TESTIFYING AT YOUR DISABILITY HEARING

Arrive Early

Unless your attorney asks you to be at the hearing office at a specific time, arrive for your hearing about a half an hour early. Any earlier is not necessary no matter what your Notice of Hearing may say about coming early to review your file. Disability hearings usually start on time--*so whatever you do,* ***don't be late.***

The Hearing Room

You will be seated at the conference table along with your attorney. Also seated at the conference table will be the judge's assistant who records the hearing on a laptop computer while taking notes of the information being given. Under some circumstances the judge may call a vocational witness or a doctor to testify. If so, they will be seated at the conference table, too.

Generally, if anyone will be testifying at your hearing (friend, family member), that person will need to remain out in the lobby during your testimony. If you would like for a family member to observe the hearing without testifying, please discuss this with your attorney ahead of time. In certain circumstances, other observers will not be allowed in the hearing room.

The Recording

A digital recording of the hearing will be made using a laptop computer. Because your hearing will be recorded, it is important for you to speak clearly when you answer questions. The microphones are very sensitive so that they will pick up your testimony from anywhere in the room if you speak loud enough for the judge to hear you. However, try to avoid nodding or shaking your head or pointing to body parts without giving verbal answers. Always answer "Yes" or "No" and specifically identify any body parts. Also, avoid "uh huh" and "huh uh" answers as the recording may not be able to pick up your meaning.

Hearings are Informal

Social security hearings are much less formal than court hearings. There are certain rules of procedure, however, the proceeding itself is "non-adversarial" which means that there is no "opponent" or anyone arguing against your eligibility for benefits. You will be under oath as you testify and you may not ask for help from anyone else in the room in answering questions. If you do not understand a question, simply state that you do not understand and the question will be rephrased or stated differently.

The Administrative Law Judge

The person who presides in a social security hearing is an administrative law judge (ALJ). Although you are not expected to stand up when the judge comes into the room, the social security judge is entitled to the same sort of respect that you would pay to a court judge.

The judge's job is to issue a decision independent from all prior decisions in your case. There is no lawyer on the other side who is going to cross-examine you and the Judge will not be "cross-examining" you either. The judge is not your opponent. The judge's job is to find out the facts.

Although it has taken quite some time to get to the hearing, you must not take out your frustration on the judge. The judge did not create this system and is not responsible for the backlog of cases awaiting scheduling of a hearing. The judge probably already knows many of the problems with the social

security appeals system, therefore, you do not need to explain these problems. It is best to focus on the facts of your case, to give the judge the best possible reasons to find you disabled.

The only time you should ask the judge a question is when you do not understand what is being asked of you. Judges and lawyers sometimes ask simple questions in complicated ways and if you're not sure you understand a question, don't be embarrassed to ask politely for an explanation.

The best way to treat the judge is with the courtesy and honesty that you would show a doctor you are seeing for the first time. It would be important to tell this doctor everything that is going on with you in terms of your health and how you feel or are limited. You do not have to use any special medical or legal words when talking to the judge and in fact, it's much better if you don't try to use such terminology.

What happens at the Hearing

Judges usually begin disability hearings by reciting the "case history" of your case and stating the "issues" to be decided. Judges often state what you have to prove in your case - but Judges seldom give a clear and simple explanation. They usually say that in order to be found disabled you must be "unable to perform substantial gainful activity which exists in significant numbers in the economy, considering your age, education and work experience." When they say it, it almost sounds like you've got to be bedridden to get disability benefits - but, as will be explained in more detail later, this isn't true.

The judge may question you first. And when the judge is done, the judge will give your lawyer a chance to ask you some questions. Occasionally, if a claimant is well prepared to testify, the lawyer doesn't have to ask any questions at all.

Some judges, however, expect lawyers to handle most of the questioning. If so, answer questions asked by your lawyer the same way you'd answer them if a stranger were the one asking the questions. Sometimes a claimant may give less than complete answers when his or her lawyer asks questions, because the claimant thinks that the lawyer knows a lot about the case already. So, it is important to keep in mind that the judge, who will decide your case, doesn't know the answers until you say them. Although the judge probably will read your file before the hearing, when you're testifying, it is best to assume that the judge knows nothing about your case. Plan on explaining *everything*.

