to the Court's attention in this brief, except those defects of a jurisdictional nature, "may be deemed waived [by the Court]." An example of this kind of waiver is found in *Oklahoma City v. Tuttle,* 471 U.S. 808, 815-816 (1985).

REPLY, SUPPLEMENTAL, AND AMICUS BRIEFS, AND PETITIONS FOR REHEARING • Under Rule 15.6, the petitioner may file a reply to the brief in opposition, but it must be confined "to arguments first raised in the brief in opposition." The reply must not exceed 10 printed pages.

Any party at any time while a petition for certiorari is pending may file a supplemental brief calling attention "to new cases or legislation or other intervening matter not available at the time of the party's last filing." Rule 15.7. But the brief must be restricted to such new matter.

Rule 37.2 authorizes amicus curiae briefs in support of or in opposition to a petition for certiorari. These briefs require either the written consent of the parties or, if consent is refused, a Court order granting a motion for leave to file — a motion which "is not favored." Rule 37.1 states that even the filing of such a brief "is not favored" unless it "brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties." Complying with this rule will often require advance consultation between the amicus and the party being supported, so that the amicus won't repeat arguments already made.

The Court permits but obviously discourages petitions for rehearing orders denying petitions for certiorari. Rule 44.2. These petitions must be filed within 25 days after the date of the order of denial. It can be no longer than 10 printed pages, and it must be confined "to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." To discourage such petitions, virtually all of which are routinely denied, the Court has increased the filing fee to $200. Rule 38.

CONCLUSION • Fully complying with every rule won't guarantee that the Court will grant your petition for certiorari. This is always a discretionary matter for the court. But presenting your case in its best possible certiorari light and following the rules to the letter will ensure that the Court is fully informed of the certworthiness of your case.

If you are in doubt about any of the Court's procedures, there are two informational resources at hand. First, call the ever-helpful Clerk's office (202-479-3011). Second, check Stern, Gressman and Shapiro, *Supreme Court Practice* (6th ed. 1986 with 1990 supplement).

A Practical Approach to Social Security and SSI Claims

James D. Leach

How to spread the safety net under your disabled client.

ONE REASON many of us went to law school was to learn how to use the law to help people less fortunate than ourselves. Representing social security disability and SSI claimants offers us a way to fulfill that goal.

EDITOR'S NOTE: The author wishes to thank Catherine Enyeart, Esq., for her valuable suggestions and assistance.

With social security disability benefits, a disabled person can put food in her stomach, clothes on her back, and a roof over her head. Without such benefits, disabled people often will become utterly dependent on others, lose their homes, their spouses, and all vestiges of their self-respect.

SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME CONTRAST • Many lawyers erroneously use the terms "social security disability" and "SSI" interchangeably. In fact, the social security disability insurance program, created under Title II of the Social Security Act, 42 U.S.C. §301 et seq., and the Supplemental Security Income ("SSI") program, created under Title XVI of the Act, are two separate programs. Both are administered by the Social Security Administration ("SSA").

Title II Eligibility

The two fundamental eligibility requirements for social security disability benefits are that:

- The claimant be disabled, as that term is defined by social security law; and
- The disability began while the claimant was insured for social security disability benefits.

Who Is Insured . . .

Generally, to be insured for social security disability benefits, a claimant who is 31 or older must have 20 covered quarter-years out of the past 40 quarter-years before he or she became disabled. 20 C.F.R. §404.130 (1990). The amount of income necessary to earn a covered quarter increases each year. In 1979, a covered quarter was credited for each $260 earned; in 1987, a covered quarter was credited for each $460 earned. A maximum of four covered quarters can be earned per year. Different rules apply for claimants who became disabled before age 31.

. . . and When

You must determine at the outset of each case the date the claimant was last insured, called the "DLI." SSA will tell you what the client's DLI was; or, if you get a copy of your client's social security earnings record, it should show the client's DLI. As a general rule, if your client was steadily employed until becoming disabled and has not worked since, your client's DLI will be five years after he or she became disabled. But if you prove your client became disabled beginning on a date after your client's DLI, you lose the claim, because you haven't proved that the disability began while the client was insured for benefits.

Title II Benefits

Social security disability benefits include:

- A monthly disability check (with yearly cost of living increases) until the earlier of the end of the disability (which in most cases will be never), or the disabled person reaches age 65;
- At age 65, monthly retirement benefits without deduction for lack of earnings during all the years the person has been disabled;
- Past-due benefits beginning with the sixth month after the claimant became disabled, but not more than one year before the application for disability insurance benefits was filed;
- Past-due and current benefits for the disabled person's minor children, and in some cases his or her spouse; and
- Medicare beginning the 25th month after disability benefits begin.

All benefits are inalienable, exempt from state process, and tax-exempt except in the rare situation where total yearly income exceeds $25,000 for a single person or $32,000 for a couple. The value of all benefits in many cases will be in excess of a quarter of a million dollars.

Title XVI Eligibility

The two fundamental requirements for eligibility for SSI benefits are that:

- The claimant be disabled, as that term is defined by social security law. This definition is the same as the definition of "disabled" in the social security disability program. The same standard applying to adults applies to children. *Sullivan v. Zebley,* 110 S. Ct. 885 (1990); and
- The claimant has less income and fewer resources than the maximums allowed.

Maximum Allowed

Currently, the maximum unearned income a single person can have for SSI eligibility is $406 per month; the maximum resources is $2,000. This excludes a home and up to $4,500 equity in a vehicle (unless the vehicle is regularly used for transportation for medical care, in which case it is excluded entirely regardless of equity).

The maximums vary according to the source of the income, the person's living situation, and whether or not the person is married. Likewise, the amount of SSI benefits also varies according to income. SSA can give you specific information on this subject as it relates to your client.

Title XVI Benefits

SSI benefits are often lower than Title II disability benefits, but can be lifesaving to those who have no other resources. SSI benefits are better than social security disability benefits in two ways. First, SSI benefits include Medicaid, which begins on the date of eligibility for SSI benefits and pays 100 per cent of medical expenses. Second, there is no waiting period for beginning payment of SSI benefits.

