Tips for Appealing a Denial

1. Strict deadline.

You only have 60 days after receiving a denial letter to appeal. The Social Security Administration (SSA) assumes you received the letter 5 days after mailing, so you actually have 65 days from the date on the letter to file your appeal.

If you don't appeal on time, SSA will usually make you start over. That means you have to file a new application for benefits. Starting over with a claim may result in the loss of back benefits, and sometimes SSA will require new evidence of disability. Starting over also means more delay. This makes it triply important that you timely file your appeal.

Do not wait while you gather additional evidence of disability. Do not delay in order to write an explanation of why the denial is wrong. Don't even wait while you hire an attorney. Appeal online at www.socialsecurity.gov or better yet, go to the Social Security office with your denial letter. Be sure that the Social Security representative gives you a signed copy of your appeal paper showing you appealed on time.

2. Medical opinion.

The most important task your disability attorney can do for your case is getting an opinion from your doctor about the nature and severity of your impairments – symptoms, diagnosis, prognosis, your physical and mental restrictions, and what you can still do despite your impairment.

Under Social Security regulations, your doctor provides the most important medical opinion evidence in your case. Your doctor's opinion might even be given "controlling weight," meaning it will be decisive. To be decisive, your doctor must have treated you rather than just evaluated you. And his or her opinion must be well supported by medically acceptable clinical and laboratory diagnostic techniques.

However, decisive refers to the degree of medical impairment, not whether you are disabled. The Social Security Administration takes the position that it is the one to determine disability, which it sees as a legal conclusion based on age, education, and work experience as well as medical evidence.

Thus, your attorney will never ask your doctor if you are disabled, but instead will focus on the degree to which you are impaired, and will seek the answers to these questions:

- How has your impairment been confirmed?
- Will your impairment last 12 months?
- What are your functional limitations?
- Are these limitations consistent with your symptoms?

3. Medical records.

The Social Security Administration (SSA) requires a lot of medical documentation. Conclusions by your treating doctor are not enough, especially if the issue is whether your impairment meets a Listing. SSA wants to see the medical test results themselves.

Your attorney will make sure SSA's case file contains the actual test results for all significant positive tests, and that they are consistent with the Listing of Impairments' specific requirements for particular kinds of medical evidence. Two examples: (1) In cardiac cases SSA requires copies of the electrocardiogram tracings as well as the cardiologist's interpretation of them. (2) In pulmonary impairment cases SSA requires copies of the spirometric tracings.

Your attorney will not withhold relevant negative records, but instead will submit them and refine the case presentation to account for their existence.

Hospital records

At a minimum, your attorney will gather the emergency room records, admission histories and physicals, all reports by medical consultants, physical therapy evaluations and reports, surgical/operative reports, pathologist's reports, discharge summaries, and test results pertaining to your impairment, such as laboratory reports, radiologist reports, nerve condition/EMG reports, nuclear medicine reports, etc.

What is ultimately assembled depends on your attorney's theory of your case. In many cases, hospital records concerning an acute illness are less important than the records generated by your doctor or therapist after you have stabilized. After all, there is no controversy over whether you can work when hospitalized with an acute illness. The issue in most cases is whether you can work after recovering from the acute phase.

On the other hand, your case might be one where you have been hospitalized so often that the frequency of hospitalization is part of your case. At a minimum, your attorney will obtain copies of all the discharge summaries and perhaps also a list of all admissions that is maintained by most hospitals and available only by special request. The summary sheet can make a dramatic exhibit.

4. Case investigation.

An important step when your attorney is developing your disability claim prior to the hearing is obtaining and analyzing your case file. This letter is an introduction to what your attorney will look for when reviewing that file.

Reason for denial

The regulation under which your claim was denied will be noted in block 22 of the Disability Determination and Transmittal (Form SSA-831). When your denial letter has been poorly written, this block is the only source for determining that the state agency found that your impairment was not severe or that you were or were not capable of performing past relevant work. For example, if the code H1, this is a denial at step four of the sequential evaluation process—you are capable of performing past relevant work.

The primary denial codes are:

Impairment Not Severe—Medical Consideration Alone	F11
Capacity for SGA—Any Relevant Past Work	H1
Capacity for SGA—Other Than Relevant Past Work	J1
Engaging in SGA	N1[3]
Impairment Prevented SGA for a Period of Less Than 12 Months	E1
Impairment Prevents SGA at Time of Adjudication but is not Expected to Prevent SGA for a Period of 12 Months	E3
Insufficient Evidence Furnished	M5
DAA Is Material to the Determination of Disability	Z1
Failure or Refusal to Submit to Consultative Examination	L1
NH Does Not Want to Continue Development of Claim—Wants Decision Made on Evidence in File	M3

Some state agencies do a good job of explaining the reasons for denial. Others do not. If your state agency does a good job, you may find that your denial letter contains the most succinct explanation of why your claim was denied available anywhere in the record.

