

# Practical Applications of the Five-Step Sequential Evaluation

Presented By: Ann Biddle, Urban Justice Center

January 18, 2023

*With gratitude to Emilia Sicilia and Stacy Cloyd,  
who contributed to an earlier version  
of this slide deck*

# Preliminary Points

- Please stay muted and use the question or chat box to communicate with us. Select “*host and panelists*” if you do not want everyone to see your question.
- You should have received the materials, including the attorney affirmation, by email in advance of today’s webinar. If you did not, please notify [mpeterson@empirejustice.org](mailto:mpeterson@empirejustice.org). We will send it to you again.
- If you are seeking CLE, please complete the evaluation electronically (pops up at the end of webinar) and return the attorney affirmation.
- This webinar is being recorded. It will be made available on the Empire Justice website.
- Live transcription is available for this webinar.

# About Empire Justice

The Empire Justice Center is a statewide not-for-profit law firm. Its mission is to protect and strengthen the legal rights of poor, disabled or disenfranchised people in New York through systems change advocacy, training and support to other advocates and organizations, and high quality direct civil representation.

As part of its mission, it represents numerous low-income disability claimants before the Social Security Administration (SSA) under New York State's Disability Advocacy Program (DAP). Empire Justice also provides training, legal support, and administrative services to DAP-funded providers statewide.

# About UJC's MHP

The Mental Health Project (MHP) started in 1994 as a foundational project of the Urban Justice Center (UJC), and our mission today is to disrupt and dismantle the cycle of hospitalization, homelessness and incarceration that traps low-income people with mental health concerns in New York City.

We are a DAP provider, and we represent individuals in their appeals before SSA and we advocate broadly for improvements and policy changes in the disability process and related systems that impact our clients.

# Agenda

- SSA's Disability Programs
- SSA's Definition of Disability
- The Sequential Evaluation
- Steps 1 through 3
- The RFC
- Steps 4 & 5

# Keeping an eye on the prize

Can the client do a full-time, competitive [unaccommodated] job on a sustained basis?

If the client cannot, then disability benefits can provide regular income.

# Main Ideas

- The Social Security Act provides for two kinds of disability benefits:
  - Title II (aka Social Security Disability or SSD, SSDI, DIB)
  - Title XVI (aka Supplemental Security Income or SSI)
- They have the same definition of disability
- The Social Security Administration (SSA) uses a 5-step sequential evaluation process to determine disability in adults
- There is a different standard for children under 18

# What do they have in common?

The disability standard!

*The inability to perform substantial gainful activity by reason of a medically determinable physical or mental impairment, or combination of impairments, which has lasted or is expected to last at least 12 consecutive months, or end in death, taking into account the individual's age, education, and work history.*

42 U.S.C. §423(d); 20 C.F.R. §§ 404.1505; 416.905.

# What else do they have in common?

Where to go!

*Both programs are administered by SSA through local field offices around NYS and the country*

# What else is the same?

## The Process!

- *Initial application*
- *Reconsideration*
- *Administrative Law Judge hearing*
- *Appeals Council request for review*
- *Civil action in federal court*

# Approval Rates

- Initial level = 39%
- Reconsideration = 14%
- ALJ Hearings = 49%
- Appeals Council = 15% (allowed and remanded)
- Federal Court = 57% (allowed and remanded)

# What is different?

## **Social Security Disability (SSD)**

Title II Program, also covers retirement and blindness

Client with a work history (insured status)

Disability onset connected in time to last work (date last insured)

## **Supplemental Security Income (SSI)**

Title XVI, also covers aged (over 65) and blind

Income and resource limits

# What else is different?

## **Social Security Disability (SSD) Payments**

Benefit payments based on earnings history

May pay dependents

Eligibility for Medicare after 2 years

## **Supplemental Security Income (SSI)**

Benefits payments based on living arrangements

Physical presence in US required

Covers only the claimant

Eligibility for Medicaid

# Unique Title II Rules

Requires “insured status” earned by “credits”

Must show disability by date late insured (DLI) = a connection between work activity and the start of the disability.

