

NAVIGATING THE SOCIAL SECURITY DISABILITY AND LONG TERM DISABILITY PROCESS

James P. Shea, JD, Ph.D.


Certified Legal Specialist, Social Security Disability

National Board of Trial Advocacy



MIGRAINES AND DISABILITY? REALLY?

- ❖ Approximately 18 percent of women and six percent of men in the United States suffer migraines.
- ❖ The Migraine Research Foundation reports that about 14 million Americans are affected by debilitating pain, fatigue, and other symptoms on a daily basis.
- ❖ the World Health Organization (WHO) indicates migraine headaches are the eighth leading cause of disability in the world.
- ❖ Migraines take a tremendous toll on earnings ability because they tend to strike during a person's most productive years. They are most common in people ages 25 to 55, according to the WHO.
- ❖ The Job Accommodation Network estimates that 157 million workdays are lost in the U.S. annually due to migraine headaches.




“DISABILITY” CAN MEAN MANY THINGS. What does it mean to the Social Security Administration?

- ❖ 20 C.F.R. § 404.1505 - Basic definition of disability:
- ❖ The law defines 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 not less than 12 months.
- ❖ THIS DEFINITION HAS THREE IMPORTANT COMPONENTS:
 - ❖ A “medically determinable impairment” (MDI) must be the **cause** of disability (employability – or lack thereof – does not count).
 - ❖ The MDI must prevent “any substantial gainful activity” (SSA’s term for work).
 - ❖ The MDI must last (or be expected to last) 12 months or result in death (the so-called “duration requirement”).



WHAT IS A “MEDICALLY DETERMINABLE IMPAIRMENT?”

- ❖ Symptoms **alone**, no matter how credible, can never invoke disability.
- ❖ Conversely, symptoms arising from a medically determinable impairment are *always* the cause of disability. Non-symptomatic conditions are not disabling.
- ❖ A **medically determinable impairment** is a medical condition that could reasonably be expected to produce some degree of symptoms, such as pain:
- ❖ 20 C.F.R. § 404.1529(b): Your symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness, will not be found to affect your ability to do basic work activities unless medical signs or laboratory findings show that a medically determinable impairment(s) is present. **Medical signs and laboratory findings**, established by **medically acceptable clinical or laboratory diagnostic techniques**, must show the existence of a **medical impairment(s) which results from anatomical, physiological, or psychological abnormalities** and which could **reasonably be expected to produce the pain or other symptoms alleged**.




WHAT DOES IT MEAN TO PREVENT “ANY SUBSTANTIAL GAINFUL ACTIVITY?”

- ❖ The activity must be *both* “substantial” (meaning the kind of things people do to earn money) and “gainful” (meaning you have to get paid for it).
 - ❖ Volunteer work is not SGA.
 - ❖ Earning small amounts of money usually does not indicate SGA.
 - ❖ But if you’re a drug dealer ... maybe. CORRAO v. SHALALA, 20 F.3d 943 (9th Cir.1994).
 - ❖ Self-employed prostitute engages in SGA. SPEAKS v. SECRETARY OF HHS, 855 F.Supp. 1108 (C.D. CAL 1994).
 - ❖ Prostitute who works for a pimp is not engaging in SGA. YOUNG v. COLVIN, 2014 WL 6632222 (W.D. WA 2014)

WHAT ABOUT THAT WORD “ANY” ... ?

- ❖ SSA Divides work into five grand categories (called “exertional ranges”):
 - ❖ Very Heavy, Heavy, Medium, Light and Sedentary
- ❖ A person who is (1) age 50 or above, (2) unable to meet the demands of past work, and (3) limited only to sedentary, unskilled work **WILL BE CONSIDERED DISABLED** even if there are thousands of unskilled sedentary jobs that person can do.
- ❖ A person who is (1) age 55 or above, (2) unable to meet the demands of past work, and (3) limited only to sedentary or light unskilled work **WILL BE CONSIDERED DISABLED** even if there are thousands of unskilled sedentary and light jobs that person can do.



