



Tips for Winning a Fibromyalgia or Chronic Fatigue Syndrome Disability Case...and...What actually happens at a Social Security Disability Hearing?

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Jonathan Ginsberg is a Social Security Disability case lawyer specialized in representing patients with chronic illnesses such as Chronic Fatigue Syndrome and Fibromyalgia. He maintains a "[Social Security Disability](#)" website offering resources from disability lawyers all over the U.S., plus a blog and radio program where patients may submit questions and receive professional responses. Though he uses examples from FM cases here, the concepts apply equally to CFS and other "invisible" disabilities.

Tips for Winning a Fibromyalgia or Chronic Fatigue Syndrome Disability Case

In a disability case, you need to prove one thing - that you are not able to work. If you remember nothing else about Social Security disability, remember that your capacity for performing work is the only thing that matters to a Social Security judge.

Your ability to perform an easy job - the main issue

Your underlying medical condition - FM, CFS, or any other medical problem, is only important to the Social Security Judge if your symptoms limit you from performing a job 8 hours a day, 5 days a week.

Thus, for example:

- I have won cases in the Atlanta hearing offices in which my client's medical problem was a moderate, functional heart defect, but in this client's case, her anxiety about her condition was so severe that she could not concentrate at work.
- Similarly, I have seen judges deny cases in which a claimant had three herniated discs, but was able to function in a minimally demanding job because of an unusually high pain threshold.

In most cases, the judge's decision really boils down to his/her decision about whether you could hold down a simple, sit-down type of job that requires no training; that allows you to sit, stand, and adjust your position; and that is not production oriented.

In fact, in most hearings, the Judge will call a 'vocational expert' to testify about work you have done in the past and about simple, minimally demanding jobs that exist in the national economy. [See the detailed description of "What Actually Happens at Your Social Security Disability Hearing," in the accompanying article, below.]

Comprehensive medical records - a key to winning

As a claimant's lawyer, my job is to identify medical records that suggest work limitations. In many cases this means I need to review all of the medical records, then create a functional capacity checklist that includes both the limitations associated with your particular case and the impairment categories used in Social Security cases.

We then ask your doctor to complete the checklist for submission to the Judge.

Note that:

- We do not ask the doctor to decide if you are 'disabled' - that is a legal decision for the Judge.
- Instead, we ask your doctor to help 'translate' his medical conclusions into specific work limitations.

What is the Judge thinking?

There is a perception that Social Security disability cases based on Fibromyalgia [or Chronic Fatigue Syndrome] are difficult to win. It is true that some judges have a problem acknowledging a medical syndrome (not a "disease") that cannot be detected by a blood test and that can have a wide range of symptoms. (See the clinical definition of Fibromyalgia as set forth by the American College of Rheumatology, at <http://www.nfra.net/Diagnost.htm>)

Nevertheless, my experience has been that you can get creative in offering a Judge a *theory of disability*.

Not too long ago, for example:

- I represented a Fibromyalgia client before a Judge who called a psychiatrist as an expert witness. The Judge granted benefits on the ground that my client's "fibro fog" was equivalent to a chronic state of anxiety - a psychiatric condition.
- Two weeks later, I tried a different Fibromyalgia case before another Judge in the same hearing office. This Judge awarded benefits (correctly in my opinion) on the basis of a combined impairment - recognizing the combined effect of Fibromyalgia's impact on my client's physical and mental condition.
- Yet a third Judge in this same hearing office granted another case on the basis that my client's condition was equivalent to an orthopedic condition - severe arthritis.

Obviously, I am most interested in winning cases for my clients, although I do find it interesting that some judges must really struggle to find a legal basis to award benefits. Further, I think it is fair to say that judges in big cities like Atlanta are probably more likely to see Fibromyalgia [and Chronic Fatigue Syndrome] patients supported by knowledgeable physicians and long treatment histories.

Fortunately, even if judges don't understand the condition, many will honor the opinion of your treating physician, especially if you have a long and continuous treatment record. (The legal term for a thorough medical history is a "longitudinal treatment record.")