Like many insurance programs, Social Security disability coverage lasts for a limited period of time after an individual stops working. The maximum length of coverage is 5 years but, for individuals who worked sporadically before they ceased working altogether, that period may be substantially less.

# More Unique Title II Rules

Worker Coverage -- Benefits may be payable to:

- a disabled insured worker who has not reached full retirement age
- a retired insured worker age 62 or older

# More Unique Title II Rules

## Dependent Coverage!

Benefits may also be payable to a dependent of a retired, disabled, or deceased insured worker

- spouse
- divorced spouse
- child or stepchild
- disabled adult child
- grandchild/stepgrandchild/parent

# In pay? Which benefit is it?

## How to Check Which One

- Look at the NYS chart for SSI benefit levels  
See <https://otda.ny.gov/policy/directives/2021/INF/21-INF-09-Attachment-1.pdf>
- Check which day of the month the benefit is paid
- Check a notice or deposit: does it say “Retirement, Survivors, and Disability Insurance” or “Supplemental Security Income”?
- Can get both!

# SSA's Definition of Disability (again)

The inability to perform substantial gainful activity by reason of a medically determinable physical or mental impairment, or combination of impairments, which has lasted or is expected to last at least 12 consecutive months, or end in death, taking into account the individual's age, education, and work history.

42 U.S.C. §423(d); 20 C.F.R. §§ 404.1505 & 416.905

# The Sequential Evaluation Process

*Breaks down each element of the definition*

*Evaluate the steps in order*

# Durational Requirement

- The inability to perform SGA must have lasted, or be expected to last, at least 12 consecutive months. An individual who performs SGA within 12 months of filing an application for benefits and before SSA issues a favorable decision will be denied benefits or awarded benefits on a later, post-SGA onset date.
- 20 C.F.R. §§ 404.1509 and 416.909, and *Barnhart v. Walton*, 535 U.S. 212, 122 S. Ct. 1265 (2002).

# Step 1: Substantial Gainful Activity

Step 1: *Is the claimant performing substantial gainful activity?*

# Step 1: Substantial Gainful Activity

- Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized....

# Step 1: Substantial Gainful Activity

Quick test? The monthly dollar value! For 2023 = \$1470/month.

20 CFR §§ 404.1574(b)(2)(ii) & 416.974(b)(2)(ii); POMS § DI 10501.015

Monthly value higher for blind applications = \$2460

Part-time work that generates the dollar value above will qualify as SGA

# SGA Issues

- What if the work is *illegal*?
- What if it's *self-employment*?
- What if there are *subsidies, special circumstances, impairment-related work expenses*, or (for SSI only) blind work expenses?
- What if the work lasts *less than 6 months*?

# Finding information about SGA

## Client interview

- Must explore whether client is working
- Consider asking how much rent the client pays

## The Record

- Check the E exhibits for detailed earnings records, certified earnings record and new wage/hire reports

# If you don't lose at Step 1, go to Step 2

*Step 2: Is the impairment, or combination of impairments, severe?*

# Step 2: Severe Impairment

- At the second step, SSA considers the medical severity of the impairment(s).
- The impairment must be identified by an acceptable medical source.
- A severe impairment or combination of impairments must meet the durational requirement.

# Step 2: Severe Impairment

- Severe means that the condition limits a claimant's ability to do **some basic work activity**.
- The limitations may affect mental and/or physical abilities.
- It's a *de minimus* test: the threshold is very low. *Bowen v. Yuckert*, 107 S. Ct. 2287 (1987)

# Step 2: Severe Impairment

- What are basic work activities?
- Basic physical work activities include sitting, standing, walking, bending, stooping, lifting, carrying, reaching, handling, seeing, hearing, and speaking.
- Basic mental work activities include understanding, carrying out, and remembering simple instructions; use of judgment; responding appropriately to supervision, co-workers and usual work situations; and dealing with changes in a routine work setting.

