Employment Protection for Domestic Violence Victims

INSIDE:
- Social Security Adult Disability Hearings
- Preparing for Litigation
- Financial Education and Asset Building for Welfare and Low-Income Groups
- Applying the Americans with Disabilities Act in Child Care Settings
For new attorneys and paralegals preparing an adult Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) claim for hearing before an administrative law judge in the Office of Hearings and Appeals, the best way to become acquainted with the social security administrative hearing process and definition of disability is to observe others doing the tasks of legal representation: interviewing new clients; developing the medical record; preparing clients for hearings; and attending the hearings. Seeing a hearing is far more effective than listening to a description of it—no one can master effective cross-examination of a vocational expert without seeing it and then doing it. Although these hearings are closed, most judges allow law students, paralegals, and attorneys to observe hearings with the permission of the claimant and the claimant’s attorney. Talk to attorneys who handle many social security hearings and ask if you may observe them.

Identify attorneys who handle social security cases and ask them questions. Attorneys routinely talk to one another about how judges question claimants, witnesses, and experts and how expert witnesses—medical advisors and vocational experts—analyze disability issues. Search out attorney groups dealing with social security disability issues. The National Organization of Social Security Claimants’ Attorneys is a national group of attorneys who handle these cases. They sponsor two national conferences yearly with presentations on the myriad issues that arise in these cases. Health and Disability Advocates assists particularly on children’s SSI issues. The National Senior Citizens Law Center assists legal aid attorneys. Local bar associations also may have specific practice groups that concentrate on social security disability issues. The Social Security Administration has an enormous amount of information on its website, including access to social security laws, regulations, and subregulatory materials.

I. Your Theory of the Case

As with all legal representation, success in social security hearings is the result of preparation before the hearing. The most essential part of that preparation is thinking about your theory of disability for the case. That analysis incorporates and builds from your
obtaining and developing factual evidence to support your client’s case: medical records, statements from treating doctors, and evidence about education and work. You should start thinking about the theory of disability in a case when you first talk to a potential client. As you pull together the evidence in a case, your theory may shift (or change dramatically). However, having an approach to proving disability from the start is essential; you need a blueprint for case development. More important, if you cannot come up with a theory of disability, the case may not be strong enough to merit your legal representation.

A. Legal Definition of Disability

Thinking about and developing your theory of disability in a case begins with first contact with a disability client. To develop your theory, you need to understand how the Social Security Administration determines whether someone is disabled in SSDI and SSI cases.

The Social Security Act defines disability for adults as “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which ... has lasted or can be expected to last for a continuous period of not less than twelve months....”5 This provision contains three key points: (i) inability to do full-time work (substantial gainful activity) due to (2) a medically determinable impairment (or impairments) (either mental or physical or a combination of both) that (c) has lasted, or is expected to last, for at least twelve months or result in death.

For purposes of determining disability, the Act adds:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.6

This provision adds a vocational framework to the three points listed above. The ability-to-work test has two prongs— inability to do work done in the past and

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5 42 U.S.C. § 423(d)(1)(A) (2002); see also 20 C.F.R. §§ 404.1504(a) (SSDI), 416.905(a) (2003) (SSI). Separate sets of regulations govern the SSDI program and the SSI program. SSDI regulations are set forth at 20 C.F.R. pt. 404, and SSI regulations are set forth at 20 C.F.R. pt. 416. For the most part, the regulations concerning disability for both programs are identical. Citations for both programs are included in this article.

inability to do other work based on consideration of the claimant’s medical impairments, age, education, and work experience.

Applying this statutory standard, the Social Security Administration uses a five-step sequential evaluation:

**Step 1—Is the Individual Working?** If the potential client is currently working, you need to determine whether this work will be considered “substantial gainful activity.” 7 If the individual is working and the work is substantial gainful activity, the Social Security Administration will find that the individual is not disabled regardless of medical condition, age, education, or work experience. Substantial gainful activity is generally based on the amount of wages earned monthly. If the claimant is working, but the claimant’s monthly gross wages (before deductions) are less than $810 (in 2004), the Social Security Administration will not consider the work substantial gainful activity. 8

If the claimant is not doing “substantial gainful activity,” go to Step 2. 9

**Step 2—Does the Individual Have a Severe Impairment?** At Step 2 the Social Security Administration decides whether an individual has a medically determinable impairment and whether the individual’s medically determinable impairment—or combination of impairments—is “severe.” An impairment or combination of impairments is considered “severe” if it significantly limits an individual’s physical or mental abilities to do basic work activities. An impairment is “not severe” if it is a slight abnormality, or a combination of slight abnormalities, with no more than a minimal effect on the ability to do basic work activities. An individual who does not have a “severe” impairment or combination of impairments will be found not disabled. 10

This step is a threshold test used to weed out claims in which there is no chance that the person would be found disabled in a complete disability evaluation. If the claimant does not have a severe impairment, the claim is denied. If the claimant has a severe impairment, go to Step 3. 11

**Step 3—Does the Individual Have an Impairment or Combination of Impairments Meeting or Equaling an Impairment Listed in Appendix 1?** When an individual has a severe impairment or combination of impairments meeting or medically equaling the requirements for one of the impairments in the Listing of Impairments in Appendix 1 to Subpart P of 20 C.F.R. Part 404 (the Listings) and meeting the duration requirement, the individual is disabled. 12 An individual medically equals the Listings if the individual’s medical impairments are as severe as the Listings but do not exactly meet the listing criteria. 13

The Listings describe, for each of the major body systems, impairments that are considered severe enough to prevent an adult from doing any gainful activity. 14 Part A of the Listings contains medical criteria that apply to adults (persons 18 and over). If a person meets or medically equals the criteria set forth in the Listings, the person is found disabled. If not, the sequence proceeds to the residual functional capacity analysis at Steps 4 and 5.

