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ABSTRACT

The handbook is part of a series on legal services for the elderly which can be provided by senior citizens functioning as paralegals. It is designed to teach paralegals to represent claimants at a Social Security administrative hearing. The handbook is designed to serve the following purposes: (1) to present major legal concepts governing the determination of disability under the Old Age, Survivors, and Disability Insurance (OASDI) and the Supplemental Security Income program (SSI); (2) to serve as a resource and reference manual on primary legal sources, the statute and regulations; (3) to explain the Social Security administrative appeals process; and (4) to present concrete suggestions for effective representation of clients at Social Security administrative hearings. The guidelines follow the sequence that an actual case would encounter, as follows: (1) summary of disability laws, (2) the appeals process, (3) the advocate's role prior to a hearing, (4) the advocate's role during a hearing, and (5) the advocate's role after a hearing. Appended materials include a bibliography and resource list, advocate's checklist for disability cases, chart of process for initial application determination of OASDI/SSI disabilities, and selected forms for OASDI/SSI disability programs. (Author/EC)

Representation at a Social Security Hearing: Focus on Disability

Advocate's Handbook

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OF
CALIFORNIA RURAL LEGAL ASSISTANCE

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Cover Photo, left to right. Mr. Jack Keefauver, Senior Legal Assistant at Senior Citizens Legal Services Office of Santa Cruz County Legal Aid Society, as claimant; Mr. Thomas Gregory Collins, professional actor, as administrative law judge; Mrs. Stephani Priest, professional actress, as paralegal representative.

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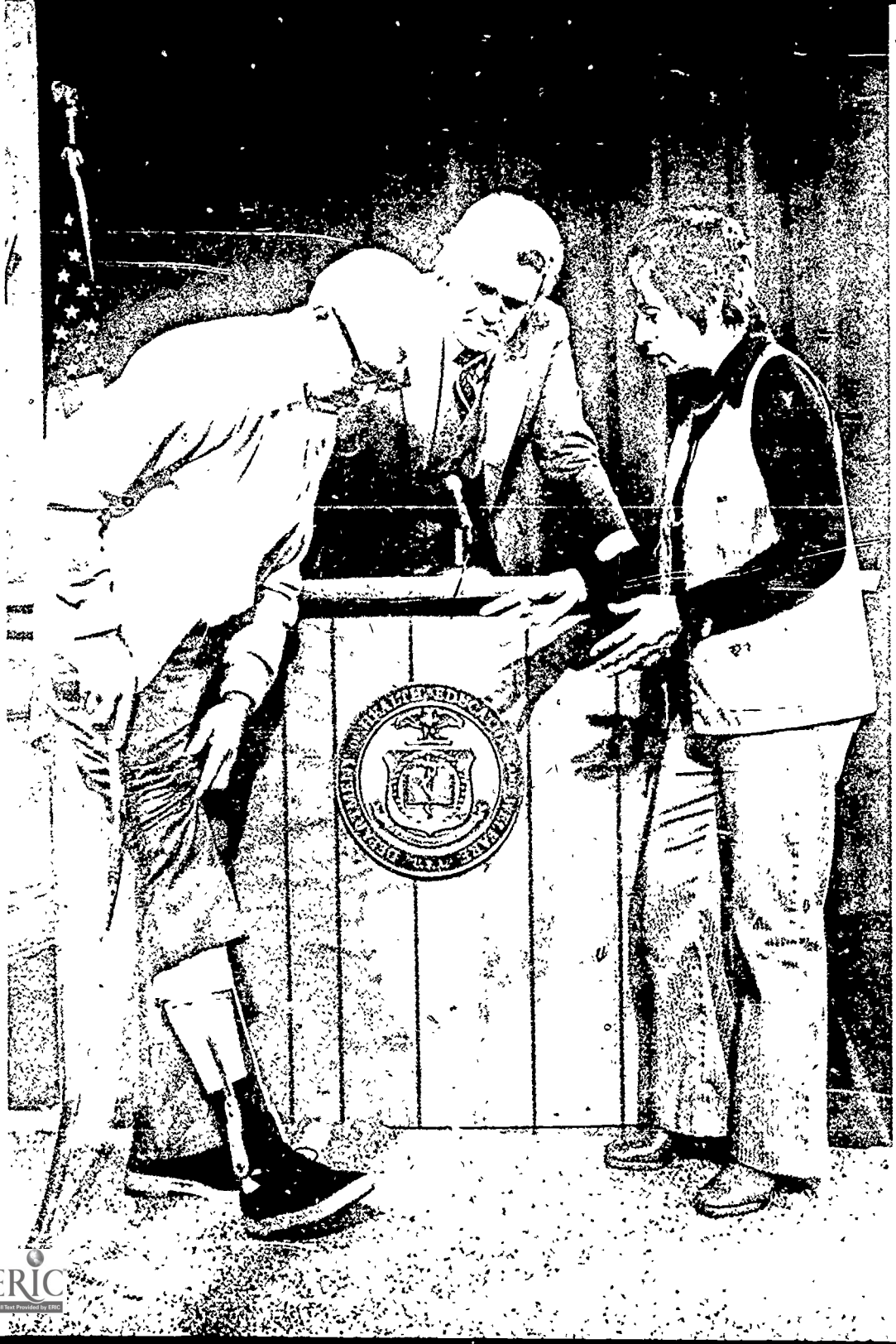

REPRESENTATION AT A SOCIAL SECURITY HEARING: FOCUS ON DISABILITY

TABLE OF CONTENTS

PREFACE

This Handbook is part of a packet designed to teach paralegals how to represent claimants at a Social Security administrative hearing. There is an accompanying 30 minute, 16mm color film on a simulated hearing, which is available for training purposes, "Paralegal Advocacy. Client Representation at a Social Security Administrative Hearing".

This packet is part of a training series being developed by the Senior Citizens Program of California Rural Legal Assistance. The funding for the series came from the Administration on Aging, Department of Health, Education and Welfare, through the National Paralegal Institute of Washington, D.C.

The purpose of this series is to train older persons as paralegals. The term "paralegal" refers to a person who assists a lawyer in the delivery of legal services. Other names include legal assistant, legal interviewer, and lay advocate. The long-range goal of the agencies involved in the funding and development of these materials is the promotion of new careers for older persons and the expansion and improvement of legal services for the elderly.

Other components in the series[1] are:

1) The Santa Cruz Story: A handbook and film on how to set up a legal services office using older persons as paralegals in delivering legal services to the elderly.

2) Paralegal Interviewing: A film and handbooks for trainers and trainees designed to teach interviewing techniques in a legal setting.

3) Advocate's Handbook on SSI: Written material on the new federalized welfare program for adults called "Supplemental Security Income." A 25 minute video-tape is also available overviewing the major concepts of the SSI program.

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1. For information on acquiring these materials, see Bibliography, Appendix A, p. 88.

INTRODUCTION

This Handbook is designed primarily for paralegal advocates. Its purpose is to:

- Summarize the major legal concepts governing the determination of disability under two Federal programs: OASDI and SSI. Advocate tips are provided as practical guides for meeting the difficult criteria for establishing disability.

- Act as a resource and reference manual to facilitate a more efficient and effective use of the primary legal sources, the statute and regulations. Therefore, cites to the statute and regulations governing OASDI/SSI disability appear throughout the Handbook.

- Explain the Social Security administrative appeals process.

- Present concrete suggestions on how an advocate can effectively represent clients at Social Security administrative hearngs. Stress is placed on the roles and functions an advocate plays before, during, and after the hearing.

The Handbook is also designed for paralegal trainers. The Handbook, together with the film, provides the essential materials for intensive training programs not only on the substantive law governing disability but also on the necessary skills in preparing and actually presenting a case at a hearing.[1]

Before getting into the substance of the Handbook, it is important to understand the rationale for developing a Handbook on a Social Security Administrative hearing and on the substantive issue of disability.

1 The National Paralegal Institute has developed an intensive training curriculum on the SSI Program with emphasis on disability. The "Keefauver Case" is also designed for training in the advocate skills of preparing and presenting a case at a Social Security administrative hearing. For more information contact NPI, 2000 P St., N.W., Washington, D.C. 20036, (202) 872-0655.

SOCIAL SECURITY ADMINISTRATIVE HEARINGS AND DISABILITY

For the past 40 years, the Social Security Administration (SSA) has administered the largest income maintenance program in this country Old Age, Survivors, and Disability Insurance. OASDI is an insurance program which provides protection for workers employed in covered industries and their families against income interruption for reasons of disability, old age, or death. Beginning in January, 1974, the Social Security Administration also took on responsibility for administering an income maintenance program for blind, disabled, and aged persons of limited or no income and resources, who either were not covered under OASDI or whose benefits were so low that they did not provide for basic survival needs. This program is called the Supplemental Security Income program (SSI) and is actually a federalized welfare program.

For both the OASDI and the SSI programs, the structure of the appeals process is the same, with minor variations at the reconsideration level. At the administrative hearing level, the rules and procedures are the same. Therefore, an administrative hearing within the Social Security system was chosen for this Handbook because it potentially affects the rights of 32 million Americans.

Another important similarity between the two programs is that they provide income for disabled persons and their disability tests are identical. Since the experience in the OASDI program is that 80% of the appeals concern the issue of disability, it seemed logical to assume that the appeals in SSI would also primarily center on that issue. Consequently, disability was chosen as the problem around which to learn how to represent a client at an administrative hearing. Of course, the skills learned are transferable to appeal situations concerning other issues.

Chapter 1
SUMMARY OF DISABILITY LAW

The purpose of this summary is to present those issues in the disability law that advocates will most frequently confront in representing clients at Social Security administrative hearings. Therefore, the focus is on the basic definition of disability, the legal standards and tests that must be met to substantiate a claim for disability benefits, and advocate tips. And finally, in order to provide understanding on a practical level, the disability tests are applied to an actual case, that of Jack Keefauver, the claimant in the hearing film.

The major elements that will be explained are:

I. Definition of Disability

II. Medical Test

III. Employability Test

IV. Application of Disability Tests to Keefauver Case

I. DEFINITION OF DISABILITY

"Disability" is a technical, legal term. The law defines "disability" in terms of the tests or criteria an individual must meet before becoming entitled to benefits. This section will focus on the most basic definition of disability which applies to the majority of claimants.

The following sections will discuss in detail the major "tests" set down in the law and regulations.

The applicable statutory law for Title II of the Social Security Act (OASDI) is found in 42 U.S.C.A. § § 401 *et seq.* with the accompanying interpretive regulations appearing in the Code of Federal Regulations, Volume 20, § § 404 *et seq.* The applicable statutory law for Title XVI of the Social Security Act (SSI) is found in 42 U.S.C.A. § § 1381 *et seq.* The regulations governing the SSI program are not final

but are presently being published in tentative form in the Federal Register. Upon finalization, however, all of the SSI regulations will be published in the Code of Federal Regulations, Volume 20, §§416 *et seq.* Cites to both programs will be provided for the definitions that appear in this Handbook.

Another essential resource for advocates is the Social Security Administration's Claims Manual.[1] The Claims Manual is the operative law for District Office personnel. It is continually updated through official "Transmittal Sheets". Policy guidelines pertinent to the SSI program are integrated into existing parts on the OASDI program. For instance, disability for both programs is dealt with primarily in Part 6 of the Claims Manual. Instructions unique to the SSI program are contained in Parts 11, 12 and 13. Please note the Claims Manual is available to advocates at the District Office.[2]

A. General Definition

The law governing both the OASDI and the SSI program defines "disability" as:

> *inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than twelve months.* (Title II: 42 U.S.C.A. §§416 (i) (1), 423 (d) (1) (A) and 20 C.F.R. §404.1501 (a) (i). Title XVI: 42 U.S.C.A. §1382c (a) (3) (A) and 20 C.F.R. §416.901 (b) (1).)

For purposes of this definition,

> *an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him or whether he would be hired if he applied for work...* (Title II: 42 U.S.C.A. §423 (d) (2) (A). Title XVI: 42 U.S.C.A. §1382c (a) (3) (B).)

1. See Bibliography, Appendix A, p. 88, for references to other resource materials.

2. Legal services offices can obtain free copies of Parts 12, 13 and pertinent sections of Part 11 from the National Senior Citizens Law Center, 1709 W 8th St, Los Angeles, California 90017, (213) 484 3990. For other agencies or individuals, the cost of these Claims Manual Parts is $15.00 a year

Besides the general definition of disability, advocates should be aware that there are more specific definitions of disability that pertain only to certain types of applicants. In general the disability tests for widows, widowers, and divorced wives of insured workers are the most restrictive and those for the blind are the most liberal. For instance, there is no employability test for the blind in the SSI program.

B. Specific Definitions for OASDI Disability

1. Blind. (42 U.S.C.A. § 416 (i) (1), 423 (d) (B) and 20 C.F.R. § § 404.1501 (a) (ii), 404.1501(b) (ii); 404.1503.)
2. Disabled Children of Insured Worker. (42 U.S.C.A. § § 402(d), 402(s) and 20 C.F.R. § 404.320.)
3. Widows, Widowers, Divorced Wives of Insured Worker. (42 U.S.C.A. § § 416 (c) (d) (g), 423 (d) (2) (B) and 20 C.F.R. § § 404.1501(a) (iii), 404.1504.)

C. Specific Definitions for SSI Disability

1. Blind. (42 U.S.C.A. § 1382c (a) (2) and 20 C.F.R. § § 416.901 (d), 416.903.)
2. Children Under 18. (42 U.S.C.A. § § 1382c (a) (3) (A), 1382c (c), and 20 C.F.R. § § 416.901 (b) (1), 416.904.)
3. Recipients of Prior State-Administered Welfare Program. (AD or ATD) (42 U.S.C.A. § 1382c (a) (3) (A) and 20 C.F.R. § 416.901 (b) (2).)

II. MEDICAL TEST

Existence of Impairment(s): *Medically Determinable Physical or Mental Impairment(s)*

Duration of Impairment(s): *Result in Death or Last 12 Continuous Months.*

Besides meeting all other eligibility requirements,[1] the claimant must meet the "medical test." Generally, in order to meet the medical test, a claimant must have: (1) a "medically determinable" physical or mental impairment(s); (2) that can be expected to last at least 12 continuous months or result in death.

The claimant has the burden of proving through appropriate medical evidence the existence, nature, probable duration, and severity of his physical or mental impairment(s).

A Existence of Impairment(s): *Medically Determinable Physical or Mental Impairment(s).* (Title II: 42 U.S.C.A. §§416 (i) (1), 423 (d) (1) (A), 423 (d) (3), and 20 C.F.R. §§404.1501 (c), 404.1523-404.1524. Title XVI: 42 U.S.C.A. §1382c (a) (3) (C) and 20 C.F.R. §416.901 (c).).

The existence, nature, probable duration, and severity of a claimant's physical or mental impairment(s) must be "medically determinable." Primary consideration, however, is given to the severity of the individual's impairments. (Title II: 20 C.F.R. §404.1502 (a) and Title XVI: 20 C.F.R. §416.902 (a).) An impairment is "medically determinable" if it results from:

> *anatomical, physiological or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.* (Title II: 42 U.S.C.A. §423 (d) (3) and 20 C.F.R. §404.1501 (c). Title XVI: 42 U.S.C.A. §1382c (a) (3) (C) and 20 C.F.R. §416.901 (c).)

1 For a thorough analysis of the SSI eligibility criteria and program, obtain a copy of *An Advocate's Handbook on the Supplemental Security Income Program* See Bibliography, Appendix A, p. 88.

A "medically determinable" impairment is one that is established by a doctor using acceptable techniques of the medical profession. Note, there is no explicit legal requirement stating that the impairment(s) be established by "objective" clinical or laboratory diagnostic techniques. While proof by "objective" medical evidence is the safest course, the claimant's "subjective" symptoms, complaints, and experiences of pain often form not only the basis for a doctor's diagnosis but can also establish the claimant's inability to perform "significant functions". (See *Advocate Tips*, #I, p. 17.)

Medical evidence is the critical factor in obtaining disability benefits. It must provide a comprehensive and detailed description of the nature, duration, and limiting effects of the individual's physical or mental impairment(s). This medical evidence should also describe the severity of the individual's impairment in relation to his ability to perform "significant functions" such as the capacity to sit, stand, or move about, travel, handle objects, hear or speak, and in cases of mental impairment, the ability to reason or make occupational, personal, or social adjustments. (Title II: 20 C.F.R. §404.1524 (c) and Title XVI: 20 C.F.R. §416.924 (b).)

If sufficiently comprehensive and detailed, the following types of reports can be considered appropriate medical evidence[1] in establishing that a claimant's impairments are disabling. Such evidence includes:

1. Reports signed by a doctor. (Title II: 20 C.F.R. §404.1524 (a) and Title XVI: 20 C.F.R. §416.924 (a) (1).)
2. Certified copies of medical records of a hospital or other medical institution. (Title II: 20 C.F.R. §404.1524 (b) and Title XVI: 20 C.F.R. §416.924 (a) (2).)
3. "Other [medical] evidence of probative value", such as reports of clinical findings (of the individual's history, physical or mental status examination or both), laboratory findings, diagnoses, and treatment prescribed and response, etc. (Title II: 20 C.F.R. §404.1524 (c) and Title XVI: 20 C.F.R. §416.924 (a) (3).)
4. Statements and Conclusions by doctors. Statements by doctors in

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1 See *Advocate Tips*, #D, p. 14, for use as evidence of other organizations' and agencies' determinations of disability.

the form of supporting letters, declarations, or affidavits should state the cause, probable duration, and severity of the impairment(s), as well as specific and complete clinical findings to support these medical conclusions. Conclusions not supported by medical evidence will have no probative[1] value, e.g.: "Mr. Keefauver is permanently and totally disabled and should be eligible to receive disability benefits." (Title II: 20 C.F.R. §404.1526 and Title XVI: 20 C.F.R. §416.926.)

5. Consultative examinations requested by the Social Security Administration. After giving due notice, the Social Security Administration can request that an applicant or a beneficiary of disability benefits submit to certain mental or physical examinations or tests. The examinations will be paid for by the Social Security Administration and conducted by a doctor designated by them. Failure or refusal to submit to such tests and/or examinations without good cause is a basis for determining that an individual is not under a disability.[2] (Title II: 20 C.F.R. §§404.1527-404.1528 and Title XVI: 20 C.F.R. §§416.927-416.928.)

B. Duration of Impairments: *Result in Death or Be Expected to Last 12 Continuous Months.* (Title II: 42 U.S.C.A. §§416 (i) (1), 423 (d) (1) (A) and 20 C.F.R. §404.1501 (a) (i). Title XVI: 42 U.S.C.A. §1382c (a) (3) (A) and 20 C.F.R. §416.901 (b) (1).)

