

Social Security Disability & SSI for people with HIV

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Disability Income

- Social Security Programs:
 - Social Security Disability Income (“SSDI” “Title II”)
 - Supplemental Security Income (“SSI” “Title XVI”)
- Private Disability Insurance
 - Short Term Disability
 - Long Term Disability

-Social Security Disability Insurance (“SSDI”) (“Title II”)

- Monthly cash benefit to disabled persons and dependents
- Insurance – based on payroll taxes (FICA)
- Must have worked long enough and recently enough (5 out of last 10 years)
- Payment amount dependent on earnings history

Supplemental Security Income (SSI) ("Title XVI")

- Monthly benefits to aged, blind or disabled persons
- Needs-based program, considers income and assets
- Payment amount supplements any other income up to a maximum
- Year 2011 maximum payment: \$674 per month (no increase since 2009)

Social Security: Comparisons

- Both programs use the same rules to determine whether claimant is disabled
- Different rules for financial eligibility
- Both programs governed entirely by federal law

Sources of Law

- Federal Statute:
 - SSDI (Title II) 42 USC §§ 401-433
 - SSI (Title XVI) 42 USC §§ 1351-1355
- Federal Regs: 20 CFR Part 400-499
- Social Security Rulings (SSR's) – ssa.gov
- POMS (Program Operating Manual)
- HALLEX (Hearings, Appeals and Litigation Law Manual)
- www.ssa.gov
- Law & Regulations:
<http://www.ssa.gov/regulations/index.htm>

Associated Medical Programs

- Social Security Disability – Title II
 - Medicare – 29 months after onset
 - Part A (hospital), B (outpatient), D (drugs)
 - Cost sharing –
 - Annual Deductibles
 - Monthly premiums for Part B & D
- SSI – Title XVI
 - Medicaid – Joint Federal/State Program
 - Must have limited income and resources
 - Administered by the state
- Medicaid – disabled adults can apply directly through County Department of Social Services
 - Disability standard is the same as for Social Security & SSI

Statutory Definition of Disability

- Severe mental or physical impairment
- Medically verifiable by lab tests, physical examination or other objective medical procedures
- has lasted, or is expected to last, at least twelve consecutive months or result in death
- renders claimant unable to engage in substantial gainful activity (“SGA”)

Three domains

- Medical
 - Medically determinable impairments
 - Identifying them
 - Proving them with medical records, tests, labs, etc
- Functional Capacity
 - **Limitations** that result from impairments and/or treatments
 - What causes them?
- Vocational
 - Client’s vocational history
 - Job analysis
 - How the functional limitations affect work related activities

The Social Security Application Process

The application process

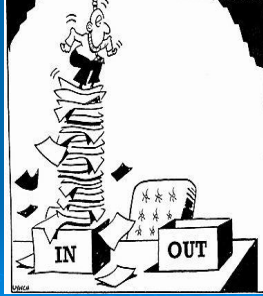
- Initial application
 - Filed at local Social Security office or online
 - Disability evaluation done at State Agency (Disability Determination Service)
 - Should take a couple months – often takes much longer
 - Approval rate in 2008: 34%
- If denied: Request for Reconsideration
 - File within 60 days of denial (paper or online)
 - DDS again looks at whether claimant is disabled
 - This can take a couple months up to 4-6 months or more
 - Approval Rate in 2008: 14%

Further appeals

- Administrative Hearing (after denial of reconsideration)
 - Hearing before Administrative Law Judge (Raleigh, Wilmington, Lumberton, Greensboro, Charlotte, etc.)
 - Wait for hearing about 12 months or more. (Was up to 2 years until recently).
 - Approval rate in 2008: 63%
- Appeals Council (2% approved; 22% remanded)
- Federal Court (5% reversed; 47% remanded)

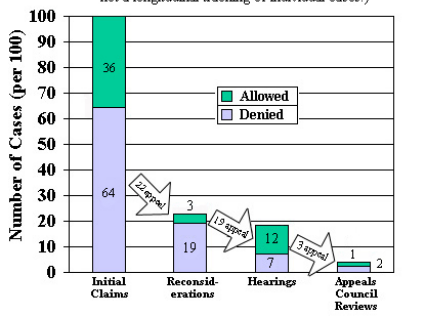
Backlog

More applications than the SSA and the State Agencies can handle



Progression of Cases Through the Disability Process

(Note: Data based on total appeals in fiscal year 2005, not a longitudinal tracking of individual cases.)



Sequential Evaluation Process

Five-Step Sequential Evaluation

1. Is the claimant doing Substantial Gainful Activity (SGA)?
2. Does the claimant have a "severe" impairment?
3. Does the impairment meet or equal a listed impairment?
4. Can the claimant do past relevant work?
5. Can the claimant do any work existing in significant numbers in the national economy?