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7See 20 C.F.R. §§ 404.1571–.1576 (SSDI), 416.971–.976 (SSI) for rules concerning what work activity is considered substantial gainful activity.

8Id. §§ 404.1574–.1575, 416.974–.975.

9Id. §§ 404.1520(b), 416.920(b).

10Id. §§ 404.1521, 416.921.

11Id. §§ 404.1520(d), 416.920(d).

12Id. §§ 404.1525, 416.925 (meeting the Listings).

13Id.

14Id. § 416.925(a).
Assessing Residual Functional Capacity at Steps 4 and 5. When the individual does not have an impairment that meets or equals the requirements for a listed impairment, the Social Security Administration assesses the individual’s residual functional capacity, or RFC, and then compares that residual functional capacity to the claimant’s past work at Step 4. If the claimant is unable to do past work, the Social Security Administration uses the RFC finding to determine whether there is any other work the claimant can do at Step 5.

Residual functional capacity is what an individual can still do despite the individual’s limitations. The Social Security Administration assesses the extent to which an individual’s medically determinable impairment or combination of impairments (including any related symptoms, such as pain or fatigue), as well as the side effects of treatment (such as medication side effects) may cause physical or mental limitations or restrictions that may affect the claimant’s capacity to do work-related physical and mental activities. Residual functional capacity is ordinarily the individual’s maximum remaining ability to do sustained work activities in an ordinary work setting on a regular and continuing basis. The residual functional capacity assessment must discuss the individual’s abilities on that basis. A “regular and continuing basis” means eight hours a day, for five days a week, or an equivalent work schedule.

The residual functional capacity assessment is based on all of the relevant evidence in the case record, including information about the individual’s symptoms and any “medical source statements” (i.e., opinions about what the individual can still do despite the individual’s impairment or impairments) submitted by an individual’s treating doctor or other acceptable medical sources.

Step 4—Does the Individual Have an Impairment or Combination of Impairments Preventing the Individual from Performing Past Relevant Work? The residual functional capacity assessment discussed above is first used at Step 4 of the sequential evaluation process to determine whether the individual is capable of doing any relevant work that the individual did in the last fifteen years. To determine what past work is “relevant,” the Social Security Administration uses the same rules that are used to evaluate whether work is substantial gainful activity in Step 1: work done in the fifteen years preceding the disability application is substantial gainful activity only if the claimant earned less than the substantial gainful activity amount in effect in that year. Even if the claimant earned more than the substantial gainful activity amount, the work is not counted if it was an unsuccessful work attempt.

The Social Security Administration determines the requirements of the claimant’s past relevant work and then compares those requirements to the claimant’s residual functional capacity. If a claimant can do any of the relevant work that the claimant performed in the last fifteen years, the claim is denied. If not, go to Step 5.

Step 5—Can the Individual Do Other Work? The last step of the sequential evaluation process requires us to determine, considering an individual’s residual functional capacity, age, education, and work experience, whether the individual can do other work. This analysis proceeds in one of three ways, depending on whether the claimant has physical, mental, or a combi-
nation of physical and mental medical impairments.

A claimant with only physical impairments, in most cases, is evaluated on the “grids,” or a matrix that combines different permutations of residual functional capacity, age, education, and work experience. For physical limitations, residual functional capacity is divided into five categories: sedentary, light, medium, heavy, and very heavy. Without being simplified too much, the grid factors are:

- **Age**—For persons 50 and older, age becomes relevant because, for physical impairments, such persons often can be found disabled with fewer functional restrictions, as compared to persons under 50.21

- **Education**—Education is relevant because claimants with less education have fewer skills that are transferable to work. As with age, lower educational levels attained farther in the past make it easier to show disability.22

- **Work experience**—If someone has work skills that can be transferred to less demanding work, this may lead to a finding of no disability.23(Remember that work experience is relevant in three different but critical ways. At Step 1, if a person is doing substantial gainful activity, that person may not be found disabled. At Step 4, if a person can do work that the person used to do in the past fifteen years, the Social Security Administration finds that person not disabled. At Step 5, if a person has transferable work skills, the Social Security Administration may find the person not disabled.)

After plugging in the four factors, the grids mechanistically answer “disabled” or “not disabled.” For example, a 50-year-old man who has a ninth-grade education and unskilled work history and is working in a warehouse would be found disabled if he had a spinal impairment that limited him to only sedentary work. Workers under 50 generally are found not disabled on the grids.24

However, the grids are not applicable in many situations. Knowing when claimants can get off the grids is essential to effective legal representation. First, for persons with physical limitations and residual functional capacities that do not permit them to do the full range of work at an exertional work level, such as sedentary work or light work, the grids operate as guidelines only and are not binding. Persons who cannot do a full range of sedentary work may be considered disabled at any age.25 Persons who cannot do either sedentary or light work but are capable of doing work in between those levels may be found not disabled.26

Second, the grids are not applicable to persons with nonexertional impairments such

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20The categories are defined in Social Security Ruling 83-10.