Title II Contrast

For social security disability benefits, there is no maximum resource limitation; for SSI benefits, there is no

requirement that the person be "insured." A disabled person may be eligible for both social security disability benefits and SSI benefits, for neither, or for one but not the other.

WHO IS "DISABLED"? • "Disability" means "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §416-(i)(1).

20 C.F.R. Parts 404 and 416 implement this statute; thousands of federal court decisions interpret it. Additionally, SSA has promulgated Social Security Rulings which are binding on SSA. *Sullivan v. Zebley,* supra.

Five-Step Evaluation

Fundamental to deciding who is "disabled" for social security purposes is the five-step sequential evaluation process set out at 20 C.F.R. §404.1520 (1990). This sequential evaluation process, which you must understand and apply in preparing and presenting every case, is as follows:

• Is the claimant engaged in "substantial gainful activity"? If "yes," the sequential analysis is over, and the claimant must be found not disabled. If "no," go to the next step.

• Does the claimant have a "severe" impairment? If "no," the sequential analysis is over, and the claimant must be found not disabled. If "yes," go to the next step.

• Does the claimant's impairment meet or equal an impairment listed in 20 C.F.R. Part 404, Subpt. P, App. 1? If "yes," the sequential analysis is over, and the claimant must be found disabled. If "no," go to the next step.

• Can the claimant return to his or her prior relevant work? If "yes," the sequential analysis is over, and the claimant must be found not disabled. If "no,"go to the next step.

• Can the claimant do any other work which exists in substantial numbers in the national economy? If "yes," the claimant is found not disabled; if "no," the claimant is found disabled.

Step 1: Is the Claimant Engaged in Substantial Gainful Activity?

"Substantial gainful activity" ("SGA") is a term of art. From January 1, 1979 to December 31, 1989, work producing an average of less than $190 per month was not SGA; work producing between $190 per month and $300 per month was judged case by case; and work producing greater than $300 per month was considered SGA. 20 C.F.R. §404.1574 (1990). Effective January 1, 1990, the $190 per month figure rose to $300 per month, and the $300 per month figure rose to $500 per month. 54 Fed. Reg. 53600 (December 29, 1989).

What To Look For

Even if your client earns an average of more than $300 per month (up to December 31, 1989) or more than $500 per month (after January 1, 1990), there are several ways to show that there was no SGA.

• If the earnings average less than $300 per month (up to December 31, 1989) or less than $500 per month (starting January 1, 1990) for less than a full calendar year, this should not constitute SGA. 20 C.F.R. §404.1574 implies that a full calendar year is the test. See Social Security Ruling 83-35.

• 20 C.F.R. §404.1576 allows certain impairment-related work expenses to be deducted from earnings (including the cost of medicine the claimant takes to enable him or her to work) before determining whether those earnings are SGA.

• Social Security Ruling 84-25 provides that the following are "unsuccessful work attempts," which by definition are not SGA: work which is terminated in three months or less due to the claimant's impairment; and work which lasts three to six months, was done under "special conditions," and ended or was reduced below the SGA level due to the claimant's impairment.

• Social Security Ruling 83-33 recognizes the concept of subsidized earnings and that "[a]n employer may, because of a benevolent attitude toward a handicapped individual, subsidize the employee's earnings by paying more in wages than the reasonable value of the actual services performed. When this occurs, the excess will be regarded as a subsidy rather than earnings." Government subsidies also are excluded.

Step 2: Does the Claimant Have a "Severe" Impairment?

"Severe impairment" is also a term of art. All it means is that the claimant must have a physical or mental impairment which "significantly limit[s]" his or her ability to do any basic work activity required in competitive employment, such as lifting, standing, sitting, carrying, seeing, hearing, understanding and remembering simple instructions, using judgment, responding appropriately to supervision, or dealing with changes in a routine work setting. 20 C.F.R. §404.1521 (1990).

You will rarely find anyone who is applying for social security disability or SSI benefits who does not have at least one physical or mental impairment meeting this standard. Furthermore, Social Security Ruling 85-28 provides that ineligibility findings should be made at step two only "when medical evidence establishes only a *slight* abnormality or a combination of *slight* abnormalities" [emphasis added], and that "[i]f an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individ-

ual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step." *See Bowen v. Yuckert,* 482 U.S. 137 (1987).

Step 3: Does the Claimant's Impairment Meet or Equal a "Listed" Impairment?

20 C.F.R. Part 404, Subpt. P, App. 1 lists most types of physical and mental impairments, defined by medical criteria such as clinical and radiological findings, laboratory test results, and psychological test results. These include listings for the musculoskeletal system, special senses and speech, the respiratory system, the cardiovascular system, the digestive system, the genitourinary system, the hemic and lymphatic system, the skin, the endocrine system, multiple body systems, the neurological system, malignant neoplastic diseases, and mental disorders. If the claimant's impairment meets one of the impairments listed in App. 1, or is as severe as one of the listings, the claimant is disabled.

This is so simple that the inexperienced practitioner might think that SSA on its own, without the intervention of a lawyer, would carefully check whether or not the claimant meets a listing. Unfortunately for claimants, SSA does no such thing. In every case, examine the listings carefully and obtain additional medical information or testing as necessary.

Step 4: Can the Claimant Return To His or Her Prior Relevant Work?

"Prior relevant work" is yet another term of art. It means work the claimant performed within the past 15 years, and which was SGA (discussed under step 1 above). 20 C.F.R. §404.1565 (1990).

Because the claimant will be ineligible if he or she can return to past relevant work, you must know what the claimant's past relevant work was and why the claimant can no longer perform it. At the hearing, you must present evidence, usually in the form of testimony from the claimant, about what the prior relevant work involved and why the claimant cannot do that work now. Whether or not the claimant could return to a particular prior employer, or whether or not the work is available in the claimant's community, is irrelevant.

