standing at a machine in a factory for six hours out of an eight-hour working day, frequently lifting 10 pounds, and occasionally lifting up to 20 pounds. I explain that even if the judge finds that he is capable of a sit-down job, the judge will find him disabled.

I would also tell you not to argue your own case, explaining that common-sense arguments won't work, and that disability determination is hypothetical. This is crucial for those difficult cases of claimants under age 50. I would sort through your reasons why you cannot do a sit-down job and tell you not to bring up the common sense reasons that SSA has deemed irrelevant: "I'm not qualified for a sit-down job." "I'd never be hired for a job like that." "There aren't any jobs like that around here."

# 12.

## Preparing for your disability hearing #3

If I was preparing you for your upcoming disability hearing and there were inconsistencies in your medical records, I would first ask if you can help explain them.

There are always inconsistencies and, indeed, factual errors in medical records. I ignore most of them unless they are of a magnitude that cannot be disregarded. Unless you had a very convincing explanation, I would deal with these problems by asking a doctor to address them in a report. I always try to keep the claimant's "medical" testimony (about things his doctor has told him but which do not appear in the medical records, about his own medical theories, etc.) to a minimum.

Such testimony is not usually helpful to the ALJ in understanding medical issues, so I would remind you not to quote your doctor unless I or the judge specifically ask, "What did your doctor say about this?"

If the ALJ asks, "What keeps you from working?"





a good answer is not to state a diagnosis, such as arthritis. Lots of people work despite the fact that they have arthritis. The ALJ may have arthritis. The reason you cannot work is the severity of your symptoms, something which you know better than anyone. So if you are asked that question, the door is open for you to launch into a full description of your symptoms and limitations.

You should neither exaggerate nor minimize your testimony about your pain or limitations. You want to guard against any tendency to exaggerate pain testimony, but you shouldn't minimize it either. You will be testifying under oath and must tell the truth. I would make sure you understand how your hearing testimony about your pain fits into your disability case. I would explain my theory of how your pain prevents you from performing substantial gainful activity, e.g., inability to sit, stand or walk for prolonged periods, inability to get through an eight-hour day without lying down, good days/bad days/missed work, inability to concentrate or pay attention on a consistent basis, irritability, etc.

# 13.

## Preparing for your disability hearing #4

I have learned that the best way to obtain vivid descriptions and detailed examples in the claimant's testimony at the disability hearing is to make him feel comfortable using his own words.

So if I were prepping you for your hearing, one way I would encourage natural testimony would be to tell you to psyche yourself up for talking to the administrative law judge, not the same way you would talk to a regular judge in a courtroom, but rather as if the ALJ

were an old friend of yours who wants to be brought up to date about all of the problems you have been having lately.

When the ALJ asks you about your daily activities, you are presented with a golden opportunity to describe your limitations in the context of daily life. Be sure to give enough details. Run through your usual day hour by hour for the judge, providing as much detail as possible, emphasizing those things that you do differently now because of your impairments.

Describe how long you are active doing things and how long you rest afterwards. Give details about resting — where you rest, whether it's sitting or lying down, whether it's on the couch or the bed or a recliner chair. Tell how long it takes to do a project now compared to how long it used to take. Describe all those things that you need help from other people to do — and tell who those others are. Give details and examples right down to the names of the television shows you regularly watch, if that is what you do.

The more specifics you can provide to the ALJ about your daily activities, the more readily the ALJ will understand your symptoms and limitations.

Lastly, remember these general rules for testifying:

1. Tell the truth.
2. Neither exaggerate nor minimize your medical symptoms.
3. Know your present abilities and limitations.
4. Provide relevant details and concrete examples -- but don't ramble on.
5. Don't worry. Your representative will be there to help you if you forget something or don't bring out the necessary details.

I hope you found my suggestions helpful. More disability information may be found on my website.

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