

A Primer on Social Security Disability Law

Emily C. Russell* and the Hon. Glynn F. Voisin, June 2012**

Introduction

If you receive a paycheck, you are likely paying into the Social Security program with the hope you will receive monthly payments after you retire. For nearly fourteen million Americans¹ with a mental or physical impairment that prevents them from working, the Social Security program has another meaning: payment of disability benefits. The Social Security disability program has reached a critical mass, in terms of the number of claims filed² and the amount of benefits paid out.³ Social Security disability insurance payments account for \$1 of every \$5 spent by the Social Security

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¹ SSA, Monthly Statistical Snapshot, April 2012, http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/ (last visited May 29, 2012).

² In FY 2009, ODAR issued 658,600 dispositions. In FY 2010, 737,616. In FY 2011, over 800,000. Hon. D. Randall Frye, The Role of Administrative Law Judges at the Social Security Administration, Statement before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, July 22, 2011, www.aalj.org/pdf/11b004a.pdf.

³ The Social Security Administration paid out \$120 billion in 2005.

Administration.⁴ To further complicate issues, current projections estimate that the disability benefits fund will be depleted by 2016.⁵

Social Security disability law is rarely a topic of conversation amongst families or American workers until it has to be. Congress is similarly silent on the issue and its future, despite the fact that the program cost \$132 billion in 2011, “more than the combined annual budgets of the departments of Agriculture, Homeland Security, Commerce, Labor, Interior and Justice.”⁶ Despite public reticence on Social Security disability, or perhaps because of it, a basic knowledge of Social Security law is arguably more important now than ever.

The aging baby boomer generation, in combination with the economic downturn, has catalyzed an unprecedented increase in applications for old-age and disability benefits.⁷ Commissioner Astrue told Congress that when he leaves office in 2013, “the agency will have about the same number of employees that we had when [he] arrived in 2007, even though our workloads have increased dramatically. Since FY 2007, retirement and survivor claims have increased by 26 percent and disability claims have increased by

⁴ Eduardo Porter, *Disability Insurance Causes Pain*, NEW YORK TIMES (Apr. 24, 2012), <http://www.nytimes.com/2012/04/25/business/economy/disability-insurance-causes-pain.html?pagewanted=all> (last visited May 29, 2012).

⁵ Brian Faler, *Social Security disability trust fund projected to run out of cash by 2016*, May 30, 2012, WASHINGTON POST, http://www.washingtonpost.com/politics/social-security-disability-trust-fund-projected-to-run-out-of-cash-by-2016/2012/05/30/gJQA3AfH1U_story.html (last visited June 5, 2012).

⁶ Brian Faler, *New use draining Social Security disability fund: Insolvency seen in four years unless Congress acts*, BOSTON GLOBE, <http://www.bostonglobe.com/news/nation/2012/05/29/social-security-disability-insolvent-unless-congress-votes/wmG61sP4AUS0Ep28oKobJN/story.html> (last visited June 5, 2012).

⁷ The percentage of disabled workers aged 25-64 has increased from 4.5 percent to 5.3 percent since the economic recession began. Janet Whitman, *Jobless disability claims soar to record \$200B as of January*, Feb. 19, 2012, NEW YORK POST, http://www.nypost.com/p/news/business/pain_brings_gain_taZkGOAUhXALmhEEyMpmqJ (last visited June 5, 2012).

over 31 percent.”⁸ One commentator explains that the recent increase in Social Security disability applications and resulting benefit awards has been caused by collection of factors, including “the baby boom demographic bump” as well as

recurrent or sustained economic recessions; a trend toward corporate downsizing of less productive workers; the elimination or reduction of other benefit programs for people with disabilities and people living in poverty; the rise in the Social Security retirement age to 66; declining access to quality ongoing and preventive health care for low-wage workers; transformations in the low wage economy; the rise in community-based alternatives to institutional care for claimants with mentally [sic] illness; outreach efforts to homeless persons with disabilities; state and local welfare agency requirements that certain persons apply for federal disability benefits; and technological, scientific, medical and psychiatric diagnostic advances that more readily reveal clinical and objective bases for impairments and their severity, among other reasons.⁹

Although the ongoing recession, the resulting increase in disability benefits applications, and an incident with an outlier judge awarding 100 percent of his cases¹⁰ have complicated Michael Astrue’s tenure as current Commissioner of Social Security, his successor will be challenged by the task of saving the entire program. As mentioned, current estimates project that the Social Security disability fund will be depleted by 2016.¹¹ In less than four years, the Social Security Administration will have to begin borrowing from the old-age benefits fund to make payments to America’s disabled

⁸ Statement of Michael J. Astrue before Senate Finance Committee, May 17, 2012, http://www.ssa.gov/legislation/testimony_051712.html (last visited June 5, 2012).

⁹ Jon C. Dubin and Robert E. Rains, Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them), *American Constitution Society for Law and Policy Issue Brief* (Mar. 2012), pub in *Social Security Forum*, Vol. 34, No. 3 (March 2012) 8, 18-19 (citations omitted).

¹⁰ Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, *WALL ST. J.* (Mar. 22, 2011), <http://online.wsj.com/article/SB10001424052748703752404576178570674769318.html> (last visited June 6, 2012).

¹¹ Robert Pear, *Social Security’s Financial Health Worsens*, Apr. 23, 2012, <http://www.nytimes.com/2012/04/24/us/politics/financial-outlook-dims-for-social-security.html> (writing that the SSA has project the disability fund will be depleted by 2016) (last visited May 29, 2012); *see also* Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, *WALL ST. J.* (Mar. 22, 2011), <http://online.wsj.com/article/SB10001424052748703752404576178570674769318.html> (last visited June 6, 2012).

workers. A massive overhaul of the Social Security disability benefits program is long overdue.

As the President of the Association of Administration Law Judges testified before Congress: “[i]n the context of disability adjudication, the government is the trustee of billions of taxpayer dollars.”¹² Social Security law has far-reaching and direct impacts on a large percentage of the American populace,¹³ and in recent months, the spotlight has focused on Social Security disability. This area of the law is ripe with opportunities for law students to study, claimants representatives to build a practice, and Americans to educate themselves on issues that may directly affect their family. With those opportunities in mind, this primer provides an insider’s view on Social Security disability law.

While the disability claims process has many steps, the heart lies with the Office of Disability Adjudication and Review (“ODAR”) and the administrative law judges who issue decisions after an initial application for benefits is denied at the state level. Part I of this primer addresses the underpinnings of the Social Security disability benefits adjudication process: the function of administrative law judges; the distinctions between federal trials and administrative hearings; and the path of a disability claim from the initial application to a hearing at the Office of Disability Adjudication and Review. Part II discusses the importance of efficiency in the claims process and ODAR’s efforts to streamline hearings. Part III provides an in-depth explanation of the sequential

¹² Hon. D. Randall Frye, The Role of Administrative Law Judges at the Social Security Administration, Statement before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, July 22, 2011, www.aalj.org/pdf/11b004a.pdf

¹³ Nearly fourteen million disabled workers and their dependents received approximately \$120 billion in disability payments in 2005. Social Security Administration, A Primer: Social Security Act Programs to Assist the Disabled, www.ssa.gov/policy/docs/ssb/v66n3/v66n3p53.html (last visited May 31, 2012).

evaluation ALJs must use to make a determination of whether an individual is “disabled” under the Social Security Act. Part IV lists a collection of practitioner best practices recommended by a Chief Administrative Law Judge and administrative law judges.

This primer concludes that Social Security disability law is experiencing a resurgence. Consequently, a variety of interested parties will benefit from a basic understanding of the fundamentals of the disability adjudication process. The average American worker may use this understanding to develop his or her case. Social Security disability claimants and claimants’ representatives will benefit from the primer on the law and can strengthen their disability practice after reading the best practices for practitioners. Finally, for those who do not have personal or professional experience with disability law, this primer may inform future career choices and will leave such readers with a thorough understanding of the basics of this distinctive area of law.

