

Column: *Walkup Talks Disability*

Social Security Disability The Zen of the Hearing

- *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).

Trying to figure out how to handle a disability hearing for someone with multiple chemical sensitivity (MCS) is tricky. The usual approaches may not work.

I have found that the outcome of these types of cases is heavily dependent on the underlying attitude of the Administrative Law Judge (ALJ), and the vocational and medical experts (VE's ME's).

My clients are all clearly unable to do any type of work due to their impairments, as they describe them. If I think there may be some type of job they can do, I don't take the case.

They also tend to have very similar sets of sensitivities in that they are particularly sensitive to artificial fragrances. That alone makes them unable to function in a work environment where they will be around other people whose habits they can't control. Usually they have left office type jobs after numerous attempts to obtain accommodations from their employers and voluntary cooperation from co-workers.

There are usually a host of other

sensitivities such as to cleaning products, herbicides, artificial materials used in decorating and construction, oil based fuels, plastics, electromagnetic frequencies, vibrations, paper and ink, which further seal the deal.

Nevertheless, you do run into judges and experts who don't "get it" and try to either say that the condition doesn't exist, and/or that it is a mental impairment. If the mental impairment is judged to be serious enough, you can win on that basis. But, they may feel that it is not that severe because they use the criteria used to judge other mental conditions like depression, anxiety, bi-polar, etc. and a person with MCS generally doesn't meet those.

Since I do cases all over the country, I usually don't know anything about the judge going in. I therefore present the case the same way each time, which is to do the following:

(1) I make sure that my client is going for regular treatment right up to the date of the hearing with an environmental doctor of some sort who will do testing and write a favorable report, and possibly testify by telephone.

(2) I try to keep my client from going into situations that might be used to argue that she/he does not have a problem, such as going shopping, to church, and to doctor's offices who are not environmental specialists. This includes having them refuse to go to examinations by Social Security doctors unless special arrangements can be made, and by having them insist on attending the hearing by telephone rather than in person or at a video conference site. This is assuming, of course, that there is a real sensitivity present that would make those appearances problematic. Often, the actual reactions are delayed so the client's difficulties are not apparent during the event. This is one reason I like to try to keep my clients out of the situation entirely as the later reaction will often not be witnessed.

(3) I may refer them for testing with specialists who work with MCS patients on a regular basis in addition to their treating doctors.

(4) I try to prevent them from filing for disability insurance, workers compensation, or personal injury claims which will cause them to be scheduled to go to examinations by unfriendly doctors who will generate reports. If they have already done so, I try to keep those reports out of the Social Security file or insist that I be allowed to cross examine any outside experts. (Since there is no provision in the Social Security Act to do this, it can be difficult. It requires that the report has not been previously sent to Social Security so they have to issue a subpoena for it after a hearing).

(5) I try to get one or more national experts on chemical sensitivity that did not treat my client to testify by telephone. I also submit synopses of the current state of research into MCS, such as recent studies by Canada and Australia, as well as the new ICU 10 Rules in Germany which recognize MCS and eliminated prior references to somatoform disorder for MCS.

(6) I try to emphasize that MCS is probably not an "allergy" as traditionally thought, but is more probably some type of disorder of the central nerv-

ous system in which the nerve and brain cells have become hypersensitive to minute amounts of chemicals and overreact when molecules of those chemicals enter the cells. This is not really a part of how medicine is practiced to date, including allergy medicine and neurology. It is more a question of biochemistry or molecular biology in which the experts used by Social Security are usually not well versed.

(7) I usually limit the cross examination of any experts called by Social Security to bring out that they do not have much, if any, direct experience in the treatment of MCS, nor have they attended any seminars or read any articles on the subject.. I then contrast their lack of experience with that of the experts I have called. In other words, "*Less is More.*"

(8) I get the vocational expert to admit that if my client would have to leave work more than once or twice in a month throughout the year, there would be no jobs that would be considered to be available, and that it would be impossible to police all of the chemicals which would cause that sort of reaction, particularly chemical fragrances in a workplace situation that the worker could not control.

Hearings do not generally provide you with much time to get into extensive cross examinations of experts and I find that trying to do that not only usually lands you in trouble, but gives the illusion that 'you had a chance to cross examine the witness', when you were really being rushed along by the judge who had only allocated one hour total for the entire hearing including the testimony of the claimant and the claimant's witnesses. It is very rare to score any points with an expert on cross examination in their area of expertise even when you have the benefit of pre-trial depositions and discovery, neither of which you have in a Social Security hearing.

By and large I have found this approach to be successful, and have won about 75% of my MCS cases overall. This compares favorably with the general rate of success for non-MCS cases on a national level. On the cases that we lose, we consider further appeals or a re-filing, or both. We will discuss that next month.