Medical evidence must also be produced to show that the individual's impairment or impairments can be expected to result in death or has lasted or can be expected to last for a continuous period of twelve months.

NOTE: A person may be able to satisfy this component of the "medical test" even if he has had his impairments for less than twelve months or if his impairments are considered to be remediable. The law requires only that there is sufficient medical evidence to indicate that the impairment(s) can be expected to last for a continuous period of twelve months.

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1. Evidence of "probative" value simply defined means "evidence that serves to prove a point."

2. Note, there is no provision for allowing a claimant to choose the physician who examines him on government expense. However, this may be requested for the record and could be an issue to be tested in court. (See also *Advocate Tips,* #E5, p. 15.)

III. ADVOCATE TIPS FOR MEDICAL TEST

A Check to see if the claimant's impairment(s) are listed in the OASDI/SSI regulations governing disability. The impairments listed in the Appendix cover each of the major body systems. (Title II: 20 C.F.R. §§404.1502 (a), 404.1506, and Appendix Subpart P. Title XVI: 20 C.F.R. §§416.902 (a), 416.906, and. Appendix Subpart I.) If the impairment(s) are not listed, determine whether they might be equivalent in severity and duration to the listed impairments. (Title II: 20 C.F.R. §§404.1502 (a) and 404.1505. Title XVI: 20 C.F.R. §§416.902 (a) and 416.905.) If an advocate can prove through appropriate medical evidence that the claimant suffers from a listed impairment or impairments or their equivalent, he has met the medical test and will be eligible to receive disability benefits. In this instance, the claimant is "presumed" to have met the "employability test."

B Get a complete medical history from the claimant. Look carefully for evidence of other impairments not previously mentioned by him.

C Obtain all hospital and medical records. Basically, advocates should make sure that the hospital and medical records meet the criteria of probative medical evidence. It is also important to carefully analyze the records to determine the strengths, weaknesses, discrepancies, and gaps in the evidence that they contain. Medical records are often incomplete, sometimes inaccurate, and are written in a way that is not understandable to a layman. Before seeking additional medical reports and/or doctor's statements, it is useful to have as complete a grasp of the claimant's medical history as possible. One way to achieve this is to translate the medical terms into laymen's language by use of medical dictionaries such as Dorland's *Illustrated Medical Dictionary* or *The Merck Manual of Diagnosis and Therapy*. Gray's *Attorney's Textbook of Medicine* can also be useful.

D. Use other organizations' and agencies' determinations of disability as evidence. Although the Social Security Administration is not bound by non governmental organizations' or other governmental agencies' determinations of disability (Title II 20 C.F.R. §404.1525 and Title XVI: 20 C.F.R. §416.925), advocates should use such determinations which are supported by specific and complete clinical and laboratory findings in regard to the severity and probable duration

of the claimant's impairments. This is evidence that, should have probative value. For instance, Veterans' Administration findings of permanent total, non service connected disability should have some probative value in view of the similarity in definition of "disability" in the Veterans' Act (38 U.S.C.A. §502 *et seq.*) and the Social Security Act.

E. Arrange for additional medical examinations if the claimant has not had one within the last three to six months prior to the hearing. Additional medical reports are also warranted if the claimant's condition has gotten worse. Advocates can assist in the development of medical reports by stating in a letter to the examining doctor all the points the report should cover. It is also helpful to enclose with the letter a copy of the regulation governing "Medical and Other Evidence" (Title II: 20 C.F.R. §404.1524 and Title XVI: 20 C.F.R. §§416.924), and a copy of the sections governing listed impairments where appropriate.

Advocates should make sure that:

1. All reports are supported by clinical and diagnostic findings, not mere medical conclusions.

2. Reports state the existence of impairment(s), probable duration, and stress the severity of the impairments in functional terms, i.e., description of the individual's capacity to perform significant functions such as sitting, standing, moving about, handling objects, etc.

3. Reports note the deteriorating effect of the impairment, how it aggravates other physical or mental impairments, and how it affects the claimant's general health.

4. Reports indicate the type of medication the individual is taking, the effects it might have on his functioning, as well as the effects and possible dangers of any other proposed forms of treatment.

5. One of the reports at least should be from a medical specialist in the area of the claimant's major impairment. This is especially important if the only other medical reports are from general practitioners. Practically, ad

vocates should develop a list of medical specialists who are patient/client oriented and who will give the claimant a thorough examination for all his possible impairments. The Social Security Administration and the State Agency (SA–DDU) have listings of board certified medical specialists that they use in evaluating disability claims. Advocates should secure those lists and try to determine whether doctors on it may be sympathetic to claimants' rights. It might also be important to try to get sympathetic doctors you know onto those lists.

F. Stress a combination of impairments which if considered separately would not be of sufficient severity to make a person eligible for disability benefits. This is a practical and powerful strategy that advocates frequently use. For instance, combine the claimant's "subjective" symptoms, complaints, and experiences of pain with the "objective" medical evidence, especially where the medical evidence is inconclusive. It is also important to consider as a strategy the combination of physical and mental impairments. (See G below.)

In trying to establish SSI disability, advocates should be cautious in using alcoholism or drug addiction (not considered in themselves disabling) in combination with other physical or mental impairments. If there is no other way to secure benefits, explain the restrictive conditions SSI imposes on addicts and alcoholics and get the claimant's consent before proceeding. These two restrictive conditions are:

1 Drug addicts and alcoholics must accept "appropriate treatment" for their addiction or alcoholism as a condition to receiving SSI disability benefits. (42 U.S.C.A. §1382 (e) (3) (A) and 20 C.F.R. §416.982.)

2 They must also agree to the appointment of a "representative payee". (42 U.S.C.A. §1383 (a) (2) and 20 C.F.R. §416.601.)

NOTE: Although these conditions are onerous, there are mitigating factors advocates can apply to benefit the claimant. (See 20 C.F.R. §§416.981, 416.983, 416.985.)

G. Psychological impairments. Another aspect of the combination of impairments' strategy is to prove the existence of mental impairments that diminish the claimant's ability to reason or make occupational, personal or social adjustments. Severe physical problems can be a cause for psychological malfunction-

ing. It can be argued that **in combination** these mental and physical impairments make it impossible for the person to perform "significant functions". Since this is a delicate area, advocates should use the utmost tact and sensitivity in pursuing this strategy.

H. **Remediable Impairments.** Whether or not an individual's impairment(s) can improve through treatment should be completely irrelevant to a decision to grant disability benefits as long as it can be shown that the impairment(s) can be expected to last twelve continuous months and be of such severity that the individual cannot perform his former work and is unable to engage in substantial gainful work activity. However, if treatment can be expected to restore a disabled person's ability to work, the Social Security Administration might require the person to undergo that treatment. Willful failure to follow a prescribed treatment might lead to a cessation of disability benefits. An advocate can argue that a claimant can refuse remedial treatment for good cause. (Title II: 20 C.F.R. §404.1507 and Title XVI: 20 C.F.R. §416.907.)

I. **Subjective Experiences of Pain.** The claimant's experience of pain and discomfort in performing normal functions of everyday living is important and should be considered in combination with the other evidence in relation to showing that the claimant cannot perform "significant functions". Advocates should highlight such "subjective" evidence especially where the "objective" medical evidence is inconclusive.

Advocates can encourage claimants to make a **record of their daily activities,** noting especially activities they perform with great difficulty or can no longer perform at all. This information will indicate key facts that must be established by the claimant's direct testimony and supported by the testimony of other witnesses. (Refer to *Conducting the Direct Examination of a Lay Witness,* #C, p. 68.)

IV. EMPLOYABILITY TEST

- Inability to Engage in Previous Work or Equivalent

  Inability to Engage in Substantial Gainful Work Which Exists in the National Economy

Besides meeting the "medical test" and all other eligibility criteria, claimants who do not have an impairment(s) listed in the regulations nor its equivalent, can still be entitled to disability benefits if they can meet the "employability test."

> *Conditions which constitute neither a listed impairment nor the medical equivalent thereof likewise may be found disabling if they do, in fact, prevent the individual from engaging in any substantial gainful activity. Such an individual, however, shall be determined to be under a disability only if his physical or mental impairment or impairments are the primary reason for his inability to engage in substantial, gainful activity.* (Title II: 20 C.F.R. §414.1502 (b) and Title XVI: 20 C.F.R. §416.902 (b).) (Emphasis added.)

In order to meet the "employability test," a claimant must be able to show that because of the severity of his impairments and the effect they have on his ability to perform "significant functions,"[1] he is (1) unable to do his previous work or its equivalent; and (2) unable to perform any other type of substantial gainful work which exists in the national economy. In other words, a claimant does not have the physical ability, the residual functional capacity, or the vocational skills to perform any new type of job. Note, however, this is an "employability" test, not an "employment" test. The focus is on whether the claimant has the physical, functional and/or vocational skills to perform certain types of jobs, not on whether he would be hired in the real job market to perform such work. Although this test is onerous, there are mitigating factors that will be discussed in more detail in the *Advocate Tips*, p. 22.

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1 Examples of "significant functions" are "*moving about, handling objects, hearing, speaking, reasoning, and understanding*" (Title II 20 C.F.R. §404.1502 (b) and Title XVI 20 C.F.R. §416.902 (b).)

A. **Inability to Perform Previous Work.** (Title II: 42 U.S.C.A. §423 (d) (2) (A) and 20 C.F.R. §404.1502 (b). Title XVI: 42 U.S.C.A. §1382c (a) (3) (B) and 20 C.F.R. §416.902 (b).)

The claimant has the burden of proving that his physical or mental impairment or impairments are of such a severity

> *that he is not only unable to do his previous work or work commensurate with his previous work in amount of earnings and utilization of capacities, but cannot, considering his age, education, and work experience, engage in any other kind of substantial, gainful work which exists in the national economy* . . . (Title II: 20 C.F.R. §404.1502 (b) and Title XVI: 20 C.F.R. §416.902 (b).) (Emphasis added.)

B. **Inability to Engage in Substantial Gainful Work Which Exists in the National Economy.** (Title II: 42 U.S.C.A. §423 (d) (2) (A) (4) and 20 C.F.R. §§ 404.1502 (b) (c) (d) (e) and 404.1532–404.1534. Title XVI: 42 U.S.C.A. §1382c (a) (3) (B) and 20 C.F.R. §§416.902 (b) (c) (d) (e), 416.932–416.923.)

After the claimant has established that he can no longer work at his previous job, or an equivalent job, he still must show that he is unable to engage in substantial gainful work activity. In Title II disability cases, the courts have held consistently that the Social Security Administration has the burden of proving that jobs exist in the national economy which this particular claimant could perform. The Social Security Administration meets this burden of proof primarily through the use of the *Dictionary of Occupational Titles* (D.O.T.)[1] and through the testimony of vocational experts. (See *Strategist*, III, #F, p. 45.) In determining disability for the SSI program, there seems to be an administrative practice of listing three alternative jobs from the D.O.T. that the individual can allegedly perform. Therefore, **claimants and representatives should always be ready to counter the evidence Social Security presents.** This onerous component of the "employability test" is defined in the law and regulations:

> . . *(the claimant) cannot, considering his age, education and*

1. *The Dictionary of Occupational Titles* is a U.S. Labor Department publication composed of two volumes and two supplements. Volume I lists over 35,000 job descriptions, Volume II, *Worker Trait Requirements*, and Supplements A and B provide data regarding the physical demands, working conditions, and training time as they apply to specific occupations.

work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual) "work which exists in the national economy" means work which exists in significant numbers, either in the region where such individual lives or in several regions of the country. (Title II: 42 U.S.C.A. §423 (d) (2) (A) and 20 C.F.R. §404.1502 (b). Title XVI: 42 U.S.C.A. §1382c (a) (3) (B) and 20 C.F.R. §416.902 (b). (Emphasis added.)

C. Additional Aspects of Employability Test

The following points further highlight the onerous nature of the "employability test."

1. **Inability to engage in substantial gainful work activity must be primarily due to physical or mental impairments.** Disability benefits will not be given if a person is physically capable of engaging in substantial gainful work activity but is not able to be hired for a job because of age, ethnic background, unavailability of work in his local area, cyclical economic conditions, minimal educational background, etc. (Title II: 20 C.F.R. §404.1502 (b) (d) (e) and Title XVI: 20 C.F.R. §416.902 (b) (d) (e).)

2. If an eligible individual for OASDI and/or SSI disability benefits **refuses to accept, without good cause, vocational rehabilitation services his benefits will be suspended.** (Title II: 42 U.S.C.A. §422 (b) (1) and 20 C.F.R. §404.422. Title XVI: 42 U.S.C.A. §1382d (b) (c) and 20 C.F.R. §§416.1703, 416.1705, 416.1707.)

3. In order for a work activity to be "substantial," it is not necessary that it be performed on a full time basis. Work activity performed on a part-time basis may also be substantial. (Title II: 20 C.F.R. §404.1532 (b) and Title XVI: 20 C.F.R. §416.932 (b).)

4. Whatever money a claimant earns even from infrequent employment will be evaluated to determine whether that individual is capable of engaging

in substantial gainful work activity. (Title II: 20 C.F.R. § 404.1534 and Title XVI: 20 C.F.R. § 416.934.) Basically, if any individual earns in excess of $200 per month he is presumed to be able to engage in substantial gainful work activity unless he can prove to the contrary. (Title II: 20 C.F.R. § 404.1534 (b) and Title XVI: 20 C.F.R. § 416.934 (b).) On the other hand, earnings of $130 or less per month show that the individual is unable to engage in substantial gainful work activity. (Title II: C.F.R. § 404.1534 (d) and Title XVI: 20 C.F.R. § 416.934 (d).) Earnings at the rate of $130 to $200 per month, however, show that the individual has some capacity to engage in substantial gainful work activity. (Title II: 20 C.F.R. § 404.1534 (c) and Title XVI: 20 C.F.R. § 416.934 (c).) Other criteria such as the nature of the work, the amount of money earned, severity of the individual's impairment, etc., are taken into account. For instance, persons earning $130 to $200 per month in sheltered workshops are usually considered to be unable to engage in substantial gainful work activity.

NOTE: Regardless of the amount of money an individual makes from work, including wages from a sheltered workshop, the Social Security Administration reserves the right to evaluate the claimant's performance. If they decide that the claimant's performance demonstrates an ability to engage in substantial gainful activity, he could be disqualified from benefits.

V. ADVOCATE TIPS FOR EMPLOYABILITY TEST

The "employability test" is onerous and highly complex. The following advocate tips focus on basic strategies by applying major exceptions to the "employability test."

A. **Know Client's Entire Work History.** This involves knowing the different types of jobs the client has done over the past 20 or 30 years; how long he has worked in each type of job; whether the jobs can be categorized as skilled, semi-skilled, or unskilled; what degree of education, training, skill, or experience is needed to perform these different types of work; and the amount of physical and/or mental exertion involved in actually performing each type of work.

B. **Inability to Do Previous Work or Its Equivalent.** The advocate's evidence that the client is unable to perform his previous work should come primarily from the **medical evidence** stating the individual's inability to perform the "significant" physical and mental activities demanded by the particular type of job. This evidence can be supported by the direct testimony of the claimant, and perhaps also by the testimony and/or statements of his former employers.

With a thorough knowledge of the claimant's work experience and earnings record, the advocate should be able to argue without much trouble that the claimant cannot perform any other type of work which is equivalent to his previous work in amount of earnings and use of his capacities.

C. **Substantial Gainful Work Activity.** In attempting to prove that their client cannot engage in "substantial gainful activity," advocates should:

1. Argue that the work activity must be **both substantial and gainful.** "Substantial work activity" involves the performance of significant physical or mental duties, or a combination of both, productive in nature . . . (Title II: 20 C.F.R. §404.1532 (b) and Title XVI: §416.932.) "Gainful work activity" is activity for remuneration, or profit or intended for profit whether or not a profit is realized to the individual performing it . . . (Title II: 20 C.F.R. §404.1532 (b) and Title XVI: 20 C.F.R. §416.932.)

NOTE: Work performed in caring for one's own household, children, etc. does not in itself constitute substantial gainful activity nor does it establish the

ability to perform such activity. If necessary, analyze carefully the tasks involved in housekeeping and caring for children paying special attention to the amount of physical and mental exertion involved in actually performing each task. Argue that the claimant does not and cannot perform the normal range of these duties and the more difficult and strenuous aspects are done by spouse, older children, grandchildren, relatives, or neighbors. Decide whether to use any of these individuals as lay witnesses or to secure from them written statements or affidavits. (See *Advocate as Strategist*, #B, p. 44.)

2. If the claimant worked while under a disability, point out where possible that the disability was aggravated or even became worse because of working. Support this claim with medical evidence.

3. Always stress the claimant's total situation, his age, education, and work experience, as well as his impairments and their effect on his inability to perform "substantial gainful work activities." Emphasize how these combined factors affect the adequacy of the claimant's performance. It can be argued that the claimant is unable to perform ordinary or simple tasks satisfactorily without supervision or assistance beyond that usually given other individuals performing similar work. This alone may constitute evidence of an inability to engage in substantial gainful activity. (Title II: 20 C.F.R. §404.1532 (d) and Title XVI: 20 C.F.R. §416.932 (d).)

4. Argue that substantial work activity is not "made work," i.e., work involving the performance of minimal or trifling duties that make little or no demand on the individual claimant and are of little or no utility to an employer or to the operation of a business.

5. Argue a common sense definition of "gainful."

D. Work that Exists in the National Economy. In attempting to prove that there are no types of jobs in the national economy that this particular claimant can do, advocates can:

1. Argue that since the Social Security Administration has produced no proof that the individual can engage in work that exists in the national economy, he is entitled to disability benefits.

2. Argue that the Administration did not take into account the entire situation of this particular claimant. Stress the uniqueness of the claimant

including his impairment or combination of impairments, their effect on his ability to perform his previous work or any other type of substantial gainful work activity, as well as his age, education, and complete work experience.

NOTE: Stress the claimant's age in showing that he is unable to engage in substantial gainful work that exists in the national economy. Statistics indicate that the prevalence and severity of disability accelerate with age. Severe disability is approximately twice as great among those aged 35-44 as among those aged 18-34. Three times as great among those aged 45-54, and five times as great among those aged 55-64. (Social Survey of the Disabled, Report No. 3, Social Security Administration, DHEW, July, 1968.)