Part I Background of the Social Security Disability Program

The Social Security Administration is responsible for the administration of two of the world’s largest disability programs: Social Security Disability Insurance and Supplemental Security Income.¹⁴ The Social Security disability program is distinct from the Social Security old-age benefits program, more commonly known as retirement benefits. When a worker is diagnosed with a physical or mental impairment that he believes prevents him from continuing to work, he may apply for Social Security disability insurance. To qualify, the worker must have paid into the Social Security system over a specific period of time.¹⁵ This preliminary gatekeeping feature of the

¹⁴ Social Security Administration, A Primer: Social Security Act Programs to Assist the Disabled, www.ssa.gov/policy/docs/ssb/v66n3/v66n3p53.html (last visited May 31, 2012).

¹⁵ See 20 C.F.R. §404.315 (“You are entitled to disability benefits while disabled before attaining full retirement age...if you have enough social security earnings to be insured for disability...”)

program has been attributed to the general perception of Social Security payments as a property right, rather than a form of welfare.¹⁶

A worker may file a paper claim with the office of Disability Determination Services (DDS) located in his state or file electronically through the Social Security Administration website. DDS processes each claim and makes an initial determination of whether the claimant is disabled. If the initial claim is denied, the claimant may appeal the determination to the Social Security Office of Disability Adjudication and Review (ODAR). An administrative law judge (ALJ) will then review the documents from DDS and the claimant's medical record. Finally, the ALJ will hold a hearing to receive testimony from the claimant and any witnesses the ALJ chooses to admit. After the hearing, the ALJ will make his decision of whether the claimant is disabled.

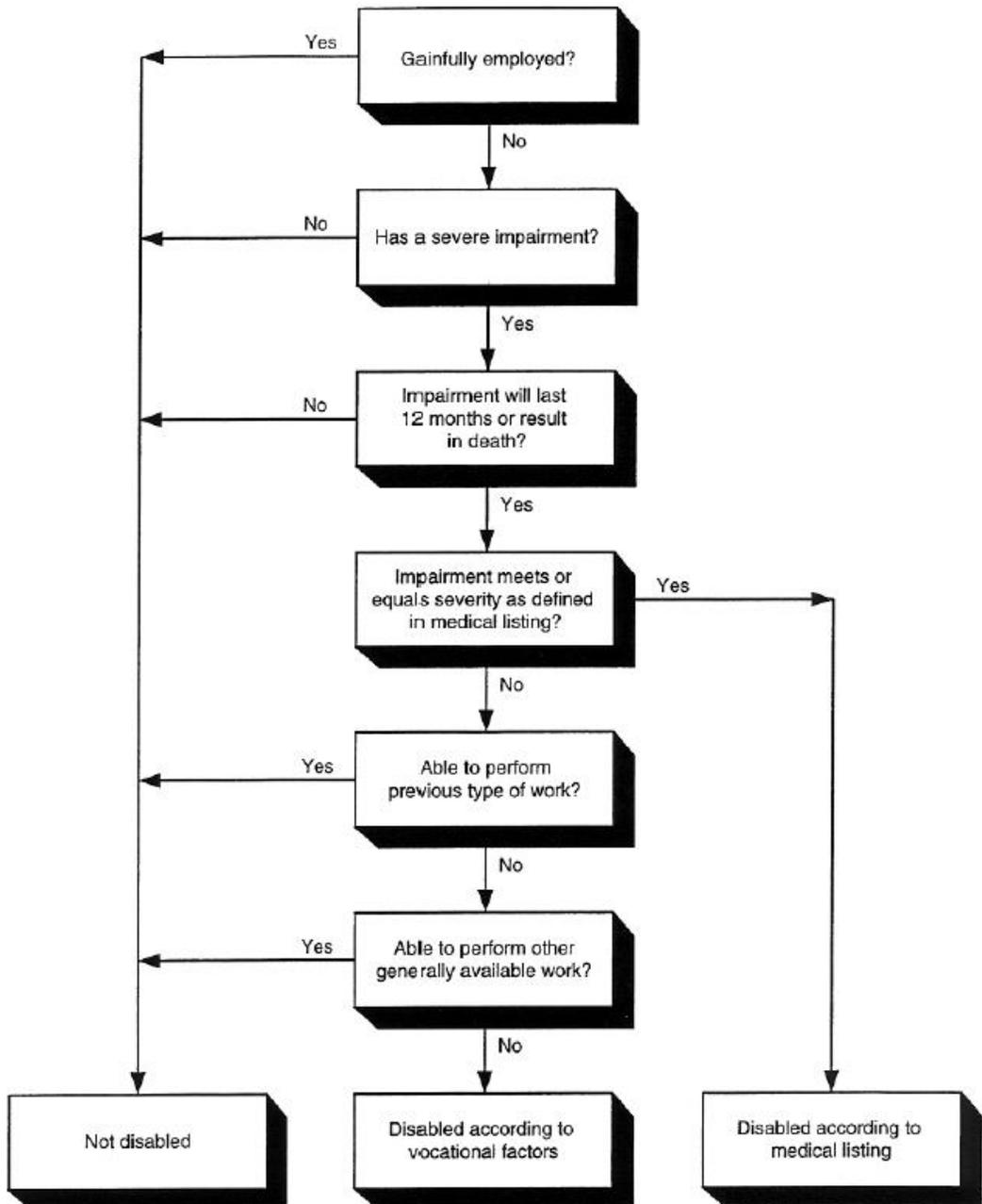
The Definition of Disability

The Social Security Act strictly defines “disability” for purposes of determining eligibility for disability benefits.¹⁷ It is important to note that a claimant may not meet the Social Security Act definition of disability even if he or she has medically determinable physical and/or mental impairments. The Social Security Administration is not a diagnosis-driven agency. Instead, its objective is to determine a person's functional abilities to work despite medically imposed limitations. Thus, federal regulations narrowly define disability as “the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of

¹⁶ Edward Rubin, *The Affordable Care Act, The Constitutional Meaning of Statutes, and The Emerging Doctrine of Positive Constitutional Rights*, 54 WM. & MARY L. REV 1639, 1695 (2012).

¹⁷ See Jon C. Dubin, *The Labor Market Side of Disability Benefits Policy and Law*, 20 S. Ca. Review of Law and Social Justice 1, 9-14 (discussing the Congress' development of the definition of disability over time).

not less than 12 months.”¹⁸ To make this determination of disability, ALJs methodically examine the medical evidence and claimants’ subjective statements about their conditions using the five-step sequential evaluation.



The five step sequential process.

¹⁸ 20 C.F.R. §404.1505

What is an administrative law judge (ALJ)?

All federal judges are not created equal. There are several notable differences between federal administrative law judges and federal district court judges. Federal administrative law judges are Article I judges. In other words, they fall under the executive branch of the federal government. The Senate does not confirm the appointment of Article I judges. Federal district court judges are Article III, or judicial branch, judges. Article III under the Constitution requires that the President of the United States appoint Supreme Court justices and courts of appeals and district judges and that the Senate must confirm those appointments.

A second difference between federal ALJs and federal district court judges is that ALJs conduct hearings. At the conclusion of a hearing, the federal ALJ makes a decision. In contrast, the federal district court judge conducts hearings on motions and trials. At the conclusion of a jury trial, federal or state district court judges issue verdicts. If the judge holds a bench trial, he or she issues a judgment.

Procedurally, hearings differ from federal or state trials or hearings on motions. There is no prohibition against hearsay in a hearing room. Also, the Code of Federal Regulations guides the admission of evidence at disability hearings, rather than the Federal Code of Civil/Criminal Procedure.