Once you establish that the claimant cannot return to his or her former work, the burden of proof shifts to SSA to show that your client is not disabled. The ALJ's failure to explicitly shift the burden is error. *See Jelinek v. Heckler,* 764 F.2d 507, 509 n.1 (8th Cir. 1985). A reviewing court must remand the case if it "cannot say for certain what the outcome would be irrespective of who shouldered the burden." *Rainey v. Bowen,* 814 F.2d 1279, 1282 (8th Cir. 1987).

Step 5: Can the Claimant Do any Other Widely Available Work?

20 C.F.R. §404.1566 (1990) provides: "We consider that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions of the country. It does not matter whether (1) Work exists in the immediate area in which you live; (2) A specific job vacancy exists for you; or (3) You would be hired if you applied for work." The claimant's inability to hold a job, however, is evidence of his or her inability to work on a sustained basis. *Gamber v. Bowen,* 823 F.2d 242, 245 (8th Cir. 1987); *Tennant v. Schweiker,* 682 F.2d 707, 710 (8th Cir. 1982).

SSA Guidelines

SSA has promulgated a set of Medical-Vocational Guidelines, which are found at 20 C.F.R. Part 404, Subpt. P, App. 2. These Guidelines are divided into three tables, one for claimants who can perform a full range of work at the "sedentary" exertional level, one for claimants who can perform a full range of work at the "light" exertional level, and one for claimants who can perform a full range of work at the "medium" exertional level. For each exertional level, the Guidelines are structured according to the claimant's age, education, and prior relevant work. For each of the three exertional levels, inserting the claimant's age, education, and prior relevant work into the Guidelines produces a "disabled" or "not disabled" conclusion.

In placing the claimant in an exertional category, what matters "is not the ability merely to lift weights occasionally in a doctor's office; it is the ability to perform the requisite physical acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world." *McCoy v. Schweiker,* 683 F.2d 1138, 1147 (8th Cir. 1982) *(en banc).* Furthermore, "most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will." Social Security Ruling 83-12. This language is extremely helpful for claimants with back impairments, who often must avoid maintaining any one position for a prolonged period.

Taking Your Client Out of the Guidelines

In every case, you must determine what outcome the Guidelines lead to if applied to your client. If the conclusion is "disabled," you may only need to prove the underlying facts showing which Guidelines category your client fits. But if the conclusion is "not disabled," you must find a way to take your client out of the Guidelines. Usually, this is not difficult if you give it some thought and preparation. In *McCoy v. Schweiker,* supra, the court wrote a primer on how to take the claimant out of the Guidelines:

• The Guidelines apply only if the claimant's ability to work and individual characteristics match the Guidelines "identically," "precisely," and "exactly." *Id.* at 1146.

• If the claimant cannot do a full or wide range of work at a particular exertional level, or if the claimant can work only intermittently at that exertional level, the Guidelines for that exertional level do not apply. *Id.* at 1147.

• Any nonexertional impairment that "diminish[es] the claimant's residual functional capacity to perform the full range of activities listed in the Guidelines," (*Thompson v. Bowen,* 850 F.2d 346, 349-50 (8th Cir. 1988)), takes the claimant out of the Guidelines. Nonexertional impairments include "mental, sensory, or skin impairments"; "environmental restrictions" such as restrictions on ability to tolerate dust, fumes, or excessive heat; psychiatric impairments; and alcoholism. *McCoy v. Schweiker,* supra, at 1148. A person with IQ scores in the 80s has a nonexertional impairment. *Webber v. Secretary, Health & Human Services,* 784 F.2d 293, 298 (8th Cir. 1986).

• Pain can be a nonexertional impairment. *McCoy v. Schweiker,* supra, at 1148.

If the Guidelines apply to your client, they can satisfy SSA's burden of proof at step 5. But when you take your client out of the Guidelines, SSA can satisfy its burden of proof only through a legally adequate hypothetical question addressed to a vocational expert. *Id.* at 1146. This is of great practical significance because many ALJs rarely have a vocational expert at the hearing. In such cases, if you are at step 5 and you have taken your client out of the Guidelines, and the ALJ rules against you, the ALJ has erred.

THE ADJUDICATION PROCESS • Whether the claimant is disabled is adjudicated at up to six procedural levels.

Level 1: Application

The claimant begins by filing an application for disability benefits. This is made by completing an initial set of forms at an SSA office. It usually takes SSA about two months to reach an initial decision. If the decision is in the claimant's favor, the disability adjudication process ends.

Level 2: Reconsideration

If the initial decision is against the claimant, the claimant will be notified of his or her right to file a "request for reconsideration" within 60 days by completing the appropriate forms. A decision on a request for reconsideration usually takes another one to two months. If the decision is in the claimant's favor, the disability adjudication process ends.

Level 3: Request for Hearing

If the reconsideration decision is against the claimant, as it probably will be, the claimant will be notified of the right to file a Request for Hearing within 60 days. The request for hearing is filed on SSA forms. The same day the request for hearing is filed, review and copy the entire claim file at the local SSA office. Know what is in the file well in advance of the hearing. After the request for hearing is filed, the file is sent to the Office of Hearings and Appeals, and it will not be available locally.

De Novo Hearing

About five months after the request for hearing is filed, an administrative hearing is held. Everything in the file up to that point remains in the file, but otherwise the hearing is de novo, so you are not limited to the evidence already in the file, and you do not have to show grounds for overturning the prior denials. The hearing is held by an ALJ, a quasi-independent employee of SSA.

The hearing is the only face-to-face hearing your client receives. It will be tape recorded to make a record for future review and about two months after the hearing, the ALJ issues a written decision.

Level 4: Appeals Council

The last level of the administrative process is the Appeals Council. If the ALJ's decision is against the claimant, you have 60 days to file an appeal with the Appeals Council. This is your last opportunity to get evidence into the administrative record. For many years, the Appeals Council did not conduct meaningful reviews. Recently, however, it became concerned about the large number of federal court cases SSA was losing, and implemented a more genuine review process. The Appeals Council now reverses ALJ denials of benefits in approximately 27 per cent of all cases. The last four appeals I have filed with the Appeals Council have yielded reversals, so it is worthwhile to present informed argument to the Appeals Council.