3. Argue that the jobs proposed by the Social Security Administration that the claimant can do are isolated jobs of a type that exists only in very limited numbers or in relatively few geographical locations, and therefore cannot be considered work which exists in the national economy. Work "exists in the national economy" with respect to any individual, when such work exists in significant numbers either in the region where such individual lives or in several regions of the country. (Title II: 42 U.S.C.A. §423 (d) (2) (A) and 20 C.F.R. §404.1502 (b) and Title XVI: 42 U.S.C.A. §1382c (a) (3) (B) and 20 C.F.R. §416.902 (b).)

4. Argue that the claimant has no previous experience in the suggested new jobs nor has any transferable skills applicable to the new jobs. Stress this especially where individuals have marginal education and the majority of their work experience has been arduous unskilled physical labor. (Title II: 20 C.F.R. §404.1502 (c) and Title XVI: 20 C.F.R. §416.902 (c).)

5. Whenever possible, stress that the claimant has been unsuccessful in efforts to find work and/or be enrolled in job training or rehabilitation programs. Describe in detail what happened and if possible secure statements indicating why the claimant was not hired or enrolled.

6. If the Social Security Administration presents evidence of work that exists in the national economy that the claimant could potentially do, argue that the claimant needs to be retrained in order to engage in such work. Therefore, the claimant should be entitled to disability benefits until he has learned the skills needed to perform the proposed job(s).

The claimant's test results from Vocational Rehabilitation or Community or Junior Colleges running job training programs could support the fact that the claimant does not now possess the necessary skills to do the proposed jobs. In some instances, such evidence might even show that the person is untrainable.

7. Argue for a closed period of disability. A "closed period of disability" is when the starting and terminating dates of disability are determined simultaneously. For instance, a judge's decision may state that the claimant is determined to be under a disability from May 1, 1971, to July 31, 1972.

   This argument can be particularly effective if the evidence clearly shows that the claimant's disability has ended prior to the hearing. By limiting the request for disability benefits from the time the disability began to the time the claimant's medical condition significantly improved might increase the claimant's chances of at least securing some retroactive benefits.

   For many claims, however, the evidence will not be so clear-cut. Nevertheless, the closed period of disability argument can still be used in addition to a request for an open period of disability, especially in cases where the evidence might be too weak or inconclusive to clearly prove disability for an open period.[1] After the advocate makes an argument for an open period, he can then present a closed period argument as an alternative for the judge's consideration.

   The closed period strategy should also be considered in appealing judge's decisions to the appeals council.

8. Argue for a period of trial work. Individuals eligible for OASDI and/or SSI disability benefits can continue to receive benefits for as long as nine months while engaging in a period of trial work. Generally, the Social Security Administration does not evaluate work performed during this period as evidence a person can engage in substantial gainful work activity. Note, a person is limited to only one period of trial work for each period of disability. (Title II: 20 C.F.R. §§404.1536–404.1538 and Title XVI: 20 C.F.R. §§416.936–416.938.)

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1 Entitlement to an open period of disability is obviously more advantageous to the claimant. The claimant not only receives retroactive benefits but also monthly benefits at least until the time the claim is reviewed. In the OASDI program, for instance, it can take as long as two years before disability claims are reviewed. Therefore, advocates should exhaust all other alternatives before using the closed period of disability argument.

VI. APPLICATION OF DISABILITY TESTS TO KEEFAUVER CASE

This section will briefly analyze the Keefauver case viewed in the filmed hearing in relation to how he met the "disability tests." The focus here is on the information used to meet these tests, not on the style and strategy used by the advocate to present the information.

A. Synopsis of Keefauver Case

Jack Keefauver is 55 years old. He has a tenth grade education and has had no other formal or specialized training. He has worked in the building trades all his life, primarily as a painter.

On February 3, 1973, he fell two stories from a paint scaffolding and crushed his right foot. Since that time, he has had two major operations on his right foot and wears a special brace and uses a cane to walk. His left foot is also crippled. It was partly fused in 1944 as a result of a gunshot wound in the war and has been damaged again because of the fall. In sum, Mr. Keefauver's impairments are so severe he has not been able to work since the accident. Consequently, he applied for OASDI disability benefits on July 10, 1973, then was denied entitlement initially and upon reconsideration. He applied for an administrative hearing which was held on March 19, 1974.

B. Application of Medical Test

Since Mr. Keefauver's impairments were not listed in the regulations nor medically equivalent, the majority of the evidence focused on the severity of his impairments, that is on how those impairments adversely affected his ability to perform significant functions of everyday living such as standing, walking, sitting, moving about, lifting, etc. Besides the medical evidence already in the hearing file, Dr. Prescott's report and Dr. Martin's reports were relied upon heavily as the main source of "medically determinable" evidence. Note, both doctors are board certified specialists and Dr. Martin's final report was February 12, 1974, a little more than a month before the hearing.

Basically, Mr. Keefauver met the medical test by demonstrating that his combined impairments were so severe that he was unable to perform "significant functions." The evidence produced was:

1. The impairments had existed for twelve continuous months from Febru-

ary 3, 1973, until March 19, 1974, the date of the hearing, and were expected to last for at least another two or three years.

2. It was shown that Mr. Keefauver was unable to perform the following "significant functions:"

   a. **Walking and standing:** Mr. Keefauver must wear an experimental leg brace. Dr. Prescott ordered that the brace be worn at least until October, 1974. Without the brace his foot tilts over to the side and his toes tend to tuck under the foot. Even with the brace Mr. Keefauver cannot walk or stand for more than two or three hours without painful swelling. In addition to the brace, he needs a cane to maintain balance when he walks.

   b. **Sitting:** Mr. Keefauver cannot sit for more than two or three hours without his feet becoming numb and swollen.

   c. **Driving:** Mr. Keefauver can't drive for more than two or three hours without his feet swelling and becoming numb. The brace is also awkward and inhibits full control.

   d. **Lifting:** Although Mr. Keefauver is able to help with the shopping, he is unable to lift, carry, or put away the groceries.

   e. **Everyday activities:** Mr. Keefauver is unable to do the yard work, household repairs, heavy household cleaning that he used to do.

   f. **Recreational activities:** Mr. Keefauver can no longer fish and golf because of his impairments.

3. The impairments are causing other medical problems that might require additional operations. Due to the operations on his right foot, Mr. Keefauver's circulation is poor and he is developing arthritis. The damage to his left foot has aggravated the prior war injury and has resulted in poor circulation accompanied by arthritis. In both feet, due to fused ankles, Mr. Keefauver is forced to walk in a way that forces his toes under his foot when he steps down. The doctor fears that hammertoe will develop and necessitate an operation on the toes of both feet. *(Hammertoe is where the toes turn in under the foot and lock there in place.)*

C. Application of Employability Test

The majority of the evidence to meet the employability test was provided by

the direct testimony of Mr. Keefauver. The medical evidence also linked his impairments to his inability to work as a painter. For instance, one of Dr. Martin's reports stated that Mr. Keefauver "had less than 25% of normal motion in either foot and therefore was precluded from ever returning to painting or any type of work which involved his being on his feet or climbing, such as on a ladder or scaffold."

1 Work as a painter was analyzed in relation to types of conditions and physical demands that it makes on a worker and why Mr. Keefauver's impairments made it impossible for him to do painting. Being a painter involved:

a **Carrying and lifting:** Painters must haul and set up scaffolding. Scaffolding is not only bulky and hard to handle but weighs up to 100 lbs. They must also carry tarps, ladders, and 5 gallon cans of paint weighing up to 90 lbs

b **Climbing and standing:** Painters must frequently work at heights on suspended scaffolding or on ladders. This demands balance and physical stamina. Basically, painting is done standing, kneeling, or sitting.

c. **Working conditions:** Construction sites with rough and uneven ground. Heights.

NOTE Paint foremen work in these conditions and the same physical demands are placed on them in setting up, inspecting, and moving from painting site to site Mr Keefauver testified that he sought employment as a foreman from some of his paint contractor friends He stated that they would not hire him because his impairments make it impossible for him to adequately and safely do that job .

2. In relation to other types of work, the Social Security Administration did not prove that there were any other jobs in the national economy which Mr Keefauver could do. The administrative law judge did some questioning related to this issue by asking Mr. Keefauver if he had any other specialized or vocational training and whether he was able to sit and work for long periods. These points were countered by the advocate with emphasis on State Vocational Rehabilitation's refusal to assist Mr. Keefauver primarily due to his age. Thus the factors of age (55), education, and work experience limited entirely to the building trades, especially painting, were the telling factors in combating the onerous effect of this aspect of the employability test.

Chapter 2
APPEALS PROCESS

ADMINISTRATIVE REVIEW

- Reconsideration
- Hearing
- Appeals Council

JUDICIAL REVIEW

- District Court
- Court of Appeal
- Supreme Court

The appeals process is the formal apparatus established by the Social Security Administration for the use of individuals who are not satisfied with a decision made by the Social Security Administration. This process has been developed over the years since the adoption of the right to a hearing by a 1939 amendment to the Social Security Act. SSI claimants have access to this same process, although there are some variations due to differences in the statute. Unfortunately, few individuals denied benefits utilize the appeals system. For example, statistics for OASDI disability cases for 1972[1] indicate that only 25% of claimants denied disability benefits filed a request for reconsideration. Of this group 37% were given a favorable decision. Claimants unsuccessful on the reconsideration level and who bothered to file for an administrative hearing were 50% successful.

The purpose of this overview is to give advocates an understanding of the administrative review process. The focus will be on the knowledge an advocate must have to protect his client's rights within the administrative appeals system. This section will contain three major elements:

I. Definition of Administrative Appeals Process
II. Definition of Judicial Review Process
III. Right to Representation

1 Note that disability cases made up about 80% of the appeals requests in the OASDI program for 1972

I. DEFINITION OF ADMINISTRATIVE APPEALS PROCESS

(Title II. 42 U.S.C.A. §405 (b) and 20 C.F.R. §§404.901–404.969. Title XVI. 42 U.S.C.A. §1383 (c) and 20 C.F.R. §§416.1401–416.1474.)

Administrative appeal is a process by which a dissatisfied claimant may request progressively higher levels of review of decisions adverse to him. In both the OASDI program and in the SSI program, each level of review is conducted independently with the authority to affirm, modify, or reverse any previous decision. The three levels of administrative appeal are: (1) Reconsideration; (2) Hearing; (3) Appeals Council review.

Since there is not much experience yet in the SSI appeals process, the focus will be on the potential within that process, with special emphasis on the reconsideration determination.

The following major characteristics apply throughout each stage of the administrative appeals process:

- Claimants have a **right to be represented** at the initial application level and at **every stage in the administrative appeals process.** (See Section III, *Right to Representation*, p. 37.)

  Requests for appeal must be **filed within certain time limits** or any decision of the Social Security Administration (initial, reconsideration, hearing, or appeals council decisions), will become **final and binding.** Advocates should note that these **time limits can be extended for good cause.** (Title II: 20 C.F.R. §404.958 and Title XVI: 20 C.F.R. §416.1474.)

  Requests for an appeal must be **made by the claimant** or by an authorized representative. The application for appeal must be **in writing** and **signed** by the claimant or an authorized representative and **filed at a Social Security office** or other officially designated place.

- Claimant has the **right to receive a written notice of any determination** stating the basis for that (adverse) decision and the right to appeal. Note, there are no time deadlines on the SSA for issuing determinations or decisions for either the OASDI or the SSI disability programs.

– Claimants must exhaust all administrative remedies before requesting judicial review. This can be a very time consuming process taking years in some cases.

Before administrative appeal can begin, however, the individual must receive a written decision called an "initial determination." "Initial determinations" are either initial application determinations[1] or post-eligibility redeterminations. (Title II: 20 C.F.R. §§404.902, 404.905–404.908 and Title XVI: 20 C.F.R. §§416.1403–416.1405.) If the claimant disagrees with the initial determination, he can then trigger the administrative appeals procedure by requesting a review (reconsideration) of that initial determination.

A. Reconsideration Determination
(Title II: 20 C.F.R. §§404.909–404.916 and Title XVI: 20 C.F.R. §§416.1408–416.1423.)

There are significant differences between the OASDI and the SSI reconsideration process. The reconsideration is more complex for SSI claims and provides advocates with an opportunity for advocacy at informal and formal conferences. Although there is no experience on the actual nature and conduct of these conferences, the suggestions for advocates contained in this Handbook should be valuable in representing a claimant at a conference.

1. Reconsideration of OASDI Disability Claims

For OASDI disability claims, the reconsideration determination is an independent case review of the claimant's initial determination conducted by the State Agency Disability Determination Unit (SA-DDU).[2] The reconsideration determination is based on the evidence submitted for the initial determination and any additional evidence requested by SA-DDU or submitted by the Social

1 Refer to Appendix C, p. 96 for chart depicting the basic steps in the application process for OASDI and SSI disability benefits.

2. The Secretary of Health, Education and Welfare contracts with State Agencies (SA) such as the Department of Vocational Rehabilitation to judge the medical evidence in determining whether an applicant is under a disability. In making these disability determinations, the SA DDU uses a manual developed by the Social Security Administration entitled, *Disability Insurance State Manual, Determination of Disability*. The manual sets down the broad requirements and objectives of the disability program. It also contains policies, procedures and guidelines for making disability determinations. (See Bibliography, Appendix A, p. 88.)

Security Administration, or by the claimant and/or his representative. Although it is possible to present oral and written evidence, this is primarily a "paper review."

2. Reconsideration of SSI Disability Claims

Case review is the basic procedure for conducting reconsideration review of disability cases in the SSI program. However, there are two additional procedures available: an informal conference and a formal conference.

The informal conference is conducted by the District Office and consists of the procedures specified in the case review. In addition it provides an opportunity for the claimant and/or representative to present witnesses and to review the evidence in the file. The formal conference consists of the procedures specified for the informal conference, and additionally, provides an opportunity for the claimant to subpoena adverse witnesses for the purpose of cross-examination. The person conducting such a conference must have had no prior involvement with the initial determination.

In both the informal conference and the formal conference, the claimant must receive 10 days prior notice of the conference and the conference must be held within 15 days from the date of the request. A summary record of the proceedings is prepared and becomes a part of the case file.

Which of these three procedures will be used is largely determined by whether the action is an initial application determination or a post-eligibility redetermination, and whether the issue is medical or non-medical in nature. In relation to disability claims, the following options are possible:

a. Initial Application Determinations

In reviewing initial application determinations of disability where non-medical issues are involved, the District Office conducts a case review. If the claimant makes the request, an informal conference is held. For claims involving medical issues, the State Agency Disability Determination Unit conducts a case review and at its option, can hold an informal conference.

b. Post-Eligibility Redeterminations

In reviewing **non-medical** post-eligibility redeterminations **where a reduction, suspension, or termination of benefits is involved,** the District Office must offer the claimant the opportunity for a formal conference to protect his **Goldberg v. Kelly** rights. The **Goldberg v. Kelly** decision prevents welfare benefits from being reduced, suspended, or terminated without due notice and without the opportunity for a hearing.

Reconsideration of **post-eligibility determinations** where **medical issues** are involved is **conducted at the administrative hearing level.**

NOTE. This is the only time in the appeals process that the reconsideration level is skipped. The Social Security Administration decided that medical issues were too difficult to be handled at the formal conference level.

Time Limit for Requesting Reconsideration

For OASDI appeals, a claimant must file a request for reconsideration **within 6 months** from the date of mailing of the notice of initial determination.

For SSI appeals, a claimant must file a request for reconsideration within **30 days** from the date of receiving the notice of initial determination.

NOTE: Time limits can be extended for good cause.

B. Administrative Hearing

(Administrative Procedure Act, 5 U.S.C.A. §§506 *et seq.* Title II: 42 U.S.C.A. §§405 (b), 421 (d), and 20 C.F.R. §§404.917–404.940. Title XVI: 42 U.S.C.A. §1383 (c) and 20 C.F.R. §§416.1425–416.1458.)

The administrative hearing level is the first time that the appeals process moves out of the District Office and the State Agency and moves into a relatively autonomous body of the Social Security Administration, called the Bureau of Hearings and Appeals (BHA). The Secretary of Health, Education, and Welfare has delegated to the

Bureau, it Appeals Council, and its administrative law judges and hearing examiners all the duties, powers, and functions relating to holding hearings and rendering decisions.

The BHA prides itself on its autonomy and on the excellence of its administrative law judges. However, a new class of judges has been created for the SSI program called hearing examiners. They are hired under the usual Civil Service Procedure and will have less experience and less autonomy than the administrative law judges. The administrative law judges will be handling the majority of SSI hearings until a sufficient number of hearing examiners have been hired and trained. Therefore, the focus in this Handbook will be on the responsibilities and functions performed by the administrative law judges but should also be applicable to hearing examiners. Note, for editorial convenience both administrative law judges and hearing examiners will simply be referred to as judges.

Social Security administrative hearings are **non-adversary** proceedings governed by the Administrative Procedure Act and conducted at the discretion of the judge.[1] Although the proceedings are supposedly "informal" they are in fact often conducted in a rather formal and paternalistic manner. Of course, the strict rules of evidence that are applicable in a court of law do not apply. However, the claimant, witnesses, and observers are introduced for the record, and testimony is given under oath and recorded verbatim. Decisions are not made at the hearing. A written decision is prepared after the hearing and mailed to the claimant and his authorized representative. The hearing decision will become the final decision of the Secretary unless appealed.

NOTE. Basically, there is no time limit for the judge to render decisions in OASDI cases. In SSI cases, however, decisions must be made within 90 days of the date of the written request for a hearing, except in disability cases, where there is no deadline!

Time Limit for Requesting Hearing

For OASDI determinations, the claimant must file a request for a

1. See also *Setting and Conduct of Hearing,* p. 51.

hearing **within 6 months** from the date of mailing of the notice of the reconsidered determination.

For **SSI determinations**, a claimant must file a request for hearing **within 30 days** from the date of receiving the notice of the reconsideration determination.

NOTE: Time limits can be extended for good cause.

C. Appeals Council Review
(Title II: 20 C.F.R. §§404.941–404.952 and Title XVI: 20 C.F.R. §§416.1459–416.1472.)

The Appeals Council consists of eleven members who conduct independent reviews of claimants' cases. The Appeals Council review is based on the evidence already in the record, including the verbatim hearing transcript of the claimant's and other witnesses' testimonies, the judge's decision, and any additional evidence that the claimant or his representative might submit. The claimant and/or his representative have the right to appear personally and present testimony and argue the case. The Appeals Council sits in Arlington, Virginia, but there are now regional appeals councils which sit in Philadelphia, Atlanta, Chicago, Dallas and San Francisco. For the most part, the claimant and/or representative do not make an appearance and the decision is made on the record.