22Id. §§ 404.1564, 416.1564.

23Id. §§ 404.1565, 416.1565.

24See id. pt. 404, subpt. P, App. 2 (2003). There is one exception. Persons 45 to 49 who are illiterate or unable to communicate in English with no or unskilled work history are found disabled if they can do only sedentary (sitting) work but not any standing work. Id. R. 201.17.

25Social Security Ruling 96-9p (July 2, 1996).

26 An example would be a person who has a back impairment that limits sitting to four hours a day and limits standing or walking to four hours a day, so long as the person can sit or stand as needed to relieve pain. In an actual case on these facts a vocational expert identified the security-guard job as one that existed in substantial numbers and that the person could do. The job would require the person, sitting or standing as desired, to watch television monitors at a front desk, to walk to different locations in the building two or three times during a shift, and to radio for help if a problem arose. The client was found not disabled. Be sure to bear in mind jobs that require both standing or walking and sitting when you have a client who can do some of both but not either exclusively.
as sensory loss (e.g., loss of vision) or mental impairments. For mental residual functional capacity, the evaluation turns on whether the individual can do simple, unskilled work on a sustained basis. The basic mental demands of unskilled work include the ability (on a sustained or full-time basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting. A substantial loss of ability to meet any of these basic work-related activities justifies a finding of disability.27

For persons with both physical and mental impairments, the grids apply only if they would result in a finding of disability based on the physical impairments. Otherwise the grids are used only as a starting framework for the disability analysis. After determining what work base remains after considering only exertional impairments, the administrative law judge must determine whether a person’s nonexertional impairments, such as a mental impairment, further reduce the work base sufficiently to show disability. In most cases the inquiry becomes one of determining whether simple, unskilled jobs remain in the job base after factoring out work excluded by exertional impairments and determining whether the claimant can do those remaining jobs.28

B. Choosing a Theory of Disability
You must think about the disability standard and how your client satisfies it throughout the legal representation. Among important questions are the following:

- If the claimant has an SSDI claim, when was the claimant last insured—the date by which the claimant must show that disability began?29
- What medical impairments does the claimant have, and do those impairments satisfy the applicable listing at Step 3? If yes, what information do you need from the claimant’s medical providers, and what type of statement (medical source statement) do you want to get from the treating doctor?
- What types of medical impairments does the claimant have? Are they physical or nonexertional (e.g., mental impairment, or loss of vision, hearing, or speech that affect the ability to work)?
- What types of work has the claimant done in the past fifteen years, and can the claimant show inability to do that work now?
- If the impairments are physical, what does the claimant need to show to win under the grids? If the claimant loses under the grids (usually because the claimant is under 50), is there any way to get the case off the grids?
- Does the claimant have nonexertional impairments that would make the performance of work at any exertional level impossible (e.g., a need to take frequent rest breaks or to elevate feet, or an inability to concentrate due to pain or other symptoms)?
- Does the claimant have mental impairments that make performance of simple, unskilled work impossible?

II. Case Development
Case development is necessarily fluid. Depending on the procedural status of a case and the time it takes to have an

27See Social Security Rulings 85-15, 85-16 for the clearest explanation of when mental impairments preclude performance of all work at Step 5.

28Social Security Ruling 85-15 provides the best discussion of what is involved in doing simple, unskilled work and how to show that someone is incapable of doing that level of work.

29To receive SSDI benefits, a person must have worked and paid social security taxes for a certain period. If not, the person cannot qualify for SSDI benefits on the person’s earnings. Generally speaking, with some exceptions for persons who become disabled before age 31 or who are blind, a person must have worked and had sufficient earnings for at least twenty quarters (a quarter is a three-month period) out of the forty quarters preceding the onset date of disability. See 20 C.F.R. §§ 404.130-146 for the rules on becoming insured for disability benefits.
administrative hearing scheduled, the
work may be done in a matter of weeks or
over many months.

A. Understanding the
Appeal Stages

When you agree to represent an individual
at the hearing, you must determine
whether the individual has timely appealed
denials. Nothing is more embarrassing
than working to prepare a case for hearing
and then learning, as you sit down at the
hearing table, that the case has some pro-
cedural problem (e.g., the claimant filed an
appeal late) leading to a dismissal of the
claim. To avoid this, you need to review the
procedural status of every case carefully
and identify late-filing issues as early as
possible.

The Social Security Administration has a
four-step administrative determination
and appeal process. After an application
for benefits is submitted, the claim is sent,
in most cases, to a state agency working
under contract with the Social Security
Administration to make the initial disabil-
ity determination. These Bureaus of
Disability Determination Services obtain
evidence of the claimant’s medical treat-
ment. In some cases the bureaus have con-
sultative medical examinations done at the
Social Security Administration’s expense,
develop evidence about the claimant’s age,
education, and work experience, review
that evidence, and make a disability deter-
mination. If the claim is denied, the
claimant has sixty days after receiving the
denial notice to request a
reconsideration. At reconsideration, the
case is sent back to the state bureau and
reviewed by different staff. They may
develop more evidence and make a new
disability determination. If the claim is
denied again, the claimant has sixty days
after receiving the denial notice to request
a hearing before an administrative law
judge from the Social Security
Administration’s Office of Hearings and
Appeals.