There are several programs administered by the Social Security Administration (SSA) to help the disabled, but over 90% of all disability benefits are distributed through only two of them:

- ❖ The **Disability Insurance Benefits** program authorized by Title II of the Social Security Act (a.k.a. “DIB,” “SSDI” or “Title II” benefits)
- ❖ The **Supplemental Security Income** program authorized by Title XVI of the Social Security Act (a.k.a. “SSI” or “Title XVI” benefits)
- ❖ **BOTH SHARE THE SAME MEDICAL STANDARD. IF AN INDIVIDUAL IS CONSIDERED “DISABLED” FOR ONE, HE/SHE IS “DISABLED” FOR BOTH.**
 - ❖ The two programs differ in non-medical qualification requirements which have nothing to do with the claimant’s medical condition.

THE DIFFERING NON-MEDICAL REQUIREMENTS FOR EACH PROGRAM

Disability Insurance Benefits

- ❖ A disability claimant must be “fully insured” and also “currently insured” at the time the disability begins.
- ❖ “Fully insured” means the claimant must have worked long enough to be entitled to a retirement benefit when he/she reaches full retirement age.
- ❖ “Currently insured” means the claimant, at the time when disability begins, must have worked five of the previous ten years.
- ❖ **There are no “financial status” considerations.**

SSI Benefits

- ❖ The claimant **need not have a work history**. Financial considerations are paramount.
- ❖ **Resources** must be limited to \$2,000 for an individual and \$3,000 for a couple. Resources are things you own such as cash, bank accounts, stocks, land, vehicles, personal property, life insurance and anything else you own that could be converted to cash and used for food or shelter. A **home you live in** does not count. **One car** does not count.
- ❖ There will be a **dollar for dollar** reduction in benefits paid for **any income** you receive from **any source**.

WHAT DO YOU RECEIVE IF YOUR APPLICATION IS APPROVED?

Disability Insurance benefits

- ❖ **A monthly disability benefit** approximately equal to your full retirement benefit (and a 50% “bump” if you have minor children living at home).
- ❖ **A retroactive benefit payment** (potentially retroactive up to one year before application).
- ❖ **Medicare medical insurance** in the 25th month following the first month for which you are paid.

SSI benefits

- ❖ **A monthly benefit payment** (the maximum depends on where you live, but not more than \$735/mo for individuals + state contribution).
- ❖ **A retroactive benefit payment** payable back to the month following the application.
- ❖ **Medicaid** immediately.

HOW DO I FILE AN APPLICATION?

- ❖ **Any application can be filed at any Social Security office.** They will give you a bunch of forms and tell you to bring them back after you have completed them. What forms?
 - ❖ Application
 - ❖ Disability Report (describing your medical conditions and the doctors who have treated you).
 - ❖ Work History Report (describing the work you have done in the last 15 years).
 - ❖ Medical Releases.
- ❖ **Disability Insurance benefit applications (but not SSI applications) can be filed on line at www.ssa.gov.** Filing on line takes a significant amount of time, but the program allows you to exit the application and come back to it later if you need to. You get a printed receipt when completed, and you must print out and mail in the medical release forms.



HOW LONG DOES IT TAKE SSA TO EVALUATE MY APPLICATION?

- ❖ SSA says “four to six months.” This is pretty accurate.
- ❖ During this time SSA will gather your medical records and submit them to a doctor for review. You will be mailed additional forms to complete describing your symptoms, limitations and daily activities. You will usually also be asked to have another person complete similar forms about you.
- ❖ You may be required to present yourself for one or more medical examinations administered at government expense.

WHAT PROCESS DOES SSA USE TO DECIDE WHETHER I AM DISABLED?

- ❖ 20 C.F.R. § 404.1520 – The **Sequential Evaluation**. It uses a **five step** analysis:
- ❖ **First:** SSA considers whether you are doing **substantial gainful activity**. If so, claim **denied**.
- ❖ **Second:** SSA considers the **severity** of your impairment(s), both individually and in combination. If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement, claim **denied**.
- ❖ **Third:** SSA considers whether you have impairment(s) which are presumed to be disabling (think blindness, paraplegia, paralyzing mental disorders or other medical disorders that leave you unable to ambulate or use both upper extremities). If so, claim **awarded**.
- ❖ **Fourth:** SSA will assess **residual functional capacity** and your **past relevant work**. If you can still do your past relevant work, claim **denied**.
- ❖ **Fifth:** SSA will consider your residual functional capacity and your age, education, and work experience to see if you can make an adjustment to other work. If you can make an adjustment to other work, claim **denied**. If you cannot make an adjustment to other work, **claim awarded**.



