

Column: *Walkup Talks Disability*

Social Security Disability Appeals

- *Michael Walkup, Attorney at Law*



Michael Walkup is an experienced disability practitioner with over 25 years of experience in the disability law field. In 2001 he became disabled due to MCS, CFS, and FM. He is now providing a service to advise clients with potential disability claims who have MCS, CFS, and/or FM. As these programs and law are usually Federal, he is able to practice in all 50 states, so your location does not matter.

Michael is a long time Sustaining Member of the National Organization for Social Security Claimants' Representatives (NOSSCR), the only national body for disability representatives. He is also certified as a Federal Trial Lawyer and is admitted to the U.S. Court of Appeals for Veteran's Claims.

Michael would welcome the opportunity to try to help you with your legal claims. His web site may be found at www.MCSLegalHelp.com, or he may be contacted at MJWalkup@Amertech.net, or at 866-880-HURT (4878).

Appeals

Although each stage of the Social Security Disability process can be called an "appeal", what I will be talking about here are appeals from adverse decisions following a hearing before an Administrative Law Judge (ALJ).

An adverse ALJ decision will be called an "Unfavorable Decision". You may also appeal a "Partially Favorable Decision", which will be a decision in which you were awarded some, but not all, of the benefits you were seeking. If you won entirely, it will be called a "Fully Favorable Decision". You cannot appeal a Fully Favorable Decision even if you don't like the rationale that was used to award the benefits i.e. mental impairment.

You have 60 days to appeal an adverse decision which is done by filling out a form and sending it to the Hearings Office. The entire file, including the decision and a disc of the hearing testimony, will be sent to the Appeals Council in Baltimore, Md. You can send in additional evidence and make additional arguments. This is addressed to the Appeals Council in writing.

You can estimate that it will take at least a year for the Appeals Council to render a decision. You can keep updating your file and adding evidence while that is going on. The average amount of time the person reviewing your file will spend for the review is about fifteen minutes, so keep any comments short and to the point.

To the extent that anything favorable happens at the Appeals Council it will be probably be to remand the case back for an additional hearing with instructions to the ALJ rather than an outright reversal. The exception to this would be if there is some definitive testing or definitive evidence of a non MCS condition which is disabling that was not raised before, such as bi polar disorder.

This will not tend to apply in MCS cases so you should at best look forward to a remand for an additional hearing. The remand hearing will be in front of the same judge as denied the claim originally, unless you move out of that Hearing Office's area, in which case it will be transferred to the new office and re-assigned to a different judge. Your chances will be better if you can get the remand heard by someone new. "Hint, hint..."

**"If you
lose at the
Appeals
Council,
you can file
a lawsuit
against the
SSA."**

If you lose at the Appeals Council, you can file a lawsuit against the SSA in the Federal District Court for your area. These are decided entirely on paper with briefs submitted by both sides. A transcript has to be prepared of the hearing testimony. If the audio disc is not audible, the case will automatically be remanded for a new hearing.

Federal court cases are difficult for MCS claims as the federal courts tend to follow more restrictive rules of evidence for admission of expert testimony. Even though there are no rules of evidence in Social Security Disability cases, I nevertheless find that these rules tend to influence the thinking of the federal judge and make it difficult to convince them to accept what may be considered non-standard tests and opinions. The decision from any federal appeal will also be published nationally, so it can create a bad precedent for others. I therefore tend to discourage federal court appeals in favor of advising my clients to re-file for

benefits, where possible.

You may re-file your application while pursuing the Appeals Council appeal. The Appeals Council will take a year or more to decide on your appeal and, at best, will probably be sending it back for another ALJ hearing that will take time to schedule. The amount of time it will take on an entirely new application may not be that much different. Even if you are still living in the same area, the new application will be assigned randomly to one of 6 or more ALJs in that Hearing Office, so the chances are that you will be assigned a different judge than the one that denied the previous claim.

The exception to this is if your "Date Last Insured" for disability benefits had expired before the date of the ALJ Decision. In that case, you will not be able to re-file a new application and will have to take all available appeals.

I will talk more about that in the next installment.

