

SOCIAL SECURITY DISABILITY AND LUPUS

ANJEL F. BURGESS, ESQ.
BURGESS & CHRISTENSEN
540 Powder Springs Rd., Ste 1, Bldg. A
Marietta, GA 30064
770-422-8111
www.Disabilityhelpline.com

WINNIE P. PANNELL
Of Counsel to:
BURGESS & CHRISTENSEN
770-438-2394

Q1. How does the Social Security Administration (SSA) define **DISABILITY?**

A1. "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 which has lasted or can be expected to last for a continuous period of not less than twelve months." ((emphasis added)) Although medical documentation and opinion of the treating physician(s) are vitally important, **disability is a legal, not a medical, conclusion.**

NOTE: *Some claimants and medical providers mistakenly believe that the disability must be permanent. This is not the case. However, with the requirement of not less than 12 months, the definition does NOT provide for just a short term or partial disability.*

Q2. What economic and medical **BENEFITS are available?**

A2. **DIB (Disability Insurance Benefits under Title II of the Social Security Act) and **SSI** (Supplemental Security Income under Title XVI of the Act.)**

DIB-monthly benefits commence the **sixth month** of disability for **insured** workers **less than full retirement age** and certain family members of the insured. The companion medical benefit is:

Medicare- federal health insurance program available to a person entitled to DIB benefits, **after 29 months of disability** (29 months of disability = 5 months waiting period without benefits, 24 months on benefits). For those persons who are disabled and entitled to Medicare, prescription medication benefits may be available through Medicare Part D.

SSI -monthly benefits for disabled people with limited **assets** and limited **income**. For calendar year 2017 the maximum federal benefit is \$735 for an eligible individual, \$1,103 for eligible couple. The companion medical benefit is: **Medicaid**- medical insurance which does pay for prescriptive medications.

Q3. How do I become **INSURED for DIB?**

A3. The Social Security retirement program requires a beneficiary to be **fully insured, i.e. have a requisite number of insured quarters. DIB has an **additional requirement**. It requires the worker also to be **CURRENTLY insured**. To be **currently insured** for DIB benefits, individuals more than 30 years old must have **no less than 20 QC's (5 years)** earned during the **40-quarter period (10 years) ending with the quarter he or she became disabled**. Special rules apply to younger workers.**

Workers acquire “**quarters of coverage**” (QC’s) as they work and pay FICA. The maximum quarter credits a person can earn per calendar year is 4. The amount necessary for crediting QC’s has changed over the years and now is indexed. **In 2017 it takes \$1,300 per covered quarter.** (2016 = \$1,260 2015 = \$1,220; 2014 = \$1,200; 2013 = \$1,160) So, in 2017 once a person earns and pays FICA on 2017 earnings of **\$5,200**, the person will have earned 4 covered quarters. The worker **need NOT** work during each of the four quarters. The amount earned and on which FICA is paid is the determining factor.

Q4. I tried to apply for Social Security disability at my local office. I was told that my **Insured Status for disability benefits expired** December 31, 2015 and that I cannot apply. Is this true?

A4. NO! You still **may apply** for disability benefits. **The critical point is**, in order to win your claim you will have to prove that your condition became disabling **on or before December 31, 2015**, that is, on or before whatever date you **were last insured**.

Q5. I cannot remember all of the names of my former employers, what years I worked, or how much I earned. What can I do?

A5. Check on line at www.socialsecurity.gov

Q6. My condition has become so debilitating that I am missing time from work and am unable to perform my job satisfactorily. I am afraid I will have to leave my job. **I have not discussed this with my physician(s).** Should I do so?

A6. DEFINITELY. Although whether a person is disabled for purposes of Social Security is a legal determination, the records, findings, and opinion of your physician(s) are **very important**. This is especially true if your physician is a specialist and has been treating you long enough to appreciate your impairment.

Q7. I have been **unable to work for 6 months**. My physician believes I will not be able to return to any employment for at least another year, and it is likely my inability to work will be long term. **Should I apply** for Social Security disability benefits?