Focus on specific symptoms

I find that it is important to focus on Fibromyalgia symptoms other than just generalized body pain. Remember, judges see claimants every day complaining of "pain all over." These cases are not Fibromyalgia, but pains caused by arthritis, obesity, poor nutrition, mild diabetes, etc.

Judges are people, and they tend to discount complaints they hear again and again. As you may know, Fibromyalgia or CFS often produce a number of other identifiable symptoms, including loss of balance, digestive problems, irritable bowel syndrome, slurred speech, vision problems, depression, swelling, memory loss, cognitive loss, fatigue, sleeplessness, etc.

Many patients get used to living with these symptoms and fail to mention all of them to their doctors or to the judge.

One technique I recommend to my clients is to obtain a calendar and keep diary notes about how you feel and what symptoms you experience each day. Make lists. Ask for your spouse's or children's observations. It has been my experience that judges may not want to grant your case based on overall body pain, but may feel more comfortable focusing on your digestive or balance problems. Make the judge's (and your lawyer's) job easy!

You might find it helpful to read a Judge's decision in a Fibromyalgia case. (The file at <http://www.4socialsecuritydisability.com/Fibro%20decision.pdf> offers two of my recent favorable Fibromyalgia decisions from the Atlanta Office of Hearings & Appeals.) The first case involved a 38-year-old woman with an extensive job background who suffers from Fibromyalgia as well as numerous gastrointestinal and other complications. Note that the Judge focuses on my client's work history and that she is very credible because she has been seeking a medical solution to her problem.

Deciding on a start-date for your disability

I also have found that many of my Fibromyalgia clients were ambitious and hardworking in their careers and jobs. Subconsciously or otherwise, many Judges realize that *few claimants would trade the*

money and job satisfaction of a challenging career for the fixed income offered by Social Security disability.

I therefore usually encourage my clients to testify about:

- What they did before they stopped work,
- How they tried to hang on, even while fighting increasing levels of pain and fatigue,
- And how they would greatly prefer their former way of life.

You may also be able to "push back" the starting date for your benefit payments if your last few weeks or months of work were not in the nature of "competitive employment." For example, if your boss allowed extra absences or changed your job description, the judge may find that you did not engage in competitive work activity.

Similarly, if you previously applied for benefits, received a denial, then tried unsuccessfully to return to work, you may be eligible for months or years of past due benefits. Issues related to amending your onset date are beyond the scope of this article, but should be evaluated.

Note: The comments and opinions expressed here should not be considered legal advice, as every Social Security Disability case is different and depends on your individual case information. Further, the author makes no warranty, express or implied, about the accuracy or reliability of this information. You should not act or rely on any information without seeking the advice of an attorney or qualified non-attorney representative.

What Actually Happens at a Social Security Disability Hearing?

by Jonathan Ginsberg, Attorney - Atlanta, Georgia*

You have waited a year or longer. The big day is finally here. Your Social Security hearing is tomorrow. What is going to happen? Who will be there? What does the Courtroom look like? Will you be asked a lot of questions?

Your hearing is your best chance for winning disability benefits. Prior to the hearing, your case was evaluated by a State Agency Adjudicator - a government employee whom you did not meet face to face and whose evaluation of your case was based on your medical records only. And, since your doctor's reports did not contain certain medical terms, nor did they discuss specific vocational restrictions, your case was denied. For more information about the initial application and the reconsideration stage of your case, go to http://www.4socialsecuritydisability.com/Appeal_process.htm .

At a hearing, you will have the opportunity to tell your story to an experienced Administrative Law Judge. Your Judge is not bound by any of the findings made by the State Agency Adjudicator. In other words, the Judge will look at your case with a fresh pair of eyes and he or she will have the chance to meet you and look you over.

While it is normal for you to be nervous, you should realize that most Judges want to make a fair decision and that you will be treated with dignity and respect. It is important, however, to know what to expect.

What does the Hearing Room look like?

The hearing room in a Social Security case is much different than traditional courtrooms you may have seen live or on TV.