WHAT ARE MY CHANCES OF APPROVAL?

- ❖ Not great. Social Security approves only about one application of every three it receives.

WHAT SHOULD I DO IF I AM DENIED?

- ❖ **APPEAL.** The appeal process consists of three steps:
 - ❖ **Step 1** – file a “**Request for Reconsideration.**” SSA will gather any additional medical records, review the paperwork and issue another decision. If you are denied a second time on this step, then
 - ❖ **Step 2** – file a “**Request for Hearing Before an Administrative Law Judge.**” You will be granted a hearing by a federally tenured Administrative Law Judge (ALJ) who will hear you out and make an independent decision. There is no requirement that you be represented, but you should be. If the judge denies your claim, then
 - ❖ **Step 3** – file a “**Request for Review of Decision of Administrative Law Judge**” with the Appeals Council in Falls Church, Virginia. You do not make an appearance. The Appeals Council reviews the evidence and the decision, and either affirms or vacates the ALJ’s decision. If decision is vacated, case is sent back for another hearing.
 - ❖ If you are denied by the Appeals Council, your only remaining appeals must be conducted in **federal court.**



HOW LONG DO APPEALS TAKE, AND WHAT ARE THE CHANCES OF ALLOWANCE? (FY 2016)



◆ Request for Reconsideration

Takes **4-6** months. **12%** allowance rate.

◆ ALJ Hearing

Takes anywhere from **12-24** months depending on the hearing office. **46%** allowed.

◆ Appeals Council Review

Takes **18-24** months. **1%** allowed, **13%** sent back for another hearing.

◆ Federal Court

Takes **7-12** months. **2%** allowed, **49%** sent back for another hearing.



MIGRAINE SUFFERERS WHO ARE CONSIDERING APPLYING FOR DISABILITY

- ❖ **RECOGNIZE THE PROBLEM** – no one knows how much pain a migraine actually inflicts **except the person who has the migraine**. This creates a **problem of proof**.
- ❖ The **frequency, duration, and severity** of migraines determine whether you qualify medically for benefits. The frequency and duration of your headaches and the extent of your migraine symptoms (nausea, fatigue, imbalance, light and noise sensitivity, etc.), tell SSA how often you must miss work. The length of migraine attacks, which can average a few hours or several days at a time, inform SSA about your ability to keep a consistent work schedule.

THESE ARE THE THINGS THAT YOU NEED TO PROVE



REMINDERS ...

- ❖ To determine your eligibility, the SSA will:
 - ❖ Look at your daily activities
 - ❖ Consider the frequency and severity of your headaches
 - ❖ Examine your employment options
 - ❖ Review your medical evidence
- ❖ Remember, to be approved for disability you will likely need to show that your migraines prevent you from working in an office environment or sedentary position. **Evidence that you are unable to communicate effectively, interact with others, look at a computer screen, or perform other essential job duties because of your symptoms** is important.
- ❖ **Keep a log** indicating how often you have attacks, what you do during an attack, and how long they put you out of commission.

YOUR MEDICAL RECORDS ARE THE PRIMARY SOURCE OF DETAILS WHEN DETERMINING ELIGIBILITY. Your records should contain:

- ❖ **Diagnostic methods your doctor used** to rule out other conditions and determine that your headaches are migraines. A full neurological evaluation, extensive blood work, and other exams and lab work will be helpful.
- ❖ **Imaging scans** like MRIs and CTs.
- ❖ **Medications** your doctor has prescribed and a description of any **side effects**.
- ❖ **Chart notes spanning a long period of time** from your primary care doctor containing a **list of your symptoms and an indication of their severity**.
- ❖ **Chart notes from other medical professionals** that have **witnessed your symptoms** first hand during office or emergency room visits.
- ❖ **A “longitudinal report” from your primary care physician.** This report should document your diagnosis, frequency and duration of migraines, medications and other treatment methods, and the **impact of your symptoms** on your ability to function during an attack. The report should also show that you’ve received **ongoing care** from a physician and that you’ve **followed prescribed therapies**.