A7. YES! YOU SHOULD APPLY. The process as it works now usually is quite time consuming. If your condition improves enough to allow a return to work before your claim is adjudicated, you nevertheless may be entitled to past benefits. If you improve enough that you think you may be able to work, you probably should **not** drop your claim until you are sure you can sustain a work effort. If you try to work, but because of your condition you can work only 6 months or less, SSA may find you have had an **unsuccessful work attempt**. This determination allows the worker to count the time she/he tried to work as part of the disability period. If you remain disabled at least 12 months, then improve enough to return to work, you still may be eligible for benefits during the “**closed period**” when you were disabled. You also may be entitled to a “**trial work period**.” See Q17 and A17 below.

CAVEAT: If you **wait too long** to apply, you may lose/forfeit benefits. A person may receive no more than 12 months of benefits prior to the date the person files application for disability benefits. So, if you became disabled January 1, 2014 and did not apply until January 1, 2016, you would be entitled to benefits only from January 1, 2015, that is, 12 months of benefits prior to the filing date.

Q8. HOW DO I APPLY for Social Security disability benefits?

A8. Telephone the Social Security Administration (1-800-772-1213) or go to your local Social Security office and request to file a claim. SSA is allowing people to file for DIB on line. www.socialsecurity.gov. There are helpful links to forms you will need to apply. The “Disability Starter Kit” will give you helpful suggestions about filing. As to SSI, one may complete the Adult and Child Disability Function Reports on line, **but it is necessary to have an appointment with SSA to complete the application process for SSI.**

TIPS: Keep a copy of everything you file. If you mail forms or records, mail them **Certified Return Receipt Requested** so that you can track dates and receipt. If you personally file the papers, get the originals and your copy **date stamped** by the SSA office and get the **name** of the staff member who takes your paper work. Take care to provide accurate, detailed information in **all** forms you file with SSA. **Again, keep a copy of everything you file, including medical records, attendance records etc.!!!** If you deal with any issue by telephone conversation with SSA personnel, make notes with the date, time, name of person with whom you spoke and a brief summary of the substance of the conversation. **Keep the notes.**

Q9. WHO EVALUATES my claim and what is the process SSA will follow in deciding whether or not I am disabled?

A9. WHO: Your local SSA office is an middleman only. Although the local office will decide certain factors, such as whether your income and assets meet the criteria for SSI, the local office does NOT make the determination whether you are disabled. Once you file your claim, the file will be reviewed by a State Disability Determination Services office. The rules at this stage are very stringent and you likely will be denied and given 60 days to appeal by requesting Reconsideration. After you appeal, the State Agency again will review your claim. It is likely you will be denied and given 60 days to appeal (request a hearing) before an Administrative Law Judge.

Q10. WHAT is the PROCESS by which my claim will be evaluated?

A10. In evaluating any impairment, SSA follows a five step process termed the “sequential evaluation.”

STEP 1: Are you engaged in “substantial gainful activity” (SGA= \$1,170 a month, 2017) If “YES”, you are not disabled; if “NO”, proceed to Step 2.

STEP 2: Do you have a “severe” impairment, that is an impairment which limits your ability to do basic work activities-walk, sit, remember etc. Most impairments meet this test. If the answer is “NO”, you are not disabled. If “YES”, proceed to Step 3.

STEP 3: Does your impairment(s) meet or equal any of the “listings” of impairments? If the answer is “YES”, you are disabled/entitled. If the answer is “NO”, proceed to Step 4. “Listings” exist for each of the major body systems, stating symptoms and findings, which if met, translate to an automatic finding of disability. Meeting the Listing can be challenging and the records of your treating specialist(s) are critical. Some impairments are not “listed”, but you still can be found disabled if your impairment is found to be “equivalent” to a listed impairment. **See Q&A11 below for SLE Listing.**

STEP 4: Can you perform your “past relevant work”, typically the work you performed over the past 15 years? If the answer is “YES”, you are not disabled. If “NO”, proceed to Step 5. To make this determination SSA must evaluate the “vocational factors” (age, education, relevant work experience) and determine your “residual functional capacity/RFC.” This means that SSA must determine what is the maximum you can do on a regular and sustained basis **eight hours a day, five days a week**. This determination takes into account “**exertional**” capacity (lifting, carrying, standing, walking, bending, twisting, reaching, pushing, pulling, and other physical activities) and “**non-exertional**” capacity (including mental and emotional function, fatigue, pain, involuntary movement, attention span, ability to concentrate, adapt to the work place and change, to get along with other people). **The non-exertional capacity, especially with lupus, is extremely important!**

STEP 5: Can you perform any other work that is available in the national economy in significant numbers? If the answer is “NO”, you are disabled/entitled. If “YES”, you are not disabled. SSA has the burden of proof.