Notably, federal administrative agency practice is an exception to the unauthorized practice of law doctrine. As a result, in disability benefits cases before an administrative law judge, representatives of claimants are *not* required to be practicing attorneys, although seventy-eight percent of claimants are represented at the hearing level

by attorneys.¹⁹ In general, the practice of law is restricted to attorneys admitted to a state bar after having met specific educational, examination and moral character requirements.²⁰ The purpose of the prohibition on the unauthorized practice of law is to promote competent representation and ethical behavior.²¹ One commentator explains: “As administrative agencies were designed without the formalities and rules of the courts, they were ideally suited for non-attorney representatives.”²² The Administrative Procedure Act, which created a framework for the hearings conducted by ALJs, neither explicitly prohibited or acquiesced in non-attorney representation.²³

In 1963, the Supreme Court addressed this congressional silence and provided a rationale explaining why states may not rely on the unauthorized practice of law doctrine to bar non-attorney representation of others before a federal administrative agency.²⁴ In *Sperry v. State of Florida*, the Supreme Court determined that the federal Administrative Procedure Act preempted Florida statutes guiding the practice of law.²⁵ “While non-attorneys were in fact practicing law, it was deemed an exception to the unauthorized practice of law doctrine because it was limited to a federal administrative agency that had authorized it.”²⁶ Because the Social Security Administration is the largest adjudicatory

¹⁹ Administrative Procedure Act §556(d); “Electronic Services for Representatives” NOSSCR Vol. 33, No. 8, 5 (Aug. 2011).

²⁰ Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 Fordham L. Rev. 2581, 2587 (1999).

²¹ Id. at 2593. See also Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, So. Ill. L. J. at 246-47 (arguing that the language in the Code of Federal Regulations and the Social Security Administration’s Hearing Appeals and Litigation Manual (HALLEX) that requires non-attorneys to be “helpful” should be changed to “competent” to reflect the language of the Social Security Act).

²² Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, So. Ill. L. J. at 234.

²³ 5 U.S.C. 500(d)(1) (2006).

²⁴ *Sperry v. State of Florida*, 373 U.S. 379, 388 (1963)

²⁵ 373 U.S. at 388.

²⁶ Swank at 238 (citation omitted).

body in the world,²⁷ it follows that non-attorneys are more likely to appear before it than any other administrative agency. Today, non-attorney representation comprises eleven to fourteen percent of the approximately 700,000 cases heard by the Social Security Administration annually.²⁸

Unlike litigation, the disability claims hearing system is non-adversarial. At the hearing, the ALJ will typically ask questions of the claimant first and allow the representative a chance to follow up. This questioning process is not a cross-examination; rather, it helps to develop the record and allows the ALJ to hone in on key points. Through the questioning process, ALJs play an active role. ALJs serve as: (1) “advocates for the government, critically scrutinizing the validity of the position of the claimant;” (2) “advocates for claimants who do not have professional representation” and (3) “as adjudicators who must render a decision.”²⁹ Professor Jerry Mashaw succinctly describes the primary goal of the adjudication as “the protection of the claimant’s interest in full development and consideration of his or her claim.”³⁰

The administrative review process for disability benefits is distinct from any other area of law because each step follows a formal, non-adversarial framework. Upon receiving an unfavorable initial determination regarding his or her application for disability benefits, a claimant may request a hearing before an ALJ. ALJs review cases *de novo*, as if considering the claim for the first time. Their review is based on the

²⁷ Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 Cornell L. Rev. 363, 364 (2007).

²⁸ *Id.* at 234-35.

²⁹ Jonathan P. Schneller, *The Earned Income Tax Credit and the Administration of Tax Expenditures*, 90 N.C. L. REV. 719, 777 (2012) (citations omitted).

³⁰ Jerry Mashaw, BUREAUCRATIC JUSTICE 128, (1983).

medical evidence, claimant's subjective complaints, and the vocational and/or medical expert.

The claimant appears at his local Office of Disability Adjudication and Review for a hearing before the ALJ. The SSA's administrative hearings process is governed by Sections 554 and 556 of the Administrative Procedure Act, the provisions for formal adjudication, which are reiterated in Sections 205(b)(1) and 205(g) of the Social Security Act.³¹ Under these provisions, the claimant's rights include: notice and opportunity to be heard;³² right to an evidentiary hearing; the right to findings of fact and conclusions about legal rights based on evidence adduced at hearing; following hearing, the right to a decision containing a statement discussing the evidence adduced at hearing and which includes the Commissioner's determination and the reason(s) upon which it is based; and the right to have the evidentiary record created before the agency preserved for judicial review at the district court level.

The hearing provides more sources of evidence for the ALJ to consider before making his or her decision on the claimant's status as disabled or not disabled. As one commentator observes, at a hearing before an ALJ, "[c]laimants have the first true opportunity to describe matters not likely apparent from the paper records before the DDS [Disability Determination Services], such as the side-effects of prescribed medication, the negative synergies from the combined or cumulative consequences of

³¹ See ALJ William A. Wenzel, AALJ VP, Region 5, *A Primer on Procedural Due Process: What Process Is Due and What Is Its Source?*, Oct. 6, 2011 (6-7) (observing "While section 554(a) of the APA...applies 'in every case of adjudication required by statute to be determined *on the record after opportunity for an agency hearing*' and while the Social Security Act does not contain this phrase verbatim, the [SSA] conveys clear Congressional intent to provide an aggrieved claimant with the [same] full panoply of protection" (emphasis in original)).

³² At least one court has ruled that the Social Security Administration violates a claimant's right to hearing if there is an unreasonable delay between the time of the request for a hearing and the date of the hearing itself. See *White v. Mathews*, 559 F.2d 852, 858-59 (2d Cir. 1977).

multiple impairments, and the burdens and limitations of various treatment regimens.”³³ Also, at a hearing, the ALJ receives testimony from a vocational expert (VE) and sometimes a medical expert. The VE provides impartial vocational opinion on the claimant’s ability to work and reviews vocational exhibits and testimony at the hearing. The medical expert provides his opinion on the claimant’s impairments, even if he or she has not treated the claimant in the past. The claimant may also present witnesses to testify, but the ALJ is not required to hear from the witness.³⁴ Using the claimant’s medical record and the information gathered at the hearing, the ALJ follows a formal five-step sequential evaluation to determine whether the claimant is disabled.

Part II Efficiency and Social Security Disability Claims Process

The one-size-fits-all sequential evaluation for adjudicating Social Security disability claims assists local hearing offices face a monumental task of processing thousands of claims every year. Recognizing the importance of expediency in this system, current SSA Commissioner Astrue aimed to reduce the disability application and hearing backlog.³⁵ When a claimant is genuinely facing a disability, the time that he waits for a determination about his benefits is critical to his financial and physical wellbeing. As Senator William S. Cohen noted in a 1983 Senate hearing, “[t]he decisions of ALJs have profound effects on people’s lives, and in many cases, represent the difference between a dignified standard of living and abject poverty for a disabled

³³ Jon C. Dubin and Robert E. Rains, Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them), American Constitution Society for Law and Policy Issue Brief (Mar. 2012), pub in Social Security Forum, Vol. 34, No. 3 (March 2012) 8, 14

³⁴ Id.

³⁵ SSA, Social Security Michael J. Astrue, <http://www.ssa.gov/pressoffice/factsheets/astrue.htm> (last visited June 6, 2012).

worker.”³⁶ Waiting three years for a determination could deplete a claimant’s life savings. Worse, the wait period could catalyze the development of mental impairment such as depression when the initial claim was limited to a physical impairment. As one federal court observed, “[t]he disability insurance program is designed to alleviate the immediate and often severe hardships that result from a wage-earner’s disability.” Consequently, efficiency is critical to Social Security disability law.

Approximately 1300 administrative law judges work for the Office of Disability Adjudication and Review.³⁷ In 2011, the ALJs issued roughly 795,000 dispositions.³⁸ Through the establishment of production goals by the Social Security Administration, ALJs demonstrated a marked increase in their rate of cases produced each month. In 1974, ALJs each disposed of roughly 13 cases per month.³⁹ Today, seventy-five percent of administrative law judges each hear nearly 500-700 cases per year, which translates to roughly 40-50 cases per month per judge.

ALJs, however, must balance efficiency with providing legally sufficient decisions. They are responsible for disposing of a high volume of cases, while being held to a high level of scrutiny.⁴⁰ The five step sequential evaluation provides a reliable, objective means of assessing large volumes of highly fact-specific claims. In recent years, even in the face of increasing volumes of hearing requests, Offices of Disability and Review have become more efficient. In 2011, ODAR cut the average waiting time

³⁶ S. Hrg. 98-926. Social Security Disability Reviews: The Role of the Administrative Law Judge (hearing before the U.S. Senate Subcommittee on oversight of Government Management, Committee on Governmental Affairs, 98th Congress, First Session, June 8, 1983. Hon. William S. Cohen (chairman of the subcommittee) presiding)

³⁷ SSA, Hearing Office Locator Office of Disability Adjudication and Review, http://www.ssa.gov/appeals/ho_locator.html (last visited June 5, 2012).