Record

Request that the Appeals Council send you a copy of the tape recording of the hearing before you file your brief. 20 C.F.R. §404.974 (1990) requires the Appeals Council to comply with this request. This is the only record of the hearing you will have when you prepare your brief. The Appeals Council is authorized by 20 C.F.R. §404.969 (1990) to review on its own motion ALJ decisions favorable to a claimant within 60 days of the date of decision, but it rarely does so.

Level 5: Federal District Court

If you lose at the Appeals Council, you have exhausted your administrative remedies and may sue in federal district court. 42 U.S.C. §405(g). Given the four previous levels of review, you might wonder whether federal district court review is likely to

produce a favorable result. The answer is that if there is some error or unfairness in the ALJ's decision, a federal district court case is quite winnable.

The Complaint and Answer

The complaint must be filed within 60 days of receipt of the Appeals Council's denial, which is rebuttably presumed to occur five days after mailing. I have included a sample complaint as Appendix 2. In many cases, you can successfully move the court to allow the complaint to be filed in forma pauperis under 28 U.S.C. §1915. The government has 60 days to answer and to file the administrative record, including the government's transcription of the tape recording of the hearing.

Bad Records

SSA's transcriptions of the tape recording of the hearing are often grossly inaccurate. You should compare the tape recording of the hearing previously obtained from the Appeals Council with the government's transcript and if there are material errors, file an affidavit detailing them. Only by doing so will you protect your client from the incredibly sloppy way that SSA prepares these transcripts.

"The court . . . may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding . . . ." 42 U.S.C. §405(g). After the government has answered, both sides move for summary judgment with supporting memoranda, and the court decides the case.

Standard of Review

The standard of judicial review of findings of fact is whether the findings are "supported by substantial evidence on the record as a whole." The Eighth Circuit has repeatedly emphasized that this standard is far stricter than a mere "substantial evidence" standard, and requires a detailed evaluation of the entire record. *See Gavin v. Heckler,* 811 F.2d 1195, 1199 (8th Cir. 1987).

The court also reviews the decision for legal error: "it is the court's duty to review the disability benefit decision to determine if it is based on legal error (i.e., erroneous legal standards, incorrect application of the law)." *Nettles v. Schweiker,* 714 F.2d 833, 835-36 (8th Cir. 1983). Every federal district court has decided numerous social security disability and SSI appeals. You can obtain these decisions through the clerk of court and learn what issues the court has found persuasive in the past. Thus you can avoid reinventing the wheel.

Level 6: Circuit Courts

If you lose in the district court, but still think you're right, the circuit court of appeal is a viable avenue for relief. The Eighth Circuit generally has been quite fair to disability claimants.

PREPARING FOR THE ADMINISTRATIVE HEARING • Preparation is no less important in social security disability and SSI cases than in any other legal work. Even if you are not successful at the hearing, this is the primary place you make your record. Thus, the hearing is all-important.

Get the Exhibits Well in Advance of the Hearing

The notice of hearing you receive from SSA will inform you that the ALJ will allow you to examine the exhibits if you arrive at the hearing 30 minutes before it starts.

None of us would consider arriving at a civil or criminal trial 30 minutes ahead of time to see the documentary evidence for the first time. Yet this is exactly how SSA encourages you to proceed and it is exactly what will happen to you unless you take the initiative to get the exhibits in advance of the hearing.

How To Get the Exhibits

Copy the entire file from your local Social Security office at the time the request for hearing is filed, as discussed above. The papers in the file will not have exhibit numbers on them because this is done at the Office of Hearings and Appeals several weeks before the hearing.

Alternatively, you could arrange with the Office of Hearings and Appeals to get a copy of all the exhibits as soon as they are marked. This should get the copies to you at least four weeks in advance of the hearing.

Included in the exhibits will be the claimant's earnings record. This vital document shows the date last insured for disability benefits (DLI), and lifetime earnings by year. You can use the earnings record to refresh the claimant's recollection about his or her work history, and to show when the claimant last performed substantial gainful activity.

Requests for Reopening

In your initial interview, find out whether the client ever filed an unsuccessful application for disability benefits before. If so, and if you are within the time limits discussed below and can make a credible argument that the client was disabled at that time, file a request for reopening of the prior unfavorable determination.

The regulations concerning reopening a prior application are set out at 20 C.F.R. §404.987-404.989 (1990). Basically, these regulations provide that a prior determination may be reopened within 12 months of the date of the notice of the initial determination (for any reason) or within four years of the date of the notice of the initial determination if there is good cause—which exists when "new and material evidence is furnished," clerical error exists, or when "the evidence that was considered in making the determination or decision clearly shows on its face that an error was made."

Requesting reopening of a prior unfavorable determination is important for two reasons:

- If the prior denial is relatively recent and your client's condition has not worsened since the prior denial, the ALJ could deny the current claim based on administrative res judicata. 20 C.F.R. §404.957(c)(1) (1990). Some ALJ's take administrative res judicata seriously; others ignore it. Two grounds for avoiding the application of res judicata are set out in *Dealy v. Heckler,* 616 F. Supp. 880, 881 (W.D. Mo. 1984): (1) that the prior decision was rendered without an administrative hearing, and (2) that the notice received by claimant of the prior denial stated "[i]f you do not request a hearing within the prescribed time period, you still have the right to file another application at any time."

- If the ALJ reopens a prior application and finds your client disabled, this greatly increases the past-due benefits your client will receive, often by many thousands of dollars. This will also substantially increase your fee.

Hearings on Reopening

A claimant has the right to a hearing on an application for disability benefits. 42 U.S.C. §405(b). But there is no right to a hearing on a request for reopening, and there is no right to judicial review of denial of a request for reopening. This rule, however, is subject to two important limitations:

- If the ALJ reconsiders the merits of the claimant's original application, the ALJ has reopened it as a matter of law. *Jelinek v. Heckler,* 764 F.2d 507, 508 (8th Cir. 1985).

- Judicial review is available when SSA refuses to hear a request for reopening which is based on colorable constitutional grounds, for example, when a claimant contends that because of mental impairment the prior notice he or she received, and failed to appeal, was not meaningful notice.