In relation to the claimant's request, the Appeals Council may **dismiss, deny,** or **grant** a claimant's request for review. It may also, on its own motion, within ninety days from the date of mailing notice of such decision, **reopen** the judge's decision **for review** or **for purposes of dismissal.** In other instances, the Appeals Council decides to remand the case to the judge. To "remand" a case means to "send it back" for additional development and further proceedings before rendering a decision. The judge will either make a new decision based on the facts or make a recommended decision to the Appeals Council for final consideration. In any case, the action of the Appeals Council must be mailed to the claimant and his authorized representative.

The Appeals Council decision to dismiss or deny a claimant's request

for a review, or to either affirm or reverse the judge's decision is final and binding unless appropriate request for civil action is filed in the United States District Court.

Time Limit for Requesting Appeals Council Review

For **OASDI decisions**, a claimant must file a request for an Appeals Council review **within 60 days** from the date of mailing of the judge's decision.

For **SSI decisions**, a claimant must file a request for an Appeals Council review **within 30 days** from the date of receiving the hearing examiner's decision.

NOTE: Time limits can be extended for good cause.

II. DEFINITION OF JUDICIAL REVIEW PROCESS

(Administrative Procedure Act, 5 U.S.C.A. §702. Title II: 42 U.S.C.A. §§405 (g), 421 (d) and 20 C.F.R. §404.954. Title XVI: 42 U.S.C.A. §1383 (c) (3) and 20 C.F.R. §416.1470.)

Judicial review is a process by which a claimant, who has exhausted the agency's administrative remedies, may request the courts to review the final decision of the Secretary. The proper court is the United States District Court in the area where the claimant resides or does business. If the claimant is dissatisfied with that decision, there may be recourse to the United States Court of Appeals and, if appropriate, to the United States Supreme Court. The defendant in these cases is the person holding the office of the Secretary of Health, Education and Welfare.

Time Limit for Requesting Judicial Review

For **both OASDI and SSI determinations**, the claimant must file a request for judicial review **within 60 days** from the date of mailing of the notice of the Appeals Council decision.

NOTE: The sixty day deadline can be extended if good cause is shown.

III. RIGHT TO REPRESENTATION

(Title II: 42 U.S.C.A. §406 (a) and 20 C.F.R. §§404.971–404.990. Title XVI: 42 U.S.C.A. §1383 (d) (3) and 20 C.F.R. §§416.1501–416.1595.)

Claimants have a right to be represented by an attorney or any qualified person of their own choosing **at the initial application level** and **at every stage in the administrative appeals process** from initial determination through Appeals Council review. Representation at the administrative hearing level is particularly critical. Nevertheless, only 30% of the individuals requesting a hearing for OASDI benefits were represented. **Representation does make a significant difference in the successful outcome of a hearing.** In a study of the Social Security Appeals system from 1965–1969,[1] a claimant's chances of winning were 48.5% if he was represented by a non-attorney (e.g., friend, family member, representative of an organization) versus a 38.8% success rate if appearing alone. **The chances of success were 54% if represented by an attorney.** There are no statistics as such on the effect of trained paralegal representation. The assumption is that they would approach the attorney's reversal rate.

A. Qualifications for Non-Attorney Representatives.

(Title II: 42 U.S.C.A. §406 (a) and 20 C.F.R. §404.972 (b) and Title XVI: 42 U.S.C.A. §1383 (d) (3) and 20 C.F.R. §416.1503 (b).)

Attorneys in good standing and admitted to practice in any jurisdiction of the United States can represent claimants in the Social Security administrative appeals process. The focus here will be on qualifications required of non-attorney representatives. The statute gives the Secretary of HEW the authority to prescribe rules and regulations governing non-attorney representatives. The regulations, however, state only very general criteria. As more trained paralegals represent claimants in Social Security administrative hearings, perhaps these regulations will be more vigorously applied. This should be closely monitored. The regulations governing non-attorney representatives state:

Any person (other than an attorney) who (1) is of good character,

1. Rock, Michael H. *An Evaluation of the SSA Appeals Process*, Report No. 7. DHEW, Social Security Administration Operations Research Staff, April 15, 1970.

in good repute, and has the necessary qualifications to enable him to render valuable assistance to an individual in connection with his claim, (2) has not been disqualified or suspended from acting as a representative in proceedings before the Social Security Administration, and (3) is not, pursuant to any provision of law, otherwise prohibited from acting as a representative may be appointed as a representative. . . (Title II: 20 C.F.R. §404.972 (b) and Title XVI: 20 C.F.R. §416.1503 (b).) (Emphasis added.)

B. **Authority and Responsibility of Representatives**
(Title II: 20 C.F.R. §§404.973, 404.978–404.990 and Title XVI: 20 C.F.R. §§416.1505, 416.1530–416.1590.)

1. **Authority of Representatives**
(Title II: 20 C.F.R. §404.973 and Title XVI: 20 C.F.R. §416.1505.)

In the case of the non-attorney representative's authority, the claimant must provide the Administration with written notice of the appointment signed by both the claimant and the representative.

Once appointed, the qualified non-attorney representative (or attorney), has the authority in the administrative appeals process:

a. To execute an application for entitlement to benefits as long as he is a person designated as authorized to execute such applications.

b. To make or give, on behalf of his client, any request or notice relating to any Social Security administrative proceedings, e.g., reconsideration, hearing, Appeals Council review.

c. To obtain and submit information relevant to the claimant's case.

d. To present allegations and evidence pertaining to the facts or findings of law in any proceeding.

e. To testify as a witness regarding matters of which he has personal knowledge.

f. To receive notices of any administrative action, determination, decision, or request for production of additional evidence.

g. To make application for fees for representing claimants in both OASDI and SSI claims. A written petition must be filed. The amount of the fee is set by SSA and is governed by factors such as the services performed and the complexity of the case. The payment of the fee is handled differently depending on the program. In OASDI claims, attorney representatives are the only ones that can be paid a fee directly by the Social Security Administration from past due benefits. The Administration assumes no responsibility for the payment of any fee to a non-attorney representative and it will not deduct such a fee from past due benefits. The basic liability for payment of a non-attorney representative's fee rests solely with the claimant. In SSI claims, fees for either attorney or non-attorney representatives are the direct responsibility of the claimant. (Title II: 42 U.S.C.A. § 406 and 20 C.F.R. § § 404.975–404.977a and Title XVI: 42 U.S.C.A. § 1383 (d) (3) and 20 C.F.R. § § 416.1510, 416.1515.)

2. Responsibility of Representatives

(Title II: 20 C.F.R. § 404.978 and Title XVI: 20 C.F.R. § 416.1530.)

Attorney and non-attorney representatives have certain responsibilities specified in the regulations governing representation and advice-giving to claimants. In general, the regulations set down a representative's responsibility not to willfully deceive, mislead, or threaten claimants in relation to prospective benefits; charge or collect fees not approved by the Administration; knowingly make false statements about facts affecting the right of individuals to benefits; or not divulge facts and information about the claimant's case.

Substantial failure to abide by these directives can result in the Commissioner of the Social Security Administration temporarily or permanently disqualifying an individual from representing claimants. The disqualification procedure and the right of a representative to appeal this disqualification are discussed in Title II at 20 C.F.R. § § 404.979–404.990 and in Title XVI at 20 C.F.R. § § 416.1540–416.1595.

Chapter 3
ADVOCATE'S ROLE PRIOR TO A HEARING

As evident from the statistics quoted in the previous chapter, (see p. 37), representation does make a difference. The following sections indicate how and why an advocate makes a difference in the successful outcome of a hearing by describing the advocate's role prior to, during, and after an administrative hearing.

This chapter deals with the roles and responsibilities an advocate must perform prior to a hearing in order to present the strongest possible case for the claimant. Since preparation is of critical importance, the following roles and functions have been separated out for a more thorough discussion. Of course, these roles and functions overlap and are all a part of the same pre-hearing preparation process. They are also relevant during every other stage of the appeals process. These advocate roles are:

I. Investigator
II. Researcher and Fact-Developer
III. Strategist
IV. Educator

The critical functions discussed in this chapter that an advocate must perform prior to a hearing are summarized in an *Advocate's Checklist for Disability Cases,* Appendix B, p. 92.

I. INVESTIGATOR

The advocate as investigator has the primary responsibility to know his client's case completely. This includes acquiring, developing, assessing, and verifying all the facts pertinent to the case.

The client interview is the starting point for investigation. Through the initial interview, phone contacts, and follow-up interviews, the advocate obtains the basic information necessary to guide the investigation. As a

prerequisite to investigation, the advocate must also receive the claimant's written authorization to represent him and to contact persons and gather information on his behalf.

A. Acquire all important information.

1. Examine all relevant documents or papers in the client's possession:

   a. All doctor's reports, hospital records, physician and hospital bills, etc., in claimant's possession.

   b. All communications with the Social Security Administration, e.g., Records of Contact, Application for Disability Insurance benefits, Claimant's Statement Regarding Disability, Initial-Determination, Claimant's Request for Reconsideration, Reconsideration Determination, and Request for Hearing.

   NOTE: Claimant's statement or admissions made in contacts with the Social Security office are all recorded on a form called Record of Contact (ROC). The ROC's can possibly be used against the claimant in future proceedings. Therefore, advocates should check the individual's file to see if it contains damaging statements and try to minimize their effect. Stress especially the fact that these statements were made when the claimant was without representation.[1]

2. Review the judge's hearing file on the claimant's case at the BHA.[2] A careful review of the judge's hearing file is essential in order to:

   a. Be prepared to respond to damaging or previously unknown evidence.

   b. Discover the absence of important information which you have uncovered and which can then be submitted as evidence at the hearing.

   c. Find out if the judge has requested the presence of a medical

1. See Appendix D, p. 97, for a list of Selected Forms for OASDI/SSI Disability Programs.

2. EXCEPTION. For SSI claims awaiting hearing, the file might be in a SSI Development Center (DC). A DC is located in each of HEW's 10 regions and is staffed with hearing analysts. The Centers assist judges by analyzing and completing pre-hearing case development on all SSI claims.

or vocational expert. Check the file for a summary of the expert's credentials.

NOTE The hearing file must be made available to you as a representative at least 10 days before the hearing. However, the documents that will make up the hearing file are usually in the offices of the Bureau of Hearings and Appeals a month before the hearing. The judge's hearing assistant can be a valuable resource in gaining the earliest possible access to these documents. This early access can help short-cut the advocate's own investigative process in acquiring relevant information and documentation. The advocate can also engage the cooperation of the hearing assistant in acquiring medical and doctor's reports that he has had difficulty in obtaining.

B. Assess all the information and make a preliminary judgement on its validity and relevance.

1. List all the relevant facts and information that are in the client's possession or in his hearing file that you will use in preparing the client's case.
2. List the names of all medical facilities and physicians who treated the client. Make sure that you review copies of the records and reports covering those periods of treatment.
3. List the information that exists but must be updated, such as a six-month or older medical examination or report.
4. List the areas in which no relevant information exists but which must be developed, such as medical records or documents that explain the claimant's medical condition in functional terms.

II. RESEARCHER AND FACT-DEVELOPER

Meaningful fact-development is based on the advocate's ability (1) to clearly identify and research the issues upon which the claimant's case will be decided and, (2) to assess the factual information to determine the amount of probative evidence that exists and will need to be developed to meet those issues.

In identifying and researching the issues, advocates can begin by carefully reviewing the "Summary of Disability Law" in this Handbook, paying special attention to the *Advocate Tips* for meeting the disability tests. Of course, the statutes and regulations should be directly researched. Besides these approaches, advocates can consult with experts concerning problem areas in the claimant's case. Advocates can develop contacts with such experts in legal services offices, litigation units, back-up centers, or in private practice, or with sympathetic government, welfare, and Social Security personnel.

Additionally, the *Advocate's Checklist for Disability Cases* acts as a guide in assessing the facts. (See Appendix B, p. 92.) It also provides a framework for developing additional factual information.

Once all the information is gathered, assessed, and verified, the advocate must begin to organize those facts in a way that is most beneficial to the claimant. Thus, the advocate gives weight and force to the facts by creatively combining them.

III. STRATEGIST

In developing a hearing strategy, advocates should always remain flexible and open to new information and changing circumstances. In developing a tentative strategy for the hearing, advocates should consider the following points:

A. Decide which evidence can best be presented by written documents, oral testimony, or a combination of both. Determine the order and the manner of the presentation.

B. Decide whether to use lay witnesses such as the claimant's spouse, neighbors, relatives, former employers, etc. Determine the order and content of the testimony. Where a lay witness's testimony is important but the witness will not be available for the hearing, the advocate should try to get a signed and preferably notarized statement from him.

C. Decide whether to use expert witnesses such as doctors and/or vocational experts. Make sure that the expert is qualified, has a good professional reputation, and can be a reliable and effective witness. Above all, it is essential that the expert be able to contribute specific well-supported testimony that clearly improves the claimant's case. It is also important to decide whether the expert's information can be presented in a manner other than oral testimony, i.e. through the use of written interrogatories, affidavits, declarations, reports. These alternatives can be less expensive and equally effective.

The expert's report should be comprehensive and based on a detailed and well reasoned analysis of specific evidence that clearly supports his opinion. Where possible, the advocate should advise the expert on how to present his opinion most effectively. (For suggestions on preparing a medical report, see *Advocate Tips*, p. 15.)

NOTE: Besides the prohibitive cost of well-qualified experts, the use of experts might cause the judge to call in experts retained by the Social Security Administration. These experts are usually highly qualified and persuasive witnesses familiar not only with these types of proceedings but also with the tests involved in determining disability. Regardless of whether such experts are present at the hearing, many judges have developed a considerable range of medical and vocational knowledge and can be expected to see through vague or inaccurate testimony.[1] *Therefore, advocates should weigh carefully all these factors in deciding when and how to use experts.*

D. Decide whether to request that observers be admitted to the hearing. One study[2] found that a claimant's probability of winning was direct-

1. See *Preparation of Expert Witnesses*, p. 49.

2. Briar and Kalmanoff, Unpublished Study of Welfare Fair Hearings, November 7, 1968, California.

ly proportional to the number of "representatives" accompanying him to the hearing. Besides this potentially beneficial effect produced by the quiet pressure of such a "people's jury," there is an important educational effect. The silent observers learn first-hand about the hearing process and can educate others in their community to utilize it.

E. Decide whether to **subpoena any documents**, records or papers relevant to the case, or to **subpoena any individuals** whose written statements or reports are adverse to the claimant's case for the purpose of cross-examination. (See *Cross Examining Witnesses*, p. 73.) For instance, it might be necessary to subpoena a doctor who conducted a one-time-only examination of the claimant for the Social Security Administration and submitted a report detrimental to the claimant and in contradiction to attending physician reports. If the subpoena is denied, determine whether to request at the hearing that the reports be removed from the record. (See *Objecting to Evidence*, p. 55.) These decisions must be made carefully and as a last resort to **ensure the claimant's rights are protected and that an adequate record is made for possible court action.** Therefore, the paralegal representative should directly involve an attorney in making these decisions.

NOTE: The claimant or his representative must file a request for subpoena with the judge not less than 5 days before the time set for the hearing. The request must designate the individuals or documents to be produced and the addresses or location where they can be contacted or found and the pertinent facts to be established showing that such facts cannot be established in any other way. If the request is granted, the subpoena will be issued in the name of the Secretary of HEW and the Social Security Administration will pay the cost of the issuance and the fees and mileage of any subpoenaed witness. (42 U.S.C.A. §405 (d) and Title II: 20 C.F.R. §404.926 and Title XVI: 20 C.F.R. §416.1440.)

F. Find out whether the judge has called **expert witnesses to testify** at the hearing, such as vocational experts or medical consultants.[1]

1. Ordinarily, the Notice of Hearing will indicate whether expert witnesses will be present It should state their name, title, and, if not obvious, whether they are medical or vocational experts.

Besides checking the expert witnesses' credentials, try to **anticipate** what type of **testimony** the experts will present at the hearing. One way to do this is to analyze the documents other than those in the hearing file on which the expert will base his opinion. In fairness, representatives should have a right to review such materials in order to be adequately prepared to counter adverse testimony. This can be particularly important in relation to vocational experts who might use personally conducted regional labor surveys in preparing their testimony.

The problem is getting access to such material prior to the hearing. It might be possible to request pre-hearing testimony[1] of the vocational expert, permission to meet with him informally or to have him respond to written interrogatories. In the extreme, it might even be possible to request that these documents be subpoenaed and, if the request is denied, to object to testimony based on such documents. (See *Objecting to Evidence,* #1a, p. 56.) These tactics, however, might prove counter-productive and should be weighed carefully.

G. **Prepare a "hearing file" or "notebook." A well organized notebook is essential to effective client representation since it embodies all the pre-hearing work the advocate has done.** It should be carefully organized and tabbed for easy reference and basically should contain the following elements: an outline of arguments for objecting to evidence in the hearing file (where appropriate); the opening statement; a summary of the issues involved in the case; the facts, law, and evidence supporting (attacking) the claimant's position on each issue; the evidence (documents, testimony) and the order in which it is to be presented; exhibit and page number cites to documents that will be referred to from the hearing file; copies of new documentary evidence that will be submitted; written questions the advocate intends to ask the claimant, lay witnesses, expert witnesses; questions anticipated for cross examining witnesses; and an outline of the closing statement.

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1. There is a provision in the SSI regulations for a pre-hearing conference. (20 C.F.R. § 416.1432.)

IV. EDUCATOR

The role of the advocate as educator is a broad one. This section will deal with only one aspect of the advocate's role as educator, namely, the advocate's role in educating the client and other witnesses about the administrative hearing and preparing them to perform effectively. The emphasis will be on the most essential aspects of this pre-hearing preparation.

A. Preparation of Claimant and Lay Witnesses

1. **Explain the roles of all those who will be present at the administrative hearing:** judge, recorder, representative, client, lay witnesses, and the roles of expert witnesses if they are to be present, such as vocational or medical experts.

   a. **Emphasize the critical role of the judge.** It is important for claimants to understand the immense power and discretion the judges exercise.

   b. **Explain the advocate's role at the hearing.** Emphasize that you will be giving an opening and closing statement, presenting evidence, asking questions, and examining other witnesses. Do not, however, set the client up to expect some type of courtroom drama or Perry Mason tactics.

   c. **Assure the claimant that this is his hearing** and he should dress, speak, and generally act as usual.

2. **Describe the hearing setting and the basic procedures that will be used in conducting the hearing** so that the claimant and lay witnesses will not be surprised by anything unexpected and will be more relaxed and in control. (See *Setting and Conduct of Hearing,* p. 51.)

3. **Make sure the claimant knows what issues the case will be decided upon.** It is important to reiterate to claimants that the case will be decided upon factual information, most of which is medical evidence already in the record, and the direct testimony of the claimant and other witnesses.

