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ESTABLISHING A BASIS FOR DISABILITY BENEFIT ENTITLEMENT ON THE BASIS OF AUTISM

Introduction

Generally, an individual cannot establish entitlement for a disability benefit, whether it is the insured benefit under Title II (SSDI, aka DIB) or the means-tested benefit under Title XVI (SSI), on the basis of a diagnosis, alone. One must demonstrate that the diagnosed condition *causes* functional limitations that prevent or is likely to prevent that individual from engaging in “substantial gainful activity” for a period of at least twelve months.

“Substantial Gainful Activity” has a very specific meaning with respect to Social Security. It refers to earnings above a certain minimal threshold on a monthly basis. That threshold increases, annually and is currently set at \$1,220 for 2019 and \$1,260 for 2020. (There is a higher threshold of \$2,040 and \$2,110, respectively, for blind individuals.)

So, the key to establishing entitlement to a disability benefit is to demonstrate functional limitations. Such limitations are much easier to demonstrate if they are physical, because they can be objectively observed, measured and tested. Benefit entitlement on the basis of a mental impairment is much more difficult to establish because the assessments are much more subjective and therefore, more easily rejected by a decision maker.

What Are the Functional Limitations To Be Identified?

In an attempt to objectify the determination of disability for both mental, as well as physical impairments, the Social Security Administration created the “Listing of Impairments,” which appears as an appendix to the official regulations of the agency. These regulations are published and have the force of law because they have gone

through a notice and comment period. The Listing of Impairments lists hundreds of medical conditions, both physical and mental, and specify, in excruciating detail, the criteria by which a given condition can be considered to be sufficiently severe so as to result in an automatic determination that the individual is disabled. You can see, for yourself, the Listing of Impairments here:

https://www.ssa.gov/OP_Home/cfr20/404/404-app-p01.htm.

If one is unable to establish the existence of a disability that “meets” or “equals” the criteria set forth in the Listing of Impairments, which is step 3 of the disability determination process, it is still possible to be found disabled through additional inquiry as I have explained in my paper, “About the Disability Determination Process.” However, it is always best if one can avoid having to proceed through those additional steps by establishing the disability at step 3.

Autism Spectrum Disorder is a condition that appears in the Listing of Impairments at §12.10. The criteria for the listing are as follows:

12.10 *Autism spectrum disorder* (see 12.00B8), satisfied by A and B:

A. Medical documentation of *both* of the following:

1. Qualitative deficits in verbal communication, nonverbal communication, and social interaction; and
2. Significantly restricted, repetitive patterns of behavior, interests, or activities.

AND

B. Extreme limitation of one, or marked limitation of two, of the following areas of mental functioning (see 12.00F):

1. Understand, remember, or apply information (see 12.00E1).
2. Interact with others (see 12.00E2).
3. Concentrate, persist, or maintain pace (see 12.00E3).
4. Adapt or manage oneself (see 12.00E4).

The references in parenthesis, above, refer to introductory paragraphs to the overall listing for mental disorders at §12.00, and will be discussed, below. As for the “B” criteria, a claimant must show “extreme limitation” in one or “marked limitation” in two of the four domains. To that end, it will be helpful to understand the five rating categories for each of the domains, and, it will also be helpful to better understand what is encompassed by each domain.

The rating scale for the “B” criteria is set forth in the regulations as follows:

- a. *No limitation (or none)*. You are able to function in this area independently, appropriately, effectively, and on a sustained basis.
- b. *Mild limitation*. Your functioning in this area independently, appropriately, effectively, and on a sustained basis is slightly limited.
- c. *Moderate limitation*. Your functioning in this area independently, appropriately, effectively, and on a sustained basis is fair.
- d. *Marked limitation*. Your functioning in this area independently, appropriately, effectively, and on a sustained basis is seriously limited.
- e. *Extreme limitation*. You are not able to function in this area independently, appropriately, effectively, and on a sustained basis

As for each of the each of the four domains, here is what the regulations have to say about each one of them in the preamble to the 12.00 listings in the regulations:

B. 1 Understand, remember, or apply information:

This area of mental functioning refers to the abilities to learn, recall, and use information to perform work activities. Examples include: Understanding and learning terms, instructions, procedures; following one- or two-step oral instructions to carry out a task; describing work activity to someone else; asking and answering questions and providing explanations; recognizing a mistake and correcting it; identifying and solving problems; sequencing multi-step activities; and using reason and judgment to make work-related decisions. These examples illustrate the nature of this area of mental functioning. We do not require documentation of all of the examples. (from 12.00E.1.)

B. 2 Interact with others

This area of mental functioning refers to the abilities to relate to and work with supervisors, co-workers, and the public. Examples include: cooperating with others; asking for help when needed; handling conflicts with others; stating own point of view; initiating or sustaining conversation; understanding and responding to social cues (physical, verbal, emotional); responding to requests, suggestions, criticism, correction, and challenges; and keeping social interactions free of excessive irritability, sensitivity, argumentativeness, or suspiciousness.

These examples illustrate the nature of this area of mental functioning. We do not require documentation of all of the examples. (from 12.00E.2.)

B. 3 Concentrate, persist, or maintain pace

This area of mental functioning refers to the abilities to focus attention on work activities and stay on task at a sustained rate. Examples include: Initiating and performing a task that you understand and know how to do; working at an appropriate and consistent pace; completing tasks in a timely manner; ignoring or avoiding distractions while working; changing activities or work settings without being disruptive; working close to or with others without interrupting or distracting them; sustaining an ordinary routine and regular attendance at work; and working a full day without needing more than the allotted number or length of rest periods during the day. These examples illustrate the nature of this area of mental functioning. We do not require documentation of all of the examples. (from 12.00E.3.)