SSA has no forms on which to file a request for reopening. A sample is attached as Appendix 3.

Medically Determinable Impairments

Your client's primary impairment may be obvious at your first interview. But you also need to identify and understand all the rest of your client's medically determinable impairments, physical and mental. "Medically determinable" is part of the statutory definition of disability in 42 U.S.C. §416(i)(1). Every impairment is relevant at steps 2, 3, 4 and 5 of the sequential evaluation: "[i]n determining whether your physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity." 20 C.F.R. §404.1523 (1990).

Medical and Non-Medical Records

SSA gathers some of the claimant's medical records. These will be placed in the file and marked as exhibits. Effective representation absolutely demands that you get all the medical and non-medical records relating to your client's impairments. In every case I have ever handled, I found helpful records SSA failed to collect. Often, these have been the keys to winning the case.

SSA often ignores medical records predating the alleged onset of disability. Yet it is exactly those records that may show how an impairment began, how it developed, the treatments attempted, and how the claimant fought the impairment over the years. Such evidence is extremely persuasive. Furthermore, SSA makes no attempt to obtain the medical records that come into existence in the five or six months between when SSA denies the request for reconsideration and the date of the hearing. You must obtain these yourself.

Medical Records

Consider requesting a medical report from your client's treating physician. Better yet, interview the physician, then send him or her a written statement to sign. Your theory of the case determines what you need the physician to say.

A report or statement from a treating physician is usually extremely persuasive. The opinion of a treating physician or therapist is entitled to special weight. *Bailey v. Bowen,* 827 F.2d 368, 371 (8th Cir. 1987). The ALJ must give "full consideration" to such evidence. *Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984).

Non-medical Records

Non-medical records can also be vital. If your client is a Vietnam veteran with post-traumatic stress disorder, he may have a history of violence; document this through court records and request his military health records through his Veterans' Service Officer. If your client is of low intelligence, get the results of any intelligence testing your client has taken, or if your client has not taken any, arrange it. If your client has taken the General Aptitude Test Battery (GATB), get the results.

Psychological Evaluation

In every case, consider getting a psychological evaluation of your client. Documenting psychological impairment will strengthen your case, take your client out of the Medical-Vocational Guidelines at step 5 of the sequential evaluation, and often allow you to cite Social Security Ruling 88-15. This ruling sets out how psychological limitations can justify a disability finding.

Finalize Your Theory and Prepare a Brief

You will begin to form your theory of the case in the first interview with your client. After you understand all of your client's impairments, have obtained your client's relevant medical history and pertinent non-medical records, have obtained a psychological evaluation if appropriate, and have reviewed the SSA file and the pertinent regulations and law, you are prepared to finalize your theory of the case and write a brief for the ALJ for delivery before or at the hearing.

Preparing the brief in advance forces you to think through the entire case, including all five steps of the sequential evaluation process, while there is still time to do something about it. My briefs typically include an introduction setting out the procedural history, a list of new exhibits, an analysis of the medical evidence including a chronological medical history, my version of the correct sequential analysis, and a conclusion.

Choose and Prepare Your Witnesses

In virtually every hearing you will call the claimant as a witness.

In many cases it helps to call the claimant's spouse or other close companion to corroborate the claimant's testimony. The ALJ must consider the testimony of such witnesses in reaching a decision, *Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984), *(Polaski I)* and 751 F.2d 943, 949 *(Polaski II)* (8th Cir. 1984), and if the decision does not show that the ALJ did so, this may well be reversible error.

You also may wish to introduce evidence from other witnesses. For example, to avoid a finding that the claimant engaged in SGA, you may need to show that work was done under special conditions. In such cases, a statement from a former employer is extremely helpful. It is easier and more efficient to have the witness sign a statement than to ask the witness to appear at the hearing and then hold your breath to see whether he or she actually shows up.

Vocational Expert?

I rarely call a vocational expert to testify at the hearing. If you do so, be sure the vocational expert understands that the issue at step 5 in the sequential evaluation process is whether the claimant could perform work that "exists in the national economy" as discussed in 20 C.F.R. §404.1566 (1990), not whether work exists for the claimant in the local labor market.

Preparing Your Client To Testify

Generally, the client's testimony at the hearing will cover the following areas:

- Background including education and training;

- Work experience in the past 15 years, including the physical demands of each job, why the client left the job, and why the client cannot do that type of work now;

- A description of each physical or mental impairment the client has, when it started, how it impairs the client's ability to perform work-related activity (lifting, sitting, standing, bending, walking, feeling, seeing, hearing, attending work all day regularly, interacting with supervisors and coworkers, etc.) on a sustained, day-in day-out basis, any pain it causes, any medications the client has taken for it, and any side effects of medication;

- The client's typical daily activities, with emphasis on limitations caused by the client's impairments and how the client's activities have changed since the disability began; and

- The client's recreational and social activities, and a description of how these have changed since the client became disabled.

Many claimants have back impairments preventing them from sitting for prolonged time periods. Be sure your client understands that he or she can get up and move around during the hearing. Otherwise the ALJ will not believe the claimant's testimony that his or her ability to sit is limited, and the claimant may be in so much pain as to find it impossible to testify effectively.

Finally, prepare your client for possible cross-examination by the ALJ.

Prepare To Cross-Examine the ALJ's Vocational Expert

Some ALJs use vocational expert witnesses frequently; others use them almost never. The vocational expert may testify about whether the claimant has any transferable work skills, and whether the claimant can perform jobs that exist in substantial numbers in the national economy.

The notice of hearing, which you receive about four weeks in advance of the hearing, will advise whether a vocational expert will testify. These vocational experts are under contract to SSA. Many seem to feel that their mission is to provide testimony that will allow the ALJ to deny benefits.

Preparing to cross-examine a vocational expert witness at a social security hearing, like preparing to cross-examine any expert witness, takes time. To complicate matters, SSA instructs the vocational expert not to talk to you before the hearing, and the vocational expert does not prepare a report, so you have little idea of what the vocational expert will say.