   NOTE: In disability cases where the issue is whether there is enough medical and supportive evidence to show that the claimant is

disabled as defined by the law, socio-economic characteristics of the client are only of secondary importance. For example, it will not be persuasive if the claimant berates the Social Security Administration's handling of his claim or laments over the small amount of money he has to live on every month. Without a well organized and persuasive presentation of factual information such testimony might even prove counter-productive.

4. **Review with the claimant and lay witnesses the type and order of questions the judge will most likely ask at the hearing.** By role-playing the judge, the advocate can ascertain how the claimant will respond to certain types of questions and help ensure against surprise testimony at the hearing. This might also dictate further preparation of the claimant and lay witnesses and/or a more thorough case preparation.

5. **Briefly outline the approach that you as a representative will use** in presenting the claimant's case at the hearing.

   a. **Explain the type of evidence you will use.**

   b. **Rehearse with the claimant and lay witnesses the questions you intend to ask them at the hearing.** Write these questions out and go over the claimant's and lay witnesses' answers thoroughly during this informal rehearsal. Try to explain to them the purpose of the questions you are asking and their importance to presenting the strongest case possible for the claimant. Avoid putting words in their mouths. (See *Conducting The Direct Examination of the Claimant,* p. 65, and *Conducting the Direct Examination of a Lay Witness,* p. 68.)

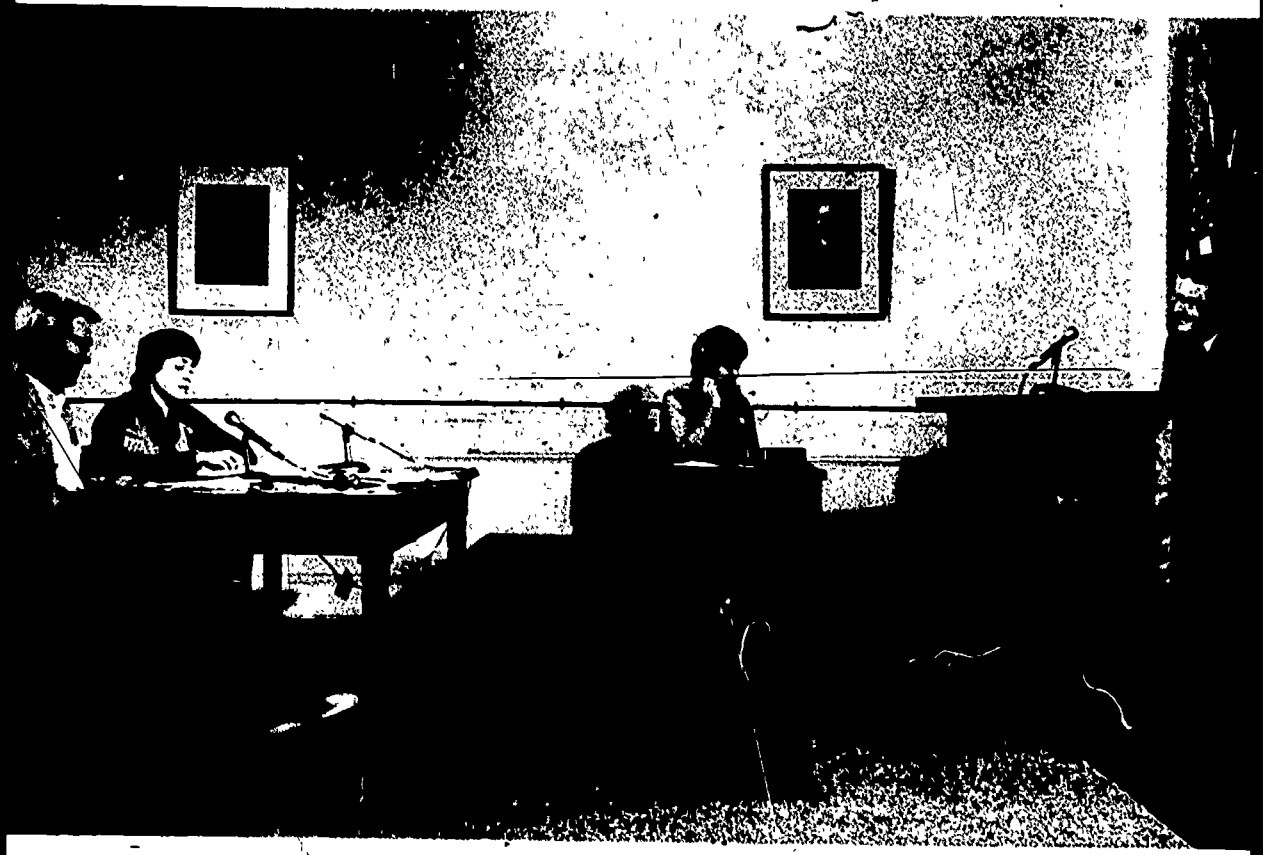
6. **Arrange a pre-hearing conference with claimant and other witnesses.** Arrange to meet the claimant and other witnesses a half hour or so before the hearing. This will give them time to settle down and become familiar with the setting. It also provides an opportunity to review strategy, make last minute preparations, and reassure the claimant.

   Check with the claimant and other witnesses a few days before the hearing and confirm the time and place of the hearing and

your appointment before it. Also make sure that the claimant and witnesses have transportation to the hearing.

B. **Preparation of Expert Witnesses**

The claimant's expert witnesses should be prepared in a similar manner as the claimant and lay witnesses, but with special emphasis on the purpose and content of the highly technical testimony they will provide. Tactfully, it should be reiterated that the purpose of expert testimony is to clearly **benefit the claimant's position, not to display the expert's knowledge.** Therefore, the advocate should work closely with expert witnesses in developing a concise and clear presentation in laymen's terms of the key points supporting the claimant's case. Above all, **make sure that each of the major points in their testimony is supported by appropriate evidence.** And finally, caution experts about the sophistication of the judges and the Social Security Administration's experts who often are called when the claimant has experts testifying. (See *Strategist*, #C, p. 44.)



Chapter 4
ADVOCATE'S ROLE DURING A HEARING

Besides describing the hearing setting and the general conduct of a hearing, this chapter will complement the filmed hearing by emphasizing the advocate's primary roles during the hearing.[1] Therefore, the focus will be on preparing and presenting an opening statement; preparing and conducting an effective direct examination of the claimant; and preparing and presenting a closing statement. Other topics that will be dealt with are submitting and objecting to evidence; direct examination of lay witnesses; and the direct and cross-examination of expert witnesses.

The topics that will be covered in this chapter are:

I. Setting and Conduct of a Hearing
II. Evidence
III. Opening Statement
IV. Direct Examination of the Claimant and Claimant's Witnesses
V. Cross-Examination of Witnesses
VI. Closing Statement

I. SETTING AND CONDUCT OF A HEARING

A. Setting[2]

Social Security hearings are conducted in quasi-courtroom settings. Generally, the judge either sits at the head of a table, or behind a hearing bench. The judge's assistant/recorder sits close to the judge and operates a disc or cassette tape recorder. The claimant, his representative (the advocate), and his witnesses are usually seated along a table in front of the judge. Social Security Administration experts are also usually seated at the table with the claimant. In some settings,

1. See Appendix A, p. 91, for a description of the film, *Paralegal Advocacy. Client Representation at a Social Security Administrative Hearing,* that accompanies this Handbook.

2. In areas where there is no office of the Bureau of Hearings and Appeals, administrative hearings are held in government buildings such as post offices, welfare departments, or Social Security District offices. Although these settings are perhaps less formal, the manner in which the judge conducts the hearing will be similar to that described in the following section.

there is a witness stand where the claimant and witnesses are sworn in and give testimony.

There appears to be a trend within the Bureau of Hearings and Appeals to move toward more courtroom-like settings. Perhaps this courtroom atmosphere will be modified for SSI hearings. However, at the present time, OASDI and SSI hearings are being conducted in the same setting.

B. Conduct

Social Security hearings, unlike other types of administrative hearings and court trials, are non-adversary proceedings. This means that the presentation of the evidence does not depend primarily on the efforts of two adversaries. In fact, the Social Security Administration has no advocate representing it at these hearings. Instead, the judge has the duty to see that all relevant evidence is presented for both sides. This dual role of arbitor and advocate can create problems that potentially affect the fairness of the proceedings. (Refer to *Objecting to Evidence*, #C, p. 55.)

The format of a hearing is established at the discretion of the judge. The hearings are often conducted in a rather formal and paternalistic manner, although they are supposedly "informal." Of course, the strict rules of evidence used in a court of law do not apply. However, the claimant, witnesses, and observers are introduced for the record, and testimony is given under oath and recorded verbatim.

Since the format of the hearing will vary from judge to judge, an advocate should become familiar with the idiosyncracies of the judges in his area[1] and make a reference file on them for use by other advocates in their preparation for hearings.

Judges usually conduct hearings in a manner similar to the one presented in the filmed hearing. Generally, the judge begins by making an opening statement that sets the tone for the hearing; informs the claimant of his rights; discusses the format of the hearing; reviews the procedural history of the claimant's case; defines the issues; and in-

1. Note, in areas where no permanent office of the Bureau of Hearings and Appeals exists, judges are brought in from other areas to conduct hearings. This can also happen when a BHA office has a backlog of cases awaiting hearing.

dicates the statutes and regulations applicable to the case. After asking the claimant and his advocate if they object to any evidence contained in the hearing file, the judge then asks if they wish to submit further evidence. In most instances, the judge asks whether the advocate wishes to make an opening statement. Then the **judge usually questions the claimant before allowing the advocate to do so.**

This general format makes it difficult for the advocate to present evidence according to a set strategy. The advocate must work around the questions of the judge and present supplementary evidence once the judge is through examining the claimant. As a basic rule of hearing preparation, the advocate must remain flexible and ready to adjust his presentation to follow the judge's questions.

In some instances, a judge departs from this general format by allowing the advocate to examine the claimant first. Since this order of presentation allows the advocate greater control over the presentation of the claimant's case, the advocate should ask to be allowed to proceed in this way. (See *Direct Examination of the Claimant and Claimant's Witnesses*, p. 64.)

If the judge has requested the presence of vocational and/or medical expert witnesses, he will also conduct the initial examination of them before allowing the advocate to cross-examine. The advocate is usually allowed to question first any witnesses he has called. After the judge cross-examines the claimant or witnesses, he usually permits the advocate to conduct a "redirect" examination. (See *Re-Direct Examination*, #F, p. 72.) The judge may follow with a "re-cross."

The judge will allow the advocate to make a closing statement when the presentation of testimony has been completed. Judges are flexible in leaving the record open for the submission of written briefs and additional evidence within a specified time period following the hearing.

In some instances, a joint or **consolidated hearing might be held,** but in either case the general conduct of the hearing will be similar to that discussed in this section. "Joint hearings" are held when substantially the same evidence is relevant to the issues previously scheduled to be decided in two or more separate hearings. (Title II:

20 C.F.R. §404.932 and Title XVI: 20 C.F.R. §416.1437.) "Consolidated hearings" are conducted if practicable when requests for hearings are pending for different programs (laws) within the jurisdiction of the Social Security Administration. (Title XVI: 20 C.F.R. §416.436.) For example, in a case where a request for hearing is pending both for OASDI and SSI disability benefits, a consolidated hearing might be held. Note, "consolidated hearings" are presided over by administrative law judges, not hearing examiners. (Title XVI: 20 C.F.R. §416.1429 (b).)

If an advocate is not familiar with the Social Security administrative hearing procedures, he should attend several hearings and become familiar with these procedures and with the style and manner of individual judges before representing claimants in a hearing himself.

II. EVIDENCE

A. Definition

Evidence is information formally presented at an administrative hearing or court proceeding to establish facts in a case. Facts in a legal context are what a judge, hearing examiner, or jury conclude to be the truth. Evidence in a disability hearing usually takes the form of documents, claimant and witness testimony, and exhibits *(such as Mr. Keefauver's leg brace.)* Only evidence can establish the facts necessary to prove the claimant's case. Consequently, the advocate's opening and closing statements and his comments during a hearing are not evidence and do not establish facts. These comments are only argument and interpretation.

The only time an advocate's statements become evidence occurs when the advocate is sworn in as a witness to testify on behalf of the claimant. The need for this situation rarely arises. This double role of representative and witness is confusing and generally should be

avoided. If it is impossible to secure an alternate representative and the testimony is crucial, the advocate should notify the judge at the beginning of the hearing of his intention to testify and be sworn in along with the claimant and other witnesses.

B. Admissibility and Weight

A judge will normally admit all evidence, including hearsay evidence, submitted either by the Social Security Administration or by the claimant and his representative, since the formal rules of evidence do not apply in Social Security hearings.[1] (Administrative Procedure Act 5 U.S.C.A. §556 (d). 42 U.S.C.A. §405 (b). Title II: 20 C.F.R. §404.928 and Title XVI: 20 C.F.R. §416.1442.)

The most important evidentiary issue at the great majority of those hearings is what weight each piece of evidence should receive. Weight is generally determined by reliability. Therefore, the advocate should evaluate the reliability of the claimant's evidence and, where it is weak, he should attempt to develop stronger evidence. It is also important that the advocate carefully scrutinize the reliability of damaging evidence produced by the Social Security Administration. If that evidence is vague or second-hand, (or derived from an unknown or undependable source), the advocate should try to reduce its impact by pointing out its unreliability to the judge.

C. Objecting to Evidence

In some instances, there may be legitimate grounds for objecting to the admission of a piece of evidence. There is generally no point in raising an objection if the evidence is clearly not damaging to the claimant's case. However, an advocate has a responsibility to argue for exclusion of evidence where there are legitimate grounds for objecting and the evidence is damaging to the claimant. The standard

1. Hearsay evidence is evidence about a written or spoken statement made out of court that is offered in court for the purpose of showing the truth of the matter described in the statement. For example, if X testifies that Y said that he saw Z at the scene of the crime, and the presence of Z at the scene of the crime is at issue, then the witness has given hearsay testimony. Like most definitions, this one merely provides a starting point for discussion and understanding and should not be relied on to determine whether or not a piece of evidence is hearsay. The picture is greatly complicated by the numerous exceptions to the rule against admitting hearsay evidence. Where a particular piece of evidence needs hearsay evaluation, the advocate is urged to consult an expert.

objections appropriate at Social Security hearings are given below. Thereafter, suggestions are offered on how to object to evidence already in the hearing file as well as how to object to evidence presented during the course of the hearing.

1. Grounds for Objecting

a. New Documents Creating an Unfair Surprise

If the advocate has never seen a document that the judge or Social Security Administration witness is introducing, he should immediately object on the grounds that no document should be admitted into evidence that was not in the file. **The advocate has the right to examine the claimant's entire file before the hearing and to expect that all the written evidence involved in a claimant's case is in that file.** The advocate should then request adequate opportunity to read the document carefully. If the document contains nothing damaging to the claimant, the advocate should indicate this and willingly continue with the hearing. If, however, the advocate has any doubt about the impact of the document, he should request a recess to study it.

When a witness either reads from or refers to a document without introducing a copy of it, the advocate should also object and request that the witness either provide a copy for immediate examination or refrain from discussing it. This situation can sometimes occur in the course of a vocational expert's testimony.

b. Opinion Beyond Competence of the Witness

An expert witness should not be permitted to testify beyond his expertise. For example, a vocational expert is not qualified to testify about the nature of the claimant's impairments or the likelihood of recuperation. Likewise, a medical expert is not qualified to testify about the availability of jobs.

c. Unreliable Evidence

While hearsay evidence is regularly admitted in Social Security hearings, sometimes it will have passed through so many hands that there is a danger of it being garbled. Other times it will come from an unknown or an inherently undependable source. In such instances, the advocate should object to the admission

of such evidence on the grounds that it is so unreliable that reasonable men would not place any confidence in it.

d. Irrelevant Evidence

This objection can cover a number of matters, including information that may reflect badly on a claimant without relating directly to the issues of the hearing.

2. Objecting to Evidence in the Hearing File

If the advocate discovers objectionable evidence in the hearing file that is damaging to the claimant, he should object to it at the beginning of the hearing and discuss his reasons for making the objection. In addition, if time permits, the advocate can reinforce the objection by submitting a written memo detailing the objection prior to the hearing. While not necessary, this approach allows a more thorough and careful presentation of the basis for the objection and might elicit more serious consideration from the judge. The advocate should not withdraw the objection if it is overruled, but request that the objection be noted for the record in order to preserve the rights of the claimant for court appeal. The advocate should request that the memos be made part of the record.

3. Objecting to Evidence Presented at the Hearing

When new evidence is offered that the advocate thinks is legally objectionable, he should simply say to the judge, "I object to this evidence," and then state his reasons. Since objections during the hearing will often be directed at testimony given in direct response to a question by the judge,[1] the advocate should make objections diplomatically. If an objection is overruled, the advocate should ask the judge to "note" it for the record.

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1 In rare instances, the advocate can request that the judge disqualify himself because of lack of impartiality or objectivity. (Title II 20 C.F.R. § 404.922 and Title XVI. 20 C.F.R. § 416.1430.) If in the advocate's opinion the judge's conduct significantly jeopardizes the claimant's right to a fair and impartial hearing or has consistently done so in the past, he has a responsibility to make such a request. The request can be made before or during the course of the hearing as the situation dictates. It is unlikely that a judge will rule against himself, so the advocate should object if the request is denied and ask to have the objection noted in the record for purposes of appeal. Obviously, such a request can produce antagonism and should be made only where absolutely necessary.

D. Submitting Documentary Evidence

1. Whether to Submit a Document

The advocate should evaluate each document carefully before deciding to submit it. A document might support the claimant on one issue, but seriously undercut him on another. If so, the advocate must weigh the potential harm against the potential benefit. Medical language is especially tricky and the advocate must be certain he understands exactly what it means. In addition, the advocate should avoid submitting needlessly repetitive evidence or evidence in such quantities that it unduly burdens the conduct of the hearing. The only evidence the advocate needs to submit is evidence not already in the file. The judge enters the file into evidence at the beginning of the hearing.

2. When to Submit a Document

In Social Security hearings, new documentary evidence should be submitted either before the hearing or at the beginning of the hearing. As a rule, new medical evidence should be delivered to the judge prior to the hearing. He will expect it as a matter of courtesy and it might significantly alter his perspective on the case. A strategy of withholding documentary medical evidence and submitting it at the beginning of the hearing or during the course of the hearing may annoy the judge and prove counter-productive.