B. 4 Adapt or manage oneself

This area of mental functioning refers to the abilities to regulate emotions, control behavior, and maintain well-being in a work setting. Examples include: Responding to demands; adapting to changes; managing your psychologically based symptoms; distinguishing between acceptable and unacceptable work performance; setting realistic goals; making plans for yourself independently of others; maintaining personal hygiene and attire appropriate to a work setting; and being aware of normal hazards and taking appropriate precautions. These examples illustrate the nature of this area of mental functioning. We do not require documentation of all of the examples. (from 12.00E.4.)

How Can Evidence Be Marshalled To Demonstrate Functional Limitations?

As you can see from the description of these functional domains, specific types of deficits must be demonstrated in order to establish disability on the basis of having an autism spectrum disorder. Some of these deficits may be established through the administration of psychological tests. Others will necessarily be established through the observations of those who live and work in close proximity to the individual claiming disability on the basis of the autism. Although a history of therapy and Individual Educational Plans (IEPs) under the Individuals With Disability Education

Act can help to substantiate that the disability has been continuing for a long time, this evidence does not conclusively demonstrate that a disability exists today. Thus, I believe a three-pronged approach can best lay the foundation for proving a disability claim when autism spectrum disorder is implicated, particularly when the disorder is present in individuals who are “high functioning” and do not necessarily demonstrate within a short, 40-minute consultative examination by a physician working on behalf of the agency the extent of their functional impairment. This assumes, of course, that the condition is of sufficient severity to provide evidence sufficient to prove the claim. The three prongs are:

1. Testing – A complete neuro-psychological evaluation of a psychologist with expertise in Autism Spectrum Disorder. Testing for ASD will necessarily involve input from not only the individual for whom disability is claimed, but also from those who live with or in close proximity to the individual claiming benefits, such as parents and/or siblings. This testing is not necessarily inexpensive, and the cost must be borne by the claimant or his family at the time of testing.
2. Diary – Maintenance of a diary by a parent or other close relative that records, as they happen, incidents that demonstrate difficulty in one or more of the four domains listed above. Recording incidents on an ongoing basis, focusing on the dysfunction that occurred, will help to establish a reliable record of difficulties experienced by the disability claimant. While any one incident, by itself, may not be debilitating, a diary filled with incidents can show a pattern of behavior from which it could be concluded that there are deficits in one or more of the four domains that are incompatible with fulltime, gainful employment.
3. Narratives – These are statements to be submitted to the Social Security Administration by those who have had opportunity to observe the claimant and are in a position to describe the claimant’s behavior to the extent that such behavior reflects deficits in one or more of the four domains listed above. (Narratives may also address the deficits in A.1 and A.2. More on this, below.) These narratives may be from a parent, a sibling or other relative, a teacher, employer, a family friend, a physician or therapist – anyone who has been in a position to observe the claimant’s behavior. The best narratives will describe incidents and patterns of behavior, but refrain from characterizing the limitations as “mild,” “moderate,” “marked,” or “extreme” unless provided by a physician or mental health professional. Statements with greater specificity are more compelling. Compare:

Whenever we go out to eat, Junior will have a fit if service is delayed by more than just a few minutes.

vs.

Junior's ability to adapt to changed circumstances and manage his emotions is limited. In the past year, we went out to eat with Junior, at his favorite restaurant, on eight occasions. This is a popular restaurant and Junior knows that we may have to wait in order to get serviced. The staff is very understanding. However, on six of those occasions, we had to wait for service. Each time we had to wait for more than five minutes, Junior would stand up, start flapping his arms, and shout "what does it take to get service around here?" or some similar statement. Knowing that this could happen, we try to avoid going out, but Junior enjoys the experience once we are able to get serviced and he really does have few pleasures.

Some additional items to consider as part of a narrative include: failed work attempts, participation in transition programs, failed educational experiences, suicide attempts, etc. This is not an exhaustive list.

It will be most helpful if all of the narratives, as a group, are able to provide examples that describe deficits in each of the four functional domains. Again, to emphasize, I am *not* asking you to describe the limitations as "extreme," "marked," "moderate," etc. It will be far more helpful for you to describe events and situations.

Addressing the A.1 and A.2 Criteria

To the extent that a narrative can also address the A.1 and A.2 criteria, it will also be helpful in establishing the existence of the disability. Regarding each of the criteria, please address the following:

A.1 What deficits does the claimant have in social interaction that you can describe? Are there situations in which the claimant failed to read social cues to his detriment? Can you describe them? Is he able to initiate conversation in a group? Does he have friends? What are their interactions like? If he doesn't have friends, can you explain why that is so? Is he too shy to initiate, or are others unable to tolerate his behavior? If the latter, what is it that tests their ability maintain a friendship. Is he easily frustrated in a conversation? If so, how does that manifest and how often? Can he accept criticism? If not, how does he react? Can you give examples?

A.2 What are the claimant's interests? Are they varied? If not, how are they restricted. Does he engage in repetitive patterns of behavior? If so, what are they? Does he have hobbies? If not, say so. Is he lonely? Does he talk about why that might be so?

Other Evidence

Of course, it will also be necessary to provide medical and psychiatric records, but these records are not likely to specifically address the specific criteria and domains discussed, above. That is why it will important to obtain testing, maintain a diary, and prepare narrative statements.

While it is not possible to guarantee that any given claim will be successful, by providing you with this roadmap for establishing the basis for a claim, it is my hope that you have a better of understanding of what facts need to be presented in order to substantiate a claim for disability benefits when Autism Spectrum Disorder is involved. Hopefully, with this understanding, and the evidence that you are able to provide, you or your loved one will have a greater likelihood of success in establishing a claim for benefits.