When you're done testifying, your lawyer will be allowed to question any witnesses you've brought to the hearing. Your lawyer will discuss with you whether a witness is needed to testify in your case. Generally, unless the witness will provide information not included in the medical records or in your testimony, a witness may not be necessary. After your witness's testimony, any doctor or vocational expert called by the judge will testify.

At the end of the hearing some judges will ask you if you have anything more to say. It's best if you don't try to argue your case at this point - let your lawyer do that. Most judges will give a lawyer the opportunity to make a closing argument either at the end of the hearing or to be submitted in writing.

Most judges won't tell you if you've won, although a few will. Even if you're told you've won, the judge still must write a decision which will be mailed to you with a copy to your lawyer. Sometimes it takes quite awhile for the decision to come out.

What to Wear

A lot of people ask what to wear, whether they should dress up. You don't need to dress up. You don't need to wear the same clothes that you would wear to a wedding. This is an informal hearing. You may wear whatever makes you comfortable. You may wear the same clothes you would to an appointment with your doctor.

Testify Truthfully

Tell the truth. When the judge asks a question, don't try to figure out why the judge is asking that particular question or whether your answer will help or hurt your case. Be honest about your strengths as well as about your limitations. The best way to lose a good case is for the judge to think that you're not telling the truth.

Do not exaggerate or underplay your problems. That is, don't pretend to cry or be in more pain than you are. On the other hand, you need not suffer silently or minimize your problems when you tell the judge how you feel. If you need to take a break from the hearing, ask the judge for permission. If you are uncomfortable sitting and it would help to stand up for awhile, you may do so and you should not be embarrassed about it.

Tell Your Story

This will be your chance to tell the judge everything we want the judge to know about why your condition prevents you from holding down a job.

If you are asked when something happened, if possible, the judge would appreciate having the precise date. But if you don't remember the exact date, don't worry. Few people can remember precise dates for events in their lives. If you don't remember the exact date, say so. Then, do your best to give an approximate date, or a month and year, or a season and year, or, if you cannot remember more accurately, just the year. Getting dates wrong is something that all of us, including the judge, do from time to time. Some people are worse than others with dates. The judge won't think you're being untruthful if it turns out that a date is wrong.

How the Judge Determines Disability

Disability determination is what we call a "hypothetical" determination. It has very little to do with the real world. It has nothing to do with the fact that employers won't hire you because of your medical problems. The Social Security Administration looks only at whether you are *capable* of doing jobs, not whether you'd be hired. Thus, you may have to prove that you are unable to do jobs that you would never be hired for in a million years.

In some cases, the medical findings about your condition alone will cause the judge to find you disabled. In other cases, the majority of cases, we usually have to prove two things. First, we have to prove that your medical impairments prevent you from performing any job you've done in the past fifteen years. Second, we have to prove that there aren't very many other jobs you are capable of doing considering your age, education and work experience.

Think about all the jobs you've had in the past 15 years, and pick out the easiest one. We have to prove that you cannot do that easiest job - we have to prove this even if we're dead certain you'd never be hired for that job again; and we have to prove it even if the company where you worked no longer exists or if the job is not available for some other reason.

Proving the second thing - that considering your age, education and work experience you're unable to do very many other jobs - is even more complicated and opposed to common sense. In many cases we have to prove that you're incapable of doing jobs that we know you'd never actually be hired for.

However, we don't need to make proof of disability more difficult that it really is. A lot of people have heard the language "totally and permanently disabled." This phrase, which comes from worker's compensation cases, does not apply in social security disability and SSI disability cases.

First, for social security, you don't have to be "permanently" disabled. You only have to be disabled for 12 months.

Second, although you have to be totally disabled in the sense that you are unable to perform jobs existing in significant numbers in the economy, this doesn't mean that you have to be unable to do anything. In fact, very few people who go in front of Administrative Law Judges are unable to do anything at all.

Areas of Testimony

Questions are going to be asked of you at the hearing about your:

1. Work history
2. Education
3. Medical history
4. Symptoms
5. Your estimate of your work limitations
6. Your daily activities.