On the other hand, documentary evidence that will be used to meet the employability test, such as written statements from former employers, job counselors, or vocational experts, might tactically be withheld and submitted at the beginning of the hearing. This strategy should be used if the advocate believes that such evidence submitted prior to the hearing might cause the judge to arrange to have a vocational expert appear at the hearing to counter the claimant's evidence. However, the judge has the power to postpone the hearing and call in an expert.

An additional tactic is to withhold such evidence until the moment of maximum impact during the hearing. Such a strategy should be used cautiously and hopefully will not offend the judge since it is consistent with the rule that the Social Security Administration

has the burden of presenting evidence on the employability issue first. However, **an advocate should never refuse to submit a new document at the beginning of the hearing if the judge asks for it.** If the judge does not ask for early submission of new documentary evidence, and this is unlikely, the advocate is free to submit the evidence at the best strategic moment.

3. How to Submit Documentary Evidence

When the advocate wants to introduce a document into evidence, he should tell the judge specifically what the document is and hand him the document, retaining a xerox copy for his own use. The judge will then normally take the document, mark it as an exhibit, indicate exactly what it is in his hearing notes and then consider it for purposes of admissibility. Once the judge has looked over the document, the advocate should be ready to carefully explain its significance and answer any questions he might have. Before discussing the document, the advocate may find it useful to call the judge's attention to important sections by reading them aloud.

4. How to Use Documents

The advocate should be careful to relate documents to testimony. Two effective times to refer to documents during a hearing are either immediately after the claimant or witness has testified on a specific point covered by the document or at the end of all the testimony by the claimant or witnesses on a general issue such as impairments or employability. The former creates a sense of immediacy by re-enforcing testimony as it occurs and by showing exactly how the testimony and the documents relate. The latter permits a smooth flow of testimony and a chance for the advocate to repeat salient portions of the testimony in his discussion of the documents. References to documents can also be woven into questions asked the claimant and witnesses. For example, a question to the claimant on his pain could start out by reciting a doctor's written diagnosis.

Documents should also be related to each other. The best time to present a comprehensive analysis of all documents is during the advocate's closing statement (See *Closing Statement*, p. 77.), since

the judge regards the hearing as a means of supplementing the file and his interest during testimony will be primarily on new information. The advocate should show how favorable documents supplement and support each other. Normally, it is good strategy to explain the strongest of a series of documents first and then use the others to buttress it. Where documents contradict each other, the advocate should argue that the favorable documents, for example, are more recent, more reliable, or more specific. **Whenever referring to documents in the file, the advocate should use the exhibit and page numbers given them by the judge.**

III. OPENING STATEMENT

A. Definition

In most cases the judge will offer the advocate the opportunity to make an opening statement before any evidence is presented. The advocate should request permission to make an opening statement if the judge does not make this offer. **An opening statement is the advocate's summary of the case and his first opportunity to influence the judge.** An opening statement outlines the claimant's/advocate's view of the issues; summarizes the evidence and the points intended to be established with it; and tells the judge what results the claimant is seeking. **The advocate should always write out his opening statement in advance of the hearing to assure that it is complete and effective.**

Since the judge is a professional who hears many cases, he will have little tolerance for anything but a straightforward, concise opening statement. In addition to explaining the claimant's view of the case, an opening statement should be used to characterize the evidence

favorably for the claimant; to impress the judge with the advocate's competence; and to orient and reassure the claimant by providing him with a calm, last-minute review.

B. Preparing an Opening Statement

1. Defining the Issues

In preparing an opening statement, an advocate must first decide what issues are involved in the case. The advocate should carefully read the Social Security Administration's notice of denial to determine the issues. Sometimes the notice gives specific, concrete reasons for the denial. Usually these reasons establish the issues in dispute, and the advocate can focus his preparation on them. However, an advocate should be prepared to offer evidence on all potential issues in case the judge's formulation of the issues differs from the notice.

When the notice of denial gives only general reasons, such as "not disabled within the meaning of the statute," the advocate should study the facts carefully to determine the issues. The facts may reveal, however, that only one of these issues is really open to question. If so, the advocate should indicate this in his opening statement. Nevertheless, he should be prepared to present adequate evidence on all potential issues.

In general, the issue in a case involving a dispute over disability is whether the claimant is disabled within the meaning of the Social Security Act.[1] The judge, of course, is aware of the general issue and will ordinarily state it in his opening summary of the case. The advocate should not waste time by reciting it again in such broad terms. Instead, he should hone down the general issue to those matters which are really in dispute. In most cases that go to

1 Most OASDI and SSI cases involve **issues of fact** *(does the claimant actually have the alleged impairment?)* and **issues mixing fact and law** *(does the claimant's condition fit within the statutory definition of disability?)*. However, in rare cases, the issue will involve a **question of law,** such as whether a particular regulation applies in a given case or whether a regulation is constitutional. If an advocate needs to raise a serious question about a matter of law that he expects will create a dispute, he should do so only after consulting an expert, and in most cases, only when he has arranged to have a lawyer available to pursue the matter in court if necessary.

a hearing, these issues will involve "functional impairments." The existence and duration of the impairment(s) are usually not in serious dispute because the medical record clearly establishes them. In such cases, the advocate should concentrate on the effect the impairment has on the claimant's ability to work. For example, the advocate in the Keefauver case might begin his opening statement by saying:

> *The record clearly establishes that Mr. Jack Keefauver's feet and ankles are severely damaged and that these impairments have lasted for more than twelve months. The real issue in this case is whether these impairments prevent Mr. Keefauver from engaging in substantial gainful activity. In other words, do these impairments prevent Mr. Keefauver from continuing his occupation as a painter, or, considering such factors as his age, education, training and general work experience, prevent him from engaging in any other type of work which exists in reasonable numbers in the national economy?*

2. Summarizing the Evidence

The advocate should prepare a short summary of the evidence once he has properly defined the issues. A summary provides a general framework into which the details of the evidence can be fit as they are presented later.

In a case involving functional disability, the advocate should begin by grouping the evidence into general categories (a) establishing the disability and its duration; (b) demonstrating that the claimant cannot perform his previous occupation; and (c) demonstrating that because of age, education, and work experience, the claimant cannot perform any other kind of substantial gainful work. Some facts may fit into more than one category. The advocate should then boil the facts down to a concise statement of the main points. While the advocate should add a few personal notes to begin the process of converting Mr. Keefauver from a name in a file into a real person, he should leave most of the details to be presented through testimony and documents.

For example, once the advocate in the Keefauver case has stated the issues, he might say:

Now let's look at what the evidence in the case will show. Mr. Keefauver is 55 years old. He has a tenth grade education and has worked for the last 30 years as a painter. On February 3, 1973, Mr. Keefauver fell two stories from a paint scaffolding. His right foot was crushed and his left foot, already partially disabled from a wound received in World War II, was severely damaged. Two major operations later, Mr. Keefauver finds himself a partial cripple. He must wear a brace on his right leg to support himself and reduce the pain. He also needs to use a cane. His mobility is severely limited.

Mr. Keefauver cannot sit for long without both feet becoming numb, and, if he stands for more than two hours, he experiences painful swelling in his feet. He is no longer able to do the family shopping, heavy house cleaning, yardwork, or household repairs.

Clearly, Mr. Keefauver cannot continue his previous occupation as a painter, which requires a man to be on his feet all day and to be steady and mobile on the scaffolds. His condition also prevents him from performing any other type of work that requires either manual labor or physical mobility, the only type of work for which he is qualified.

3. **Proposing Conclusion of Law and Asking for Benefits**

After summarizing the evidence, the advocate should assert that the evidence establishes disability within the meaning of the OASDI/SSI law. The advocate should then conclude his opening by asking for whatever benefits, including retroactive benefits, the claimant may be entitled to. To accomplish this, the advocate might say:

If what I have described is proven by the evidence in this case, as I believe it will be, then Mr. Keefauver cannot continue his previous work as a painter and is unable to engage in any other type of substantial gainful activity which exists in the national economy. This situation makes him disabled within the meaning of the Social Security Act and entitles him to receive disa-

bility benefits, including benefits retroactive from July 10, 1973.

C. Advocate Tips for **Presenting the Opening Statement**

1. In general, **the advocate's manner should be a professional one: direct, low-key, confident, and respectful.** Opening statements that are long, rhetorical, emotional, or unduly argumentative will prove counter-productive.

2. If the judge has clearly and adequately stated what the advocate planned to say in a major part of his opening, the advocate should forego that part, agree with the judge's statement, and move on to the next part of his opening. This saves time and may create rapport with a judge who appreciates efficiency.

3. In rare cases where the judge's statement of the issues is totally inconsistent with the advocate's, the advocate should discuss the matter with the judge and either win him to the advocate's view or decide whether he is prepared to handle the hearing under the judge's formulation. If not, the advocate should ask for a delay to prepare for this development.

IV. DIRECT EXAMINATION OF THE CLAIMANT AND CLAIMANT'S WITNESSES

A. Definition

Direct examination is the method of questioning an advocate uses to draw testimony from the claimant and the claimant's witnesses. The hearing is the claimant's "day in court" and his direct testimony should allow him to tell his own story in his own words. An effective direct examination of a claimant in a hearing involving disability issues provides a clear, comprehensive picture of the claimant's impairments and the effect they have on his ability to perform "significant functions" and to engage in his former employment or any other type of substantial gainful work activity. A **direct examination of the**

claimant should also "humanize" him in the judge's eyes and breathe life into the dry, clinical details of the file.

In the Social Security hearings, the judge usually conducts the initial direct examination of the claimant. However, the advocate should request the right to examine the claimant first. This is an important opportunity to seize because a well conducted direct examination allows the advocate to present the evidence in a way that is most favorable to the claimant. It also allows the advocate to take the offensive, to control the flow of the testimony, and to have some influence over the overall direction of the hearing. Unfortunately, since the advocate must follow the judge's hearing format, he is usually in the position of following up the judge's direct examination with a limited direct examination of his own.

During this follow-up examination, the advocate should avoid conducting a total re-examination or rehashing what the judge already learned from the claimant. Such an examination wastes time and may irritate the judge. Instead, the advocate should emphasize the points the judge considers important; question the claimant on points which the judge failed to mention or which need amplification or clarification; and, where possible, elicit answers improving testimony which damaged the claimant's case.

B. Conducting the Direct Examination of the Claimant

Pre-hearing preparation is the key to an effective direct examination of the claimant. The claimant should know exactly what the advocate will ask and how to answer each question if he has been properly prepared. He will also have a good idea of the type of questions the judge will ask and how to respond to them. Nevertheless, a hearing is always a strange, new, and perhaps traumatic experience for the claimant. Therefore, the advocate should be calm and reassuring. The claimant should be encouraged to think for a moment before answering each question and to ask for clarification if the question is unclear or if he is not sure how to answer. If the claimant suffers a lapse of memory, becomes very flustered, or begins to give unanticipated testimony, the advocate should not hesitate to ask for a recess.

Although the following suggestions on conducting the direct exam-

ination of the claimant are most relevant when the advocate is allowed to examine the claimant first, most of these suggestions are also useful when the advocate conducts a limited direct examination following the judge's questioning.

1. **Be prepared with a complete set of written questions.** The advocate should be ready to present the claimant's testimony in an organized, persuasive manner if the judge permits the advocate to conduct the initial direct examination. **If the judge goes first, the advocate should still try to present every element of the case in a logical order.** This is difficult because some of the questions will have already been asked and perhaps fully answered. One solution is to summarize the previous questions and answers and ask the claimant if he wishes to add anything to his former testimony. It might also be possible to select out one aspect of the former testimony for clarification. This approach restores the logical framework of the presentation and highlights previous testimony.

   During the judge's examination of the claimant or of any witness, the advocate should make notes on any new questions he may need to ask to complete or clarify testimony. These procedures will assure that the claimant's case is fully presented.

2. **Phrase questions to enable the claimant to tell his story in his own words.** The advocate should encourage the claimant to use his own words. The advocate should generally avoid using leading questions and refrain from using questions that require only a yes or no response. Memorized testimony or testimony that is too tightly controlled by the advocate often confuses the claimant, sounds phony, and can arouse the suspicions of the judge and cause him to examine the claimant more closely than he might otherwise do. In some situations, however, a shy or vague claimant may have to be led through the direct examination with specific questions calling for short answers. The judge will usually understand this situation.

3. **Organize questions into categories** dealing with the specific subjects, such as impairments, daily activities, and work history. This approach helps assure that the judge will recognize all the evidence

on each issue in the case. The questions should be ordered chronologically within each category. The chronological approach not only aids the claimant's memory, but also assures an orderly presentation of the facts.

4. Concentrate questions on the most important points. Avoid needless repetition.

5. Try to anticipate the judge's concerns. Advocates should anticipate and deal with damaging points in the claimant's case during the direct examination. This tactic allows the advocate to control the presentation of testimony on the issues and creates an impression of candor.

C. Conducting the Direct Examination of a Lay Witness

Well prepared lay witnesses can provide useful testimony supporting the claimant's contention that he is unable to perform "significant functions" of everyday living or those connected with his prior occupation. For example, Mrs. Keefauver could reinforce Mr. Keefauver's testimony on his inability to carry heavy objects, to stand for long periods without pain or swelling, or to sit without his feet becoming numb.

Most of the suggestions given previously for conducting a direct examination of the claimant apply to the direct examination of lay witnesses. It is also important to establish through questioning the basis of a lay witness' knowledge. Have the witness point out in what capacity he knows the claimant and limit questions to those matters about which the witness has personal knowledge and that contribute specifically to some aspect of the claimant's case.

D. Conducting the Direct Examination of an Expert Witness

An advocate should use expert testimony carefully. When a detailed report from an expert is not sufficient, make sure the expert is well prepared and can offer specific testimony that will clearly improve the claimant's case. In Social Security hearings on disability issues, the principal experts an advocate will use are doctors and vocational

consultants.[1] A doctor can testify about the nature and severity of the claimant's impairments, especially the effect they have on his ability to perform "significant functions" of everyday living and/or "significant functions" connected with a prior occupation.[2] The testimony of a medical expert specializing in the area of medicine involved in the hearing is normally given special weight.

Vocational experts are used primarily to counter testimony by Social Security Administration vocational experts that the claimant has transferable vocation skills and/or that jobs exist in the national economy that the claimant can perform. Theoretically, the Social Security Administration has the burden of proving that suitable jobs exist in the national economy, and, therefore, its expert should testify first. The advocate should try to use the claimant's vocational expert strategically by requesting that he be allowed to testify after the Social Security Administration's vocational expert. If this procedure is permitted, it gives the advocate the opportunity to hear and cross-examine the Social Security Administration's expert before presenting testimony of the claimant's expert. (See *Cross-Examination of Witnesses*, #2, p. 73.) In addition to considering the general suggestions for conducting a direct examination that have already been discussed, advocates should note the following specific suggestions on conducting a direct examination of an expert witness.

1. Qualify the expert witness. Before an expert is allowed to give testimony he must be found qualified by the judge. The matter is left up to the judge's discretion since there are no minimum standards for qualification. Ordinarily, it will only be necessary to show that the expert possesses the licenses or degrees of his profession. The advocate should submit a copy of the witness' resume in order to further qualify him. In some instances, the judge may

1. The role of medical advisors and vocational consultants called by the Social Security Administration will be discussed in the next section on *Cross-Examination of Witnesses*, #3, p. 74.
2. The claimant's medical expert can also be used as part of a defensive strategy. For example, the expert's testimony might discredit the validity of a diagnosis or prognosis damaging to the claimant appearing in medical reports paid for by the Social Security Administration. Or the expert might challenge the reliability of the types of examinations/tests that such a diagnosis or prognosis was based on.

decide that the resume is adequate to qualify the expert without testimony. If this is not the case, ask the expert to describe his credentials and experience in a conversational manner. An alternative is to lead the expert through a limited direct examination that explains his background and experience. The procedure will depend largely on the preference of the judge.

2. Have the expert use clear terminology. The advocate should have the expert translate difficult or technical terms into laymen's language. However, the advocate should be careful that the expert does not talk down to the judge, who may possess a great deal of knowledge about medicine and employment.

E. How to Examine an Expert

An expert can testify either from first hand knowledge about the claimant or in response to hypothetical questions. Most expert testimony in disability cases is given in response to hypothetical questions. This type of question asks the expert to draw a conclusion based on assumed facts. The assumed facts should be identical to the facts established in the claimant's file or that the advocate is trying to prove. The questions asked an expert and his answers to them should be carefully prepared and reviewed before the hearing. The following is a sample line of hypothetical questioning that might be used to examine a doctor in the Keefauver case:

Q. Now Dr. _____. I want you to assume that the following facts are true (At this point the advocate should state the facts describing the damage to Mr. Keefauver's feet and ankles and repeat the content of Mr. Keefauver's earlier testimony about the nature of painting.) *Assuming these facts are true, can you express an opinion with reasonable certainty as an expert on whether or not Mr. Keefauver is physically able to engage in painting without pain and without danger to his health?*

1. *I can.*

Q. And what is that opinion?

1 *My opinion is that he cannot. If he were to perform such work, he would suffer . . . . . etc.* (The doctor's answer should include a de-

tailed recitation of the medical consequences that painting would subject Mr. Keefauver to.)

Q. Would you explain the reasoning behind your opinion?

A. (The doctor's reply should include a technical explanation indicating why painting would cause the consequences he has just described.)

This much from the doctor is adequate. However, if the advocate wants to increase the impact of the doctor's testimony, he might add something like the following questions:

Q. I have just asked you to assume a set of facts and to base your opinion on them. Is today at this hearing the first time these facts were called to your attention?

A. *No.*

Q. When were they first brought to your attention?

A. *Three weeks ago when you asked me to study both the medical records pertaining to Mr. Keefauver's feet and ankles and a memo describing the work of a painter.*

Q. Are these copies of the medical records and the memo that you examined? (The advocate should hand the copies to the doctor for his inspection.)

A. *They are.*

(At this point the advocate should show the material to the judge. The medical records should be the same as those in the file. The memo should describe the general nature of painting. During his earlier testimony, Mr. Keefauver, in addition to giving the same general description of his work, should also indicate that he saw and approved the contents of the memo.)

Q. Will you please review the medical records and the memo and tell the judge whether the facts set forth in both the records and the memo are identical with those facts I have asked you to assume today.

