Preparing for the hearing

Preparing for a hearing is essential for success. If done well it can mean the difference between winning and losing. If done poorly, it can mean disaster. Hearing preparation starts and ends with the record. Knowing the record completely and as well as, if not better, than everyone in the hearing room means the world not just to the client but also to establish credibility with the administrative law judge, the medical expert, and the vocational expert. Failure to properly prepare can result in embarrassment for you professionally and may result in the alienation of your client and future clients.

Developing a winning theory /documenting the history of the ailment- --Forms/Letters from the medical professionals for physical versus mental disability claims

I have coupled these two areas together because they seem synonymous when addressing hearing preparation. Most of the time my ability to develop a winning theory goes hand-in-hand with documentation from medical professionals regarding physical or psychological complaints. Therefore I will merge the two subjects and discuss them together.

The first thing that I look at on any case that comes before me is the client's date of birth. That simple fact starts my thinking process on where I want to go and how I'm going to proceed. It tells me whether I have a children's disability case, an adult case, or a grids case. Everything else I do follows the age of my client. It goes without saying that I will argue a 52-year-old client's case differently from a 45-year-old clients case. As will I argue a child's disability case different from a 25 year old client's case. For me, personally, it is the most important fact that I start with.

Depending on my client's age, it will affect where I looked next in the record. If it is a grids case I will usually look at their past work to determine the exertional level of their past relevant work. People may ask me why I wouldn't look to the medical records first. My answer is that I'd rather know what I have to prove before I look for the evidence that supports how I prove it. Simply put, if my client is 52 years old and has past relevant work as a construction worker, I know that I just have to limit him to sedentary to win my case. Whereas if the same client was 52 years old and had past relevant work as a secretary, then I know that it is more likely than not that I'm going to have to eliminate sedentary work as a possibility. These are the broad strokes that I begin my case analysis with in order to complete the puzzle which leads to a finding of disabled. I love grids cases for this reason; you only have to prove that the client is limited to a certain category of work as opposed to eliminating all work. You will find that there are no bonus points or extra money given on grids cases for eliminating all work. Why

prove more than you have to when it takes more time to do so and will often alienate the judge?

Once I've considered my client's age and whether it is a grids case, I determine whether this is mainly a physical disability, a psychological disability, or both. I usually try to look at the original disability application to determine what the client is alleging disability for. I want to hear it/see it in the client's own words. Once I have ascertained what the claimant's alleged disabilities are, I then turned to the medical records to look for supporting evidence for those conditions. Since there are two categories of impairments, physical and psychological, I will address both individually and then together.

When the claimant is alleging disability due to mainly physical problems, the first thing I look for is objective findings which will support the complaints the claimant is making. Whether it be an x-ray, MRI, CT scan, or EMG, I look for anything that shows definitive abnormalities which give a basis for the claimant's complaints of pain and/or other limitations. If the objective findings are present, I look to see whether they are to the level of severity that would explain the claimant's complaints of pain. For instance if the claimant is complaining of severe low back pain with radicular symptoms down through their legs, and they have an MRI which shows mild degenerative disc disease with no other findings, then I begin to question whether the claimant's complaints are out of proportion to the objective findings. That is a problem that I will have to address at the hearing. However, if the claimant is complaining of severe low back pain with the radicular symptoms down through their legs and their MRI shows disc herniations with cord compression and severe stenosis then I know that their pain complaints are well founded. The easiest cases are the ones where the objective findings support the claimant's complaints of pain. The harder cases are, obviously, ones that don't. It is those cases that I look to other evidence which supports my argument that the claimant is disabled even without this objective evidence. It is those situations for which I will look at the treatment notes over time from a consistent medical provider and try to couple those medical records with a completed RFC form that supports a finding of disabled.

The treatment notes are often important if they address physical examinations and/or neurological deficits. Findings such as decreased sensation, reflex abnormality, positive straight leg raising, muscle weakness, atrophy, and other abnormalities are good evidence in the absence of objective findings. They are the icing on the cake when coupled with severe problems documented by objective testing. The good arguments come from pointing to the multiple instances within the record of neurological deficits

that have been documented over time on a consistent basis. Consistent treatment and consistent complaints made by a claimant to a doctor provide evidence of both a long-standing treatment relationship and along with supporting the contention that the claimant's condition is chronic.