Sequential Evaluation Step 1: Work

- Is the claimant engaged in substantial gainful activity ("SGA")?
 - "Substantial" means work activity that involves significant physical or mental activities
 - For 2011, "gainful" means resulting in income of \$1000/month (gross income minus impairment related work expenses)

Sequential Evaluation Step 2: severe impairment 20 CFR § 404.1521

- Severe = significantly limits an individual's physical or mental abilities to do basic work activities
 - More than minimal effect
 - Duration = lasting at least 12 months or resulting in death (§ 404.1509)
- Generally, this is a low bar

Sequential Evaluation

Step 3: Listings

- Does the impairment, or combination of impairments, meet or equal a “listed impairment”?
 - Organized by body systems
 - Impairments presumed to prevent the ability to engage in SGA
 - Each listing includes a diagnosis as well as certain findings which must be included in medical records
 - many listings include durational requirements and severity levels

Step 3: Listings

- HIV Listing: 14.08
 - Part of “Immune System Listing -- 14.00 series
 - Specifically begins at 14.08, but includes introductory material – which is very important
 - Requires a positive HIV test PLUS an “AIDS-defining” condition

HIV as a disability

- Requires a positive HIV test, but HIV+ alone is not enough
- No particular CD4 or Viral Load is required, and a low CD4 won't guarantee approval – nor should high CD4 necessarily be a barrier
- Often, there is an HIV diagnosis, but other conditions predominate (mental health, liver disease, cardiovascular, kidney)

The 14.08 A-J Listings

- A list of AIDS-defining conditions, including
 - A. Bacterial Infections
 - B. Fungal Infections
 - C. Protozoan or helminthic infections
 - D. Viral Infections
 - E. Malignant neoplasms
 - F. Conditions of skin or mucuous membranes
 - G. HIV encephalopathy
 - H. HIV wasting syndrome

HIV Listings

- I. Diarrhea
- J. Other infections

14.08K : Repeated Manifestations of HIV

- The kitchen sink
 - AIDS defining conditions that don't meet A-J
 - Other HIV symptoms (fatigue, weakness, cognitive issues, depression)
 - Medication side effects
 - PLUS
 - Functional Limitations
 - Limitations in Activities of Daily Living
 - Limitations in Maintaining Social Functioning
 - Limitations in timely task completion due to deficiencies in concentration, persistence, or pace.

Other Impairments We See

- Hepatitis (listing 5.00)
- Pancreatitis (5.00)
- Peripheral neuropathy (listing 11.04)
- Cardiovascular issues (4.00)
- Kidney Disease (6.00)
- Organic Brain Issues (12.02)
- Depression (12.04)
- Anxiety (including PTSD) (12.06)
- Mental Retardation (12.05)
- Personality Disorders (12.08)

Important Listings

- 14.08 – HIV Listings
- 12.00 -- Mental Disorders
 - 12.04 -- Affective Disorders (e.g. depression)
 - 12.05 – Mental Retardation
 - 12.06 – Anxiety Disorders
- 5.00 – Liver Disease (Hepatitis C, Cirrhosis)

Medication Side Effects

- See 14.00G – consider
 - a. Effects of medications you take
 - b. Adverse side effects (acute and chronic)
 - c. The intrusiveness and complexity of your treatment
 - d. The effect of treatment on your mental functioning (for example cognitive changes, mood disturbances)
 - e. Variability of responses to treatment
 - f. Interactive and cumulative effects of your treatments
 - g. The duration of your treatment
 - h. Any other aspects of treatment that may interfere with your ability to function

Medication Side Effects

- Listings acknowledge that sometimes it's impossible to determine what's a direct effect of HIV and what's a medication side effect
- 14.00G(5)(a):
 - "The symptoms of HIV infection and the side effects of medication may be indistinguishable from each other. We will consider all of your functional limitations, whether they result from your symptoms or signs of HIV infection or the side effects of your treatment."

Two important limitations

- **Substance Abuse:**
 - Claimant may not receive benefits if substance abuse "contributes materially" to the finding of disability (20 CFR 404.1535)
- **Compliance with treatment:**
 - No benefits if claimant fails to follow prescribed treatment that would restore ability to work. (20 CFR 404.1530)
 - Acceptable excuses: treatment contrary to religion, very risky; considers physical, mental, educational, and linguistic limitations
 - For HIV infected, common problem is medication adherence.