A. *They are.*

Q. What did you do with the material when I gave it to you?

A. *I studied it carefully and formed my opinion based on the information it contained.*

Q. *Is that the same opinion you have given today?*

A. *It is.*

Q. *Then that opinion was not hastily conceived today?*

A. *No, it is the result of careful study.*

Advocate to judge: *I ask that these copies of the medical reports and the memo on painting be admitted into evidence to demonstrate that Dr._____'s opinion was formed after careful study and is based on the same facts that I have asked him to assume today.*

F. Re-Direct Examination

After the judge cross examines the claimant or claimant's witnesses, he will usually allow re direct examination by the advocate. A re-direct examination is conducted much like the follow-up direct examination of a claimant after the judge has conducted the initial examination and normally should be limited to correcting misstatements and wrong impressions created during cross-examination. However, an administrative law judge, or hearing examiner, unlike a judge in court, will usually permit the advocate to add material left out during the direct examination, even if it does not directly relate to the cross examination questions. A re direct may be followed by a "re-cross." Most judges will allow alternating examinations as long as they are useful.

V. CROSS-EXAMINATION OF WITNESSES

A. Definition

Cross-examination is a method of questioning designed to challenge a witness' direct testimony. In Social Security hearings, the advocate is allowed to cross-examine a Social Security Administration witness, usually a medical or vocational expert, after the judge has completed his direct examination of the witness.

B. Decision to Cross-Examine

Cross-examining a witness is always a risky business since it may turn up additional harmful testimony. Cross-examining an expert for the Social Security Administration is especially dangerous since he usually is well qualified in his field, familiar with the criteria of disability, and experienced at testifying. In general, the advocate should cross-examine only when the witness has damaged the case against the claimant and the contrary evidence is inadequate to refute the witness. The advocate must also weigh whether the probability of discrediting or favorably modifying the direct testimony exceeds the probability of the expert's giving further damaging testimony. Of course, there is no recourse but to cross-examine an expert vigorously if his testimony is fatal to the claimant's case.

C. Advocate Tips for Conducting a Cross-Examination

1. Take notes during the direct examination. The advocate should take notes during the judge's direct examination, analyze each point in the testimony, and weigh it against the other evidence. The notes will not only assist in the decision on whether or not to cross-examine, but will also help the advocate choose what to ask if he decides to cross-examine.

2. Limit the cross-examination to the weak points in the witness' testimony. Generally, the cross-examination of a witness should be directed at very specific purposes. Since most of what a witness says is probably accurate, the advocate should avoid a general cross-examination that invites the witness to repeat, clarify, or strengthen his testimony. The advocate should limit his cross-

examination to the weak points in the witness' testimony and, by undermining the reliability of those points, cast whatever doubt he can upon the entire testimony. Above all, the advocate should realize that cases are won primarily by presenting the affirmative evidence for the claimant in an effective manner and not by challenging Social Security Administration witnesses.

3. **Maintain a professional attitude toward Social Security Administration witnesses.** In general, the advocate should be courteous and cordial towards a Social Security Administration witness and respect his expertise. He is not necessarily against the claimant[1] and is more likely to favor his cause if the advocate appears friendly and open. Above all, the advocate should avoid needlessly antagonizing an expert. He can help or hurt the claimant's case, often in ways that are imperceptible and not open to challenge. The strategy of amiability, however, does not require the advocate to fawn or to forego pointed and difficult questions. The purpose of a cordial approach is to predispose the expert favorably toward the claimant in order to get the expert to modify testimony or to offer beneficial testimony he might otherwise withhold.

   The advocate may also find that an air of respectful scepticism or the appearance of confusion about the meaning of testimony will draw a witness into changing his position in favor of the claimant. However, in those rare instances when the witness is obviously biased against the claimant or is offering what is clearly unreliable testimony, the advocate should feel free to attack the witness directly on those grounds, although this should be done in a professional manner.

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1. Based on a small sample of OASDI disability cases, a possible trend emerges indicating that the claimant's chances of winning a hearing increase with the presence of Social Security Administration experts 54.8% success with a medical expert present vs. 38.8% if the claimant appears alone, 39.9% success with a vocational consultant present vs. 38.8% if the claimant appears alone, and a 46.7% reversal rate if a medical advisor and a vocational consultant both appear vs. 38.8% if claimant appears alone. Clearly, the medical advisor is preferable to the vocational consultant. The vocational consultant can more correctly be considered an adverse witness. The judge, however, will not view the vocational consultant as an adverse witness, but only as an expert called upon to provide objective testimony. Rock, Michael H. *An Evaluation of the SSA Appeals Process*, DHEW, SSA Operations Research Staff, Report No. 7, April 15, 1970.

4. Develop methods to discredit the testimony of an expert. Expert testimony in general consists of opinions reached by applying scientific principles to facts. One way to challenge an expert's opinion is to ask him whether or not it depends on a particular fact. If so, the advocate may be able to damage the testimony by showing that the fact is not true. For example, in the Keefauver case a vocational expert might have formed an opinion that Mr. Keefauver could continue to work as a painter on the assumption that Mr. Keefauver's right ankle was capable of considerable lateral movement. If the diagnosis shows a great loss of lateral movement, then the expert's factual assumption is false and the reliability of his conclusion is seriously weakened. In this situation, the expert may be willing to offer an opinion favorable to the claimant if asked a new hypothetical question that more accurately reflects the facts in the claimant's case. However, the advocate should be careful about asking such a question since the expert may reach his original conclusion again by a new route.

   Another way to undermine expert testimony is to challenge the expert by confronting him with opinions inconsistent or contrary to his own. For example, the claimant's vocational expert might present documentary and/or testimonial evidence showing that the claimant does not have skills transferable to the jobs proposed by the Social Security Administration's expert. He might also challenge the statistical adequacy of labor surveys used by the Social Security Administration's expert to prove jobs exist in reasonable numbers in the national economy that the claimant can do. This approach of directly confronting an expert requires a great deal of expertise on the part of the advocate, plus some advance notice of what the Social Security Administration's expert will say. Therefore it should be used sparingly.

5. Ask effective cross-examination questions. An effective cross-examination strategy is usually designed to lead a witness step by step into a situation where he feels compelled to make an admission he might not make if confronted directly at the outset. One device to achieve this result is to ask precise questions that call for only yes or no answers. Questions structured in this

way discourage justifications, explanations, or digressions, and force the witness to move towards the admission or concession the advocate seeks. An effective cross-examiner will maintain an aura of innocence in phrasing and presenting his questions in order to avoid unnecessarily telegraphing their intent.

For example, if a vocational consultant testified that Mr. Keefauver could work as a painting supervisor, the advocate might ask the following questions:

Q. Would you agree that a paint foreman's job entails . . . . . ?
(Summarize the most important aspects of a paint foreman's job.)

Q. Isn't it true that the foreman is responsible for seeing that the job is done correctly?

Q. Doesn't this mean that the foreman must check the quality of the work?

Q. Isn't it true that the only way a paint foreman can be assured that the painting and filling have been done correctly is to closely inspect the work?

Q. And isn't it true that the only way a foreman can closely inspect much of the work is to climb ladders and scaffolding?

Q. And isn't it true that the medical evidence reveals that Mr. Keefauver has a hard time walking, climbing, and maintaining his balance?

Q. Doesn't this mean that to perform his job correctly, Mr. Keefauver will not only have to endure the pain of climbing scaffolding and ladders, but also will have to run the high risk of losing his balance, falling off a scaffolding and perhaps suffering serious re-injury or even death?

At this point, the witness is almost forced to concede that Mr. Keefauver is in fact physically unable to work as a paint foreman. Another line of questioning might expose the fact that a paint foreman is required to deliver equipment to the painting site, set up scaffolding, and haul ladders, tarps, and cans of paint.

NOTE: An advocate should recognize that most cross-examining is a dry methodical business that only occasionally brings substan-

tial rewards. In most cases it produces unpromising results or worse. An advocate should also realize that, contrary to what happens on Perry Mason, witnesses almost never break down under dramatic or overbearing questioning, but instead become stubborn and evasive, usually to the claimant's detriment.

6. **Be prepared to retreat. An advocate should always be prepared to abandon instantly a line of questioning that is turning up harmful testimony.** If necessary, the advocate should interrupt an answer by saying something like, "Thank you, 'Mr. Vocational Expert,' you have answered my question." Where the witness surprises the advocate with negative testimony that seriously damages the claimant's case, the advocate should consider asking for a recess to deal with the situation.

VI. CLOSING STATEMENT

A. Definition

The judge will normally offer the advocate an opportunity to make a closing statement after all the evidence has been presented. If the judge fails to offer this opportunity, the advocate should ask for it. **The closing statement is the advocate's last chance to sway the judge and his only chance to comment fully on all the evidence.** In a closing statement, the advocate should focus on the specifics of the evidence presented at the hearing, emphasizing the favorable evidence and down playing the unfavorable evidence. He should also organize and analyze the evidence in terms of the issues in the case and justify the conclusions he wants drawn from the evidence. Finally, he should remind the judge of the results the claimant is seeking.

B. Preparing the Closing Statement

Unlike an opening statement, a closing statement cannot be fully pre-

pared before the hearing because it is impossible to anticipate the exact evidence that will be presented at the hearing. However, the advocate should prepare a comprehensive written outline of his closing statement that contains all the key issues, evidence, and arguments. The outline should serve as a framework for organizing and discussing the new evidence presented during the hearing. The outline should be flexible enough to allow the advocate to counter damaging testimony, to respond to special concerns of the judge, and to write in new material during the testimony. Such an outline will enable the advocate to review and organize his notes quickly in preparation for the closing statement.

C. Tips on Presenting the Closing Statement

1. Before delivering the closing statement, the advocate should ask the judge to keep the record open for written submission of additional evidence if it is important to strengthen the claimant's case. In certain situations, it may be necessary to request that the hearing be adjourned so that more oral testimony can be presented at a later time. The advocate should also consider requesting that the record be kept open for the submission of a written brief summarizing the claimant's case. (See *Responsibility to Complete Hearing Record-Hearing Brief*, p. 83.)

   NOTE. In some instances, the judge will leave the record open for his own benefit to enable him to obtain additional medical evidence, often in the form of further medical or psychiatric reports. Ordinarily, the advocate has no grounds to object to this procedure but should ask to receive a copy of the reports for his evaluation.

2. During the hearing, the advocate should take notes of critical testimony (verbatim where essential) and of other points he should cover in the closing statement. After all the evidence has been presented, the advocate should review these notes and draw from them the material to be included in the closing statement. The advocate should ask for time to collect his thoughts and review his notes, if necessary, to assure that he is fully prepared. The advocate may need to request a brief recess, which the judge in most cases will grant.

3. A closing statement should be specific, organized, and brief. A long winded or dramatic presentation is out of place. In disability cases, the advocate normally should treat the issue of medical impairments before the issue of employability because it logically comes first. The advocate should consider reviewing the negative evidence before disclosing the positive evidence. This strategy aims at making the judge's final impression on an issue a favorable one.

In the Keefauver case the advocate might close by saying:

ADVOCATE: *Thank you, Your Honor.*

The evidence in the record clearly establishes that Mr. Keefauver's February 3, 1973, accident caused severe impairments. These impairments have existed for more than twelve continuous months and restrict his normal functioning. The question then is whether Mr. Keefauver can continue to work as a painter, or, as an alternative, whether he can perform some other substantial gainful work.

Let's review the evidence on Mr. Keefauver's capacity to work as a painter.

Dr. Martin's September 27th report, Exhibit 12, page 2, states that "Mr. Keefauver has 25% of normal motion at most in both his left and right feet."

Dr. Prescott's November 18th report, Exhibit 13, page 10, states that "Mr. Keefauver's right foot is so severely fractured that it will demand the creation of an experimental brace." Note; at that time Dr. Prescott told Mr. Keefauver to wear the leg brace for at least one year, or until October of this year.

Dr. Martin's February 12th report, Exhibit 14, page 6, states that as a result of surgical fusion on the right foot, the patient still experiences mild to moderate pain, which can be expected to last for another two or three years. He can be expected to have 25% of normal motion at most in that foot. Dr. Martin's prognosis at that time, a little more than a month ago, was that "Mr. Keefauver's condition would preclude Mr. Keefauver from ever returning to painting or any type of work which involves being on his feet or climbing, such as on a ladder or scaffold."

Mr. Keefauver's testimony supports the medical evidence and shows conclusively that he cannot stand on his feet; carry objects, or walk without his feet swelling and becoming sore. Even while sitting for two or three hours, Mr. Keefauver's feet become numb.

Mr. Keefauver has testified that painters must haul and set up scaffolding that weighs up to 100 lbs. They must carry 5 gallon cans of paint weighing up to 90 lbs. They must also work on scaffolds and ladders where stamina and balance are absolutely necessary. Clearly, Mr. Keefauver cannot do these things. He can't even perform all the normal activities of day-to-day living without aggravating his condition and suffering severe pain. In short, we believe that the combined evidence clearly shows that Mr. Keefauver is physically incapable of earning a living in his usual occupation as a painter.

Let's now consider the question of whether Mr. Keefauver can do alternative work.

Mr. Keefauver is 55 years old. He has a limited 10th grade education, lacks training in any occupation other than painting, and has a work background limited to the manual side of the building trades. These combined factors prevent him from engaging in any work that is not manual. However, it is clear that the same impairments which prevent Mr. Keefauver from painting also prevent him from engaging in other sorts of manual labor. Mr. Keefauver cannot be a truckdriver, or a chauffeur because his feet grow numb and his brace inhibits control. Mr. Keefauver cannot be a paint foreman because, as he has testified, that position requires the capacity to set up scaffolding, haul paint, and inspect the work by moving about scaffolding safely and easily.

Moreover, a man who is not steady on his feet and who cannot stand without debilitating pain and the help of a cane obviously cannot dig ditches, carry large objects, or use heavy tools. Therefore, it is clear that Mr. Keefauver is unable to engage in an alternative occupation. This conclusion is reinforced by the fact that there has been no evidence produced by the Social Security Administration showing that Mr. Keefauver can perform any other

type of work that exists in reasonable numbers in the national economy that is both substantial and gainful.

In sum, we believe that the evidence in the file and presented at this hearing clearly establishes that Mr. Keefauver is entitled to Social Security disability benefits, retroactive to July 10, 1973.

We thank you, Judge _____, for this opportunity to present our case.

Chapter 5
ADVOCATE'S ROLE AFTER A HEARING

Unfortunately, the advocate's role after an administrative hearing is rarely discussed because it is considered either uninteresting or unimportant. This section will discuss these major responsibilities of the advocate after the hearing.

I. Responsibility to Complete Hearing Record — The Hearing Brief
II. Responsibility to Client
III. Responsibility to Legal Office
IV. Responsibility to Himself as a Legal Paraprofessional

I RESPONSIBILITY TO COMPLETE HEARING RECORD — THE HEARING BRIEF

An advocate has the right to file a hearing brief or a written statement after the conclusion of the hearing to complete the hearing record. (Title II 20 C.F.R. § 404.930 and Title XVI: 20 C.F.R. § 416.144.) This section will provide some suggestions on the purpose and potential format of a hearing brief.

A. Definition

A hearing brief is a short written summary of the claimant's case. Its purpose is to 1) recap the documentary and testimonial evidence favorable to the claimant and to argue for conclusions based on those facts that show the claimant is entitled to the benefits in question; and/or 2) to argue points of law such as the correct interpretation or application of certain regulations.

As a general rule, advocates should prepare a hearing brief or written statement for each case they represent at a hearing because it is a useful way to effectively influence the favorable outcome of the hearing. A hearing brief can be especially important if facts in a case are close. In such situations, a thorough and concise written analysis can be particularly persuasive.

From a common sense view, judges are busy people with heavy hearing schedules. The hearing brief can positively influence the judge by facilitating his process of making decisions as well as aiding him in the organization and writing of his decision. Incidentally, judges' written decisions often reflect the points, emphasis, organization, and even phrasing of well-written hearing briefs.

Generally, a hearing brief should be submitted within several weeks after the hearing, not at the conclusion of the hearing itself. This allows the advocate additional time to weigh and cogently organize all the evidence. It can also refresh the judge's impression of the case just before writing an opinion.

B. Organizing and Writing a Hearing Brief

In organizing and writing a hearing brief, advocates should study hearing briefs dealing with the issue of disability submitted by other advocates or attorneys within their office. It is also useful to carefully analyze judges' decisions on disability cases to see how their decisions are organized, the points that they emphasize, and so forth. Hearing decisions are on file in most legal services offices or appear for the OASDI program in a monthly publication entitled *Social Security Rulings on Federal Old-Age, Survivors, Disability, Health Insurance and Minors' Benefits.*[1]

Generally, an effective hearing brief should be concisely written and contain the following elements:

1. Facts

   A brief review of the procedural and factual history and the claimant's efforts to obtain disability benefits.

2. Issues

   A concise statement of the issues to be resolved with cites to the statute and regulations where appropriate.

3. Evidence

   A thorough summary of the most important and most favorable documentary and testimonial evidence. The emphasis should be on

1. Refer to Bibliography, Appendix A, p. 89, for more information about the Rulings.

key medical evidence and portions of the claimant's testimony that deal with physical or mental functional incapacities. References to exhibit and page numbers should be provided where necessary. For a possible model of how this summary of the evidence could be developed, refer back to *Application of Disability Tests to the Keefauver Case*, p. 26.

4. Conclusions

   State clearly the conclusions based on the evidence, emphasizing how each issue has been resolved. Such conclusions can also be effectively integrated with the summary of the evidence discussed in Point 3 above.

5. Results

   Conclude by arguing for the claimant's right to benefits based on the evidence produced. Clearly designate the date to which the benefits should be retroactive.

NOTE: A draft of the hearing brief or written statement should be discussed with the claimant to seek his opinions and corrections before finalizing the brief and submitting it to the judge.

II. RESPONSIBILITY TO CLIENT

The advocate has a responsibility to stay in touch with the client until the hearing decision is rendered. Before terminating the relationship with the client, the advocate should:

A. Inform the client about all benefits to which he might be entitled. Make sure that the client's emergency needs are provided for.

B. Follow up to see that the hearing decision is enforced.

C. Explain to the client his rights to appeal if the decision is unfavorable. For instance, explain to the client his right to an appeals

council review and assist the client in filing a request for review. See *Appeals Council Review,* p. 35.) Or, if necessary, assist the client in obtaining the services of an attorney for court appeal.

D. Conclude the relationship with the client with tact and consideration for the client's feelings and expectations. The advocate should stress with the client that he will be available if any problems arise concerning his benefits.

III. RESPONSIBILITY TO LEGAL OFFICE

The advocate has a responsibility to the legal agency he works for to conduct and complete a client's case efficiently and professionally. At this stage of the representational process, the advocate's responsibilities center around updating, summarizing, and closing the client's case file. These responsibilities include:

A. Checking to make sure that all relevant information is in the client's case file and that the file is organized in a way that can be utilized and/or evaluated by other legal service personnel.