# Step 2: Severe Impairment

Remember – the diagnosis must come from an *acceptable medical source*:

- Licensed physician, psychologist, optometrist (visual disorders), podiatrist (foot and ankle disorders), speech-language pathologist (speech and language impairments)
- **AND, for claims filed after March 27, 2017**, licensed audiologist (hearing loss, balance disorders, auditory processing disorders), nurse practitioner and physician's assistant.

# Step 2: Severe Impairment

- Where do you find this evidence?
  - Consultative Examiner reports
  - Treating source records, the pages that list the official diagnoses
  - Other medical records to show how long the claimant has had the diagnoses

# If you don't lose at Step 2, go on to Step 3

*Step 3: Does the impairment meet or equal a listing, looking at the medical and other data?*

- Considered per se disabled (short hand)
- Exact match to SSA's listings

# Step 3: Listings

- Published by SSA: 20 C.F.R. § 404, Subpt. P, Appendix 1
- Organized by major body systems

# Listings: Looking for Evidence

- Check the specific listing and then scour the record for those exact findings
  - Introductory notes to each listing also highlight how SSA thinks about that impairment – so read those too!
- Must exist in the medical records. Can include medical source statements/CE reports.
- Most likely in the “F” exhibits

# Step 3: Listings

- You can win at Step 3!
- Some listings, with concrete findings, may be easier to meet
- Don't stop here: Prepare for all 5 steps

# If you don't win at Step 3: The RFC

- “Your impairment(s), and any related symptoms, such as pain, may cause physical and mental limitations that affect what you can do in a work setting. Your residual functional capacity is the most you can still do despite your limitations.” 20 CFR §§ 404.1545 and 416.945.
- **RFC** is what a claimant can still do, physically and/or mentally, on a sustained daily basis despite his or her impairment-related limitations.

# Elements of the RFC

It is ***the most*** that the claimant can do despite his or her limitations or restrictions, not the least the claimant can do.

- The RFC may include specific activities that a person can perform or it may be phrased as specific activities that a person cannot perform.
- Often starts with “exertional level”

# SSA will set RFC at an exertional level

- **Sedentary:** sitting 6 hours out of an 8-hr day; standing and/or walking at least 2 hrs/day; lifting up to 10 pounds.
- **Light:** standing 6 hours out of an 8-hour day; lifting up to 20 pounds; using foot pedals, etc.
- **Medium:** standing all day; lifting up to 50 pounds
- **Heavy:** standing all day; lifting up to 100 pounds
- **Very heavy:** lifting over 100 pounds

# Let's look at physical limitations

- Start with SSA's strength limitations:

Sitting

Standing

Walking

Lifting

Carrying

Pushing, and

Pulling

# Add in other “nonexertional” limitations

Climbing	Reaching (extending hands and arms)
Balancing	Handling (seizing, holding, grasping, turning)
Stooping	Fingering (picking, pinching, typing)
Kneeling	Feeling (feeling size, shape, temperature, texture)
Crouching	Environmental restrictions
Crawling	Fatigue and Weakness
Hearing	Dizziness
Seeing	Shortness of breath

# Nonexertional limitations related to Mental Disorders

Refer to introductory notes to the 12.00 listings

12.00.E provides details about activities typically performed under the four domains in the listings – this can be a helpful checklist for identifying what a claimant cannot do

# Nonexertional limitations related to Mental Disorders

Use SSA's definitions for the basic mental demands of work:

- understand, carry out, and remember simple instructions
- make judgments commensurate with the functions of unskilled work, i.e., simple work-related decisions
- respond appropriately to supervision, coworkers and work situations
- deal with changes in a routine work setting (meaning that the person cannot negotiate changes in the work setting not that the job never changes)

# More elements of the RFC

- SSA must consider any statement(s) made by the claimant as part of the RFC assessment. The agency follows a specific framework for this assessment.
- SSA must also consider medical source statements about impairments and the limitations imposed by the impairments *The rules to assess such statements is different for claims filed before or after 3/27/17.*

# How do you pull an RFC from the record?

- Start with the MDIs
- Identify the limitations
- Connect the limitations with work-related functions
- Quantify the extent of the work-related functions

# Extent of the limitation

- Hardest part!
- Look for assessments from DDS, CEs, treating sources
- Look for specific findings
- Consider side effects of medication
- Consider impact of treatment
- Common sense
- Medical research

# After the RFC, hop back on the sequential evaluation at Step 4

Step 4: *Is the claimant able to perform past relevant work (PRW)?*

# Step 4: PRW

PRW includes jobs on or off the books.