Work and Educational History

For work history, you will be asked to describe job duties on your last job and on all significant jobs you've had during the past fifteen years. The judge may want to know how much weight you had to lift on each job and about how much time during the workday that you spent sitting, standing and walking on each job. And he'll be interested in difficulties you had performing past jobs because of your health and why you left each former job, especially your last job.

The judge will also ask about job skills. If you have had semi-skilled or skilled work, it is important that you describe your skills accurately. Remember, though, this hearing is not like a job interview in which a person often has a tendency to try to puff up his job skills.

For education, you'll be asked the highest grade you completed in school, whether you had any training in the military, whether you have had any formal vocational training or on-the-job training.

There usually are few problems in explaining work and educational history. If you have difficulty explaining why you can't now perform one of the jobs that you have done in the past 15 years, you'll want to go over this with your lawyer before your hearing. If you have recently completed some schooling which might qualify you for a skilled job, be sure your lawyer knows all about this schooling.

Medical History

Sometimes there are no questions whatsoever about your medical history. The judge will have your medical records from doctors, hospitals and others who have treated you and may let the medical records speak for themselves. It is your lawyer's job to see to it that all of the medical records the judge needs to see are in the hearing exhibit file and, when necessary, that there are letters from your doctors explaining your medical condition and their opinions about your limitations.

The judge may ask a few general questions about your medical history. He may want to know how often you see your doctor, what sort of treatment your doctor provides, what medications you are taking, how often you take them and whether there are any side effects. You may be asked to describe the symptoms and treatment of your medical condition since it began, what doctors you have seen, where and when you were hospitalized, and so forth. But since the judge has records from your doctors you will not be expected to be able to explain technical medical things to the judge. Unless you are asked, it's better not to try to explain what your doctors have told you or what your friends have told you or what you have read about your medical problem unless you have first cleared it with your lawyer. However, if the

judge *asks* you what your doctor has told you about your condition or your limitations, do your very best to quote your doctor as accurately as possible.

Symptoms

Symptoms are how you feel. No one knows how you feel better than you. You know where you hurt, and when you hurt. You know when you get short of breath or dizzy or fatigued. So it's up to you to describe those symptoms to the judge in as much detail and as vividly as possible. This is very important since it's your symptoms that keep you from working. You're not disabled because your condition has a particular label like arthritis or coronary artery disease or emphysema. You cannot work because of how you feel.

So if the judge says to you, "Why can't you work?" Don't say, "It's because I have arthritis," etc. Lots of people who can and do work have the same impairment. So telling the judge the name of your health problem really tells him nothing. What the judge needs to know is the severity of your pain and other symptoms.

Be specific when you describe your symptoms. Don't just say, "It hurts." Describe what your symptoms feel like, the same way you have probably described your symptoms to members of your family. Describe the nature, intensity, and location of pain, whether it travels to different parts of your body, how often you have pain, and how long it lasts. Explain if you feel different from day to day. Explain what starts up your pain or other symptoms, what makes them worse and what helps relieve them.

Describe your symptoms to the judge the very best you can. Be precise and truthful. Don't exaggerate, but don't minimize your symptoms either. If you exaggerate your symptoms in your testimony, if you testify about constant excruciating pain but the medical records don't back up what you say, the judge will not believe you. He is also going to wonder how you made it to the hearing if your pain is so bad. So be careful when you use words such as "extreme" or "excruciating" to describe pain; and don't say that you "always" or "constantly" hurt or that you "never" get any relief from pain if what you mean is something less.

On the other hand, if you minimize your symptoms by saying they're not so bad, and a lot of people do, the judge is not going to find you disabled because you will convince him that you have few limitations. This is not the time to be brave. So try not to be a minimizer or an exaggerator. Try to describe your symptoms exactly like they are.

Estimate How Often You Have Pain or Other Symptoms

If your symptoms come and go, be prepared to explain how often this happens. Some people don't give enough information, especially when the frequency of symptoms varies a lot. It is never a good answer to say that something happens "sometimes." The judge could conclude that "sometimes" means that your symptoms occur only a few times per year - which is not enough to be disabling. When the frequency of symptoms varies a lot, a lot of explanation and examples are necessary. For example, tell how often symptoms occur in a *usual* week. If you have weeks with no symptoms, estimate how many weeks out of a year are like that. The more information you give about how often you have symptoms, the better understanding the judge will have about why your symptoms keep you from working.