CASE ANALYSIS

Q.1 Is applicant working? (In 2017: are you making as much as \$1,170 a month before taxes ?)	No. To Q.2	Yes-Not Disabled
Q.2 Does applicant have a severe impairment that will last one year or more or result in death?	Yes-To Q3	No-Not Disabled
Q.3 Is condition “listed” in C.F.R. or of equal severity ?	No- To Q.4	Yes - Entitled
Q.4 Does condition prevent former employment?	Yes - to Q.5	No - Not Disabled
Q.5 Does condition prevent other substantial gainful employment?	Yes - Entitled	No - Not Disabled

Q11. Does SSA have **SPECIFIC CRITERIA** pertinent to my particular condition?

A11. Yes. SSA has “**Listings**”, which are criteria for many body systems and diseases. As an example, **Listing 14.02 sets out the CRITERIA for SYSTEMIC LUPUS ERYTHEMATOSUS.**

Systemic Lupus Erythematosus as described in 14.00D1 (As revised June, 2008)

With:

- A. Involvement of **two or more** organs/body systems, with:
1. **One** of the organs/body systems involved to at least a moderate level of severity; and
 2. **At least two** of the constitutional symptoms or signs (severe fatigue, fever, malaise or involuntary weight loss). **OR**
- B. Repeated manifestations of SLE, with **at least two** of the constitutional symptoms or signs (severe fatigue, fever, malaise or involuntary weight loss) and **one** of the following at the **marked level**:
1. Limitations of activities of daily living
 2. Limitations in maintaining social functioning
 3. Limitations in completing tasks in a timely manner due to deficiencies in concentration, persistence and pace

Q12. If my lupus does not meet the “Listing”, what will SSA look for in order to find me disabled?

A12. In addition to reviewing all evidence of the diagnosis and severity of your lupus, SSA will evaluate the Vocational Factors, applying the “Grid.” The “Grid” allows for a type of uniformity in the evaluation of claims as it sets forth classifications in age, education, skill level, and physical capacities. As a rule, those who are older, have less education, and few or no work skills and diminished physical capacities are more likely to be eligible for benefits.

Q13. If I am a younger person, not educationally limited, with skilled work experience, can I still prevail in my claim?

A13. Yes! If your lupus limits your ability to sustain attendance, productivity, concentration, social skills (such as unpredictable energy, attention, concentration etc.), it is possible for you to prevail in your claim.

Q14. What information does **SSA NEED** to evaluate my medical condition?

A14. All **medical records** are important This includes records of physicians, hospitals, physical therapists, psychologists, chiropractors, etc. Diagnostic test results are critical. Information about how your condition affects you and your function is important. It can be extremely helpful if your primary treating specialist can write a fairly detailed letter setting forth the diagnosis with objective evidence, clinical findings, subjective complaints, treatment and a fairly comprehensive summary of your functional capacity and limitations. Refer to **all symptoms** and describe your difficulty with function and activity in detail. For example, a person who must lie down and rest 15-20 minutes each hour cannot meet the requirements of competitive work. **Keeping a diary, attendance records, disciplinary records, photos (hair loss, rashes, swelling), and getting letters from friends, family, pastor/minister/rabbi can be helpful.**

Q15. Do I need an **ATTORNEY** as I pursue my claim?

A15. While a claimant can complete the initial application process without an attorney, retaining an attorney at the initial stage can be very helpful. An attorney at the Reconsideration level also can be very helpful. Based on our experience, we believe it is imperative that a claimant be represented by an **attorney** if the claim must go to a **hearing before an administrative law judge (ALJ)**. Studies

show that attorney representation, especially at the ALJ hearing, makes a difference. It is important that the claimant work with an attorney with enough experience in SSA disability law to be effective. A person may wish to contact the National Organization of Social Security Claimant's Representatives (NOSSCR) for assistance in locating a qualified attorney. The internet referral site is: www.nosscr.org/helping-you/referral-service. Or, one may call NOSSCR toll free at 1-800-431-2804.