It does not matter if PRW exists any more or exists in this country.

SSA looks at whether the claimant could still do the job based on his or her residual functional capacity.

# Step 4: PRW

Past relevant work =

- work that you have done within the past 15 years [sometimes of alleged onset date, sometimes of date last insured]. For further information, refer to-  
<https://secure.ssa.gov/poms.nsf/lnx/0425001001#a64>
- that was substantial gainful activity
- and that lasted long enough for you to learn to do it

20 CFR §§ 404.1565; 416.965

# Finding evidence of PRW

Check ERE:

“A” exhibits: The DDE may include notes on past work identified by SSA

“D” exhibits: The detailed earnings query lists employers and income

“E” exhibits: The Work History Report completed by claimant usually has details about jobs

# Finding evidence of PRW

Next, check the Dictionary of Occupational Titles for the closest job description. You can find that at <https://occupationalinfo.org/>.

Finally, interview the client to double check what you have found

# Sample DOT Entry

CODE: 211.462-014    TITLE(s): CASHIER-CHECKER (retail trade)

Operates cash register to itemize and total customer's purchases in grocery, department, or other retail store: Reviews price sheets to note price changes and sale items. Records prices and departments, subtotals taxable items, and totals purchases on cash register. Collects cash, check, or charge payment from customer and makes change for cash transactions. Stocks shelves and marks prices on items. Counts money in cash drawer at beginning and end of work shift. May record daily transaction amounts from cash register to balance cash drawer. May weigh items, bag merchandise, issue trading stamps, and redeem food stamps and promotional coupons. May cash checks.

GOE: 07.03.01 STRENGTH: L GED: R3 M2 L2 **SVP: 3** DLU: 81

# Step 4: PRW

SSA uses the RFC to determine if the person can perform past relevant work

*Be sure that the RFC excludes PRW!*

For example, if the person has limitations for lifting, then PRW is excluded if the RFC limits lifting to a lower level

# Step 4 Special Vocational Profiles

- The regulations contain two vocational profiles that may be used, if all the criteria are met, for a person to be found disabled at Step 4.

# Step 4 Special Vocational Profiles

- Unskilled arduous work: This profile applies if the claimant has no more than a marginal education, work experience of 35 years or more of only arduous unskilled physical labor, and is no longer able to do this kind of work because of a severe impairment(s). SSA's example refers to a miner's helper as one who performed arduous work.
- "Unemployed housewife or househusband": An individual who has a severe, medically determinable impairment, who is age 55 or older, with a limited education or less and no past relevant work experience, will be found disabled.
- POMS DI 25010.001

# If you don't lose (or win) at Step 4, go to Step 5

*Step 5: Is the claimant able to perform any other work which exists in significant numbers in the national or local economy, considering your age, education, and work experience?*

# Step 5: Adjustment to Other Work

- SSA uses the RFC to determine if someone can adjust to any other *full-time* work in the regional or national economy.
- SSA includes new vocational factors now for age, education, and work experience.
- Burden of proof shifts here to SSA! 20 C.F.R. §§ 404.1512; 416.912.

# Step 5: Adjustment to Other Work

- SSA has rules for evaluating these factors.

# Step 5: Adjustment to Other Work

- Different rules apply if limitations are
  1. solely exertional
  2. solely nonexertional or,
  3. a combination of the two.

If the limitations are solely exertional, the Grid rules likely apply. If the limitations are not solely exertional the rules generally do not apply but may be used as a guide.