If the administrative law judge denies a
claim, the claimant may, within sixty days
of the administrative law judge’s denial,
file an appeal with the Appeals Council.
Acting as an appellate court, the Appeals
Council reviews the administrative record
from the hearing and either dismisses the
appeal or grants the appeal and takes a dif-
ferent action, such as reversing and find-
ing disability or remanding the matter for a
new administrative law judge hearing. If
the Appeals Council denies the claim, the
claimant has sixty days to file for judicial
review in the U.S. district court.

B. Interviewing the Claimant and
Requesting Medical and
Other Evidence

The initial interview with a client is the first
major part of preparing to conduct the
hearing. In that interview a representa-
tive needs to learn

- the procedural status of the case (includ-
ing determining which level of the
administerative appeal the case has
reached and whether any hearing dates
have been set);
- the claimant’s age, educational status,
and work history; and
- the claimant’s medically determinable
impairments and what medical care the
claimant has received (including a
detailed list of where the claimant has
received medical care), types of treat-
ment, and medication.

Many attorneys who routinely represent
SSDI and SSI claimants have question-
naires to gather information at the initial
interview. New advocates should sit in on
initial interviews done by more experi-
enced advocates.

3020 C.F.R. § 416.1400.

31See 20 C.F.R. §§ 404.90, 416.1409. Generally the Social Security Administration assumes that someone receives the denial
five days after the date stamped on the notice. Id. §§ 404.901, 416.1401. This means that appeals must be filed within sixty-
five days after the date stamped on the denial notice. If the appeal is filed late, the appeal will be considered only if the claimant
can show good cause for filing the appeal late. The good-cause request must be in writing. Id. §§ 404.909–911,
416.1409–1411.

32The time period for requesting a hearing is the same as for requesting reconsideration. See id. §§ 404.933, 416.1433.
As part of the interview, the applicant should sign three sets of documents: an appointment-of-representative form (SSA-1696), medical information releases, and a retainer agreement (if a fee is being collected on the case).33

Once you have agreed to represent the claimant, you need to submit a copy of the signed appointment-of-representative form and retainer agreement (if collecting attorney fees) to the appropriate Social Security Administration office. The appropriate office depends on which level of review the claimant’s case has reached. At the initial and reconsideration level, the appointment-of-representative form and retainer agreement should be submitted to the appropriate social security district office and to the state Bureau of Disability Determination Services if the case is pending at the bureau. At the hearing level, these two documents should be submitted to the Office of Hearings and Appeals.

You should also send requests for medical records to the relevant medical sources identified by the claimant. I generally request records from all medical sources that are identified by the claimant and cover the claimant’s medical care back one to two years before the original date of application for benefits.34 Most states have laws regulating how much a medical provider may charge for copying and mailing medical documents. Check with experienced attorneys to see whether your state is covered by a medical records copying law.35

C. Getting and Reviewing the Administrative Case File

The Social Security Administration maintains an administrative file for all claimants. These files are available to claimants and their legal representatives (if the claimant gives written permission for the legal representative to review the administrative file).

To represent a claimant competently, you must obtain a copy of the administrative file when the case is at the administrative law judge hearing level (Office of Hearings and Appeals). Social Security Administration personnel allow representatives and their employees to review files on Office of Hearings and Appeals premises, and they make copying machines available so that the representative can copy the file. The Social Security Administration does not allow legal representatives to remove administrative case files from Office of Hearings and Appeals premises.

The case file should contain decision rationales that are completed by personnel at the state Bureau of Disability Determination Services and that go through the sequential evaluation steps and explain (in greater or lesser detail) the reason the person was found not disabled; the applications for benefits; appeal documents; various forms that are completed by the claimant and that detail the claimant’s education, work experience, and daily activities; and the medical records.

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33 The appointment-of-representative form (SSA-1696) is available on the Social Security Administration website.

34 The relevant period for which medical records are required differs between SSI and SSDI. SSI benefits may not be paid before the date of SSI application (unless an earlier SSI application is reopened). Thus, in SSI-only cases, I usually develop records for only one year before the original date of application for benefits. SSDI benefits may be paid for months up to twelve months before the date of application. When coupled with the mandatory five-month waiting period between onset of disability and commencement of payment, disability status must be shown up to seventeen months before the date of application to maximize SSDI benefits. Thus medical records up to two and one-half years before the date of SSDI application are relevant. If a claimant’s date last insured for SSDI benefits is before the date of application, the medical records should be collected up to one year before that date. E.g., assume that Mr. Jones’s date last insured for SSDI purposes is December 31, 2000. As discussed in note 29 supra, this means that the three-month period (quarter) ending December 31, 2000, is the last quarter in which Mr. Jones had sufficient work earnings in twenty of the preceding forty quarters. To get SSDI, he then must show that he became disabled on or before December 31, 2000. If he files for SSDI benefits on January 1, 2004, he must show that he was disabled as of December 31, 2000. If he shows this, he still maybe paid SSDI benefits for only 12 months before the date of application or January 1, 2003. See 20 C.F.R. § 404.315.