When the case involves psychological problems, objective findings are often unavailable due to the inherently subjective nature of many psychological conditions. In proving a psychological disability, I, nonetheless, try to look for any testing that would be objective in nature such as MMPI test, IQ tests, and Nelson-Denny reading test, etc. In most cases , the most important evidence would be descriptive treatment notes that document a long-term relationship between a claimant and therapist or psychologist. It is the absence of treatment which normally makes proving these cases difficult. Any long-term treatment with consistent diagnoses, consistent prescribed medication, and consistent abstinence from substance abuse all help immensely in proving the claimant is truly disabled due to their psychological condition. I look for the records to be detailed because it is one thing to say that the person is depressed and anxious and another to describe the hopelessness and helplessness that the claimant is going through on a day-to-day basis that helps lend substance to otherwise generic complaints. In my purely psychological cases, I find that GAF scores of 50 and lower have provided me with my best chance of winning. If a case comes before me with GAF scores consistently higher than 50 I make it a point to make sure that there is an MRFC form completed by a treating physician in the file. It is my hope that the judge will understand that GAF scores are subjective and vague. Instead, I am hoping that an ALJ will rely on the work-related impairments set forth by the physician and find the claimant disabled.

In certain cases, where I feel my clients IQ scores would fall in the mild mentally retarded range, I will send them out for IQ testing myself and front the costs. I know that may not seem logical to pay for testing which I do not know what the results will be, but more times than not my suspicions will be confirmed and the IQ range will fall within the deficient level and open the door for new arguments at a hearing. I will also make attempts to obtain school records for my claimant when I believe that their IQ is deficient. This may provide me with that rare opportunity to prove a pre 22-year-old onset of deficient IQ. You would be surprised of the wealth of information that may come from school records especially when your client has some learning disability which may not meet the levels satisfactory to show that they meet 12.05C. Here, you can often find other deficiencies which may eliminate categories of work which would help on a grid finding.

When a client has both physical and psychological problems, I look to combine the two previous sections and get as much evidence as possible to support both physical and psychological disabilities. Never in my cases do I claim one disability and not the other. I claim everything that could possibly hinder any work performance under a simple theory; the claimant does not get to choose what problems they want to suffer from on any given day. For example, the claimant doesn't get to say, today I would like to have back pain and tomorrow I'll suffer from depression. Life doesn't work that way and some days the pain may be severe and other days the depression may be severe, but the claimant doesn't get to separate the conditions --therefore I will not at a hearing. I emphasize to my clients the importance of claiming everything when telling the doctor what's going on with them. No matter how minor complaint you never know what will be the evidence or the impairment that tips the scales in favor of your client.

In some of these cases it is not essential for me to have everything such as an RFC form regarding physical impairments and a MRFC form regarding psychological impairments. As long as one form supports a finding of disability that is usually sufficient. Don't get me wrong, I would love to have both but if I can only get one and it says what I wanted it to say, I'm usually happy. As to developing a winning theory with these types of cases I usually push for two goals. First, I argue that the combination of a person's impairments is enough to equal a listed impairment. Second, I argue that the combination of impairments would render the claimant unable to complete competitive work on an ongoing sustained basis. Out of all the cases that I have won, these arguments have been consistently the most successful. And, when you think of it, they are the easiest arguments to make. You don't have to prove specific things such as that a person can lift 10 pounds or would be on their feet two hours a day. All you have to prove is that the totality of all their problems, when lumped together, with unpredictable symptoms that may all be exacerbated on a certain day, would keep them from working. You would be surprised how often and how easy it is for a judge or a medical expert to accept those types of arguments.

Practical tips for obtaining medical records and other crucial documents

I've already discussed the importance of the representative requesting medical records. We have found it appropriate to request medical records from the providers once every

6 to 8 months. We have found that any sooner creates ill will between the doctor's offices and our office. We are specific in what we are asking for and the time frames for when we want the records. We have found that specificity is appreciated by the doctor's offices and usually results in faster processing times. We have also offered to pick the records up ourselves if it will help the doctor's offices process the records faster. We have made arrangements for medical records to be sent through e-mail, or to be faxed to our office, or in any manner for which the doctor's office desires. It is the doctor's office that controls how fast we get our records so we will do anything in our power to make their job easier.

With school records we have found that is easier to request them when school is in session and to find out where the records are located before the request is sent out. All school districts are different. Some school districts keep the records in a centralized location others keep the records at the school where the student is attending. A simple phone call before the request is made will often eliminate the need for repeated requests to be issued and for any confusion that could be experienced along the way.