Hypothetical Questions

Innumerable cases discuss the proper role of a vocational expert in a social security case. Read some of these cases to understand the law in this area.

For your own use in cross-examination, write out all the claimant's impairments and limitations. The law is clear that the ALJ's hypotheticals should include all impairments and

limitations. Often, however, the ALJ's hypotheticals fail to do so. If this happens, you will need to decide whether to ask your own hypothetical question on cross-examination. The advantage is that the vocational expert may testify that with the additional restrictions you pose, there is no work existing in substantial numbers in the national economy that the claimant could perform. The disadvantage is that if the vocational expert testifies that even with the additional restrictions, such work does exist, you may have given the ALJ a legally sufficient basis to rule against your client that did not exist before you cross-examined.

Skill Transferability

Read the provisions of the Code of Federal Regulations dealing with skills and transferability of skills, especially 20 C.F.R. §404.1568 (1990) and 20 C.F.R. Pt. 404, Subpt. P, App. 2 §§201.00 and 202.00. The vocational expert will frequently use these terms in ways that are inconsistent with these regulations.

Labor Department References

Become familiar with the Dictionary of Occupational Titles (U.S. Dept. of Labor, 4th ed. 1977, supp. 1986) and with Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles (U.S. Dept. of Labor, 1981). Both are available from the Government Printing Office, and together will set you back about $30. 20 C.F.R. §404.1566(d) (1990) provides that SSA takes administrative notice of the information in these books. These books often directly contradict vocational expert testimony. Even if you can't leaf through these books quickly enough at the hearing to cross-examine based on them, you can cite them in a post-hearing brief.

Real-World Demands

Think about how the jobs the vocational expert claims your client can perform are actually performed in competitive employment. Mentally compare this with your client's actual limitations and cross-examine the vocational expert about any part of the jobs your client would have difficulty with.

THE HEARING • An ALJ will conduct the hearing. The ALJ "is in the peculiar position of acting as an adjudicator while also being charged with developing the facts." *Landess v. Weinberger,* 490 F.2d 1187, 1189 (8th Cir. 1974). Most ALJs are courteous and professional. There are exceptions. No opposing attorney is present and the hearing is not open to the public.

Making the Record

At the outset of the hearing, the ALJ will ask if you have any objections to the exhibits that have been previously marked in the file. If you have no objections the ALJ will receive the exhibits into evidence. Before the hearing you can request the ALJ to issue a subpoena for testimony or documents. 20 C.F.R. §404.950 (1990). If you properly request a subpoena for an adverse physician and the ALJ fails to issue the subpoena, you may in some circumstances have a valid objection to receipt of the physician's report into evidence. *Richardson v. Perales,* 402 U.S. 389, 402 (1971).

You will then offer, and the ALJ will receive into evidence, any additional exhibits you have. No foundation is required for your exhibits and the rule against hearsay does not apply.

Most ALJs allow you to conduct the direct examination of your client; others want to do it themselves. If the ALJ does it, you can be sure he or she will miss important areas or fail to develop some areas thoroughly. Return to these areas after the ALJ is done.

The ALJ will allow you to present an opening statement and a closing argument, but impassioned oratory does not win these cases. The substance of your argument should be in the brief you file before or at the hearing.

At the conclusion of the hearing, if there is additional evidence you still need time to obtain and submit, ask that the record remain open for 30 days. ALJs routinely grant these requests.

About two months after the record is closed, you and the claimant will receive the ALJ's decision.

IF THE ALJ FINDS YOUR CLIENT NOT DISABLED • If the ALJ rules against your client, you should strongly consider filing an administrative appeal with the Appeals Council, and if that is unsuccessful, a complaint in federal district court. These steps have been discussed above.

Some of the most frequently successful grounds for federal court appeal are:

- The ALJ erred by using the Guidelines;
- After finding that the claimant could not return to his or her prior work, the ALJ erred by failing to explicitly shift the burden of proof to SSA;
- The ALJ improperly evaluated the claimant's complaints of pain;
- The ALJ failed to evaluate all the evidence;
- The ALJ failed to develop the record fully and fairly;
- The ALJ's decision is not supported by substantial evidence on the record as a whole;
- The ALJ ignored some of the claimant's impairments; and
- The ALJ's hypothetical to the vocational expert was inadequate or erroneous.

Another option is to have the claimant file a new application for disability benefits. If a federal court appeal is foregone or lost, the disad-

vantages are that the claimant will lose the possibility of obtaining a substantial amount of past-due benefits, and administrative res judicata may be applied to the new application if the claimant's condition has not significantly worsened. On the other hand, the second time around the claimant's case may be heard by a more reasonable ALJ who may award benefits and who may even reopen a prior denial.

IF THE ALJ FINDS YOUR CLIENT DISABLED • If the ALJ rules in favor of your client and he or she may be financially eligible for SSI benefits, the next step is an interview at the local social security office to establish financial eligibility for each month of disability.

SSA district office employees generally are well-meaning, but they have a large caseload and tend to explain complicated matters so fast that the client doesn't understand the ramifications of choosing one option instead of the other. Deal with this by getting the SSA employee who will conduct the interview to explain these issues to you ahead of time, then go with your client to the interview to be sure the client makes a careful, informed decision.

If your client has minor children and is eligible for social security disability benefits, be sure that SSA actually pays the benefits. In several of my cases, SSA totally ignored payment of benefits to minor children until I called this to SSA's attention.

Workers' Compensation Offset

If your client has received or will receive workers' compensation benefits, you must be sure that SSA correctly computes the workers' compensation offset, set out in 20 C.F.R. §404.408 (1990). The basic rule is that up to age 62 (if the claimant became disabled between June 1, 1965 and March 1, 1981, or if the claimant takes something called the "RIB option") or otherwise up to age 65, the claimant's social security disability benefits, when added to his or her workers' compensation benefits (excluding medical and legal fees), may not exceed 80 per cent of his or her highest year's earnings in the five years before the year in which he or she became disabled. This area is complex, and dealing with it is essential to your client receiving the maximum social security disability benefits to which he or she is entitled.