35 The National Organization of Social Security Claimants’ Representatives (NOSSCR) compiles in its monthly newsletter a list of various state-law provisions regulating the copying costs that medical providers may charge. For more information, check the NOSSCR website or talk to an attorney who is a NOSSCR member.
In all cases, when reviewing the administrative file do the following:

- Review the application and other documents to determine the alleged onset date of disability and the date last insured if the claim involves SSDI benefits.

- Review the initial denial, request for reconsideration, reconsideration determination, and request for hearing to determine whether the claimant filed timely appeals so that the administrative law judge properly has jurisdiction of the case.

- Review the vocational history in the file, including the disability report, the vocational report (if any), the earnings record, and any other information concerning past work and education.36

- Inventory the medical evidence in the file and compare it to evidence that the claimant has identified.

- Review the earlier decisions in the case—the initial and reconsideration decisions—to determine why, and based on what evidence, the person was found not disabled.37

D. Obtaining Medical Source Statements

The most valuable medical evidence in a case often is the claimant’s treating doctor’s statement (a “medical source statement”) that describes the claimant’s medical problems and identifies the work-related limitations that those medical problems cause.38 The medical source statement ideally should address the claimant’s diagnosis, prognosis, treatment (e.g., physical therapy, medications), side effects of treatment and medications, and functional limitations, including the need to rest during the day, the need to elevate extremities, problems with concentration and memory, pain, and weakness.

One key to obtaining a strong medical source statement is having a theory of disability upon which to rely. Doctors do not understand the social security disability definition, and they usually do not know what their patients must show to be found disabled. For example, if you have a client who would be found disabled at Step 5 if limited to light work activity, you need to be able to tell the treating doctor this. A doctor might be unwilling to say that your client is completely disabled. The doctor might be willing to state that your client cannot, due to medical impairments, do medium work activity that requires standing and walking throughout the day with lifting of 25 to 50 pounds.

Although letters that address these factors are the strongest evidence, they are difficult to obtain because doctors are often unable or unwilling to draft letters that compare their patients’ limitations to the social security disability standard. Such letters are time-consuming to prepare. Sometimes, after reviewing the claimant’s medical records, advocates are able to draft such letters and send them to the treating doctor for review and, if acceptable to the doctor, signature. Others ask the doctor to dictate a statement and have that statement typed up. Another way to get the evidence is to send treating doctors forms that review the residual functional capacity factors and ask for their opinions on, as appropriate, physical and mental limitations on work activity. The best forms are those that are closely tailored to your client’s medical conditions. Experienced social security attorneys often have developed such forms, and they may be willing to share them with you. Social security treatises also contain sample forms that you can use. The drawback to using pre-prepared forms is that

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36 In some claims the case file includes a vocational report identifying possible jobs that the claimant has the residual functional capacity to perform. Not all states prepare these forms, and these forms are not prepared in all cases.

37 Assessing what evidence the Social Security Administration used to make its decision is very important. Often at the initial and reconsideration levels, the Social Security Administration would not have been able to obtain medical or school records that, had they been obtained and considered, would have resulted in a finding of disability.

38 Medical source statements submitted by treating sources provide medical opinions which are entitled to special significance and may be entitled to controlling weight on issues concerning the nature and severity of an individual’s impairments(s).... Adjudicators must weigh medical source statements under the rules set forth in 20 C.F.R. 404.1527 and 416.927, providing explanations for accepting or rejecting such opinions.” Social Security Ruling 96-5p (July 2, 1996).
they are more easily attacked than complete medical source statements unless the treating doctor keys findings related in the forms back to medical evidence for documentation.

Strategies to get a doctor to complete the forms include giving the form or request to the claimant to take to the claimant’s next appointment. The claimant should call the doctor’s office in advance to inform the doctor that he is bringing the form and to set aside extra time to complete the form. Also, you may interview the doctor by telephone and use that information to complete a statement to submit to the doctor for signature.

E. Completing the Evidentiary Record

Obtaining the claimant’s medical records, reviewing the administrative case file, and obtaining medical source statements (if possible) produce the materials needed to complete the evidentiary record before an administrative law judge hearing. Send the administrative law judge any medical evidence that is not already in the administrative case file; medical source statements; and any other statements that are necessary to complete the picture of the claimant’s education and work experience. Getting medical records usually involves making phone calls (often more than one) to medical offices and asking, cajoling, and, as needed, begging to have medical evidence made available. Once you obtain this evidence, you should promptly send it to the judge.

F. Claimants’ Diaries

One other effective technique is to have your client keep a diary concerning the client’s medical condition. A diary need not be more than the claimant’s daily notes in a notebook about the claimant’s medical problems or care. A daily activities diary allows persons with pain to document what activities they do on a regular basis and to keep track of when they must rest and take pain medications. Persons with chronic conditions such as asthma or seizures can track when they have episodes as well as the circumstances of each episode. Persons with diabetes can track ongoing blood levels and note when they have diabetic episodes. The diaries can be turned in as evidence although you should also have the person who kept the diary testify at hearing about it and explain how it was kept.39 Keeping a diary also helps a claimant prepare for hearing.