³⁸ SSA, Comprehensive Printing Program Plan for Fiscal Years 2013-2015, 1 (Jan. 2012), 1 www.ssa.gov/legislation/2013-2015CPPP.pdf.

³⁹ William Cohen’s testimony (cited elsewhere in article)

⁴⁰ All decisions by ALJ may be appealed to the United States Supreme Court.

for hearing decisions to less than one year for the first time since 2003.⁴¹ The Office of Disability Adjudication and Review has established benchmarks for quality case processing that aim to move a case from its initial receipt to mailing of the ALJ's decision in 219 calendar days or less (seven months).⁴² From 2011-2012, the average processing time for hearing decisions decreased, but is still higher than Commissioner Astrue's goal of 270 days.⁴³ The New Orleans Office of Disability and Adjudication Review averages 259 days to process a case.⁴⁴ At the time of this writing, its average processing time ranked number ten out of 165 hearing offices and hearing centers in the country.⁴⁵

The increasing efficiency at the SSA is due, in large part, to agency's technological advances in recent years. With the advent of the Electronic Disability Project, SSA's electronic folder in 2004 the SSA replaced folders filled with paper claims that had to be lugged to hearing rooms and on airplanes during travel.⁴⁶ Offices of Disability Adjudication and Review moved into a fully electronic realm where all paper evidence, forms, and case processing documents would be officially stored in an electronic record accessible to all offices across the country. The system contains a folder for every claimant who files a claim and a case processing management system.

⁴¹ Statement of Michael J. Astrue before Senate Finance Committee, May 17, 2012, http://www.ssa.gov/legislation/testimony_051712.html (last visited June 5, 2012).

⁴² Office of Disability Adjudication and Review Benchmarks for Quality Case Processing, <http://odar.ba.ssa.gov/hq-components/ocalj/benchmarks-for-quality-case-processing/> (last visited Feb. 27, 2012)

⁴³ Statement of Michael J. Astrue before Senate Finance Committee, May 17, 2012, http://www.ssa.gov/legislation/testimony_051712.html (last visited June 5, 2012).

⁴⁴ SSA, Hearing Office Average Processing Time Ranking Report FY 2012, http://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html (last visited June 5, 2012).

⁴⁵ Id.

⁴⁶ ALJs, including this article's co-author Judge Glynn F. Voisin, at the Jackson, Mississippi office processed one of the first cases in a fully electronic environment. Mississippi was one of the first states for which the electronic folder became the official folder for new disability cases filed January 25, 2005 or later.

Other technologies include electronic hearing rooms, digital recording acquisition project, and video hearings.

Going electronic provides Offices of Disability and Adjudication with a more efficient and effective case processing system. In light of the large volumes of confidential information contained in each case (medical histories and Social Security numbers), it is significant that the electronic system provides a secure, centralized repository of ODAR data. Administratively, the system reduces the time it takes to receive information and facilitates automatic creation of the exhibit list. For the tech savvy claimant and representative, it provides online access to hearing notices. Claimants who request a copy of their case files will receive it via CD. Representatives have access to this CD during a hearing, but do not have access to the system as a whole.⁴⁷ One Louisiana non attorney practitioner has embraced the paperless processing system at ODAR. Gary Sells advises his colleagues: “the best way for a representative to maximize the benefits of ODAR’s technology is to go completely paperless.”⁴⁸ In his office, Mr. Sells retains paper copies of only “the signed fee contract, medical releases, SSA-827s, and SSA-1696” and stores all other documents and files to his computer server.⁴⁹

Part III. The Five-Step Sequential Evaluation

The five-step sequential evaluation mimics the definition of adult disability in the Social Security Act line by line. The ALJ must follow the specific steps in sequence

⁴⁷ See HALLEX I-2-1-35, http://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-35.html (last visited June 5, 2012).

⁴⁸ Gary Sells, “Using Technology to Help Your Practice,” presented at “Social Security Disability on the Cutting Edge of Technology” Continuing Legal Education Course, Loyola University New Orleans College of Law, Oct. 15, 2011.

⁴⁹ Id.

when evaluating a claim for disability. This process is designed to achieve accurate and consistent application of the provisions of the Social Security Act and regulations at all levels of consideration. It permits identification of the most obvious allowances and denials early in the process. Though the ALJ follows the steps sequentially, the process is stopped at any step at which a finding of disabled or not disabled can be made.

The adjudication and review process begins at ODAR when the claimant files his appeal of DDS' decision. The ALJ receives the claimant's record, which typically contains medical evidence, documents filed by the claimant with DDS, and sometimes statements from a third party such as a wife or friend who assisted with the initial disability application. Using this record, an ALJ follows the five-step sequential evaluation to make his determination of whether the claimant meets the SSA's definition of "disabled" and is therefore entitled to disability benefits.

Step 1 Substantial Gainful Activity

At step one, the ALJ must determine whether the claimant has engaged in substantial gainful activity since he or she filed the initial application. Substantial gainful activity, or SGA, is work that involves significant and productive physical or mental duties, the substantial facet, and is done for pay or profit, the gainful facet.⁵⁰ The ALJ will ask the claimant "Are you working?" and "Have you worked since you filed your initial claim?"⁵¹ Part-time work may still qualify as substantial.⁵² "Gainful" means work that is typically performed for pay or profit.⁵³ The claimant does not have to realize a profit for the work to qualify as gainful. The definition of disability is premised on the

⁵⁰ See 20 C.F.R. §404.1510

⁵¹ See 20 C.F.R. §§ 404.1571, 416.971 (2011)

⁵² See 20 C.F.R. § 404.1572

⁵³ See 20 C.F.R. §1572(b)

idea that the claimant is unable to perform *any* work activity. Therefore, the exceptions to this rule are few and far between.

One such exception is an unsuccessful work attempt. If the claimant has worked since the initial application filing, his representative will attempt to demonstrate that the claimant did not earn enough money to rise to the level of SGA.⁵⁴ The Social Security Administration “generally consider[s] work that [the claimant is] forced to stop or to reduce below the substantial gainful activity level after a short time because of [his or her] impairment to be an unsuccessful work attempt. Aside from this exception, if an individual engages in SGA, she does not meet the Social Security Act’s definition of disabled regardless of how severe her physical or mental impairments are.⁵⁵ The inquiry ends at step one. If the individual is not engaging in SGA, the analysis proceeds to the second step.

Step 2 Does the claimant have a severe impairment lasting at least twelve months?

If the claimant is not performing substantial gainful activity, the next step in the disability determination is an evaluation of whether he has severe physical or mental impairment.⁵⁶ The impairment must result from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical and laboratory diagnostics techniques.⁵⁷ There are several requirements for a claimant to meet this step. First, the impairment must be expected to result in death or have lasted, or be expected to last, for a continuous period of at least 12 months.⁵⁸ Second, the

⁵⁴ See 20 C.F.R. §404.1574(b)

⁵⁵ See 20 C.F.R. §404.1571 (“If you are able to engage in substantial gainful activity, we will find that you are not disabled.”).

⁵⁶ 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (2011)

⁵⁷ 20 C.F.R. 404.1508

⁵⁸ See 404.1509

impairment must be severe. Courts have interpreted a severe impairment as requiring more than a slight or de minimis impairment.⁵⁹ Third, the impairment must be medically determinable. If an impairment fails to meet any of these three factors, the claimant is not disabled and the sequential evaluation ends.

Severe impairments that do not last twelve months are not considered disabling. Examples include broken bones that require six weeks in a cast but the claimant returns within one year of the date of the injury. If the disability does not, or did not, last twelve months, no benefits will be awarded.