B. Completing a summary of the facts and results in the case.

C. Closing the client's case and forwarding it for appropriate filing.

These rather rudimentary duties assure accountability and are a final expression of the responsibility an advocate owes his client. This will help reinforce the agency's policy that prompt action should be taken on each case and that complete data on every client be kept and be readily accessible. It also serves as one device to evaluate the advocate's performance as well as provide data to judge the types of cases the legal services office is handling and efficiency and effectiveness of the service. Taken as a whole, analysis of case files can be a basis for policy and program modification and necessary information for refunding purposes.

IV. RESPONSIBILITY TO HIMSELF AS A LEGAL PARAPROFESSIONAL

In general, the advocate should review the steps he took prior to and during the hearing to assess his strengths and weaknesses in handling the case. Periodically, the advocate should review such cases with the supervising attorney as an opportunity for on-going education and development.

A critical element of this case review should be a discussion of the important relationship between the hearing record (appeals council record) and subsequent court review. Ordinarily, the evidence that the advocate introduces and objects to at a hearing or at appeals council review forms the sole factual basis for court appeal. At court, no new evidence can be submitted but only judged whether it is "substantial" enough to support the prior decision. *(Administrative Procedure Act.* 5 U.S.C.A. § § 556 (E), 706 (2) (e). Title II: 42 U.S.C.A. § 405 (g) and Title XVI: 92 U.S.C.A. § 1383 (c) (3).)

Careful review of the factual record advocates have made at hearings can help develop the advocate's representational skills as well as protect the due process rights of future clients.

APPENDIX A

BIBLIOGRAPHY

Substantive Law

*An Overview of SSI.** 25 minute video tape. CRLA, Senior Citizens Program, July, 1974.

The video tape is designed to give paralegals with limited knowledge of the Supplemental Security Income program a basic understanding of that program. A discussion and a series of explanatory charts are used to highlight the major concepts of the program.

Collins, Wanda R. *An Advocate's Handbook on the Supplemental Security Income Program.** Volumes I & II. CRLA, Senior Citizens Program, August, 1974.

The purpose of this Handbook is to provide paralegals in legal service offices or lay advocates in health and social agencies with an understanding of SSI, the new federalized welfare program for the aged, blind and disabled. It is designed to be used both as a training manual and a reference book. Volume I provides a thorough explanation of the major concepts in the SSI program. Cites to the statute, regulations, Claims Manual, and SSI Handbook are provided. Advocate tips are interspersed throughout Volume I, so that paralegals will not only understand the program, but be able to utilize that knowledge on behalf of the client. Volume II includes the statutes and the regulations, as well as some of the forms used by the Social Security Administration.

Disability Insurance State Manual. Determination of Disability. Parts I, II and III. Social Security Administration, DHEW. Reprinted July, 1967.

Advocates should be especially aware of Part III, *Disability Evaluation Standards*, and the *Disability Insurance Letters*, (DILS) that continually update policy. The Manual should be available at the DO, SA-DDU, or at regional BDI.

Dixon, Robert G., Jr. *Social Security Disability and Mass Justice: A Problem in Welfare Adjudication.* New York: Praeger Publishers, 1973. 190 pp.

A stimulating policy analysis of the Social Security Disability law and bureaucratic system.

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* Write for price information.

Golick, Toby and Jennings, Judson. *How to Handle a Disability Insurance Case.* in *Clearinghouse Review*, Volume VI, #4–5, August-September 1972, pp. 222–226.

Hannings, Robert B., Ash, Philip, and Sinick, Daniel, (eds.). *Forensic Psychology in Disability Adjudication: A Decade of Experience. Vocational Experts in the Bureau of Hearings and Appeals.* DHEW, Social Security Administration, Bureau of Hearings and Appeals, DHEW Publication No. (SSA) 72-10284.

*Highlights of Major Benefit Programs,** 20 minute video tape, CRLA, Senior Citizens Program, July, 1974.

The video tape discussion focuses on the major income maintenance, health and food programs that are available in this country. Each program is only touched on, with no in depth discussion of any one program. This tape is useful for beginning paralegals who might not be familiar with the broad range of programs and their interrelationships.

McCormick, Harvey L. *Social Security Claims and Procedures.* St. Paul, Minnesota: West Publishing Company, 1973. 703 pp.

A comprehensive book covering the entire OASDI program and the Black Lung Benefits Act with extensive coverage of disability. The book is a valuable resource and reference, citing statute and regulations as well as abundant references to key court cases.

Social Security and Medicare Explained, Including Medicaid. Chicago: Commerce Clearing House, Inc., 1974.

This publication provides a concise but comprehensive explanation of the OASDI program, Medicare, and Medicaid. The manual is revised periodically to reflect changes in the law and regulations.

Social Security Rulings on Federal Old-Age, Survivors, Disability Health Insurance, and Miners' Benefits. Bi monthly publication of Social Security Administration, DHEW, U.S. Government Printing Office, Division of Public Documents, Washington, D.C. 20402.

The rulings contain precedent setting case decisions, statements of policy, and interpretations of the law and regulations.

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* Write for price information.

General Paralegal Material

Collins, Donnelly. *Paralegal Interviewing: Fact Gathering and the Human Perspective.** 30 minute, 16 mm. color film and accompanying *Trainee's and Trainer's Handbooks*. CRLA Senior Citizens Program.

A 30 minute 16 mm. color film, *Paralegal Interviewing: Fact-gathering and the Human Perspective*, is designed to demonstrate principles of paralegal interviewing through an actual interview and through the use of a commentator who highlights important issues during the course of the interview. The client's problem is denial of benefits under the Social Security Disability Insurance Program.

A 31 page *Trainee's Handbook* accompanies the film. It is designed to be used either as a self-teaching tool with questions to be answered by the trainee, or as the core material in a more elaborate training program. Basically, it provides additional information about interviewing which could not be included in the film without disrupting the flow of the interview. In order that the trainee can better understand the purpose of the interview, a brief discussion of the issues involved in determining disability under the Social Security Act is included.

---. *Paralegal Training: Focus on Interviewing.** is a 51 page *Trainer's Handbook* designed to be used independently of the film and the *Trainee's Handbook* or as a supplement to them.

The purpose of the *Trainer's Handbook* is to provide assistance to a person placed in the role of trainer, whose experiences in that role might be limited. The first four sections deal with issues which are germane to training no matter what the subject area, and the fifth section is devoted exclusively to teaching interviewing techniques, including ten training exercises.

Collins, Donnelly, McAdams. *The Santa Cruz Story: Older People Serving Older People in a Legal Setting.** CRLA, Senior Citizens Program, May, 1973.

This 63 page handbook, complete with photographs and model forms, describes in detail the steps involved in setting up and operating a legal services office serving low-income elderly through the use of senior citizens as legal assistants. This handbook is essential to understanding how the Senior Citizens Legal Services program in Santa Cruz was set up and operates.

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* Write for price information.

The Santa Cruz Story: Senior Citizens Legal Services, is a 10 minute 16 mm. color film designed to illustrate the operation of the Senior Citizens Legal Services program of Santa Cruz, California.

This is a unique program serving low income elderly through the use of seniors as legal assistants. The film highlights the various roles of the legal assistants. (This film was revised in October, 1974, so those persons who viewed the older *Santa Cruz Story* might want to preview the new version.)

Statsky, William P. *Introduction to Paralegalism: Perspectives, Problems, and Skills*. St. Paul, Minnesota: West Publishing Company, 1974.

_____ *Investigation in a Law Office: A Manual for Paralegals.** National Paralegal Institute and Antioch School of Law, 1972. NPI, 2000 P Street, N.W., Washington, D.C. 20036, (202) 872-0655.

_____ *Legal Research, Writing and Analysis for Law Students and Paralegals: Some Starting Points*. National Paralegal Institute and Antioch School of Law, 1974.

_____ *What Have Paralegals Done? A Dictionary of Functions.** NPI, 1973.

Film Accompanying Handbook

Paralegal Advocacy: Client Representation at a Social Security Administrative Hearing. 30 minute, 16mm color film. CRLA, Senior Citizens Program, September, 1974.

The film is designed to show how an administrative hearing operates. It dramatically depicts the setting, procedures, and manner in which these hearings are conducted and shows clearly the power of the administrative law judge. The purpose of the film is to illustrate how an advocate can operate effectively within such a setting, with emphasis on presenting an opening statement, conducting a direct examination of the client, and making a closing statement. A brief filmed discussion follows the hearing focusing on the conflicts which arose, and the relationship of those conflicts to the unique characteristics of Social Security hearings.

* Write for price information.

APPENDIX B

ADVOCATE'S CHECKLIST FOR DISABILITY CASES

I. Status of Application and Request for Appeal

A. **Status of Application** (Complete and check; indicate dates; secure copies of documents whenever possible.)

	Dates	Documents
_____ Application Filed		
_____ Application Pending		
_____ Application Denied		
_____ Application Deferred		
_____ List names and titles of all Social Security District Office personnel claimant spoke with.		

B. **Status of Request for Appeal** (Complete and check; indicate dates; note if time limits for filing met; secure copies of documents.)

	Date	Filing Limits	Documents
_____ Filed for Reconsideration			
_____ Reconsideration Determination			
_____ Request for Hearing Filed			
_____ Notice of Hearing			
_____ Notice of Hearing Decision			
_____ Request for Appeals Council Review			
_____ Notice of Appeals Council Decision			

NOTE: Assist claimant in filing for appropriate level of administrative review. Make a "good cause" argument if time limits for filing were not met.

II. Authorization (Check if client has signed the following forms.)

_____ Authorized Representative

_____ General Authorization (To contact individuals and institutions, to obtain documents, records, reports, etc.)

III. Basis for Denial (Check one or more.)

_____ Lacks insured status (quarters of coverage inadequate).

_____ Starting date of period of disability in question.

_____ Excess income or resources. Specify.

_____ Does not meet other general and/or technical eligibility requirements. Specify.

_____ Does not meet tests for determining disability, i.e., "medical and employability tests." Specify.

_____ Termination, suspension, or reduction of disability benefits.

_____ Define clearly the issue(s) upon which the client's case will be decided.

IV. Investigation

A. Information from Client (Complete and check.)

_____ Obtain a detailed history of client's medical problems and impairments. Focus on the severity of the impairment(s) in terms of experiences of pain, limitations in performing everyday activities, limitations in doing functions of former occupation. Describe.

_____ Outline how client spends a typical day.

_____ List names and addresses of doctors who have treated the client. State nature and dates of treatment.

_____ List names and addresses of hospitals and clinics who have treated the client. State the nature and dates of treatment.

_____ Obtain a detailed history of client's work backgrouhd, education, special training, and skills. When is the last time the client worked; under what circumstances; and why did he stop working?

_____ Check to see if client has sought employment, vocational rehabilitation, or job training. List names and addresses of persons or agencies contacted and the approximate date of contact. Find out the results.

B. Documents (Complete and check.)

_____ Evaluate validity, relevency, and probative value of client's information. List points that need to be clarified by the client.

_____ Evaluate validity and relevancy of all documents in hearing file.

_____ Analyze all pertinent documents. List reports that need to be up dated.

_____ Decide whether certain medical reports need clarification or explanation of client's condition in functional terms. Is doctor or institution willing to submit a supporting statement, affidavit, or declaration? Outline the essential points the report or statement should contain.

_____ Determine whether a report from a board certified specialist is required. List type of speciality required and possible names of sympathetic doctors.

_____ Find out if expert witnesses have been called to testify at the hearing. Check credentials and try to anticipate the type of testimony they will present. If possible secure documents upon which they will base their testimony.

_____ Research and summarize the statutes, regulation, and case law pertinent to client's case.

NOTE: Make sure that there is probative evidence to offer on each issue that will be raised at the hearing. If the evidence is inadequate, decide whether to ask for a postponement of the hearing for more time to prepare.

V. Strategy (Complete and check.)

A. Decisions Concerning Documents and Witnesses

_____ List documents to be submitted and/or referred to in presenting the case. Identify each document by title, date, exhibit/page number, and purpose. Decide on tentative order of submitting and referring to documents.

_____ Decide whether to subpoena any documents, records, or papers relevant to the case or to subpoena individuals for the purpose of cross-examination. Clearly identify documents, list names of individuals, state where documents and individuals can be located, and purpose to be achieved by subpoena.

_____ Decide whether to object to any documents contained in the hearing file. Outline basis for objection.

_____ Decide whether to use supportive witnesses or whether certified statements or affidavits will suffice. List names of witnesses, relationship to

client, and content and order of testimony or statement.

_____ Decide whether to request that observers be present at the hearing. Who and how many?

B. Preparation of Client and Witnesses (Complete and check.)

_____ Describe setting, conduct and procedure of an administrative hearing. Explain the role of all participants.

_____ Explain the issues upon which the case will be decided and outline the general strategy of how you intend to meet those issues.

_____ Review the type of questions the judge is likely to ask the client and other witnesses.

_____ Go over the questions you intend to ask the client and other witnesses. Explain the purpose and importance of the questions.

_____ Arrange a meeting with your client and other witnesses a half hour or so before the hearing is to begin.

_____ A few days before the hearing, check with the client and other witnesses to make sure that they know when and where the hearing is to be held, and whether they have transportation.

C. Completion of Hearing Notebook (Complete and check.)

_____ Prepare an opening statement.

_____ Summarize the issues involved in the case and cite the facts, law, and evidence supporting (attacking) the claimant's position on each issue.

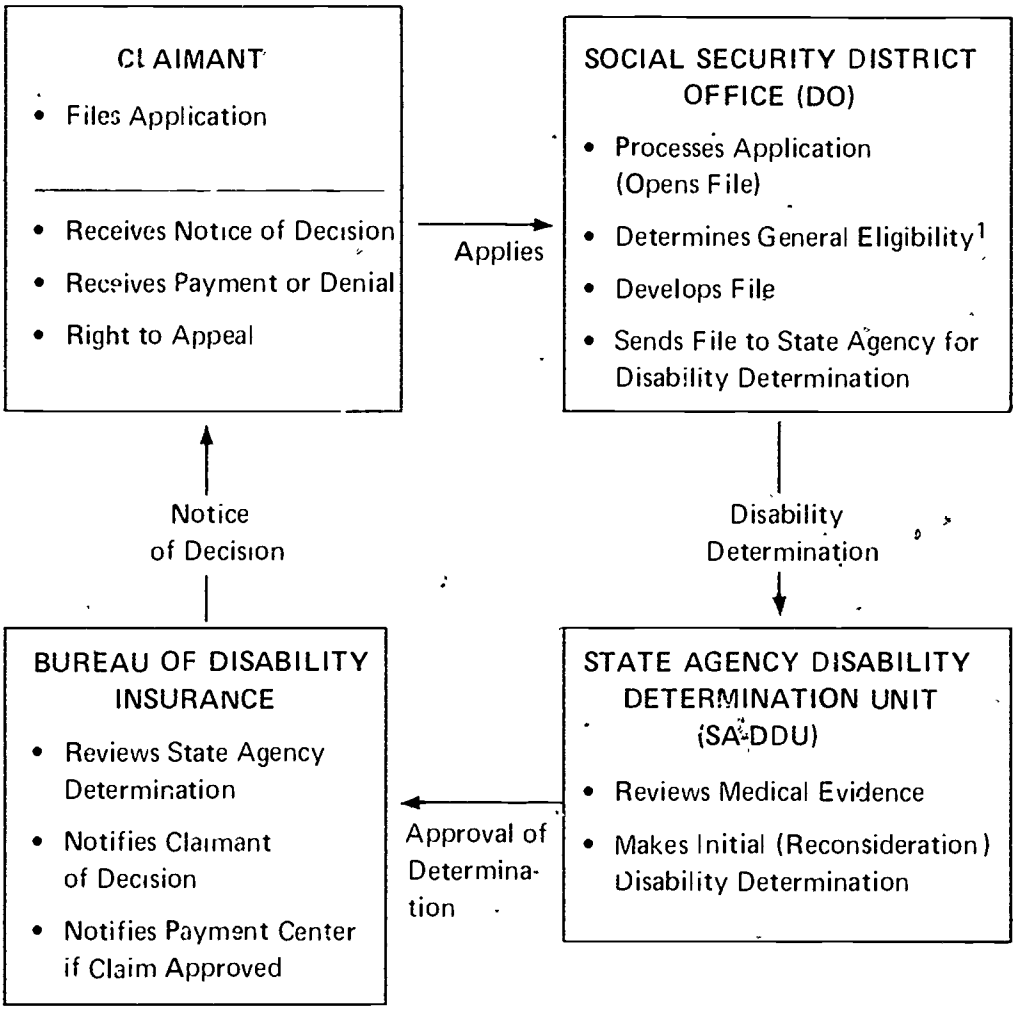
_____ Write out all the questions you intend to ask the claimant and lay and or expert witnesses, as well as questions anticipated for cross-examining witnesses.

_____ Make an outline of the closing statement.

_____ Check over the notebook to make sure it contains all necessary information and materials for the hearing and is well organized for ready reference.

APPENDIX C

PROCESS FOR INITIAL APPLICATION DETERMINATION OF OASDI/SSI DISABILITY



1 The Social Security District Office (DO) determines whether the claimant meets the general conditions of eligibility, i.e., for OASDI claimants, they must have an insured status and meet other general conditions of entitlement, and for SSI claimants, they must have limited income and resources in order to meet the restrictive means test as well as meet other general eligibility criteria.

APPENDIX D

SELECTED FORMS FOR OASDI/SSI DISABILITY PROGRAMS

The forms selected for this Appendix are the ones an advocate is most likely to see or use while representing claimants in Social Security proceedings. The majority of these forms are usually available at a local Social Security District Office.

OASDI PROGRAM

Application for Disability Insurance Benefits (Form SSA-16)*

Medical History and Disability Report (Form SSA-401)*

Chronological Work History*

Report of Contact (Form SSA-5002)*

Request for Reconsideration (Form SSA-561)*

Request for Hearing (Form #501)*

Appointment of Representative (Form SSA-1696)*

Notice of Hearing (Form HA-507.1)*

Notice of Decision (Form HA-502-3)*

Hearing Examiner's Decision (Form HA-514.1)*

Request for Review of Hearing Examiner's Action (Form HA-520)*

SSI PROGRAM

Application for Supplemental Security Income (Individual) (Form SSA-8001)

Application for Supplemental Security Income (Couple) (Form SSA-8000)

Application for Supplemental Security Income (Individual with Spouse) (Form SSA-8002)

Statement of Income and Resources (Form SSA-8010)

Disability Determination and Transmittal (Form SSA-831)

Supplemental Security Income Notice of Disapproved Claim (Form SSA-8030A)

* Forms used by both the OASDI and SSI programs