

## OAJ Social Security Section Article January 2014

### Using Trial Work Period and Unsuccessful Work Attempt in Cases where Disability has not yet been Determined

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As we all know, work activity by a claimant who has applied for Social Security Disability benefits creates a unique set of challenges beyond the basic determination of whether or not a claimant is disabled. But, with wait times for hearings averaging over a year, the reality is that many claimants must return to some form of work after filing an application for DIB. Many of these claimants have no family or friends who will help them weather the two year (or more) period from application to adjudication by an Administrative Law Judge. Others must return to work to support their needy families. No matter what the reason, many claimants return to work after they have filed for benefits. The question then becomes, how do we, as representatives, address this work activity at the hearing level?

Many claimants return to work only part time and do not perform work at a substantial gainful activity level (over \$1070 for 2014). These cases are rather easy to address with an Administrative Law Judge by arguing that the claimant has not performed work at a substantial gainful activity level and thus, the earnings should not affect the claimant's eligibility for benefits. But what do you do if you have a claimant who has been working at or close to substantial gainful activity for an extended period of time? Before you consider a closed period, an amended onset or withdrawing the application for benefits, I encourage you to contemplate arguing for a trial work period or unsuccessful work attempt.

As we know, considerations regarding substantial gainful activity come at step one of the five-step analysis. 20 C.F.R. 416.920(b). So, if there is work activity, trial work period and unsuccessful work attempts must also be addressed at step one in the five-step analysis. Trial work period and unsuccessful work attempts operate to allow claimants to attempt to work without penalizing them for engaging in substantial gainful activity. In fact, Social Security Ruling 05-2 states that if a claimant is engaging in substantial gainful activity they are not entitled to disability benefits "except within the trial work period (TWP) provisions and section 1619 of the Social Security Act." Therefore, trial work period and periods of unsuccessful work activity allow the adjudicator to disregard a claimant's substantial gainful activity during a certain period of time and find that individual disabled.

Unsuccessful work attempts can occur at any time after the alleged onset date. Before work activity can be considered an unsuccessful work, there must be a "significant break in the continuity of your work." SSR 05-2. A break is generally considered significant when a claimant

is out of work for 30 days or more due to his impairment. Months where a claimant works and has earnings at or above the substantial gainful activity level are considered unsuccessful work attempts if the claimant later stops working or the claimant's work drops below the substantial gainful activity level. The Social Security Administration breaks unsuccessful work attempts into two categories: three months or fewer and three to six months. When a work attempt lasts less than three months a claimant must show that he left the workforce due to his impairment or that special conditions related to his impairment and essential to the performance of the work activities were removed. For periods of work that last from three to six months, the claimant must also show frequent absences from work due to an impairment, unsatisfactory work due to an impairment, work done during a period of temporary remission of an impairment or work done under special conditions. An unsuccessful work attempt cannot last more than six months. In cases where work activity at the substantial gainful activity level lasts more than six months, I recommend analysis under the trial work period rules.

A trial work period is a period of nine consecutive or nonconsecutive months in a five year period during which a disabled employee may work and still be considered disabled. § 20 CFR 404.1592. Any month of work in which earnings exceed \$750 (for 2013) and \$770 (for 2014) is considered to be a month of service for the trial work period. The trial work period begins with the month in which an individual becomes first entitled to benefits, provided this is not before the month in which the application for benefits was filed, and ends with the ninth month of trial work. See Program Operations Manual System DI 13010.055; DI 13010.065. A claimant may also be eligible for a re-entitlement period after the end of a trial work period. As noted above, a trial work period is a period of either consecutive or non-consecutive months. Thus, if your client's work activities and work hours vary they may have months that count as a month of work for the purposes of a trial work period interspersed with months of work where they are performing minimal work activity.

I offer a word of caution to those arguing trial work period during the adjudication of an initial claim application. In 2002, the United States Supreme Court upheld a ruling by the Commission finding that "you are not entitled to a trial work period" if "you perform work . . . within 12 months of the onset of the impairment(s) . . . and before the date of any notice of determination or decision finding . . . you . . . disabled." *Barnhart v. Walton* 535 U.S. 212 (2002) citing 20 CFR § 404.1592(d)(2) (2001). If you argue for a trial work period during the initial adjudication of a claim at the hearing level, the trial work period must have taken place over 12 months after the onset of disability. Case law differs on whether or not a trial work period is applicable during the initial adjudication of a claim. However, it has been my experience that Administrative Law Judges will consider trial work period arguments during initial adjudication as long as that trial work period is at least 12 months after the onset date.