

§273 Memorandum to Claimant Re: Working While Your Disability Claim Is Pending

This memorandum is designed to answer questions asked by claimants for Social Security disability or SSI benefits who are considering working part-time during the long wait for their hearings.

Will working part-time make my claim more difficult?

It depends on the facts of your case. As a rule, working a part-time job does not make a case more difficult, but it does once in a while. Sometimes working actually helps a case. Most often, working a part-time job is a neutral factor, neither helping nor harming a case. Occasionally, a judge will draw the wrong conclusions from a claimant's work effort; but this possibility ought not be a reason not to work.

If you earn too much money working at a part-time job, it can cause you to lose your case or limit your back benefits. So, if you are going to work, you need to carefully watch how much you earn. See the discussion below.

If you work, the judge will look closely at your ability to perform work activities. If the job you do part-time is inconsistent with what you have to prove in order to win your disability case, your case will be more difficult—maybe impossible if the part-time job is really inconsistent. For example, if you are under age 50, to win your case you probably must prove that you cannot do any kind of easy job on a full-time basis. So if you are doing a very hard job part-time, the judge will wonder how it is you can do a hard job part-time but you cannot do an easy job full-time. To avoid this problem, be sure to discuss with your lawyer the part-time job you are thinking of doing to make sure the job is not inconsistent with your disability claim.

Usually, though, claimants for disability benefits who work part-time do not work at jobs that are inconsistent with their claims for disability. Working part-time at a job that is totally consistent with your disability claim may actually help your case by illustrating what you are capable of doing and showing your work limitations.

How much can I earn per month?

If you ask employees of the Social Security Administration (SSA) this question, they are likely to tell you to keep your income below what is called the "substantial gainful activity" amount, which for 2009 is \$980 per month. The substantial gainful activity amount is an absolute cut-off point. For example, if you were earning more than the substantial gainful activity amount when you applied for benefits, even \$1 more, SSA would deny your claim without even looking at how disabled you are. If you start earning more than the substantial gainful activity amount after you've been off work for less than 12 months, your claim can also be denied outright. After you've been off work for at least 12 months, if you start earning more than the substantial gainful activity amount and you keep earning that much, eventually this will cause your Social Security disability benefits to stop no matter how disabled you are. SSI, however, works differently.

If you are going to work, it is best to keep your income far below the substantial gainful activity amount. The closer your income is to the substantial gainful activity amount, the more likely that problems will arise in your case. In fact, because there are advantages to keeping your income below what SSA calls the "trial work period services" amount, which in 2009 is \$700 per month, then we recommend you do just that if your claim is for Social Security disability benefits.

If your claim is for SSI, the trial work period rules do not apply. But because it helps to keep your income well below the "substantial gainful activity" amount while your case is pending, it wouldn't be a bad idea to use the same rule of thumb. Those with SSI claims, however, do not have to compulsively watch every penny when they get close to the trial work period services monthly amount.

What are the advantages to keeping income below the “trial work period services” amount?

The trial work period rules, which were designed for people already receiving benefits, allow a person to earn any amount per month for nine months and still receive their monthly disability benefits. These rules allow you to test your ability to return to full-time work without having your monthly disability benefits stop. For example, if after you’ve already been found disabled, you use your trial work months by working full-time for eight months and decide you don’t want to continue working, there is no harm done to your on-going disability benefits. You’ll keep your benefits as long as you don’t medically improve.

But it is possible to use up your trial work period months even before SSA has found you disabled. If your income exceeds the trial work period services monthly amount (which is \$700 in 2009—it goes up a little every year) for nine months at any time since five full months after you became disabled, even if those nine months are not consecutive, you will have used up your trial work period. Once you use up your nine-month trial work period, it is gone.

If you have already used up your nine-month trial work period by working part-time, you may be surprised when SSA stops your benefits abruptly. For example, if your trial work period has already been used up and then you go to work full-time for eight months, your benefits will be stopped after only three months of work. You’ll probably be able to get your benefits back if you stop working within three years of the time when you used up your nine-month trial work period; but then if you work again at the substantial gainful activity level more than three years after you used up your trial-work period, SSA will stop your benefits following the first month of work. If you’re unable to continue working at that point more than three years after the end of the trial work period, you’ll have more difficulty getting your benefits reinstated.

In short, it is best not to use up your trial work period until you are ready. Because the trial work period can be valuable, we recommend that you do not waste it on part-time work. To keep from wasting the trial work period, you need to keep your monthly income below the trial work period services amount.

When I am trying to keep my income below the trial work period services monthly amount, is it gross income or take-home pay that counts?

Gross income. The trial work period services monthly income rules are very strict. There are no deductions that can be taken against your gross income to reduce it below the trial work period services monthly amount. Because income is not averaged, if you are paid weekly or bi-weekly, you may have some months where you earn more than other months since some months have more paydays.

If I need more income than the trial work period rules allow, what are the rules for working at less than the “substantial gainful activity” level?

Gross income counts but income is averaged. Theoretically, you get to subtract sick pay, vacation pay, and what SSA calls “impairment-related work expenses,” which, as a rule, is the amount of out-of-pocket payments you make in order to treat your disabling impairment, but there may be some other work expenses that can be deducted, too. You’ll need to consult with your attorney about these deductions because many things you might think are deductible, like health insurance, are not deductible. These deductions can be used to reduce your income below the substantial gainful activity level. However, if you rely on such deductions to keep your income below the substantial gainful activity amount, you’re really living dangerously. It is better just to use the substantial gainful activity amount as your guideline and make sure your average monthly earnings do not exceed this amount.

Is it possible to work part-time at my own business?

It is possible but we don't recommend it. SSA's rules allow it to find that a person who is working part-time in his or her own business and actually losing money is engaging in substantial gainful activity. A claim can be denied on this basis alone. Also, even if you are not making much money (or even losing money) but you are working more than 80 hours per month, SSA will find that you are performing trial work period services. Thus, you will be using up your trial work period without making any significant money.

Although trying to start your own business after you have already been found disabled may be a different story, it is not a good idea before you have been found disabled. Telephone your lawyer before you get very far into starting your own business while your disability case is pending.

Does working part-time change how we handle the hearing?

We will take testimony about your work. You will probably be asked to explain it in detail. We also need to provide income records in your possession such as W-2 forms or check stubs. Be sure to save these documents and provide them to your attorney when we are gathering evidence to prepare for your hearing. If these do not provide sufficient information, we may need to request a month-by-month income summary from your employer.