For symptoms that come and go, be prepared to explain how long they last. Try to explain this without using the word "sometimes." Use the word "usually," then estimate how often the symptoms last longer and how often the symptoms are shorter.

Estimate the Intensity of Your Symptoms

You may be asked if your pain and other symptoms vary in intensity. If so, do your best to describe how your pain and other symptoms vary in intensity during a usual day or over a usual week. Often it is best to use the 1 to 10 scale sometimes used by therapists and doctors. On this scale 1 is essentially no pain and 10 is the worst pain you've ever had. Be sure you understand this scale and use it correctly without exaggerating. Think about the worst pain you ever had. Did it cause you to go to the emergency room? Did you lie in your bed writhing in pain, finding it difficult to get up even to go to the bathroom? Did it cause you to roll up into a fetal position? These are the images that the judge will have about what it means to have pain at a 10 level. Some people with disability claims have pain that gets to this level once in a while. Most do not. People who testify that their pain is frequently at the 10 level do not understand the scale. Most judges will conclude that someone who testifies that his or her pain is at a 10 level during a hearing is not to be believed -- because judges think there is no way a person could be at a hearing with pain that bad.

Estimate of Limitations

The judge will ask you how far you can walk, how much you can lift, how long you can stand, how long you can sit, etc. You must give the judge a genuine estimate of what you can do. So it is important to think about these things before your hearing.

If a friend asks you how far you can walk, you probably start thinking of places you have walked recently, how you felt when you got there, whether you had to stop and rest along the way, and so forth. You are likely to answer his question by giving one or more examples of places you have walked recently. If the judge asks this questions, answer it the same way. Talk to the judge the same way that you would talk to an old friend.

Also, be aware that there is a built-in ambiguity in a judge's question concerning how long you can stand, how much you can lift, how far you can walk, and so forth. Judges always ask the question just that way: "How long can you stand?" The question should *not* be interpreted to mean, "How long can you stand before you are in so much pain that you must go home and go to bed?" What the judge needs to know, of course, is how long you can stand in a work situation where you must stand for awhile, are allowed to sit down, and then must stand again.

Many times it is best to answer the question more than one way. You might give the judge an example of overdoing it and having to go lie down. But if you give the judge that example, be sure to fully explain it. Be sure to explain that, for example, when you washed Thanksgiving dinner dishes for an hour, you had to go lie down for a half an hour. Otherwise, it will show up in the judge's decision that you have the capacity to stand for one hour at a time, when your true capacity in a work situation is much less. But also give other examples that demonstrate the work situation: for example, if you are going to stand for a period of time, then sit, then stand again, this second standing time may be much shorter.

Another problem comes up when you have good days and bad days. For example, on good days, you might be able to sit or stand or walk for much longer than you can on a bad day. If you have good days and bad days, describe what it's like on a good day and what it's like on a bad day. Be prepared, though, for the judge to ask you for your estimate of how many days out of a month are good days and how many days are bad days. A lot of people answer such questions as, "well, I never counted them." Count them. The judge will need this information.

It is important that you give specific estimates about your problems. For example, if you tell the judge you have a particular problem "occasionally" or "once in a while," without further explanation, the judge won't know if you have the problem once a week or once a year. And there is a big difference.

To give good testimony about your limitations, it is really important for you to know yourself, know your limitations, and neither exaggerate nor minimize them. This is hard to do. You will need to think about it, perhaps discuss your limitations with family members and definitely discuss these limitations with your attorney before the hearing.

Mental Limitations

This memorandum is not intended to help prepare people to testify who have *only* mental limitations, since the issues in such cases are different in many ways from those we have been discussing; and it is difficult to make general statements about how to prepare for such cases. If your case involves only mental limitations, you and your lawyer will need to go through these matters before the hearing. For those with mental limitations in combination with physical impairments, it is also necessary to discuss the mental limitations with your lawyer prior to your hearing; but there are a few things that we can say here about mental limitations in combination with physical impairments.