- Your hearing room will be small and informal.
- The hearing will be held around a conference table.
- You will also notice an audio tape recorder and microphones used to tape the hearing.
- Unlike regular court cases, Social Security hearings are not open to the public - therefore, there are no seats for spectators.

- Most people like the small, informal setting. This type of set-up should help you relax and establish a dialog with the judge.

Who will be there?

The participants at a hearing will be the Judge, a hearing assistant (who operates the tape machine), you, your lawyer, and possible one or more expert witnesses.

Why will expert witnesses be present at my hearing?

- Social Security Judges use expert witnesses to help them better understand the issues in your case.
- Expert witnesses are not there to hurt you or to help you.
- Expert witnesses come from a panel of experts selected by Social Security.
- When the Judge decides to call an expert witness, he cannot ask for a particular witness - instead, a member of the panel is assigned randomly.

The Vocational Expert

In most cases, the Judge will call a "Vocational Expert" (also called a VE).

- The VE may be a job placement professional, a professor, or a vocational rehab counselor.
- The VE's job is to classify your past work and describe for the judge the skill level of your past work (unskilled, semi-skilled or skilled) along with the exertional level called for in this job (sedentary/sit-down, light, medium, or heavy).
- The judge needs this information to determine whether your claimed impairment would prevent you from returning to your past work and whether you have acquired any skills that would transfer to less demanding work.
- Vocational experts will be familiar with a publication called the *Directory of Occupational Titles* - which is a book published by the U.S. Department of Labor that describes the physical and mental requirements of all jobs that exist in the United States.

Examples of Vocational Expert testimony

The Judge will use the VE to "translate" your medical problems into work limitations. After listening to your testimony, the Judge will turn to the Vocational Expert and pose one or more questions about your job capacity. For example, in a recent hearing the Judge posed the following questions to the VE:

1. "Mr. VE, assume I find that the claimant is 48 years old, with a high school education and has past work as a machine operator, as a shift supervisor at a convenience store and as a shift supervisor at a retail store. Further assume that I find that the claimant has been diagnosed with fibromyalgia and has a moderate level of pain all the time. Further assume that the claimant can stand for no more than 20 minutes at a time, and that standing can constitute no more than 2 hours total during a work day. Sitting is unlimited, although the claimant needs a "sit/stand" option. Could this claimant return to her past work? Could she do any other work?"
2. "Mr. VE, assume the same limitations set out in question 1, but add the following limitations. Assume that I find that the claimant's testimony is credible in her statement that her pain level rises to a "severe" level at least one hour per day at unpredictable times. This severe level of pain would cause a significant interference with attention and concentration. Assume further that as a result of pain, the claimant would likely leave work early or miss work entirely 1 to 2 days per week.

What does all this mean?

In response to question Number 1, the VE testified that the claimant could not return to past work, but could perform a variety of unskilled, sedentary jobs.

In response to question Number 2, the VE testified that the claimant could not return to either past work or to any other job.

The point of this is to show you how the wording of the question to the VE can result in a win or a loss. That is why it is so important to get your doctor's cooperation in identifying specific work activity limitations arising from your medical condition.

Further, your testimony should be both truthful and consistent with the limitations set out by your doctor. As your attorney, our job is to explain to you what is in your file and practice your testimony.

The Medical Expert

In some cases, your Judge will call a Medical Expert as well as a Vocational Expert. In our experience, a Judge will call a Medical Expert:

- If your medical record is long and complicated;
- If you have been diagnosed with multiple conditions;
- If there is contradictory information in your medical record.

Some Judges call Medical Experts (also called ME's) frequently. Other judges call them rarely. Currently, the ME panel includes psychiatrists, psychologists, orthopedists, internists, cardiologists, and other specialists.

It has been our experience that the quality of testimony from various medical experts varies widely. Some Medical Experts testify frequently and understand the underlying vocational nature of a Social Security case. Other ME's provide very little help.

Your attorney is permitted to cross examine the ME, either to clarify a point or to discredit the testimony if it is out of line.