Although a denial letter may be a few pages long, the only paragraph worth reading is the one that explains the reasons for denial. The list of evidence considered tends to be unreliable. The rest is boiler plate—stock paragraphs that appear in all denial letters.

Onset date

The next item in your case file that your attorney will review is your Social Security disability application. The most important item there is the alleged "onset date," the date you said you became disabled.

In many cases this crucial date may be wrong as a result of being chosen by an SSA representative based upon an incomplete description of your problems, or because you had inadequate information about what it means to be disabled. Such incorrect onset dates need to be amended, which may be accomplished simply by your attorney writing a letter to the administrative law judge.

Since the onset date determines the amount of back benefits you can receive, it is important that it be accurate.

Other items

Your attorney will also be checking for references to prior applications, claims filed under other programs, children who may be eligible for benefits, your date last insured, date of entitlement, primary insurance amount, family maximum, and more.

Your attorney will pay special attention to your file's state agency worksheets, which include notes written about your case by disability examiners and state agency doctors. Any good questions in those notes should also be posed by your attorney to your treating doctor. Your doctor is likely to give a different answer, or at least an explanation that will lead to a result different from that reached by the state agency.

If your attorney thinks your impairments meet the criteria set forth in one of the impairments found in the SSA's Listing of Impairments, he or she will look at the state agency worksheets to see how this issue was addressed by the disability examiner and state agency physician. Sometimes state agency doctors miss the issue, but more commonly the worksheets will reveal what missing evidence is needed to prove that your impairment really does meet a Listing.

Mistaken denials

Perhaps the most common single reason for an erroneous denial is that the state agency overestimated your residual functional capacity (what you can do on a sustained basis in a work setting despite your impairment). For example, the state agency may have determined that you are capable of medium work, but you are actually limited to light work. If this is an issue in the case, your attorney will concentrate on obtaining medical opinion evidence and other evidence that demonstrates your correct residual functional capacity.

Other common examples of erroneous reasons for denial are:

- an impairment was determined to be "not severe";
- the claimant's mental impairment was determined not to meet the Listings;
- additional impairments were not considered;
- the claimant's allegations of pain were not properly evaluated;
- the state agency did not gather evidence showing that the claimant's impairment meets the Listings;
- the claimant was determined to be capable of past work but the state agency underestimated the exertional level of the past work both as the claimant actually performed it and as the occupation is usually performed; and
- the state agency used the claimant's years of formal schooling for establishing educational level but testing shows the claimant's educational level is considerably lower.

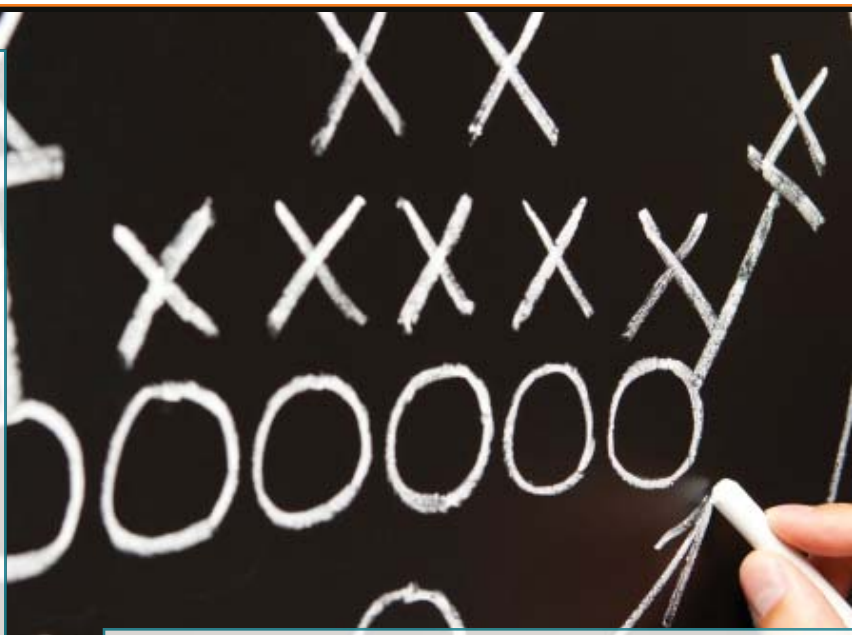
Other possibilities are virtually limitless.

By understanding how the state agency came to its conclusion that you are not disabled, your attorney may find discrete issues in your case on which to focus on. At the same time, your attorney will work on obtaining the rest of the proof that you are disabled.