Many people who have serious physical problems, especially if they have been having pain for a long time, develop emotional problems associated with their physical impairments. This is so common that it is surprising to find someone with a long-term physical problem who doesn't also have some emotional problem. But, many people who suffer physical impairments are afraid to talk about this emotional component of pain for fear they will be viewed as crazy. But having such problems doesn't mean you're crazy. It probably means you're normal.

It is important that you be willing and able to describe any emotional problems because it is often the emotional aspect of pain that interferes the greatest with the ability to work. Common problems include difficulty concentrating, forgetfulness, nervousness, a quick temper, difficulty getting along with others, avoiding other people, crying spells, and depression.

If you have some of these problems, you may be asked about your ability to understand, carry out and remember instructions, to make judgments, to respond to supervisors, co-workers and usual work situations and how well you deal with changes in a routine work setting. You may be asked how well you deal with stress which, you must remember, is a very individual thing. Different people find different things stressful. If the judge asks you about how well you deal with stress, as part of your answer be sure to tell the judge what sorts of things *you* find stressful, especially things at work.

Sometimes claimants have trouble putting their fingers on exactly what it is about work that they find stressful. For this reason we're providing a list of examples of things some people find stressful in work:

meeting deadlines, completing job tasks, working with others, dealing with the public,

working quickly, trying to work with precision, doing complex tasks, making decisions,

working within a schedule, dealing with supervisors, being criticized by supervisors,

simply knowing that work is supervised, getting to work regularly, remaining at work for a full day,

fear of failure at work.

Sometimes people find routine, repetitive work stressful because of the monotony of routine, no opportunity for learning new things, little latitude for decision-making, lack of collaboration on the job, underutilization of skills, or the lack of meaningfulness of work. Think about whether you find any of these things particularly stressful. If so, discuss them with your lawyer.

Daily Activities

Judges always ask about daily activities. They ask how you spend a usual day. They use your description to figure out whether or not your daily activities are consistent with the symptoms and limitations you describe. For example, if you claim to have trouble standing and walking because of severe pain in your legs but you testify that you go out dancing every night, the judge is going to have some reason to doubt your testimony about your symptoms and limitations.

To help the judge live your day with you, run through your usual day hour by hour. Emphasize those things that you do differently now because of your health problems. If you stop and think about it, you'll probably be able to come up with a long list of things you do differently now than you did before you became disabled. These things are important because they show how your disability has affected your life in major and minor ways.

Describe how long you are active doing things and how long you rest afterwards. Tell where you rest, whether it's sitting or lying down, whether it's on the couch or the bed or a recliner chair. Tell how long it takes you to do a project now compared to how long it used to take you. Describe all those things that you need help from other people doing - and tell who those others are and what help they provide.

The more specifics that you can provide, the easier it is for the judge to understand your testimony about your symptoms and your limitations.

Some Things Not To Do

1. *Don't argue your case.* Your job is to testify to facts, describe your symptoms, give estimates of your limitations, outline your daily activities, and provide lots of examples of your problems. Leave arguing your case to your lawyer. For example, don't use the line that starts "I worked all my life...." Or don't say, "I know I can't work."

2. *Don't try to draw conclusions for the judge.* Let the judge draw his own conclusions. Don't say things such as, "If I could work, I would be working." Or "I want to work." If you say this, it may cause the judge to think about Stephen Hawking who is in a wheelchair and unable to speak but is the world's leading expert on theoretical physics. There are many exceptional people with extreme disabilities who work; but it is never the issue in a social security disability case that there are others who work. It is also not relevant that there may be people less disabled than you who receive disability benefits.

3. *Don't compare yourself to others.* Popular lines are:

"I know a guy who has nothing wrong with him but **he** gets disability benefits."

"I know people less disabled than me who get disability benefits."

"If I were an alcoholic you'd give me disability benefits."

None of these comparisons helps your case.

4. *Don't try to play on the judge's sympathy.* It won't help. It might backfire. Judges have heard it all. Your financial situation, the fact that the bank is going to foreclose on your house and so forth are not relevant.