G. Considering Witnesses Other than Claimant

Consider whether any witness other than the claimant should testify at the hearing. I tend to use witnesses in two circumstances: (1) Sometimes I am able to persuade medical providers or therapists to give testimony. This type of testimony is extremely helpful—the equivalent of a medical source statement. However, persuading medical providers to appear and offer testimony at hearings is usually very tough. (2) I use witnesses when I believe that the claimant is unable to describe essential parts of his testimony due to a medical impairment or just because the claimant cannot answer questions very well. Possible witnesses are spouses, caregivers, family members, neighbors, or anyone else who has good knowledge of the claimant.

If you plan to have witnesses in addition to the claimant, you should let the judge know before the hearing. You may submit written statements in lieu of testimony from these witnesses. Live testimony is always better than written statements. It allows the administrative law judge to ask questions and follow up on areas of concern and to assess the demeanor of the witness. You cannot always get witnesses to hearings, and, if not, written statements such as affidavits are better than not addressing the point. One instance in which I have used statements concerns reports of seizures. Generally the reports describe what the witness observed when the person had a seizure and, as such, are present sense impressions of what hap-

39Evidence presented at the hearing may be received and considered “even though the evidence would not be admissible in court under the rules of evidence used by the court.” 20 C.F.R. §§ 404.950(c), 416.1450(c). Hearsay evidence is generally admissible and comes in for whatever weight the administrative law judge determines is appropriate.
pened. Administrative law judges often rely on such statements, particularly if the statements describe a consistent pattern of seizure activity and are corroborated by the medical findings of the seizure disorder.

III. Preparing for the Hearing

The administrative law judge hearings are the key step of the administrative appeal because disability claimants are more successful at this step than at any other. The judge reviews all of the evidence, including any new evidence that is submitted, and takes testimony from the claimant and any other witnesses you call at hearing.40

The judge may also choose to call two types of experts to testify at the hearing. The first is a medical advisor (a doctor or psychologist who has not earlier examined the claimant or been involved in the initial or reconsideration denials). The second is a vocational expert who advises the judge about the claimant’s job requirements and skills and answers hypothetical questions about the types of jobs available for persons with vocational factors such as those of the claimant. Based on the administrative case file and the testimony at the hearing, the judge makes a new decision and issues a notice explaining the decision and the right to appeal to the Appeals Council.

A. Submitting Records and Prehearing Statement

Once a case is scheduled for hearing, you need to ensure that the case is prepared for hearing. The first, and most important, task is to make sure that all relevant medical evidence has been obtained and submitted to the administrative law judge. You hope that earlier work in collecting medical records will have led to all records coming in. If not, redouble your efforts to obtain the medical evidence and submit it.

The better practice is to submit a prehearing statement to the judge before the hearing date. An effective prehearing statement should contain the following:

- An introduction that sets forth the theory of disability succinctly (e.g. Ms. Jones is unable to do past relevant work and is disabled at Step 5 pursuant to Grid Rule 203.07 based on her age of 56, high school education finished in 1966, unskilled work history, and residual functional capacity for light work).
- Identification of any evidence that is not already part of the record.
- Objections, if any, to any of the records already in the administrative case file.
- Dates of application, disability onset, and last date of insured status (for SSDI cases only).
- Claimant’s age, education, and work experience.
- A medical impairment summary, discussing each impairment separately and setting forth the relevant evidence of treatment in chronological order.
- The theory of disability.

B. Preparing the Client to Testify

Meet or speak by telephone with claimants before the hearing date to prepare for the hearing. Try to meet or speak a day or two before the hearing date so that the information stays fresh with the claimant.

In that meeting you should (1) explain the hearing process, (2) explain who will be in the hearing and the roles of each participant, (3) explain the disability standard, (4) explain general rules for testifying, (5) identify what needs to be shown to obtain a finding of disability, and (6) go over the questions that will be asked of the claimant at the hearing.

Explaining the Hearing. Describe what will happen at the hearing. Knowledge of how the particular judge conducts hearings is extremely helpful here. Many judges take the claimant’s testimony first. Others take testimony of medical experts to explain what the medical evidence shows and then take the claimant’s testimony. Some judges prefer to have advocates question the
claimant initially, and others question the claimant initially themselves. All administrative law judges have different ways of eliciting testimony from claimants. Knowing how your judge operates allows you to prepare your client better.

**Explaining the Hearing Participants.** I usually discuss who the administrative law judge is, describe the judge, and explain how the judge conducts hearings. If a medical expert or vocational expert is called, I describe who the expert is and what the expert does at the hearing.

**Explaining the Theory of Disability.** Claimants do a better job of testifying when they understand what the disability standard is and how they meet it. For example, if your theory of disability provides that someone is disabled if limited to light work, even if the person retains the ability to do sedentary work, the claimant should be told this. Often claimants have misconceptions about what they must show to be found disabled, and those misconceptions color their testimony.

**Explaining General Rules About Testimony.** I tell claimants that the hearings are recorded and stress the importance of making a good record. This means that claimants need to wait until the question is asked before answering. They need to try to answer the question asked and not guess what the judge wants. I warn them not to exaggerate—they need to be as truthful as possible. And I reassure them that not knowing the answer to a question or being unable to remember is permissible. I also advise that they may ask that a question be rephrased if they do not understand it.