Q16. I have been **DENIED BENEFITS** on my initial application. SSA writes that my condition "is expected to improve soon." My physician states that I remain disabled from work and cannot assure me whether or when I will be well enough to return to work. According to my SSA notice, I can file another application later or I can **appeal** by filing a **Request for Reconsideration within 60 days**. **SHOULD I APPEAL?**

©

A16. YES! Dropping your claim, then filing a new claim later could result in a **loss of benefits to you**. Be sure to **appeal timely**. If you are unable to appeal timely due to illness or emergency, request an **Extension**.

Q17. I have been **denied on reconsideration**. SSA still expects my condition to improve. My physician states I remain disabled. I have a right to appeal the denial with a **Request For A Hearing** before an Administrative Law Judge. **SHOULD I APPEAL?**

A17. YES!

Caveat: Always **read carefully any correspondence and notices**, including denials, which you receive from SSA. Occasionally a claimant will be mailed the incorrect form and this can cause delay and complications.

Q18. How much will my **monthly benefit** be if I am awarded DIB benefits?

A18. This depends upon your earnings history. You can get a copy of your past earnings record from your local Social Security office or on-line, www.socialsecurity.gov. SSA mails a **benefit status report** annually to wage earners. The "average" monthly benefit for a disabled worker is \$1,172. The benefit may be more if there is a spouse and/or minor children.

Q19. What is the **TRIAL WORK PERIOD** and how does it work?

A19. The trial work period is "**a period during which you may test your ability to work and still be considered disabled**." To be eligible for a trial work period, you must continue to have a disabling impairment, you may not work at the substantial gainful activity level (\$1,170 in 2017) within 12 months of the start of your impairment. The disabled person is entitled to nine (9) months of "**service**", **not necessarily consecutive**, during a rolling period of 60 months, while continuing to receive monthly benefits.

A "**service month**" in the year 2017 is any month in which **gross earnings exceed \$840**. The trial work period ends once the beneficiary has accumulated **nine "service months"**, not necessarily consecutive. If the disabled person has made "**substantial earnings**" during the trial work period, this is an indication to the SSA that the person has ability to work despite the disabling impairment.

Effective January, 2017, “**substantial earnings**” are deemed to be **\$1,170 a month net after deducting Impairment Related Work Expenses (IRWE)**. IRWE include routine drugs and medical services necessary because of the impairment and necessary **in order to work**. The amount constituting “**Substantial Earnings**” has increased over the years. In the first month of substantial activity **after the end of the trial work period**, SSA may decide the beneficiary is no longer disabled. The beneficiary will receive monthly benefits for the month in which disability ceased and for the next **two months**.

NOTE: It is imperative that you report a return to work and any earnings to Social Security. Keep a record of your report!!! Improper receipt of benefits can result in an overpayment which SSA will attempt to recover.

Q20. Am I guaranteed a “**trial work period**”?

A20. Not necessarily. SSA periodically reviews of beneficiaries to determine whether disability continues. Most claims are to be reviewed after three years, but timing of review can vary depending upon several factors. SSA may decide that the beneficiary in fact has improved

©

to the extent he/she is able to return to work/substantial gainful employment **even though** the beneficiary has never tried to return even to part-time work.

Q21. I have been receiving disability benefits for 4 years. SSA just **REVIEWED** my file and has determined that I am able to return to work and that after two more months of benefits, my **monthly checks will be terminated**. However, I know and my doctor agrees that I continue to have significant problems which preclude my return to work. What should I do?

A21. You have a **right to appeal**. There are various criteria SSA uses in its reviews, but in order to terminate your benefits based on medical improvement, SSA must show that your medical condition **has improved**, that the improvement relates to **your ability to work**, and that you are **able to work**. Keeping a **diary** of your medical problems and appointments, functional problems, medication side effects, etc. throughout your disability period can be significantly helpful in demonstrating the extent of your ongoing disability to SSA. This also can be helpful to you and your physician(s) in monitoring your condition.

Revised September, 2017