# Step 5: Adjustment to Other Work

- First, do the Grids apply?
- **The Grids** = A set of rules developed by SSA to provide uniform conclusions about disability when all the factors are met. These rules are more formally known as the medical-vocational guidelines and can be found at 20 C.F.R. § 404, Subpt. P, Appendix 2. The Grid rules are a series of tables each of which presumes the ability to perform a certain level of sustained exertional activity (sedentary, light or medium) based on an individual's RFC. (The Grid rules apply to both Social Security and SSI disability claims, but they are only published in the Social Security regulations).

# Step 5: Adjustment to Other Work

To use the Grids, identify specific vocational factors

- Identify the claimant's exertional level
  - Sedentary
  - Light
  - Medium
  - Heavy
  - Very Heavy
  - Arduous

# Step 5: Adjustment to Other Work

Next, identify the claimant's age and education level

**Age.** 20 C.F.R. §§ 404.1563 and 416.963

- 18-49: Younger worker
- 50-54: Closely approaching advanced age
- 55-59: Advanced age
- 60-64: Closely approaching retirement age

**Education.** 20 C.F.R. §§ 404.1564 and 416.964

- |                     |                  |
|---------------------|------------------|
| ▪ up to 6th grade   | = marginal       |
| ▪ up to 11th grade  | = limited        |
| ▪ H.S. graduate/GED | = high school    |
| ▪ College           | = more than H.S. |

# Step 5: Adjustment to Other Work

- Next, identify the claimant's skill level (from past work)
  - The SVP from past relevant work
  - SVP pulled from the DOT entry
- Now, apply the grid rule

# Step 5: Adjustment to Other Work

**For solely nonexertional claims:**

**First: Determine how much the claimant's occupational base is reduced by the effects of the nonexertional impairments.**

The first step is to identify the specific nonexertional limitations. Again, these should be described as how it affects the ability to perform work. What specific tasks or functions cannot be done by the claimant? If the claimant also has mental limitations, then the evaluation would include those nonexertional limitations, too.

# Step 5: Adjustment to Other Work

## **For solely nonexertional claims:**

The goal is to exclude the demands of unskilled work, notably the mental demands of unskilled work.

Do not limit the argument to just the mental demands of unskilled work – assume that other limitations will also erode the job base.

# Step 5: Adjustment to Other Work

**For claims with both exertional and nonexertional claims:**

The Grid rule is not outcome-determinative if it yields a “not disabled”

The Grid rule is a guide, and then you add in the nonexertional limitations which will continue to erode the job base

# Step 5: Adjustment to Other Work

- What is SSA's source for other jobs? SSA uses the Department of Labor's Dictionary of Occupational Titles, or DOT. This book is notoriously outdated. It can be found on-line at [www.occupationalinfo.org](http://www.occupationalinfo.org).
- More details about jobs may be found in the DOT's companion book, Selected Characteristics of Occupations, or SCO. The SCO is a lovely source of additional information about jobs, such as the amount of handling and fingering a job may require.

# Step 5: Adjustment to Other Work

SSA may call a Vocational Expert (VE) to give live testimony at a hearing about the ability to perform other work

The ALJ elicits testimony with hypothetical questions that detail specific limitations and vocational factors drawn from the claim

It's a peculiar method where the conversation is about the person but in "hypothetical" terms

# Questions?



# Thank you!

For technical support, please contact:

**Maia Younes**

Disability Advocacy Program

Empire Justice Center

585-454-4060 x5831

[myounes@empirejustice.org](mailto:myounes@empirejustice.org)

# DAP State Support Attorneys

## **Ann Biddle**

Mental Health Project

Urban Justice Center

[abiddle@urbanjustice.org](mailto:abiddle@urbanjustice.org)

## **Emilia Sicilia**

Senior Managing Attorney

Empire Justice Center

[esicilia@empirejustice.org](mailto:esicilia@empirejustice.org)

## **Jennifer Karr**

Senior Statewide Support Attorney

Empire Justice Center

[jkarr@empirejustice.org](mailto:jkarr@empirejustice.org)