Furthermore, unrelated consecutive severe impairments none of which last twelve months do not qualify for benefits. For example, a claimant who breaks his leg and is in a cast for six months will not receive benefits if he falls and breaks both arms also, requiring him to be in a cast for an additional seven months.⁶⁰ Although the claimant is disabled for more than one year, these are separate impairments. Independently, neither lasted for more than twelve months and benefits must be denied.

Federal regulations define the meaning of an impairment that is *not* severe as an impairment or combination of impairments that does not significantly limit the claimant's physical or mental ability to do basic work activities. Thus, a severe impairment significantly limits a claimant's physical or mental ability to do basic work activities. Basic work activities include physical functions such as walking, standing, sitting, lifting, pushing, pulling, and reaching and the ability to see, hear, or speak. It also includes mental functions such as the ability to understand, carry out, and remember simple

⁵⁹ See, e.g., *Dixon v. Shalala*, 54 F.3d 1019, 1023-25 (2d Cir. 1995) (describing the de minimis "slightness" step-two standard, noting that five members of the Supreme Court in *Bowen v. Yuckert*, 482 U.S. 137 (1987), found that application of a greater-than-slightness standard would be unlawful, and sustaining invalidation of the SSA's systematic application of a greater-than-slightness step-two threshold).

⁶⁰ See 20 C.F.R. 404.1522

instructions; using judgment; and dealing with changes in a routine work setting. A claim will be denied at step two if the impairment or combination of impairments does not cause more than minimal impact on the ability to perform basic work activities.⁶¹

A medically determinable impairment exists when clinical diagnosis or testing demonstrates physical or mental abnormalities. The medical evidence must consist of signs (demonstrated through the medical evaluations), symptoms (the claimant's subjective complaints), and laboratory findings.⁶² Without any medical evidence demonstrated with medically acceptable clinical and laboratory diagnostic techniques, the impairment cannot be shown to be severe. In the Fifth Circuit, "an impairment can be considered as not severe only if it is a slight abnormality [having] such minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education or work experience."⁶³

Social Security disability law makes an important distinction between signs and symptoms. Symptoms are a claimant's own description of his/her physical or mental impairment(s). Signs are anatomical, physiological, or psychological abnormalities that can be observed and are independent from a claimant's statements about his/her symptoms.⁶⁴ To establish a physical or mental impairment, the objective evidence (signs) must support the subjective complaints of the claimant (symptoms). In determining whether the claimant is disabled, the ALJ will consider *all* of his symptoms and determine their consistency with other evidence of record by balancing them against the objective medical evidence. After making a determination that the claimant is not

⁶¹ See 20 C.F.R. 404.1521; Social Security Rulings 85-28, 96-3p, and 96-4p

⁶² 20 C.F.R. 404.1508

⁶³ *Stone v. Heckler*, 752 F.2d 1099, 1101 (5th Cir. 1985).

⁶⁴ 20 C.F.R. 404.1528

engaged in substantial gainful activity, the ALJ will consider the claimant's symptoms to evaluate whether he has a severe physical or mental impairment and at each remaining step in the sequential process.

Remember that the claimant's impairment(s) must be medically determinable and demonstrated by medically acceptable clinical and laboratory tests. Unsupported statements about pain or other symptoms will not establish that the claimant is disabled. Therefore, it is important for the claimant and/or his representative to develop his record with objective medical evidence from treating and nontreating sources and other sources.

At step two, an ALJ is likely to ask the claimant to describe his disabling conditions. He will then ask when the claimant stopped working and why. Finally, he may ask for the dates of diagnoses of the disabling conditions. The claimant's testimony supplements the record and assists the ALJ in making his disability determination at step two.

Step 3 Does the claimant have an impairment(s) that meets or equals any of the Listing of Impairments?

Once the ALJ determines that the impairment is severe, he moves to step three to evaluate whether the medical evidence alone documents an impairment or combination of impairments so medically severe as to be presumed disabling.⁶⁵ To make this assessment, the ALJ will consult the Listing of Impairments contained within the Code of Federal Regulations.⁶⁶ The Listings are also organized in two parts, one for adults 18 and older (Part A) and one for children under age 18 (Part B). The criteria for Part B apply to children only. In evaluating disability for a child, use Part B first. If the criteria in part B

⁶⁵ See 20 C.F.R. §§ 404.1520(a)(4)(iii); 416.920(a)(4)(iii) (2011);

⁶⁶ 20 C.F.R. pt. 404, app.1 (2011).

do not apply, then use the criteria in part A.⁶⁷ For example, if an adult claimant has asthma attacks at least six times per year despite prescribed treatment, and these attacks require physician intervention, his asthma meets a listing and is therefore severe.⁶⁸

The Listing of Impairments is organized by major body system.⁶⁹ Under each body system, the List specifies impairments that the SSA considers severe enough to prevent an individual from doing any gainful activity, irrespective of his age, education, or work experience. “Because this step authorizes a favorable decision on medical grounds alone where a claimant's condition meets or equals the listing, listing-level impairment severity is set at a very high level.”⁷⁰

The listings are comprised of several specific parts and each part must be medically documented to meet the listing. For example, parts of a listing may include the persistence of the condition and the number of hospitalizations over specific period of time.⁷¹ If the theory of a claimant’s representative’s case is that the client meets a listing and should be found disabled at step three, the representative should be prepared to provide medical documentation that proves each part of the listing is met. The ALJ’s questions will track the listing requirements. For example, if the claimant disabling condition is a major dysfunction of a joint, the ALJ will rely on the musculoskeletal category of impairments and will expect medical documentation proving that a gross anatomical deformity accompanied by chronic joint pain and stiffness exists; that there is

⁶⁷ 20 C.F.R. 404.1525(b)

⁶⁸ 20 C.F.R. 404, Subpart P Appendix 1, 3.03(B)

⁶⁹ Cardiovascular, mental, respiratory, etc. See 404.1525(a)

⁷⁰ Jon C. Dubin, *The Labor Market Side of Disability Benefits Policy and Law*, 20 S. Ca. Review of Law and Social Justice 1, 33 (2011)

⁷¹

visual evidence of narrowing of the joint space; and that at least one weight-bearing joint or joint in an upper extremity is affected.⁷²

The impairment criteria under the listings are used as the basis for determining whether a claim may be allowed considering medical and other evidence. Acceptable medical sources such as licensed physicians, psychologists and optometrists may provide medical evidence to establish an impairment.⁷³ These acceptable medical sources will likely provide medical reports that include medical history, clinical findings, laboratory findings, diagnosis and treatment prescribed.⁷⁴ Evaluation at step three excludes consideration of the vocational factors of age, education, and work experience.⁷⁵ If the evidence in an individual's record is the same as the signs, symptoms, and laboratory findings in a listing, and the individual is not working, the individual will be found to be disabled on the basis of "meeting" a listing and the claim will be allowed.

If an individual's impairment or combination of impairments does not meet a listing, the ALJ may still determine he is disabled if the impairment(s) "equal" a listing.⁷⁶ An individual's impairment(s) can be considered to be medically equivalent to a listed impairment when "it is at least equal in severity and duration to the criteria of any listed impairment."⁷⁷ There are three ways to establish equivalence: (1) listed impairments; (2) unlisted impairments; (3) combined impairments.⁷⁸

An ALJ may find that an impairment is the medical equivalent to a listing if the individual has other finds that are at least of equal significance to the required criteria.

