

Disability Status and Its Effect on Support: Does It Ever End?

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This article explores the impact that a determination of disability may have on support obligations, discusses the Social Security Administration's (SSA) requirement for disability status, surveys the case law, and makes recommendations for practitioners handling such matters.

When an individual is deemed disabled by the SSA, that status creates a rebuttable presumption of a limited ability to work. This reduces the ability of the nondisabled spouse to argue that the disabled spouse should be imputed income commensurate with that spouse's earnings capability, were he or she not disabled.

Social Security Disability Benefits

The SSA pays benefits to individuals who are unable to work "because they have a medical condition that's expected to last at least one year or result in death. Federal law requires this very strict definition of disability." www.ssa.gov/pubs/EN-05-10029.pdf. The SSA considers a variety of factors before declaring an individual eligible for disability benefits. In most circumstances, to be eligible for disability benefits, an applicant must meet various earning tests that take into account various factors, such as the age of the applicant and the duration of time employed. If the applicant meets the tests, their application is forwarded to the Disability Determination Services (DDS) office in their home state.

At this point, disability specialists consult the applicant's medical records in order to make a determination of disability. Five questions are considered when examining a file and determining disability status: (1) is the applicant working?; (2) is the applicant's medical condition "severe"?; (3) does the applicant's impairment fall within the predetermined list of disabilities or medically equal a condition on the list?; (4) can the applicant do any of their past work?; and (5) can the applicant perform any other type of work? If the applicant fails one or more of these areas, they will not qualify for disability benefits.

If the state agency staff is unable to come to a conclusive decision based on the information provided, applicants may be required to submit to a medical examination. The preference of the SSA is to have the examination conducted by the applicant's own doctor. In matrimonial litigation, this preference gives rise to concern over the adequacy and thoroughness of the initial examination.

Periodic Review of Benefits

Determinations of disability are subject to periodic reviews. The frequency of review is based on the nature of the disability. If the condition is expected to improve, the first review will occur between six and 18 months from the date of disability. If improvement is possible, but difficult to predict, the case is reviewed approximately once every three years. If the condition is not expected to improve, the case will be reviewed approximately once every seven years.

Substantial Gainful Activity

Attorneys and courts need to keep in mind that a declaration of disability by the SSA (or private insurer) does not mean that an individual is entirely incapable of earning income or precluded from earning income. *Gilligan v. Gilligan*, 428 N.J. Super. 69, 81 (N.J. Super. Ch. Div. 2012). In fact, the SSA allows disabled individuals to work as long as the work is not “substantially gainful.” 20 C.F.R. 404.1571. However, the amount that is permitted to be earned, before benefits are affected, is currently approximately \$1,000 per month. Proving that a disabled spouse is able to perform “nonsubstantially gainful work” may increase the amount of income that a court imputes to a disabled spouse.

Private Insurance

Even though the focus of this article is on the impact of Social Security Disability Insurance (SSDI) payments, there are many individuals collecting disability payments from private insurers. The practitioner must seek to secure full knowledge of the procedures in place with the private insurer, including, but not limited to, frequency of disability review, scope of review and termination dates.

Case Law on the Presumption of Disability

In *Golian v. Golian*, 344 N.J. Super. 337 (App. Div. 2001), the plaintiff wife was unemployed due to a disability and sought spousal support from her husband. The appellate court created a burden-shifting scenario, holding that “the [Social Security Administration’s] adjudication of disability constitutes a prima facie showing that plaintiff is disabled, and therefore unable to be gainfully employed, and the burden shifts to defendant to refute that presumption.” *Id.* at 342. The court was persuaded by case law which “require[s] courts to give deference to those [administrative] determinations ... supported by substantial credible evidence in the record and [which are] not arbitrary or capricious,” by the lack of contravening evidence presented by the defendant, as well as by the fact that the defendant assisted the plaintiff in obtaining the disability status.

The rebuttable presumption that a Social Security determination equates to an inability to work must be refuted by a clear and convincing evidence, as expounded by the court in *Wasserman v. Parciasepe*, 377 N.J. Super. 191 (Ch. Div. 2004). In *Wasserman*, the defendant was not working and was collecting SSDI because of kidney disease. Once the defendant received a kidney transplant, the plaintiff moved for a modification in the alimony amount. The plaintiff

produced two witnesses at the plenary hearing: a medical expert and a vocational expert. The vocational expert testified that the “defendant was capable of full time employment, although with some restrictions.” *Id.* at 196. The testimony of the vocational expert was critical to the court’s holding that the plaintiff rebutted the presumption that the defendant could not work.

While Golian and Wasserman discussed alimony payments, the decision in *Gilligan v. Gilligan*, 428 N.J. Super. 69 (Ch. Div. 2012), addressed disability in the context of child support. In *Gilligan*, the defendant made an application to the court seeking an order reducing his support obligation due to his inability to work because of his disability. The only proof that the defendant submitted to the court was a copy of his Social Security award letter. The court explained that “the obligor must supply supplemental, corroborating evidence of a complete inability to work, such as substantiating medical reports and records” in order to trigger the rebuttable presumption of an inability to work and shift the burden to the other party to show otherwise. *Id.* at 81. The court was further persuaded in part by the SSA’s own guidelines, which allow an individual who has qualified for disability to continue to earn income from another source as long as the income is not “substantially gainful.” *Id.* at 79.

Implications for the Practitioner

The importance of defeating the rebuttable presumption of disability is that in the absence of a total and indefinite disability status, the court is likely to impute earning potential and therefore income to the spouse who had been claiming disability status. This imputation would reduce the support received by or paid to the heretofore “disabled” spouse. The nature of many disabilities is that they are not permanent and may improve with time. In addition, even if disabled in one field of activity, an individual may have skills in another field that may already exist or can be developed. Common sense dictates that it cannot be expected for a disabled spouse to voluntarily offer to submit to: 1) a medical examination to determine if a disability has become less severe; or 2) a vocational expert to determine if previously unexplored forms of employment may now be appropriate.

Argument should be made that equity must permit the nondisabled payor spouse to be given an opportunity to periodically review the medical/vocational status of the disabled payee who is benefitting from the disability designation, at least as frequently as the award is theoretically reviewed by the SSA or private insurer.

When representing the nondisabled spouse, it can be an exasperating task to gain a court’s cooperation to revisit support obligations, absent a proven “change of circumstances.”

One remedy would be that if the disability determination was made prior to the divorce, the parties should agree to have the right to periodically challenge disability status in a clause incorporated in their Matrimonial Settlement Agreement (MSA). This review may include periodic medical examinations and/or vocational reassessment.

Courts need to be sensitive to the frustration of the nondisabled party who is asked to bear a financial burden for an individual who may no longer be entitled to the same support previously established. Just as the SSA and private insurers reserve the right to periodically reassess their payments to a “disabled” individual, so should the former spouse, burdened with funding the disabled party, have the right to periodically investigate the continued need for that funding.

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