**Going over the Hearing Questions.** Most lawyers who do disability hearings have questionnaires that they use during the hearing. In general, the questions address background information (claimant’s address, marital and family status, birth date, educational background, and work history); medical treatment history; activities of daily living; and what the claimant can and cannot do. The questionnaires are modified for each hearing to address issues specific to the claimant and to address issues on which you anticipate questions from the judge. For example, judges follow up on any evidence of alcohol or substance abuse in the record, whether or not the substance abuse is in remission and even when it is not an issue determining disability.

**IV. Conducting the Hearing**

At the hearing, you should be prepared to make a brief opening statement that sets forth the bases for finding the claimant disabled. You should discuss with the judge any pending issues. If relevant evidence is still missing from the administrative case file, you should apprise the judge of the missing information and ask the judge to leave the administrative record open after the hearing so that you can obtain and submit the information for the judge’s review. If you cannot obtain certain evidence, such as records that a doctor’s office does not want to turn over, you may request the judge to issue an administrative subpoena to the holder of the materials.41

Be prepared to ask the claimant questions. While many of the questions are the same from hearing to hearing (age, education, work experience, activities of daily living, the claimant’s medical impairments), others are tailored to your theory of disability. You should review the points that you must show for a disability finding, and make sure to elicit testimony from the claimant or witness on those points.

Write out in advance of the hearing the questions you plan to ask. If the judge questions first, your questions become the basis for cross-examining the claimant. If the judge opts for you to question the claimant or witnesses, you will be prepared.

**A. Cross-Examining Medical Experts**

Medical experts are doctors or psychologists who have not examined the claimant. Their testimony is based on the records and testimony at hearing. The medical expert may explain complicated medical issues to the judge, assist in determining

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41 See id. §§ 404.950(d), 416.1430(d) (issuance of subpoenas).
whether the claimant meets or equals the listings, and assist in determining residual functional capacity and disability onset dates.

As the advocate, you need to prepare to cross-examine the medical expert. Cross-examining medical experts is, as a general rule, difficult because you have no idea what they will say.

There are a few ground rules. First, you must consider whether you want to ask a specific question at all. Once the question is asked, the answer will be part of the record. If the medical expert’s testimony is favorable, do not follow up with questions. If the medical expert does not address a subject for which you have the treating doctor’s evidence, do not ask the expert any questions on this subject. For example, if the medical expert has not testified about residual functional capacity, do not ask him for an opinion. If you have a strong medical source statement from a treating doctor, you may want to rely on that and argue, after the doctor finishes testifying, that the statement of the treating doctor deserves controlling weight.42

Second, dueling on medical issues with medical experts is difficult. The doctor is the expert, not you. Ask questions in which you are more expert. For example, questions concerning the disability standard are fair game. A doctor who testifies that a claimant with depression has only moderate limitations in activities of daily living should be asked to define moderate and relate that definition to the disability standard. Another area concerns medical evidence in the file. Ask the medical expert to list the evidence that the expert has relied upon in giving an opinion. If the medical expert has not discussed certain strong evidence, you can follow up on that. For example, you can ask questions about medical exhibits that support your theory of disability: “Let’s look at Exhibit F-4: doesn’t that meet the first prong of listing 1.02 for disc disease?” This means that you need to know your theory of disability and the medical exhibits that support that theory.

At times you will have no choice but to take the plunge and ask questions that go to the heart of the medical expert’s expertise. When faced with a medical expert who gives damaging testimony, sometimes you must challenge. This is, however, your last resort. My approach in such situations is to chip away at the doctor’s testimony. For example, when a doctor testifies that a person with back pain that radiates down the left leg can do the full range of standing work, an appropriate opening question is to ask whether such conditions can ever cause pain of the type, but not the extent, described by the claimant. If yes, I would next ask whether the doctor believes that pain of that type could ever be so severe as to preclude standing work. The next question might address what types of findings would be expected when someone had pain of that type severe enough to preclude standing work. The purpose of such a question is to get the doctor to admit that there is no one set of medical findings that would produce such pain and that the issue of pain is highly personal. If you get to this point, the next question should address whether the doctor believes—in light of the subjective nature of pain and the inexactness of descriptions of medical findings that would cause such pain—that the claimant’s findings could, in any set of circumstances, cause the inability to do standing work on a sustained basis. If the claimant has other medical impairments such as depression, you should ask whether the combination of these conditions might make the pain sufficient to preclude standing work. The key in such cross-examination is to get the doctor to admit that the symptoms described by your claimant could be caused by the type of impairment that the claimant has. If you can get the doctor to admit that such pain is medically possible, the admission allows you to argue to the administrative law judge that your client is credible and is precluded from standing work.

B. Cross-Examining Vocational Experts

For information about work that exists in the national economy, administrative law

42See id. §§ 404.1527 and 416.927 for a discussion of when treating doctors’ statements deserve controlling weight and the rules for deciding controlling weight when faced with conflicting medical statements.
judges rely primarily on the Dictionary of Occupational Titles, a compendium of different jobs with description of work performed, skill levels, and exertional levels.43 When the dictionary is insufficient, judges use vocational experts to resolve complex vocational issues.