⁷² 20 C.F.R. 404, Subpart P Appendix 1, 1.02

⁷³ 20 C.F.R. 404.1513(a)

⁷⁴ 20 C.F.R. 404.1513(b)

⁷⁵ 404.1525(a) and 20 C.F.R. 404.1526(c)

⁷⁶ 20 C.F.R. 404.1525(a)(5) and 404.1526

⁷⁷ 20 C.F.R. 404.1526(a)

⁷⁸ 20 C.F.R. 404.1526(b)

This analysis arises when an individual has an impairment that is listed but he does not exhibit one or more of the findings specified in the particular listing. It may also arise when the claimant exhibits all of the findings but one or more is not as severe as specified in the listing.⁷⁹

If an individual has an impairment that is not described in the Listing of Impairments, the ALJ will compare the individual's findings with those for closely analogous listed impairments.⁸⁰ If the findings are at least of equal medical significance to those of a listed impairment, he will find the individual's impairment to be medically equivalent to the analogous listing.⁸¹

Finally, for combined impairments where none meet a listing, the ALJ will compare the claimant's findings with those for closely analogous listed impairments.⁸² If the findings are at least of equal medical significance to those of a listed impairment, the ALJ will find the individual's combination of impairments to be medically equivalent to the listed impairment.⁸³

If a listing has been deleted, a claimant with that impairment is not necessarily precluded from being found disabled. The impairment may still be considered under other generalized listings, such as the cardiovascular body system listing, if it causes or contributes to the severity of an impairment for that particular listing.⁸⁴ Obesity is a good example of this situation. The Social Security Administration deleted the obesity listing

⁷⁹ 20 C.F.R. 404.1526(b)(1)(i)(B)

⁸⁰ 20 C.F.R. 404.1526(b)(2)

⁸¹ 20 C.F.R. 404.1526(b)(1)(ii)

⁸² 20 C.F.R. 404.1526(b)(3)

⁸³ Id.

⁸⁴ SSR 02-01 (1999) "Because there is no listing for obesity, we will find that an individual with obesity 'meets' the requirements of a listing if he or she has another impairment that, by itself, meets the requirements of a listing. We will also find that a listing is met if there is an impairment that, in combination with obesity, meets the requirements of a listing."

in 1999. The SSA and ALJs, however, are aware that obesity is a contributing factor to other body system impairments, such as creating difficulty breathing and heart problems. As a result, an obese claimant may still demonstrate that he has severe impairments because obesity can cause other impairments to rise to the level of severe.

To make a finding that an impairment, or combination of impairments, equals a listing, an opinion by a medical expert or other “medical or psychological consultant designated by the Commissioner” is required.⁸⁵ The ALJ may not base such a finding on the opinion of any other physician, such as a treating physician.⁸⁶ Finally, the ALJ must consider the opinion of a State agency medical/psychological consultant on the issue of “meets or equals,” though he or she is not bound by it. If the medically determinable impairment(s) does not meet or equal in medical severity any listed impairment, then the ALJ will proceed to an intermediate step in the sequential process, the residual functional capacity determination.

“Step 3.5” Residual Functional Capacity

Though not an official step in the sequential evaluation, the ALJ must determine an individual’s residual functional capacity (“RFC”) before moving on to steps four and five. The RFC determination is often referred to as “step three-and-a-half.” The ALJ conducts an RFC assessment in order to determine the level of activity the claimant can perform in order to determine whether or not he or she can perform his/her past relevant work, and if not, if he/she can make an adjustment to other work. RFC is the individual’s maximum ability to do sustained work activities in an ordinary work setting on a regular

⁸⁵ SSR 96-6p

⁸⁶ SSR 96-5p

and continued basis, notwithstanding his impairment.⁸⁷ A “regular and continuing” basis means eight hours a day, for five days a week, or an equivalent work schedule.⁸⁸

When assessing RFC, the ALJ does not determine whether the claimant is or is not disabled. Instead, the RFC formulation is a two-step process to determine the types of work activity the claimant can still do despite his impairments and related symptoms. The ALJ will: (1) determine the limitations established by the record and (2) determine the remaining functional capacity of the claimant.

The ALJ phrases RFCs so that they are comprehensive, clear, and consistent. Comprehensiveness refers to the basis for making the RFC determination. ALJs base their RFC findings on *all* of the evidence of record, including both medical and non-medical evidence. The ALJ will consider the claimant’s physical, mental, environmental abilities and the limitations imposed by all of the claimant’s impairments in combination (including severe and non-severe impairments).⁸⁹ The RFC must include at least one limitation for each impairment that is found to be “severe.” For example, if the ALJ finds a severe medically determinable mental impairment, the RFC must include one or more limitation(s) in the claimant’s mental capacity to perform work activities.

To make an RFC clear, an ALJ will distinguish between the use of the words impairment,⁹⁰ symptom,⁹¹ and limitation.⁹² A statement that is limited to just impairments or symptoms is not a proper RFC. A statement that includes some but not all of the claimant’s limitations outlined in functional language is also not proper.

⁸⁷ SSR 96-8p.

⁸⁸ SSR 96-8p

⁸⁹ 20 C.F.R. 404.1520(e) and 404.1545; SSR 96-8p

⁹⁰ Depression, e.g.

⁹¹ Pain, e.g.

⁹² Inability to understand, remember and carry out detailed job instructions, e.g.

To be consistent, the ALJ will explain how material inconsistencies and ambiguities are considered and resolved. His opinion will address any conflicts between the RFC and any medical opinions or the RFC and the claimant's testimony. The ALJ should ensure that the RFC is consistent with the record in the hypotheticals posed by the judge to the vocational expert. The RFC in the rationale and findings sections of the decision must be the same.

When preparing the RFC assessment, the ALJ must consider: what the claimant can still do (daily activities or functioning); all established impairments and related limitations; effects of medication or treatment; subjective complaints; medical opinions and/or medical source statements; testimony and other lay evidence. Limitations that are strength-related are known as exertional limitations. Non-strength related limitations are non-exertional.

Exertional limitations affect an individual's ability to meet the strength demands of a job. These strength demands include lifting, carrying, standing, walking, sitting, pushing and pulling.⁹³ Each of these exertional activities is further classified according to the strength demands. The various classifications are sedentary, light work, medium work, heavy work and very heavy work.

Nonexertional limitations or restrictions affect an individual's ability to meet the nonstrength demands of jobs. Nonexertional physical functions can be postural,⁹⁴ manipulative,⁹⁵ visual,⁹⁶ communicative,⁹⁷ environmental and mental.⁹⁸ It is the nature

⁹³ 20 C.F.R. 404.1545(b)

⁹⁴ Climbing, balancing, stooping, kneeling, crouching and crawling

⁹⁵ Reaching all directions, handling, fingering, and feeling

⁹⁶ Near acuity, far acuity, depth perception, color vision, and field of vision

⁹⁷ Hearing and speaking

of the functional limitations or restrictions caused by an impairment-related symptom that determines whether the impact of the symptom is exertional, nonexertional, or both.⁹⁹

After determining that a medically determinable impairment exists, the ALJ must evaluate the intensity, persistence, and functionally limiting effects of the claimant's symptoms. This necessarily requires the ALJ to make a credibility determination about the individual's subjective statements. In recognition of the fact that an individual's symptoms can sometimes suggest a greater level of severity of impairment than can be shown by the objective medical evidence alone, the ALJ must consider certain factors in addition to the objective medical evidence when assessing the credibility of an individual's subjective statements. Those factors include, *inter alia*: the individual's daily activities; the location, duration, frequency, and intensity of the individual's pain or other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage effectiveness, and side effects of any medical the individual takes or has taken to alleviate pain; and any measures other than treatment the individual uses to relieve pain or other symptoms (such as sleeping on the floor to alleviate back pain).

Step 4 Can the claimant perform past relevant work (PRW)?

If a claimant's impairment does not meet or equal the listing criteria, the ALJ proceeds to step four, past relevant work. Here, the ALJ must determine whether the claimant has the residual functional capacity to perform the requirements of his past

⁹⁸ The ability to understand, remember, and carry out instructions; the ability to make work-related judgments and decisions; responding appropriately to supervision, co-workers; and the ability to deal with changes in routine work setting. See 20 C.F.R. 404.1545(c)

⁹⁹ SSR 96-9p

work.¹⁰⁰ If the claimant can still do the kind of work he did in the past, the ALJ will decide he or she is not disabled.¹⁰¹

For work activity to be considered “past relevant work,” it must meet a three-part test: (1) recency; (2) duration; (3) earnings.¹⁰² Recency means that the ALJ will consider work experience performed within fifteen years of the date of adjudication. Duration means that the claimant must have worked at the job for a period sufficient to learn to do it and achieve an average performance level. The Dictionary of Occupational Titles (DOT) describes the duration requirements for learning jobs based on specific vocational and preparation ratings. These ratings are further organized according to skill level (unskilled, semi-skilled, skilled). An ALJ or vocational expert (VE) may rely on this resource to obtain evidence to help determine whether the claimant can perform his past relevant work. To meet the earnings requirement for past relevant work, the claimant must have performed his job at substantial gainful activity levels. The SGA is determined by earnings and the amount of time performing the job.