We try to request records as soon as we know about a provider and we submit them to Social Security in a prompt fashion. We have found that no judge likes multiple records submitted right before a hearing. When an occasion arises where we get records right before a hearing, we will typically give a courtesy call to the judge's unit and ask them how they would like the records submitted. Now, with the invention of electronic files, all records must be submitted electronically. But still, when staff knows that bulks of records are coming in they will give typically give the Judge's office a heads up. We have found that the judge is much more likely to be appreciative of our efforts, not continue the hearing, and deal with everybody on the day of the hearing in a pleasant and professional manner.

By requesting records every 6 to 8 months we are usually able to avoid getting large amounts of records to submit at one time. There are some exceptions to this, namely the Veterans Administration and MetroHealth which seem to thrive on voluminous records for each patient. As I said before, each case unique and at times must be dealt with individually but overall these tips should help the bulk of your medical records problems.

Drafting the brief and what forms/documents must be submitted with it

Drafting a brief is an endeavor that I believe is essential to setting up a winning case. It helps accomplish several goals:

1. it allows you to go through the evidence in a goal oriented manner so you know what's in the file;
2. it allows you to organize the evidence in a clear and concise manner to emphasize the strengths and deal with the weaknesses of your case;
3. it allows you a roadmap to have with you in a hearing so that you do not lose your way of what is important;
4. it provides the judge evidence that you have actually reviewed your file before the hearing;
5. it also sets up your arguments and points the judge in the direction for which you want them to ultimately go;
6. it provides a record so that if unsuccessful at the hearing, you can show the Appeals Council exactly what the arguments were and what the judge missed.

Always remember, a brief should be just that, *BRIEF*. Too many times I've heard judges complain to me that they do not like getting briefs that are long because they do nothing but regurgitate facts already in the record. They find them boring, difficult to read, and in the end unnecessary. You never want a judge to get bored reading your brief. They will not pay attention and they will stop reading before you get to tell them what they should do, which is ultimately pay your case. Most of the judges for which I write briefs have consistently commented to me that they enjoyed the fact that my brief was short, to the point, and gave them different arguments as to how to find the claimant disabled.

Most of my briefs are no longer than two pages. I set the brief up in a certain style to where I cover date of birth, application date, onset date, past relevant work, all within the first paragraph of the brief. My next paragraphs deal with the medical evidence emphasizing objective findings, physicians opinions of RFC/MRFC, consultative examinations, physical examination findings, and any other relevant statements from the medical records. The trick is to keep this section of the brief short and to the point. I have kept my two-page rule for a brief in cases where the record was 250 pages long and when the record was 1000 pages long. Granted, it is harder to do when the record is 1000 pages long, but it is in those cases you must pull out the salient facts and learn to control your desire to use gross amounts of verbage. Trust me, most judges will appreciate you boiling down 1000 pages of records to a few paragraphs when you hit the high points and get straight to what is ailing the claimant. The next section of my brief covers substance-abuse and why I think it is not material to the claimant's disability. Lawyers have asked me why I include this in my briefs and my answer is

simple; I hide from nothing. Most judges know when there is a substance-abuse issue in a case and not addressing it yourself seems self-serving and hurts credibility. Address those issues head on. Admit that there is a problem but also show what the claimant has done to address the problem or offer a reason for the problem such as self-medication, unsophistication, or any other reason which would explain substance-abuse. I use this self-disclosure when dealing with any issue in the file which may be harmful to my client such as non-compliance with medication, continuous missed doctors appointments, or lack of treatment. I give the judge an explanation of the bad things that appear in the file in the hope that this self-disclosure will bolster our credibility and let the judge know that we are aware that there are issues in the case which are not favorable to the claimant. This goes a long way for judges trusting you in this case and in the future. I finish my brief by explaining to the judge why they should grant benefits in the case. My first argument is usually that they meet or equal a listing. Here, I show the specific evidence which supports that finding. But, if the Grid Rules are involved, I will often lead with that. My point being that you need to lead with your strongest argument and then give the judge a secondary argument to fall back on. This is a sample closing statement;

> "The claimant meets/equals listing 1.04A because they have objective findings of disc herniation with mild cord compression and stenosis with physical findings of decreased sensation, positive straight leg raising, muscle weakness, and radicular distribution of pain. The medical evidence supports these findings on MRI and physical examination. In the alternative, the claimant would be unable to complete sustained competitive work based on the opinions of his physicians, the completed RFC's, the overwhelming psychological evidence in the file, and the consistent ongoing medical treatment that substantiates the claimant's complaints."