"Step 3.5": Residual Functional Capacity

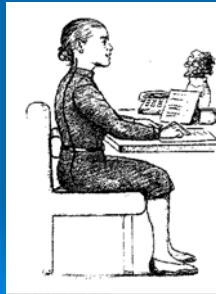
- What can the claimant do in spite of her/his impairments?
- RFC is what the claimant can sustain on a full-time basis, 5 days/week, 8 hrs/day or equivalent
- Assess physical, mental
 - Strength, manipulative limitations, environmental restrictions, etc.
 - Ability to sit, stand, walk, lift, carry, etc.
- Strength classifications
 - Heavy, Medium, Light, Sedentary

Residual Functional Capacity

- Exertional Levels -- Strength
 - Sedentary
 - Light
 - Medium
 - Heavy

Sitting

- Sedentary jobs generally require sitting about 6 hours in an 8 hour work day
- Some people need to alternate between sitting and standing on a schedule or at will (often back problems)

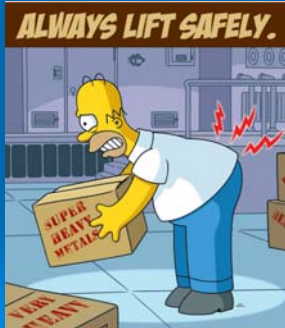


Standing/Walking



- If limited to no more than 2 hours in an 8 hour work day → *SEDENTARY*
- Otherwise – Light or higher level

Lifting/Carrying



Lifting/Carrying

- If limited to:
 - Occasionally lifting 10 pounds
➔ *SEDENTARY*
 - Occasionally lifting/carrying up to 20 pounds
 - Frequently up to 10 pounds
➔ *LIGHT*
 - Occasionally lifting/carrying 20-50lbs
 - Frequently lift/carry 10-25 lbs
➔ *MEDIUM*

Sedentary



- Sitting
 - 6 hrs
- Standing/Walking
 - 2 hours total in 8 hr/day
- Lifting/Carrying
 - 10 pounds frequently
 - 20 pounds occasionally

Light

- Walk/Stand → 6 hours out of 8 hour day
- Lift/Carry →
 - Up to 10 pounds frequently
 - Up to 20 pounds occasionally



Medium

- Standing/Walking →
 - 6+ hours
- Lifting/Carrying →
 - 20-50 pounds occasionally
 - Up to 25 pounds frequently



Mental RFC



Minimum Mental Abilities

- Understanding, carrying out, remembering **instructions**
- Making simple work-related **decisions**



Minimum Mental Abilities - 2

- **Respond appropriately** to supervision, coworkers, unusual work situations
- **Deal with changes** in a routine work setting



RFC Considerations

- Non-exertional impairments: fatigue, pain, nausea, diarrhea, depression
- Good days/bad days
- Difficulties *sustaining* work 8 hours a day, 5 days a week
- Naps, bathroom breaks
- Attendance problems (illnesses, medical and other appointments) – especially when unscheduled

RFC Considerations

- Attendance
- Breaks, naps

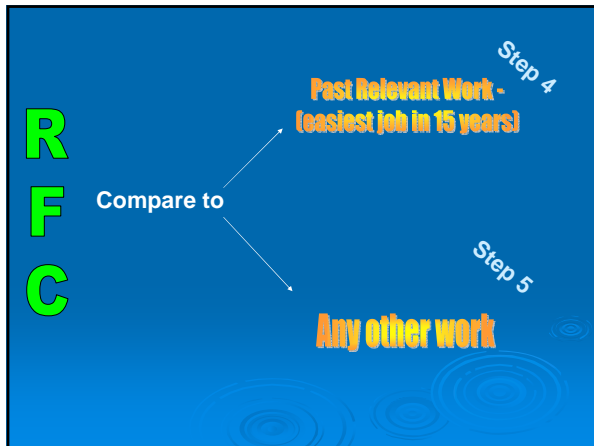


Problems sustaining effort




- See SSR 96-8p re RFC:
 - "sustained work-related physical and mental activities"
 - "regular and continuing basis"
 - 8 hours a day; 5 days a week or equivalent
- RFC is not
 - What you can do *part of the day*
 - what you can do on your good days

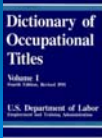
Steps 4 & 5: Medical-Vocational Analysis




Past Work

- > Relevant Work =
 - 15 years
 - Long enough to learn
 - SGA level
- > As actually performed, or
- > As performed in economy (DOT)







Client's description of Work



Mop, make beds, carry equipment....