Vocational experts are trained in vocational rehabilitation. They assist administrative law judges on a number of subjects concerning Step 4 and Step 5 disability decisions.44 At Step 4 the vocational expert may testify about requirements of claimant’s past work as performed both by the claimant and generally in the national economy. For example, the vocational expert might explain the physical requirements for a job such as welding. Based on that information, the administrative law judge could decide whether the claimant’s residual functional capacity permits the claimant to do that past job.

At Step 5 the vocational expert may testify about whether the grids are applicable to the claimant and, if not, whether the claimant can do other jobs based on the claimant’s residual functional capacity, age, education, and work skills acquired from past relevant work.

Most often, the vocational expert addresses the Step 5 issue by answering a series of hypothetical questions—posed by the judge and the advocate on cross-examination—that concern the claimant’s ability to do other jobs in the national economy. The typical hypothetical question sets forth the claimant’s age, work skills, if any, derived from education and training, work skills derived from past work, and the individual’s functional limitations.45 Based on the factors in the hypothetical question, the expert gives an opinion on whether jobs exist that the claimant can do, the names of such jobs, and an estimate of the number of such jobs in the surrounding economy. Most administrative law judges ask a series of hypothetical questions based on a range of different residual functional capacity findings that the judge may make, given the evidence of record. Plan to ask your own hypothetical questions that follow up on those asked by the judge.

In answering the hypothetical questions, the vocational expert may rely on resources such as the Dictionary of Occupational Titles, other publications prepared by the U.S. Department of Labor and state agencies dealing with job issues, as well as the expert’s own experience in vocational rehabilitation or job placement work.

To prepare to question the vocational expert, review your client’s past work; focus on “relevant” work (done in the last fifteen years) and look at how your client performed it. Also review your theory of disability, with special emphasis on how your client can be found disabled at Step 5. If your client has exertional limitations and you are relying on the grids, determine the applicable grid rule. If you are arguing that the grids do not apply, identify the nonexertional limitations that take your client off the grids.

The ground rules for questioning medical experts also apply to vocational experts. For example, you must consider whether you want to ask a specific question at all. Once the question is asked, the answer is part of the record. If the vocational expert’s testimony is favorable, do not follow up with questions. And avoid dueling with vocational experts on work issues that are within the vocational expert’s area of expertise.


44See id. for a discussion of the role of vocational experts.

45A sample hypothetical question would be the following: Assume a man, 56, with four years of college in accounting; employed as an accountant for the last twenty-eight years, he has been performing that job as described in the Dictionary of Occupational Titles. Further assume that this man has residual injuries from an auto accident that require him to walk with a cane and walk or stand no more than three hours a day; limit his ability to sit, due to back pain, to no more than forty-five minutes at a time; limit his sitting to no more than five hours in a day; permit only occasional bending and no squatting or kneeling; limit lifting and carrying to no more than ten pounds in his left hand because he uses his right hand to hold his cane; and do not limit reaching. Are there jobs in the national economy that this man can still do?
Generally speaking, you should not cross-examine the vocational expert unless the expert responds to every one of the administrative law judge’s hypothetical questions with jobs that the claimant could do.\(^{46}\) If the vocational expert responds to all the judge’s hypothetical questions with testimony that jobs are available, you need to ask follow-up hypothetical questions to describe limitations that you believe accurately set forth your claimant’s limitations and result in a finding by the vocational expert that no jobs are available. This part of cross-examination can be tricky and cannot be adequately discussed here. You need to talk to more experienced advocates about what hypothetical question they would ask before going into a hearing. In preparing for a hearing where a vocational expert will be called, I prepare a hypothetical question that I believe accurately reflects the medical evidence and testimony that I expect my claimant to give and that I believe will result in a finding of no available jobs.

C. Closing the Hearing

In almost all cases, the administrative law judge, at the close of testimony, takes the matter under advisement and issues a written decision after the hearing. Be aware that the hearing does not always end the work of advocacy. If the record is left open, you need to follow up to obtain and submit needed documents. You sometimes obtain relevant evidence after the hearing in cases where the record is closed. In such circumstances, you should submit the evidence to the judge with a cover letter explaining why the evidence was not available before or at the hearing and asking that the judge consider the evidence in making the decision.

You may choose to submit a written closing statement summarizing the evidence and setting forth the legal arguments that support a finding of disability. If you decide to submit a closing statement, you should ask the judge while at the hearing for leave to do so later. Closing statements are helpful when unclear or unresolved legal issues arise at the hearing or if factual testimony goes in directions that you did not anticipate.

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Successful representation at hearing results from preparing your case. Develop all the relevant medical and other evidence and integrate that evidence into the theory of disability that supports the claim. And, as in every other area of legal practice, the best way to learn how to do hearings well is to observe others doing hearings, talk to other advocates about cases, and then do hearings yourself.

\(^{46}\) If the administrative law judge asks a hypothetical question or questions to which the vocational expert responds that the vocational expert cannot identify any jobs, you must convince the judge that the facts in the hypothetical supporting a finding of no available jobs best describes your claimant. Put another way, in such circumstances you should focus on the judge, not the vocational expert.