This type of closing paragraph gives the judge two ways to find the claimant disabled. If he does not buy that the claimant meets or equals a listing, then he can find the claimant disabled based on an inability to sustain work. It gives the judge an out and it gives you a backup so that you are not boxed into just one argument.

The only documents which I attach to my brief are those which are new (meaning not in the file already) or those which are so powerful that a simple reference in the brief is insufficient. I found that judges do not like you to attach things to a brief which are already present in the file. It creates confusion that it may be a new RFC form or other evidence that is not in the file already. A simple reference with exhibit and page numbers will normally be sufficient to draw attention to the document that you wish to

emphasize. If you don't think your point is getting across, that's why word processors invented bold type face, italics, and underlining. All those work just as well as any attached document.

The second thing to remember with the brief is to submit it as soon as possible. Many judges have indicated that they loathe receiving a brief right before the hearing. Some don't read the brief at all, or some take valuable time during the hearing to read the brief which often affects their schedules for the rest of the day. Neither of these things get you what you want.

I try to submit my briefs no later than two weeks before hearing if at all possible. It allows the judge to read your brief in advance, doublecheck your citations against the evidence in the file, and at times grant an on the record decision because they completely agree with you. Judges are much more likely to go forward with a hearing where they received the brief only a few days beforehand rather than just granting an on the record decision.

Some of you may disagree with me about the brief length, when to submit, and what to include with it. I understand your point of view and everybody's practice will be different. I use what works for me based on the feedback that I have obtained from judges and staff at ODAR. And, believe me, I have asked a judge how they liked my brief and if there's anything different they wanted or would like to see. You would be surprised how candid a judge will be when asked that question.

Why evaluation of the work history and earnings record are important

Evaluation of the work history and earnings record gives a practitioner the necessary background of the claimant in order to present to the judge evidence and arguments which will lead you to a successful disposition of your case. The work history is important so everyone has an accurate idea of what past relevant work claimant has performed. Accurate would be the keyword when describing work history. Most claimants will have several jobs throughout their life where their job title does not always match what their job duties entailed. They have a sense of pride and want others to believe that they have accomplished something with their work career which may not necessarily be reflective of what their actual responsibilities were. In all of my cases I take a look at the detailed earnings query that comes with the file and go through that with my claimant before the hearing. I will ask them what their job title was and what their job duties were to see how both matchup. So often a person who describes their past work as a manager will in reality only have performed the work of a cashier or stocker. Two completely different jobs with different skills. I ask them to describe how

long they were on their feet, how much they had to lift, any supervisory responsibilities, or any other fact that may describe the job accurately. The last thing any representative wants is to be at the hearing have the claimant describe the job title and have it result in past relevant work that is not really what the claimant did. It can mean the creation of transferable skills which the claimant does not possess and will often result in a step five denial. This is why preparation before hearing is so important. I use a prehearing conference to educate the claimant regarding issues such as accurate description of past relevant work in order to elicit testimony that will help them as opposed to hurt them. It is only through accurate descriptions of past relevant work and a thourogh examination of their work history that you can lay the groundwork for successful arguments at step four and step five.

Evaluation of the earnings record is equally important. The goal is to establish what is and is not past relevant work. The earnings record will also clue you into any earnings after an alleged onset date to allow you to make the proper argument as to whether it was an unsuccessful work attempt, a trial work period, vacation pay, sick pay, or long/short-term disability which would account for the earnings after onset. The person may claim that they have past work as a cashier but when you evaluate the earnings record and it shows $400 made at McDonald's as the only past work, it allows you to eliminate that position. The elimination of surprise and the ability to account for earnings at any period of time that may be considered by a judge goes a long way toward proving disability for your claimant. When you find out about a possible earnings issue, and you can classify what is past relevant work, it allows you to spend a short amount of time on what is essentially a procedural question. Instead you can focus your time on the physical and mental impairments that prevent the claimant from working. You do not want to get bogged down spending a great deal of time at the hearing arguing about work after onset date or what is past relevant work. It distracts from the real issues in the case and creates problems that could easily have been handled when one takes the time to analyze them before a hearing.