If the ALJ finds that the claimant may still perform his past work in spite of his impairments, he or she is not disabled. At this step in the sequential evaluation, the RFC is the focus of the inquiry, not the availability of the past work at the present time. The Supreme Court has held that an elevator operator was not entitled to disability benefits when she has the capacity to perform her past work, even though the job had become obsolete and thus no longer existed.¹⁰³

¹⁰⁰ 20 C.F.R. 404.1520(f)

¹⁰¹ See 20 C.F.R. 404.1520(e)

¹⁰² 20 C.F.R. 404.1560(b)(1) and 404.1565(a)

¹⁰³ Barnhart v. Thomas, 540 U.S. 20 (2003).

At Step, 4 an impartial VE classifies the claimant's past relevant work in terms of skill and exertional level. Once the exertional level is established, the VE responds to hypothetical questions posed by the ALJ. The ALJ will ask the VE to give his or her opinion as to whether or not a hypothetical claimant who is a mirror image of the claimant, exhibiting the same aches and pains, could do the past relevant work performed by the claimant.¹⁰⁴

Hypotheticals to the VE should be phrased in terms of specific work-related functional abilities. The hypothetical should clearly indicate the limitations and capacities to properly reflect the claimant's RFC. It should not be limited to impairments and/or symptoms. The hypothetical should also include all of the claimant's limitations outlined in functional limitations.

Improper: Assume a hypothetical person who is depressed and irritable.

Proper: Assume a hypothetical person who has depression and is irritable, and that as a result of this impairment and symptom, the individual is able to interact with supervisors, co-workers and the public on an occasional basis only.

Step 5 Can the claimant perform any other jobs available in significant numbers in the national economy?

If the ALJ finds that the claimant cannot perform any past work because of his RFC, he will apply the same RFC to decide if the claimant can adjust to do other work.¹⁰⁵

At this step, the inquiry is tailored to the subjective characteristics of the claimant. The ALJ considers not only the RFC from Step 4, but also the claimant's age, education, and

¹⁰⁴ 20 C.F.R. 404.1560(b)(2)

¹⁰⁵ See 20 C.F.R. 404.1560(c)(1)

work experience.¹⁰⁶ If the ALJ determines that the claimant has the RFC to adjust to other jobs, the burden shifts to the Commissioner (the ALJ) to show that those jobs are available in significant numbers in the national economy.¹⁰⁷

At Step 5, the ALJ usually begins by asking the VE if there are any other jobs the claimant is capable of performing considering his age, education, and past work experience. These jobs must be at a lower exertional level than the claimant's past relevant work, since the ALJ determined at step four that the claimant cannot perform his past relevant work. The VE then discusses whether the claimant's acquired work skills are transferable to other skilled or semi-skilled occupations. The VE also responds to hypotheticals regarding existence and number of jobs in the regional/national economy that can be performed by an individual with the claimant's RFC and vocational profile. Finally, the VE discusses the issue of transferability of skills, i.e., whether the skills are transferable with very little, if any, vocational adjustment required in terms of tools, work processes, work setting or the industry, if that is in issue. The ALJ and VE will rely on the Dictionary of Occupational Titles¹⁰⁸ for information about the requirements of work in the national economy.¹⁰⁹

The ALJ also relies on a series of grids organized by the vocational factors (age, education, and work experience), which are then organized according to categories of sedentary-, light-, and medium-work RFCs.¹¹⁰ Age is divided into three categories:

¹⁰⁶ Id.

¹⁰⁷ See 20 C.F.R. 404.1560(c)(2)

¹⁰⁸ 4th ed. (1991) U.S. Dep't of Labor, Employment and Training Administration, U.S. Employment System.

¹⁰⁹ SSR 00-4p

¹¹⁰ A thorough discussion of the utility of the grids and occupational titles in today's labor market is outside the scope of this article and indeed worthy of a separate article dedicated to that subject alone. Suffice it to say that the grids have been called "seriously outdated" and a federal circuit court recently referred to the

younger worker, advanced age, and closely approaching retirement age.¹¹¹ Education is also divided into four, ranging from illiterate or unable to communicate in English to high school grade level or above.¹¹² Finally, work experience ranges from unskilled to skilled.¹¹³ Certain rules require that a claimant automatically qualify as disabled if specific combinations of these factors are met. Otherwise, the ALJ must make the determination using the body of evidence before him.

As mentioned above, the ALJ has the burden of finding that the work the claimant is still able to perform exists in significant numbers in the national economy. He or she is not required to find that the job is available near the claimant's home or that the claimant could actually procure one of those available jobs if he applied. The Fourth Circuit Court of Appeals recently spoke to this issue, affirming a decision by a district court where a claimant argued he could not return to his past work as a retail clerk and cashier due to the current employment market.¹¹⁴ The district court determined that the Social Security Administration does not consider a lack of work in a claimant's local area, the hiring practices of employers, technological changes in an industry, or cyclical economic conditions in determining whether a claimant is disabled.¹¹⁵

At step five, there are also several combinations of medical and vocational profiles that the Social Security Administration presumes demonstrate an inability to make an adjustment to other work. When a claimant meets one of these profiles because of his or her medical history and job experience, he or she is qualified as "disabled"

Dictionary of Occupational Titles as "now-defunct." See Jon C. Dubin, 43 and *Abbott v. Astrue*, 391 Fed. Appx. 554, 559 (7th Cir. 2010).

¹¹¹ See 20 C.F.R. §§ 404.1563, 416.963 (2011).

¹¹² See 20 C.F.R. § 404.1564; 416.964 (2011).

¹¹³ See 20 C.F.R. §§404.1565, 416.965 (2011).

¹¹⁴ *Stroupe v. Astrue*, No. 09-1206, 2009 WL 5125669 (4th Cir. Jan 6., 2010)

¹¹⁵ *Id.* at PIN CITE.

without further inquiry. First, an ALJ will consider claimant who has less than a sixth grade education and work experience of thirty-five years or more of arduous, unskilled physical labor unable to do lighter work, and therefore disabled.¹¹⁶ Second, if the claimant is fifty-five years or older with an eleventh grade education or less and no past relevant work experience, the ALJ will consider the claimant disabled.¹¹⁷ An ALJ will not reach these considerations unless and until the claimants also demonstrates that they are not performing substantial gainful activity and have a severe medically determinable physical or mental impairment.¹¹⁸

Credibility and Consistency

In addition to the formal five-step sequential evaluation, ALJs make an informal credibility determination based on the claimant's subjective complaints and testimony at the hearing. The consistency of the evidence also may add to, or detract from, the credibility of a disability claim. A good example of a claimant's record is one that includes medical evidence that is consistent with the subjective evidence. That is, a treating or non-treating physician or other source corroborates the claimant's subjective complaints about his pain and symptoms. Consistency and supporting evidence from medical sources will significantly impact the claimant's application for disability benefits.

Consistency and Medical Opinions

A common scenario plays out in medical records or in the hearing room where a claimant describes his joint pain as a 9 out of 10, 10 being the worst pain, but the treating physician notes that he has a full range of motion in those joints. In this case, the

¹¹⁶ See 20 C.F.R. 404.1562(a)

¹¹⁷ See 20 C.F.R. 404.1562(b)

¹¹⁸ See 20 C.F.R. 404.1562

evidence is not entirely consistent. To overcome the inconsistency, the ALJ must evaluate every medical opinion and assign varying weights to those opinions and determine the severity of the impairment.