Vocational Expert testimony, by contrast, is usually much more consistent and predictable than Medical Expert testimony.

Where do you sit and who says what?

When you enter the hearing room, you will be directed to sit in a specific chair, usually one that is facing the Judge. The Judge will introduce himself/herself along with the Hearing Assistant and the Vocational and/or Medical Expert witnesses. He will then ask your attorney to state his/her name. The Judge will then read a very brief statement setting out the issues to be heard. In most cases, he will ask your lawyer to waive a formal reading of the issue.

The Judge will then ask your lawyer if he/she has any objections to exhibits in the record and if there are any outstanding records not in your file.

One of the things you should expect from your lawyer is a diligent effort to obtain up-to-date copies of your medical records. Remember, the Hearing Office will not update your records - this is your responsibility. It has been our experience that your Judge will be upset (and may even postpone the hearing) if important medical reports are missing. For this reason, you should contact your lawyer's office regularly to advise them of new treatment, new doctors, etc.

Assuming no objections, the Judge will swear you in to tell the truth. If your religious beliefs do not permit you to take a sworn oath, you may affirm that your statements will be true.

The Judge may then ask your lawyer for an Opening Statement. Again, some Judges do and others do not.

Your testimony

Every Judge has a different technique with regard to questions and testimony. Most Judges will ask all the questions, offering your lawyer a chance to follow up. Other Judges leave all questioning to your lawyer. The subjects covered in your direct examination include:

- Background information - your age, education, marital status, living arrangements (home, apartment, etc.)
- Discussion of past work as performed - lifting, carrying, supervisory roles, etc.

- Specific discussion of medical problems and activity limitations.

What you must remember when testifying

The most important things for you to remember when testifying are as follows:

- Tell the truth.
- Be specific - instead of saying "I can't walk very far and I can't lift very much," say "It's about 25 yards to my mailbox. When I get to the mailbox, I have to stop because my knees hurt so bad and my chest hurts. When I come back, I have to support myself on a fence so I won't lose my balance" "As far as lifting, I tried to lift a gallon of milk about a month ago, but I could not hold it, even with both hands, and it fell and spilled all over the floor."
- It is very important that you remember and practice being specific. It has been our experience that you will be nervous, and that at a hearing, it will be hard to think about how much you can lift, how far you can walk, etc. Practice ahead of time!
- Be very descriptive when describing pain. Don't say "it hurts a lot." Instead, say "when I get a migraine, I can't do anything. I feel nauseated and sick. I turn off the lights, lie in bed with a cold compress on my forehead, and try not to think at all. It usually takes my medicine about an hour to kick in - even that does not help - it just puts me to sleep."
- If you need to stand up and walk around, do so. Judges don't mind if you have to stretch out. This is especially important if you testify that you can sit without interruption for no more than 15 minutes, then sit still at your hearing for an hour.
- Say "yes" or "no," not "uh-huh" or "huh?" or just nod or shake your head. Remember that your hearing is being tape recorded.
- Don't curse.
- Dress neatly - you don't need your Sunday best, but you should avoid blue jeans and T-shirts.
- Bring your bottles of medicine - the Judge may want to see them.
- Your attitude during your testimony is important. Remember that your Judge sees claimants every day who want benefits. *Your attitude ought to be "if I could work I would work."* Describe for the Judge what you did and how you enjoyed being productive and useful.
- *Don't tell the Judge that you are "disabled"* - that is his job to decide. After listening to your testimony, the Judge will then take the Expert Witness testimony and ask questions of the Expert Witnesses. Your attorney will also be given an opportunity to ask questions of the Expert Witnesses.

Finally, the Judge may ask you if you have any final comments. If everything was covered in your testimony, its OK to say "no." Respect the fact that the Judge has other hearings and time constraints.

In most cases, the Judge will not issue a decision at the end of the hearing. You can expect to receive a written decision in four to six weeks, sometimes longer.

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featuring Q&A and interviews "about winning case strategies and forthcoming changes to the disability adjudication process."

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