If you handle a workers' compensation settlement for a client who also receives social security disability benefits or who may receive such benefits in the future, understanding this area is essential to structure the workers' compensation settlement so that your client receives the maximum total benefits possible. Pertinent materials include Social Security Rulings 81-20, 81-32, and 87-21c, SSA's Programs Operations Manual (POMS) §11501.048-11501.428, and §8.04 of Matthew Bender's Social Security Practice Guide.

GETTING PAID • Unlike civil litigation, how and when you get paid in social security disability cases requires following the government's guidelines.

Staying Out Of Jail

At the beginning of the case, before SSA will recognize you as your client's attorney, you must complete an SSA Form 1696. Form 1696 informs both you and your client that you cannot charge or collect a fee until your representation is concluded, you have filed a fee petition, and your fee has been approved by SSA or, in cases filed in federal district court, until the court has awarded a fee. Violating these provisions is a federal crime punishable by a fine of $500 and free room and board in a federal correctional institution for one year. 42 U.S.C. §406.

Withholding of Benefits by SSA for Payment of Your Fee

In a social security disability case SSA will pay directly to the claimant's attorney the smallest of:

- 25 per cent of total past-due benefits;
- The amount of the fee approved by SSA; or
- The amount agreed upon between the claimant and his or her attorney. 20 C.F.R. §404.1730(b) (1990).

In an SSI case, SSA will withhold nothing for possible payment of an attorney's fee. This means that your client will receive all past-due benefits. Thus, your fee agreement should provide that if the client receives past-due SSI benefits, the client will immediately deposit the estimated fee and sales tax in your trust account. The fee agreement should also provide that you will hold all such funds in your trust account until SSA or a court has acted on your fee petition and if the amount deposited is more than the amount finally approved as a fee, you will promptly refund the difference to the client. Social Security Ruling 82-39 provides that if you follow these rules, you can place the anticipated fee in your trust account without violating 42 U.S.C. §406.

If you have any desire to actually get paid in an SSI case, you must get the money in your trust account as soon as the client receives the past-due benefits check. My experience has been that the vast majority of clients come in with the estimated fee as soon as they receive their SSI past-due benefits check, so long as this responsibility was clearly explained to them orally and in the written fee agreement.

From Favorable Decision to Filing Your Fee Petition

In the simplest SSI case, it takes approximately one month before SSA computes and pays past-due benefits; in the simplest Title II disability case, about two months to do so; and in any case involving concurrent Title II and SSI benefits, about a month to compute and pay the SSI benefits and

about five months to compute and pay Title II benefits. SSA is supposed to send notices of its determinations about past-due benefits to both you and the claimant. Always review these notices carefully, because they frequently contain errors.

After you are satisfied that SSA has correctly computed all past-due benefits due your client and his or her dependents, you can file your fee petition on SSA Form 1560. Attach to Form 1560 a complete recapitulation of your time records, your fee agreement, copies of all notices showing the amount of past-due benefits received, and if you wish, a statement of why your fee is reasonable. It is vital to attach notices of past-due SSI benefits.

The ALJ's Action on Your Fee Petition

After receiving the fee petition, the ALJ waits at least 20 days for comments by the claimant. After the time for client comment expires, the ALJ decides what fee to approve. An ALJ has authority to approve a fee up to $4,000. Above $4,000, the ALJ determines a recommended fee, and forwards it to the Regional Chief ALJ, who decides what amount to approve. The attorney or the client can appeal the decision on the fee petition to another SSA official, who makes a final decision. 20 C.F.R. §404.1720(d) (1990).

For fee determinations beginning July 1, 1991 SSA will approve fee agreements if signed by attorney and claimant when past-due benefits are awarded and the fee is less than the lesser of $4,000 or 25 per cent of the past-due benefits.

Attorney Fees in Federal Court Cases

Whenever you sue in federal court and prevail, the federal court has authority under 42 U.S.C. §406 to award up to 25 per cent of past-due benefits as a fee for your services before the court. *Fenix v. Finch,* 436 F.2d 831 (8th Cir. 1971).

EAJA Motions

You also may file a motion for attorneys' fees and costs under the Equal Access To Justice Act, 28 U.S.C. §2412 ("EAJA"). EAJA fees include compensation for your time beginning when you first prepared the case for filing in federal court, for your time at the administrative level on a court-ordered remand, *Sullivan v. Hudson,* 109 S.Ct. 2248 (1989), and for your time preparing the EAJA motion, *Kelly v. Bowen,* 862 F.2d 1333 (8th Cir. 1988). EAJA costs include "those customarily charged to the client where the case is tried." *Id.* at 1335.

The grounds for an EAJA motion are:

- The claimant is the prevailing party;
- The government's position was not substantially justified;
- The claimant's net worth does not exceed $2 million (this is not a problem for any of my clients); and
- No special circumstances make such an award unjust.

Generally, the main issue on an EAJA motion is whether the government's position was substantially justified, which means whether it had a "reasonable basis both in law and fact." *Pierce v. Underwood,* 487 U.S. 552, 565 (1988). The government bears burden of proof on this issue. *Gamber v. Bowen,* 823 F.2d 242, 244 (8th Cir. 1987). This burden entails "proving that its position was substantially justified at both the administrative and litigation levels." *Gowen v. Bowen,* 855 F.2d 613, 618 (8th Cir. 1988). EAJA motions are frequently granted, and if denied, are appealable. *Gamber v. Bowen, supra,* 823 F.2d 242; *Bailey v. Bowen,* 827 F.2d 368 (8th Cir. 1987).

If a fee is awarded for the same work under both the EAJA and 42 U.S.C. §406, the attorney is entitled to receive the larger of the two, and the client receives the smaller of the two. *Cotter v. Bowen,* 879 F.2d 359, 361 n.2 (8th Cir. 1989).

CONCLUSION • Social security disability and SSI cases give you the opportunity to represent the truly needy and deserving, and to obtain for them an inalienable monthly income, usually for life, plus medical insurance. Few areas of the law, and for that matter few areas of life, offer the opportunity to do so much for the disadvantaged with such a small investment of ourselves.