In general, an opinion from a doctor who has examined the patient is given more weight than one who has not. Additionally, a treating physician's opinion is entitled to more weight because it is more likely to provide a detailed picture of the claimant's medical impairments than observations during a brief hospitalization or from a consultative examination conducted by the State. Specialists are also given more weight than general primary care doctors. As the Code of Federal Regulations notes "if your ophthalmologist notices that you have complained of neck pain during your eye examinations, we will consider his or her opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain."¹¹⁹

While medical source opinions are important for showing the existence and severity of an impairment, certain medical opinions will not be considered if they are relevant to findings reserved to the Social Security Administration's discretion. The SSA bestows upon ALJs the responsibility and duty of determining: whether the claimant is disabled and whether the impairment(s) meets or equals a listing. The ALJ is also responsible for making a finding on the claimant's RFC and applying the vocational factors: education, age, and former work.

The ALJ will also consider all of the available evidence when evaluating the intensity and persistence of the claimant's symptoms and how such symptoms may impact the claimant's ability to work. Certain factors relevant to the symptoms may help

¹¹⁹ 20 C.F.R. 404.1527(d)(3)

quantify a claimant's subjective complaints about the intensity and persistence of his pain and other symptoms. The ALJ will consider the following factors in evaluating the severity of the impairment in terms of persistence and intensity of the symptoms: daily activities; location, duration, frequency and intensity of claimant's pain or other symptoms; precipitating and aggravating factors; type, dosage, effectiveness, and side effects of any medication taken to alleviate the symptoms; and other treatment for the symptoms. In order to get disability benefits, claimants must follow treatment prescribed by his physician. Claimants who make a personal decision to stop treatment, without consulting with their doctors, will be considered non-compliant and will not receive disability benefits.

Objective medical evidence assists ALJs to make reasonable credibility assessments. This evidence is a useful indicator of the intensity and persistence of the claimant's symptoms and the effects those symptoms may have on his/her ability to work.¹²⁰ However, the ALJ will not reject claimant's statements about the intensity and persistence of pain or other symptoms or their effect on his/her ability to work solely because the available objective medical evidence does not substantiate his/her statements. The ALJ will consider all of the evidence presented, including information about prior work, statements about symptoms, evidence submitted by claimant's treating and non-treating medical sources. He will also take into account the claimant's daily activities; location, duration, frequency, and intensity of symptoms; precipitating and aggravating factors' type, dosage, effectiveness and side effects of any medications and treatments other than medication.

¹²⁰ 20 C.F.R. 404.1529(c)(2); 416.929(c)(2)

For example, if a claimant alleges he is unable to work due to problems with his hands and depression, an ALJ may find a claimant's testimony not fully credible when he fails to provide a record of hospitalization or counseling treatment and deferred corrective surgery for his hands. Relying on the record, the ALJ may see that the claimant's daily activities also fail to demonstrate limitations on his ability to take care of himself, drive, do yard work and walk long distances. The hearing serves a critical function for the credibility assessment.

An ALJ's initial opinion of the case after pre-hearing review of the record may change once he witnesses the claimant's demeanor at the hearing. Similarly, a claimant has an opportunity to elaborate on his record by giving testimony as to his impairments and how they impact his daily life. A twenty-eight year old male who alleges he cannot work because of back problems may create issues because of his young age and the likelihood of his recovery. However, the ALJ may be persuaded of the claimant's genuineness by his demeanor and testimony at the hearing.

Credibility and Unemployment Compensation

For the disabled worker who loses his or her job as a result of her disability, a conflict arises when the individual applies for both unemployment compensation and disability. When filling out the unemployment compensation application, an individual will certify he or she is "able and available" to return to work. However, he or she will likely allege on the Social Security Disability Benefits Application that he or she cannot do his or her past relevant work or any other job in the national economy. In this contradictory situation, ALJs may make a less favorable credibility determination for a claimant out of concern about an exaggerated claim of disability or fraud.

The Supreme Court has not addressed whether an ALJ may use the fact that a disabled claimant has received unemployment compensation as evidence to support the assertion that the claimant is not credible. In these economic times, the issue is becoming more prevalent. One scholar writes that unemployment compensation need not destroy a disability claimant's credibility. A good representative can maintain his client's credibility by making the right arguments before the ALJ, including examining precisely what the claimant certified when he or she applied for unemployment compensation.¹²¹

Part IV. Best Practices for Practitioners

The recommendations below relate to the central theme/mission of the SSA ODAR: to provide Social Security claimants with timely and legally sufficient hearings and decisions. Given the sheer numbers of applications to review, hearings to be held and decisions to be rendered, efficiency and expediency are critical to the disability review process. Unlike other federal law where the definition of a key term could be a cross-reference to another law entirely, the Social Security Act is a straightforward framework. The job of an ALJ to administer that framework is equally thorough and methodical (see Part III *supra*). Prepared, knowledgeable claimants' representatives ensure that this process runs smoothly and without delay. Arguably, the best way to prepare for a hearing before an administrative law judge is to follow their advice.

¹²¹ "Typically, an ALJ will assert that the claimant who received unemployment compensation benefits made certain representations to the governmental entity issuing the payments. However, the disability record typically does not contain any statements from the claimant regarding unemployment compensation." Jerrold A. Sulcove, *Damned If You Do and Damned If You Don't: Unemployment Compensation and the Disabled Client*, Social Security News (Social Security Section of the Federal Bar Ass'n) (Spring 2012).

Administrative law judges have provided all of the following tips, developed over years of experience with claimants, claimants' representatives and the hearing process.

Specificity

Disability claims evaluation is distinct from the cases before a federal or a state court judge because an ALJ applies the same framework to every case. The evaluations, however, are entirely tailored to the specifics of the subjective claimant and his impairments. Recent court decisions have admonished ALJs for including boilerplate language in their opinions.¹²² If the judge cannot do it, neither should you. The judge's evaluation should be tailored specifically to the claimant before him and depends on the facts that the claimant and his medical history provide. Thus, it behooves any representative to know the medical records and claimant's case well and to support his theory by citing to the record.

Best practices for attorney and non-attorney claimant representatives:

Submit additional evidence as early in the hearing process as possible.

Avoid submitting evidence at the last minute.

Number the pages on your exhibits.

Do not file post-hearing evidence without permission. The case may already be with a writer or awaiting a judge's signature.

Use the facts to demonstrate that your client is disabled because of his or her RFC rather than manipulate his medical history to fall into a listing under the "meets or equals" step of the sequential evaluation.

Avoid conclusory statements when giving the ALJ your theory of the case. The following statement is conclusory: "The impairments are severe. Therefore, the claimant's limitations and restrictions caused by the impairment prevent him or her from doing any kind of work." Now, a stronger statement, based on the

¹²² Given the highly claimant-specific nature of Social Security disability, ALJs should avoid boilerplate findings. (see recent 7th Circuit cases, *Bjornson v. Astrue*, No. 11-2422, F.3d (2012) and *Smith v. Astrue*, No. 11-2838 (March 12, 2012)).

record: “The relevant evidence in the case record demonstrates that the claimant can only stand for thirty minutes at a time, must take breaks to check blood sugar five times a day and cannot walk more than 200 feet at a time, according to the assessments of the endocrinologist and consultative examiner.” Use the medical record and build your claimant’s case with facts rather than conclusions.

Meet with your client and advise them that the judge will ask them questions. Prepare their answers by suggesting avoidance of vague descriptions like “a while” and “a long time.” Specificity is better.

It is not necessary to cite regulations to the judges.

Conclusion

The role of an administrative law judge tasked with making disability determinations has become increasingly challenging in recent years. ALJs face a growing numbers of cases even as they attempt to reduce the backlog. Efficiency must be balanced against issuing legally sufficient decisions and providing due process for each claimant. As the ALJs themselves are taught, “preparation prevents poor performance.” In a system where time is of the essence, having a solid understanding of disability law will benefit practitioners in their representation and American workers as they file their disability claims.

Change is in store for the Social Security disability program and it will surely be in the headlines in months and years to come. A new leader will assume responsibility as Commissioner of Social Security in 2013. The entire program may deplete its reserves in less than four years. The law is due for amendments, and the future of the program will be closely watched during this election year and through the new presidential term. The time is ripe to understand these issues and what they mean for American workers, their families and the claimants’ representatives who represent them.