Your ultimate goal is to win your case. What has been presented here are tools which will help you gain information that you need to accurately establish the facts in your case so that what you are presenting before the judge describes the claimant completely. Each case is different and at times you will have issues that you may not be able to explain, but when you know that ahead of time it seems that the amount of embarrassment that you may experience at the hearing will be diminished. Not all rules apply uniformly, including those that we have discussed today. The important thing is

to be open-minded and allow yourself to adapt to anything which may occur while representing your claimant.

Lay testimony

As a general rule administrative law judges don't like testimony from people other than the claimant. The judges generally like for anybody wanting to provide a statement to do so in writing. We encourage our clients to have friends or family members provide statements in writing that support their allegations of disability. We are careful to point out to the clients and their family members that the letters cannot turn into a de facto sob story. The letters have much more effect when the letter demonstrates the limitations that the claimant has in their day-to-day life. We would like the letters to address the help that is needed to accomplish daily activities such as cleaning, grooming, shopping, and other activities for which they cannot do on their own anymore. They can also describe the person's activities on a daily basis with an emphasis on specificity. I tell all of our clients that the devils in the details and that the more you can describe the better the case.

At times it helps to have a letter from the person's past employers. These letters can support the claimant's limitations on the job especially if they show that accommodations were given or that attendance became sporadic. When trying to eliminate past work these letters are invaluable as evidence. This is one of the things that we may ask a client to obtain on their own. However, we always ask the client to let us know so that we can be following up with a phone call, or a letter to polish the statement or confirm the authenticity of the statement.

The only times that I typically consider eliciting lay testimony at the hearing is when my claimant suffers from seizures or when they are simply incapable of providing testimony on thier own due to overwhelming psychological factors or a low IQ. However with the seizures, a letter describing seizure activity will suffice instead of opening the variables that may be encountered at a live hearing. Even in the case where a claimant has overwhelming psychological problems or a low IQ that I believe would make it impossible for them to clearly state their impairments for the record, I will not usually elicit testimony from a layperson because normally the severity of the claimant's condition will be added into the hearing record even without the necessity of lay testimony from a non-claimant.

Anyone who has practiced in this area of law for any length of time will tell you that there is not a whole lot that is within the control of a representative during the hearing. We usually don't know what testimony is coming from the experts, we can't normally control what the judge will ask, and many times, despite all preparation beforehand, we can't even control what our clients testify about. So I try to limit the variables that I can control. The variable mentioned above is layperson testimony, and the statement that I choose to control is the written one that I will submit to support the claimant's disability. This will keep me from being surprised at the hearing and from having a layperson damage what otherwise could be a strong case.

I have not found any other sources of testimony or statements that have helped other than the two that I've mentioned. There are some exceptions that one must always deal with on a case-by-case basis but these types of statements have always been helpful had at the hearing level and on appeal.

Prepare clients to effectively testify

I always have a prehearing conference with my client before a hearing. I like them to meet with them so they know who is going to be handling their hearing. I will go over the procedures and players in the hearing so the claimant is comfortable with who will be there and what will be covered. It will also go through the medical record so the claimant knows what the doctors have reported, both good and bad. I find this especially helpful when I have some bad facts in the case so the claimant understands where some of the harmful evidence lies. I will even read them quotes from the record so they can see where their statements might conflict with the record.

I also discuss the claimant's work history with them so we clarify what the past relevant work actually is so we don't get tagged with skills that the claimant didn't really develop. I also go over the work history to help prevent my claimant from making claims that they would love to work and how much they would like to work when their work record does not really support these claims.

Tips for establishing the claim

There are a combination of different things I do to help establish the claim. The first is medical documentation . I want to make sure that we have all of the medical records from all possible medical sources. I also want to try to get medical source statements from all treating doctors to help establish the claim. I also like to prep the claimant so they are aware of my theory of the case and what my argument is going to be so we are all on the same page at the time of the hearing.

This all goes hand in hand with the pre-hearing brief to help point out the evidence that I think is important to establish the arguments for my claim.

Avoid mistakes with ready-to-use forms and letters

The only mistakes with ready to use forms are that more and more the ALJ is rejecting these form as simple "checklist" type forms that aren't supported by the treatment notes. I also am cautious with any type of medical source statement where the limitations are so extreme that they can't be supported by the record.