Off the Grids

Non-exertionals

Pain

Fatigue

Mental impairments

Diarrhea, incontinence

Manipulative limitations

Environmental limitations

Vocational Expert

Winning Theories

- Problems sustaining effort
- Problems with concentration/attention
- Absences, lateness
- Excessive breaks (e.g. bathroom)
- Need for naps
- Problems getting along with people

Mental limitations we see



- Concentration, attention
 - “claimant can only pay attention for 10 minutes at one time”
 - “claimant would have to work in an area away from co-workers or the public to avoid distraction from work tasks”
- Getting along with others
 - “claimant would be likely to respond to criticism or correction from supervisor by shouting, walking away, or speaking disrespectfully”

Attendance

- Describing attendance limitations:
- “Claimant would likely miss work at least 3 days per month due to fatigue that would cause him to be unable to get out of bed”
- “Claimant would likely be late to work at least three times per week because of medication side effects that occur within 2 hours of taking morning medications”



Why do People with HIV get turned down?

The Gray Area Cases

- These are the cases we see:
 - Fatigue
 - Pain
 - Peripheral Neuropathy
 - Gastrointestinal issues: diarrhea, constipation, nausea, vomiting
 - Anemia
 - Night Sweats
 - Skin problems
 - Sleep Disturbances
 - Depression, Anxiety, Personality Disorders,
 - Cognitive deficits – concentration, memory, attention

Why do people with HIV get turned down?

- Adjudicators want objective findings
 - HIV often manifests with subjective, self-reported symptoms – not measurable – e.g. fatigue, pain, sleep problems
 - Pay attention to
 - 14.00H: "How do we consider your symptoms, including your pain, severe fatigue, and malaise?"
 - 20 CFR § 404.1529, 419.929 - How we evaluate symptoms, including pain
 - SSR 96-7p, Evaluation of Symptoms in Disability: Assessing the Credibility of an Individual's Symptoms
 - Get an opinion from the medical provider that the client's subjective symptoms are consistent with medical findings and clinical observations, e.g. CD4 count, history of the illness

Why do people with HIV get turned down?

- Adjudicators assume that viral suppression or rebounding CD4 count = remission
 - Get medical provider to address relevance of these measures
- Statements in records, such as "asymptomatic," "doing well"
 - Get medical provider to put these statements in context ("doing well for someone who had a nadir CD4 of 15 and almost died")
- Duration issues: applying early in the illness – very sick, but responding well to medications
 - Get medical provider to give an opinion on prognosis

Why do people with HIV get turned down?

- Lack of consistent care, good records
 - Get client into HIV case management
 - Supplement with statements from providers
- Treatment Compliance Issues
 - Medication side effects -- See 14.00H
 - "we will not draw any inferences from the fact that you do not receive treatment or that you are not following treatment without considering all of the relevant evidence in your case record, including any explanations you provide that may explain why you are not receiving or following treatment."
 - Complexity of regimen (but getting easier)
 - Transportation, cost issues, stigma
 - *Requirement to follow prescribed treatment: 20 CFR, § 404.1530, POMS DI 23010.005 – consider mental health, cost, other access issues*

Why do people with HIV get turned down?

- Substance Abuse Issues
 - High incidence of HIV among substance abusers
 - Most frequently an issue in connection with mental illness, liver disease, pancreatitis
 - See 20 C.F.R. § 404.1535, SSA Emergency Teletype, EM-96200
 - Find period of sobriety in the records
 - Get an opinion from provider that substance abuse doesn't materially contribute to the disability

What to get from the provider

- An opinion that the client meets a particular listing
- An explanation of the medical issues in the case, including how various conditions may be related
- An overview of the medical history and course of treatment
- Prognosis, duration
- Observations of client during visits, including mood, appearance, reports of subjective complaints

How we can build the case

- ## What to get from the provider
- Residual Functional Capacity Opinion and/or Questionnaire
 - Opinion about credibility of subjective symptoms, med side effects
 - "I am aware that patient complains of being unable to cook dinner without sitting on a stool.... credible based on medical findings."
 - Opinion about consistency of client's statements about functional limitations with medical findings and history

- ## What to get from the provider
- Reality check about effects of treatment & CD4 count
 - Context for statements such as "doing well" "asymptomatic"
 - Explanation of any compliance problems – e.g. depression, cognitive deficits, side effects, chaotic life, etc.
 - Opinion re materiality of substance abuse

What to get from client and third parties re functioning

- What can s/he do?
 - Housekeeping, transportation, grocery shopping (uses a cart/scooter)
 - Concentration/attention issues: Remembering medical appointments? banking? Helping child with homework? Paying bills? Following medication schedule? Assemble furniture that comes in a box? Read a book, magazine? Follow TV, movie
- How long at one time?
- Breaks? How long, how often?
- Naps? How long, how often?
- Assistance from family, friends, case managers?
- Frequency of medical appointments, illnesses

What to get from client and third parties re mental functioning

- Mental Health symptoms
 - Concentration, memory, attention
 - Mood
 - Social isolation
 - Anxiety, intrusive thoughts
 - Ability to be around other people, take instructions
 - Anger issues