5. Case theory.

One of the bigger contributions a disability attorney makes to your claim is developing a winning theory for your case.

The theory is one or two sentences that sum up your case and explain why you should be found disabled. Sometimes the theory is as simple as this: "The claimant, whose past work was semi-skilled medium work, is 54 years old and is limited to sedentary work by degenerative disk disease. Because he has no transferable skills, Rule 201.14 of the Medical-Vocational Guidelines requires that he be found disabled."



In more difficult cases, such as those involving literate claimants under age 50, the attorney's theory is an explanation why the client cannot do a broad range of sedentary work

The first step in your attorney developing this theory is listing your symptoms and impairments, with the most limiting ones first. Each impairment must be supported by the medical records. And there must be a clear link between each medical impairment and the resulting symptoms. A symptom unrelated to a diagnosed medical impairment cannot form the basis for a finding of disability.

Ability to work

The next step is for your attorney to record your residual functional capacity, which is what you can do on a sustained basis in a work setting despite your impairment. A few examples are:

☐_____says that s/he can walk about _____ blocks before stopping.

☐ S/he can sit for about _____ minutes at one time and stand for about _____ minutes at one time.

☐ Out of an 8-hour working day, s/he says s/he can sit for a total of _____ hours and stand/walk for a total of _____ hours.

☐ S/he needs to walk around approximately every _____ minutes for about _____ minutes.

☐ S/he needs a job that permits shifting positions at will.

☐ Because of

☐ muscle weakness	☐ pain/paresthesias, numbness	☐ _____
☐ chronic fatigue	☐ adverse effects of medication	☐ _____

s/he may need to take unscheduled breaks [¨ to lie down] during an 8-hour working day. S/he expects this to happen _____; and s/he may need to rest _____ minutes (on average) before returning to work.

☐ If s/he had a sedentary job, because of _____ s/he says s/he would need to elevate his/her legs about _____% of the time during an 8-hour working day. S/he needs to elevate his/her legs about _____ high.

☐ S/he needs a cane to walk because of

☐ imbalance	☐ pain	☐ weakness	☐ dizziness
☐ insecurity	☐ _____		

☐ S/he can occasionally lift and carry _____ lbs. and frequently lift and carry _____ lbs.

☐ S/he says that because of

☐ pain/paresthesias	☐ motor loss	☐ sensory loss/numbness	☐ muscle weakness
☐ swelling	☐ side effects of medication	☐ limitation of motion	☐ _____

The theory of your case is the engine that runs it. The theory guides the development of the case's evidence and its hearing testimony.

6. Hearing wait.

A hearing before an administrative law judge (ALJ) is necessary to win many kinds of Social Security disability cases.

Although an individual hearing only lasts an hour or so, in can take 18 months or so from the time a hearing is requested until the hearing is held and a decision is issued. Since more than half of hearings result in favorable decisions, your odds of success are good, but the lengthy waiting time is painful.

The only time SSA holds hearings earlier is when a claimant is terminally ill, suicidal or homicidal, or unable to obtain food, medicine or shelter and has no means to remedy the situation. Living in a homeless shelter is not sufficient reason, although "expiration of shelter stay" is sufficient under SSA's rules. In actual practice, though, people living in homeless shelters can usually have their cases expedited because SSA personnel know that most homeless shelters have time limits.

SSA has been hiring ALJs and staff to reduce the wait. It has worked to identify cases in which favorable decisions can be issued without a hearing. It has allowed ALJs to issue favorable decisions from the bench. And it is using more technology.

Unfortunately, the flood of additional applications that arrived during the Great Recession has overwhelmed these improvements and a lengthy wait is still the norm.

7. Hearing basics.

The most common problem claimants have at their hearings is their own nervousness. I have found that spending sufficient time explaining what will happen at the hearing can work wonders at calming nerves. I describe the hearing room, the judge, and the judge's assistant who will run the recorder. I explain the necessity for answers audible to the microphones.

I also outline the areas of inquiry: education and training, work experience and work skills, medical condition, treatment history, physical abilities, mental abilities, and daily activities.

I typically meet with my clients a day or so before the hearing to discuss my theory of disability, go through the issues in their cases, and prepare them to testify. My goal is to prepare them to give relevant, honest testimony which neither exaggerates nor minimizes their impairments. The best claimant testimony is filled with anecdotes, details, and examples of limitations. It provides facts about strengths as well as weaknesses in a straightforward manner.

When claimants have difficulty describing things in detail, I encourage them to think about how their impairments have changed their lives. Completing an activities questionnaire can be helpful.

8. Your testimony.

When I am preparing a claimant to testify at his or her disability hearing, I describe my theory of the case.

