



United States District Court
Middle District of Pennsylvania

Social Security Appeals

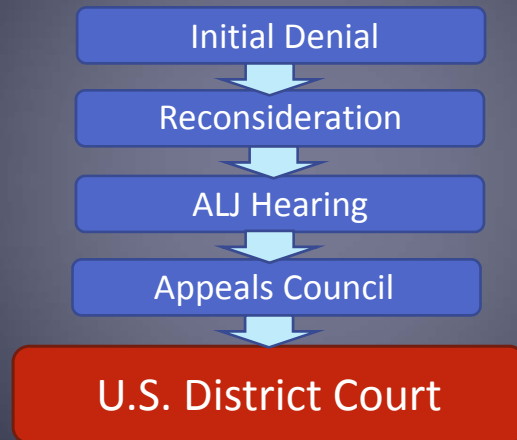
The Art of Advocacy

Our Goals Today Are Four-fold

- First, to provide those who are new to this field with a brief overview of Social Security litigation.
- Second, to suggest some tips on how to be a more effective advocate in these cases.
- Third, to update practitioners in this field regarding some changes in federal court staffing of these cases.
- Fourth, to find out from you how we can serve you better.

Social Security 101

How does a Social Security Case get to Federal Court?



Administrative Hearing

- May be in person, or via videoconference.
- May submit new evidence, examine evidence already in the record, present and question witnesses.
- The ALJ may ask questions of the claimant, or question other witnesses.
- A Vocational Expert will almost always testify.

ALJ Decision

The 5 Step Sequential Evaluation Process

1. Did the Plaintiff engage in Substantial Gainful Activity During the Relevant Period?
2. Does the Plaintiff have a “Severe,” “Medically Determinable” impairment?
3. Is the Plaintiff’s severe and medically determinable impairment of listed severity?
4. Does the Plaintiff’s medically determinable impairment(s) prevent him or her from performing past relevant work?
5. Does the Plaintiff’s medically determinable impairment(s) prevent him or her from performing any other work?

ALJ Decision

Residual Functional Capacity Assessment

Between Steps 3 and 4 is a crucial part of this analysis, the evaluation of a claimant’s Residual Functional Capacity (“RFC”), which is defined as the most he or she can still do despite his or her limitations. *See* 20 C.F.R. §§ 404.1545, 416.945.

The RFC adopted by the ALJ is often outcome determinative since a claimant’s perceived capacity for work will decide his or her disability status.

District Court Jurisdiction

The District Court has jurisdiction to review a **final decision** of the Commissioner denying an application for benefits. 42 U.S.C. §405(g).

Where the Appeals Council denies review, the decision of the ALJ is binding, and therefore is the “final decision” of the Commissioner. *See* 20 C.F.R. §§ 404.981, 416.1481.

Standard of Review: Is the ALJ’s Decision Supported by Substantial Evidence?

Substantial Evidence is less than a preponderance of the evidence but more than a mere scintilla of proof.

Richardson v. Perales, 402 U.S. 389, 401 (1971). It can also be described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Plummer*, 186 F.3d at 427 (quoting *Ventura v. Shalala*, 55 F.3d 900, 901 (3d Cir. 1995)).

BUT—Courts require clear articulation of legal and factual basis for ALJ decision.

What Relief Can A District Court Grant?

“The court shall have power to enter, upon the pleadings and transcript of record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding for a new hearing.”

42 U.S.C. §405(g)(sentence 3)

What Relief Can A District Court Grant?

- (1) Remand the case to the Commissioner to conduct a new hearing pursuant to sentence four of 42 U.S.C. §405(g) because it is not supported by substantial evidence.
- (2) Remand the case to the Commissioner pursuant to sentence six of 42 U.S.C. §405(g) for consideration of new evidence.
- (3) Reverse the ALJs decision and award benefits *without* ordering a new hearing.

Six Suggestions for Effective Advocacy in Social Security Appeals

- First, keep in mind that the substantive standard of review is generally deferential but the courts impose a burden of articulation on ALJs.
- Therefore, often the most effective argument is not that the ALJ was wrong, an argument measured against the “some evidence” test, but rather that the decision is not sufficiently explained.

Six Suggestions for Effective Advocacy in Social Security Appeals

- Second, in the words of Ronald Reagan, trust but verify.
- Sometimes given the high volume of cases ALJs adjudicate factual errors will creep into their decisions.
- Fact-check the decision since a factual error can be a path to remand.
 - Examples: The left-handed claimant, the amazing shrinking man.

Six Suggestions for Effective Advocacy in Social Security Appeals

- Third, consider the perils and opportunities created by arguments aimed at different stages of the sequential analysis.
- Examples:
 - Step 2 denials, de minimis standard, receive careful judicial scrutiny
 - Step 3 claims, high threshold for showing per se disability, difficult burden to meet.

Six Suggestions for Effective Advocacy in Social Security Appeals

- Fourth, evaluating medical opinion evidence, challenges and opportunities.
- Examples:
 - Weighing treating and non-treating sources
 - Acceptable medical sources
 - The ALJ as doctor
 - The new and changing regulations.

Six Suggestions for Effective Advocacy in Social Security Appeals

- Fifth, sometimes less is more.
- The brief that focuses on one or two cardinal mistakes in reviewing a claim is often more persuasive than the brief that indicates the ALJ committed 10, 20, or 2,000 reversible errors.

Six Suggestions for Effective Advocacy in Social Security Appeals

- Sixth, capture the reader's attention at the outset.
- If possible, pick your strongest argument, and summarize it in a single persuasive declarative sentence.
- Avoid beginning the brief with an endless chronological "organ recital"



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- Recent steps the federal courts are taking to better serve Social Security disability litigants.
- Standing Order 19-5, Direct Referrals to Magistrate Judges.
- Practice and Procedure—how will it work?
- The choice is yours-pros and cons.
- Our pledge to all litigants



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- Feedback Session: How can the courts better serve the parties in this field?
- Other questions