

Social Security Disability: Hurdles in Mental Impairment Claims

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To prevail in a claim for Social Security Disability benefits based on a mental health impairment the Social Security Administration must find that a claimant is not engaging in work activity at or above the Substantial Gainful Activity threshold¹; that she has a severe, medically determinable impairment; and that either she (a) meets or equals the criteria of a Listing of Impairment, or that (b) her limitations are such that they prevent her from performing her Past Relevant Work or any other work available in the national economy on a full time basis.²

Assuming that a claimant is not working and that she has a documented mental health impairment, the inquiry focuses on the latter portion of the analysis above: does the mental health impairment meet or equal a Listing? If not, do the functional limitations resulting from that mental health impairment preclude the performance of past work or other work on a full-time basis?

There are many difficulties in prevailing in a disability claim premised on a mental health impairment, but they center on a primary difficulty: the diagnosis of mental health impairments is predominantly based on a patient's subjective reports. A doctor cannot put a patient in an MRI tube to determine if they have depression or anxiety like they can to determine if a patient has a herniated disc in their lumbar spine. Instead, they must rely on the patient's report of symptoms and their own observations on exam. This means the claimant's credibility is often a central issue in mental health claims.

This is problematic because of the nature of mental health disorders. Many individuals with mental health disorders have comorbid substance use disorders.³ Research has indicated that individuals being treated for mental health disorders are more likely to be noncompliant or nonadherent with medication than those being treated for

¹ The 2019 SGA level is \$1,220.00 gross earnings per month.

² 20 C.F.R. § § 404.1520, 416.920; Social Security Administration, Program Operations Manual System (POMS) DI 22001.001: Sequential Evaluation of Title II and Title XVI Adult Disability Claims

³ National Institute on Drug Abuse, Comorbidity: Substance Use Disorders and Other Mental Illnesses (August, 2018) (available at <https://www.drugabuse.gov/publications/drugfacts/comorbidity-substance-use-disorders-other-mental-illnesses#ref>) (“about half of people who experience a mental illness will also experience a substance use disorder at some point in their lives.”).

physical disorders.⁴ Last, individuals with severe mental health disorders are likely to have a history of interruptions in employment; they are unlikely, correspondingly, to demonstrate a strong work history.⁵

If we have a client who has substance abuse problems, who is noncompliant/nonadherent to treatment/medication, and who has a poor work history, then we have a very steep climb to establish this individual's credibility in front of the Social Security Administration. Given the importance of the credibility analysis in determining the presence/disabling impact of a mental health disorder, the difficulty with mental health claims is evident.

The difficulty in establishing disability based on a mental health impairment does not mean that these cases lack merit. It only means we are facing an uphill battle.

How do we overcome these hurdles?

1. Substance Abuse

As aforementioned, many individuals with mental health disorders have comorbid substance use disorders.⁶ Substance use in the record can cause a judge to doubt a claimant's credibility. Further, it can "muddy the waters," and make it difficult for the decisionmaker to determine whether the symptoms the claimant is experiencing are due to a mental health diagnosis or due to substance use.

To overcome this hurdle a claimant's attorney should explain to their client the importance of maintaining sobriety, and its potential impact on the Social Security Disability claim. Further, in gathering treating source statements I ask treating providers if the individual has disabling limitations *apart from* any limitation they have from drug use. In short: I want to know if the claimant is functionally impaired primarily by a

⁴ Cramer, Rosenheck, Psychiatric Services, Compliance with Medication Regimen for Mental and Physical Disorders (Feb. 1998) (available at <https://www.ncbi.nlm.nih.gov/pubmed/9575004#>).

⁵ Luciano, Meara, Psychiatric Services, The Employment Status of People with Mental Illness: National Survey Data from 2009 to 2010 (Oct., 2015) (available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4182106/>).

⁶ National Institute on Drug Abuse, Comorbidity: Substance Use Disorders and Other Mental Illnesses (August, 2018) (available at <https://www.drugabuse.gov/publications/drugfacts/comorbidity-substance-use-disorders-other-mental-illnesses#ref>) ("about half of people who experience a mental illness will also experience a substance use disorder at some point in their lives.").

mental health impairment or by a substance use issue. If I can obtain a statement that supports the former, then I will present this to the judge and assert that the mental health impairment is disabling *on its own*.

It must also be said that in regards to substance use *honesty is key*. You must make sure your client knows that their substance use is documented in the record (if it is), and you must make sure that they understand the need to be honest about this substance use. If the evidence contains a positive drug test for heroin and, when asked by the judge, the claimant reports never using heroin? Their credibility is reduced to nothing. It's important to get in front of this problem and encourage honesty.

2. Noncompliance or Nonadherence to Treatment

As aforementioned, research has indicated that individuals being treated for mental health disorders are more likely to be noncompliant/nonadherent with medication than those being treated for physical disorders.⁷ Aside from being noncompliant with medication, claimants may fail to attend mental health appointments or stop treatment altogether. This will do substantial harm to the claimant's credibility and to the strength of the claim as a whole.

I frequently tell clients, when I take on their case, that I will not continue to represent them if they stop treating or are noncompliant with treatment. I explain the negative impact of noncompliance on a disability claim. I implore them to treat consistently for the benefit of their own mental health *and* for the benefit of their claim. I then watch their cases as time goes on to make sure they are treating consistently. If they are discharged for noncompliance I may withdraw from the case, or I may counsel them to re-initiate treatment as soon as possible with the understanding that if they do not, I will withdraw.

3. Difficulty Maintaining Contact with Client

⁷ Cramer, Rosenheck, Psychiatric Services, Compliance with Medication Regimen for Mental and Physical Disorders (Feb. 1998) (available at <https://www.ncbi.nlm.nih.gov/pubmed/9575004#>).

People with mental illnesses are much more likely to become homeless than the general population.⁸ As such, it is more likely that your client with a mental health impairment (versus your client with physical health impairments) will lose their mailing address and telephone number by way of homelessness. As such, it is often difficult to maintain contact with your client suffering from mental health impairments.

How to address this? I tell my clients upon intake that it is imperative that we remain in contact. I ask that they always keep me up to date on their address and phone number. Further, I ask my paralegals to periodically reach out to my clients to see if they have any updates. This way we know, as soon as possible, if we have a bad phone number or address. Upon intake I ask for secondary contact information (a friend or family member). If we lose touch with the claimant, then hopefully we can use this secondary contact to reestablish contact with the claimant. If this is unavailing, we reach out to the claimant's treating providers and ask if they have any updates in contact information. We may also search incarceration databases and obituaries to see if our client is in jail or has died. In short: we do all that we can to reestablish contact and then maintain that contact.

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The hurdles of substance abuse, noncompliance with treatment, and difficulty maintaining contact with the claimant are significant, but with work on the part of the claimant's attorney we can do everything in our power to overcome these hurdles and achieve a positive outcome for our client.

⁸ National Coalition for the Homeless, Mental Illness and Homelessness (July 2009) (available at https://www.nationalhomeless.org/factsheets/Mental_Illness.pdf).