APPENDIX 1 — RESOURCES

The following resources not previously mentioned are extremely helpful in representing social security disability and SSI claimants:

(1) The one-volume 20 C.F.R. Parts 400 to 499, which is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. This year it costs $24;

(2) "A Disability Appeal Primer" by Arthur J. Fried, a concise, handy booklet available from West Publishing Co. (1-800-328-2209) for $2.50; and

(3) Membership in the National Organization of Social Security Claimants' Representatives (NOSSCR), 19 E. Central Ave., Pearl River, NY 10965, tel. (800) 431-2804. This costs $100 per year. In exchange, you receive a monthly newsletter containing invaluable information about developments in law and new strategies, and free access to experts in the area and materials prepared by experts.

APPENDIX 2 – SAMPLE COMPLAINT

UNITED STATES DISTRICT COURT
DISTRICT OF _____
_____ DIVISION

**********		
Plaintiff,	*	Civ. 91-
v.	*	
Louis W. Sullivan, M.D.,	*	
Secretary of Health &	*	
Human Services,	*	
Defendant.	*	
	*	
**********		

COMPLAINT

JURISDICTION

I

This is an action to review a final decision of the Secretary of Health and Human Services of the United States of America. This court has jurisdiction under 42 U.S.C. §405(g).

PARTIES

II

Plaintiff is a claimant for social security disability and SSI benefits. Plaintiff's social security number is _____.

III

Defendant is the Secretary of Health and Human Services of the United States and is sued in his official capacity.

CAUSE OF ACTION

IV

Plaintiff is dissatisfied with the Secretary's final decision finding him not disabled.

V

Plaintiff suffers from impairments of such a nature and severity that he is disabled within the meaning of the Social Security Act, and has been disabled at all pertinent times.

VI

At all pertinent times, plaintiff has been unable to engage in any substantial gainful activity by reason of medically determinable impairments. Plaintiff's impairments lasted for a continuous period of more than 12 months.

VII

Plaintiff has exhausted his administrative remedies.

VIII

Defendant's position is not supported by substantial evidence, is contrary to law, and is not substantially justified.

IX

If the case is remanded for another hearing, it should be remanded to a different Administrative Law Judge.

WHEREFORE, PLAINTIFF PRAYS:

1. That this Court review defendant's final decision denying plaintiff disability benefits, and reverse that decision;

2. That if this Court remands this case for another hearing, the Court remand it to a different Administrative Law Judge;

3. That this Court award plaintiff a reasonable attorney's fee and costs pursuant to the Equal Access To Justice Act;

4. That this Court determine and allow a reasonable attorney's fee pursuant to 42 U.S.C. §406(b)(1);

5. That this Court award plaintiff his costs of suit; and

6. That this Court grant such other and further relief as it deems just.

Dated: _____ __, 1991

_____
[Name]
Attorney for Plaintiff
[Address & Telephone]

APPENDIX 3—SAMPLE REQUEST FOR REOPENING
DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

In re: _____ *
SSN _____ *
*
*

REQUEST FOR REOPENING

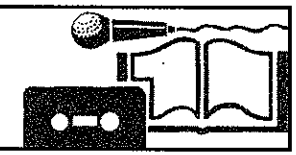
Pursuant to 20 C.F.R. §404.987-404.989, the due process clause of the fifth amendment, and relevant case law, _____ requests reopening of the disability determinations of _____ __, 19__ and _____ __, 19__, on the following grounds:

1. This request is made within 12 months of the date of the notice of the initial determination of _____ __, 19__, and that decision therefore may be reopened for any reason;
2. The prior determinations finding Mr. _____ not disabled were clearly incorrect;
3. The evidence that was considered in making the prior determinations clearly shows on its face that an error was made;
4. The Social Security Administration in making the prior decisions denied Mr. _____ due process of law by failing to follow clearly established law;
5. The equities justify tolling of the 60-day appeal periods;
6. Mr. _____ was entitled to believe that the Social Security Administration had faithfully performed its duties and followed the law, *see, e.g., Bowen v. City of New York,* ____ U.S. ____, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986); and
7. The Notice of Reconsideration of _____ __, 19__, advised Mr. _____ that "If you do not request a hearing of your case within the prescribed time period, you still have the right to file another application at any time."

Dated: _____ __, 199__

_____
Attorney for Claimant

PROGRAMS PUBLICATIONS and PLAYBACKS



COURSES

Evidence for the Litigator

The newest ALI-ABA Professional Skills Course, *Evidence for the Litigator,* will be cosponsored by and presented at the Philadelphia Bar Association, in Philadelphia, on May 31, 1991.

This one-day program uses live trial vignettes portraying typical trial situations. The vignettes demonstrate many common evidence problems that confront litigators, including:

- The do's and don'ts of making objections;
- Responses; and
- Laying foundations.

Through a combination of lecture, demonstration, and discussion, the course teaches participants to analyze evidentiary problems in the battlefield context of trial situations.

The leader of this program/workshop is David A. Sonenshein, Professor of Law at Temple University School of Law in Philadelphia, and a recognized trial advocacy and evidence expert.

Negotiation and Settlement

ALI-ABA's popular one-day Professional Skills Course, *Effective Legal Negotiation and Settlement,* will be presented June 7, 1991, at the Embassy Suites, Times Square, in New York.

Negotiation is a vital skill that occupies a position of great importance for every litigator. This lecture/workshop helps attorneys understand and apply general negotiating principles to maximize personal strengths in future negotiations. This course takes a practical approach to the negotiation process and uses videotaped segments to demonstrate some of the concepts. Participants also engage in negotiation exercises to improve their negotiation skills.

The conductor of the lecture/workshop is Charles B. Craver, Professor of Law at the George Washington University National Law Center.

To register or to obtain further information, write to Alexander Hart, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104-3099, or call (215) 243-1630. Usually, detailed announcements are not ready until three months before the scheduled date of a course. Earlier inquiries will be acknowledged immediately and printed announcements will be sent as soon as they are available.