So if you were my client, I would explain to you that I will be attempting to prove two things with your testimony:

First, that you cannot do any of the jobs you have had in the past 15 years; and second, that you are not able to do any other jobs which exist in significant numbers. For the first element of proof, I would ask you to describe the easiest job you've had in the past 15 years and explain why you cannot do it now. I would help you refine your explanation by weeding out any reasons Social Security Administration (SSA) has determined are irrelevant. For example, "The company went out of business." "They'd never rehire me with all my medical problems." And so on.

For the second element of proof, I would explain that you don't have to be bedridden to be incapable of performing jobs existing in significant numbers. I would describe how Social Security regulations help with this proof by rather explicitly setting forth what needs to be shown, especially in an exertional impairment case.

For example, for a 50-year-old, poorly educated claimant with an unskilled heavy work background, I would explain that in addition to proving that he cannot do his former heavy job, he must also prove that he cannot do a light job, e.g., standing at a machine in a factory for six hours out of an eight-hour working day, frequently lifting 10 pounds, and occasionally lifting up to 20 pounds. I explain that even if the judge finds that he is capable of a sit-down job, the judge will find him disabled.

I would also tell you not to argue your own case, explaining that common-sense arguments won't work, and that disability determination is hypothetical. This is crucial for those difficult cases of claimants under age 50. I would sort through your reasons why you cannot do a sit-down job and tell you not to bring up the common sense reasons that SSA has deemed irrelevant: "I'm not qualified for a sit-down job." "I'd never be hired for a job like that." "There aren't any jobs like that around here."

9. Medical inconsistencies.

If I was preparing you for your upcoming disability hearing and there were inconsistencies in your medical records, I would first ask if you can help explain them.

There are always inconsistencies and, indeed, factual errors in medical records. I ignore most of them unless they are of a magnitude that cannot be disregarded. Unless you had a very convincing explanation, I would deal with these problems by asking a doctor to address them in a report. I always try to keep the claimant's "medical" testimony (about things his doctor has told him but which do not appear in the medical records, about his own medical theories, etc.) to a minimum.

Such testimony is not usually helpful to the ALJ in understanding medical issues, so I would remind you not to quote your doctor unless I or the judge specifically ask, "What did your doctor say about this?"

If the ALJ asks, "What keeps you from working?" a good answer is not to state a diagnosis, such as arthritis. Lots of people work despite the fact that they have arthritis. The ALJ may have arthritis. The reason you cannot work is the severity of your symptoms, something which you know better than anyone. So if you are asked that question, the door is open for you to launch into a full description of your symptoms and limitations.

You should neither exaggerate nor minimize your testimony about your pain or limitations. You want to guard against any tendency to exaggerate pain testimony, but you shouldn't minimize it either. You will be testifying under oath and must tell the truth.

I would make sure you understand how your hearing testimony about your pain fits into your disability case. I would explain my theory of how your pain prevents you from performing substantial gainful activity, e.g., inability to sit, stand or walk for prolonged periods, inability to get through an eight-hour day without lying down, good days/bad days/missed work, inability to concentrate or pay attention on a consistent basis, irritability, etc.

10. Persuasive testimony.

I have learned that the best way to obtain vivid descriptions and detailed examples in the claimant's testimony at the disability hearing is to make him feel comfortable using his own words.

So if I were prepping you for your hearing, one way I would encourage natural testimony would be to tell you to psyche yourself up for talking to the administrative law judge, not the same way you would talk to a regular judge in a courtroom, but rather as if the ALJ were an old friend of yours who wants to be brought up to date about all of the problems you have been having lately.

When the ALJ asks you about your daily activities, you are presented with a golden opportunity to describe your limitations in the context of daily life. Be sure to give enough details. Run through your usual day hour by hour for the judge, providing as much detail as possible, emphasizing those things that you do differently now because of your impairments.

Describe how long you are active doing things and how long you rest afterwards. Give details about resting — where you rest, whether it's sitting or lying down, whether it's on the couch or the bed or a recliner chair. Tell how long it takes to do a project now compared to how long it used to take. Describe all those things that you need help from other people to do — and tell who those others are. Give details and examples right down to the names of the television shows you regularly watch, if that is what you do.
The more specifics you can provide to the ALJ about your daily activities, the more readily the ALJ will understand your symptoms and limitations.

Lastly, remember these general rules for testifying:

1. Tell the truth.
2. Neither exaggerate nor minimize your medical symptoms.
3. Know your present abilities and limitations.
4. Provide relevant details and concrete examples—but don't ramble on.
5. Don't worry. Your representative will be there to help you if you forget something or don't bring out the necessary details.