5. *Don't try to demonstrate what a "good" person you are.* Benefits are not awarded to the virtuous. They are awarded to the disabled. Some claimants, perhaps influenced by the rhetoric of politicians, bring up extraneous matters to demonstrate their virtue, thinking that this will influence the judge. Don't do it.

This is just like trying to play on the judge's sympathy. It doesn't work. It may backfire.

6. *Don't engage in dramatics.* You are supposed to tell the truth at your hearing. If you are putting on a show for the judge, that is the same thing as not telling the truth. At the same time, however, if you are having a genuine problem at the hearing and you need to stop the hearing for any reason, tell the judge and your lawyer.

7. *Don't give irrelevant testimony.* Social security regulations contain a list of irrelevant areas of testimony - areas that the judge can't and won't consider in deciding your case. This list is in the regulations:

(a) The fact that you are unable to get work is irrelevant.

(b) The lack of work in your local area is irrelevant.

(c) Hiring practices of employers are irrelevant.

(d) Technological changes in the industry in which you have worked are irrelevant.

(Although there are questions about this one.)

(e) Cyclical economic conditions are irrelevant.

(f) The fact that there are no job openings is irrelevant.

(g) The fact that you would not actually be hired for a job is irrelevant.

(h) The fact that you do not wish to work at a particular job is irrelevant.

Also, it doesn't matter that a particular job doesn't pay well enough to support your family.

Problem Areas

There are three areas where there could be potential problems. So if any of these three things apply to your case, be sure to bring them to the attention of your lawyer *before* the hearing.

1. Think back over the fifteen years before you became disabled. Pick out your easiest job. If you have trouble explaining why you can't now do that easiest job, even if that job no longer exists, be sure to discuss this with your lawyer.

2. If you got unemployment compensation at any time during the period that you are claiming to be disabled, make sure your lawyer knows about it before the hearing.

3. If you have been looking for work during any period that you claim to be disabled, tell your lawyer about it before the hearing.

Things To Do

Here's a list of things to do at your hearing:

1. **Tell the truth.**
2. Neither exaggerate nor minimize your symptoms.
3. Know your present abilities and limitations.
4. Provide relevant details and concrete examples but don't ramble on.

What Your Lawyer Does

Your hearing will be over in an hour or so. If you're well prepared because of this memorandum and your meeting with your lawyer before your hearing, your lawyer may not have to ask many questions at the hearing. In hearings with those judges who like to ask most of the questions, it's only where issues are not developed or your lawyer thinks that your testimony wasn't clear enough that he needs to ask some questions of you at your hearing. In fact, it's better that way. The more that comes from you in answer to the judge's questions, the better it is for your case. Your case will go in naturally. Your testimony will flow freely. The judge will get to know you and your situation as you talk with him. And the judge won't think that it's your lawyer testifying rather than you. Your lawyer will, however, ask questions of any witnesses you bring along to the hearing.

The most important part of what your lawyer does usually takes place outside of the hearing. That is, your lawyer gathers medical evidence, gets reports from doctors, does legal research, prepares witnesses to testify and may make a closing argument either in writing or at the hearing. The best developed cases, though, don't need a closing argument. If a case is so well developed with medical evidence and with the claimant's testimony, by the time it comes to argue the case, it is like stating the obvious - so why bother? But this doesn't mean that there hasn't been a lot of work that has gone into making a case so clear.

There is one thing that we lawyers cannot do, however. We're powerless to speed up the system. There may be a delay in getting the written decision. The written decision will be mailed to you with a copy to your lawyer. Sometimes, written decisions come out fairly quickly. Fairly quickly for a hearing

decision is about a month. It is not uncommon for it to take three months or even much longer for a hearing decision to be mailed to you.

There is seldom any way to speed up getting a decision out. So, as hard as it is, you must grit your teeth and wait. If more than three months pass, it's a good idea to make sure that your file hasn't been lost; and your lawyer can do that. But your lawyer can't do much more to speed things up.

If You Lose

Sometimes good cases, well-presented cases, are lost. It's hard to figure out why, but it happens. There are usually some possibilities for appeal. If you lose, be sure to consult right away with your lawyer about appealing your case. Do this as soon as possible. It is absolutely essential that you appeal to the Appeals Council within 60 days of the judge's decision or you will lose your right to appeal.