Tips for Writing Effective Hearing Briefs for the ALJ

by Gordon Gates, Esq.

The Portland, Maine ODAR has required a hearing memorandum from claimant representatives since 2006. Prior to scheduling a hearing, the claimant's representative receives a letter from the Chief Judge. That letter states in part:

> The Judge will conduct the final pre-hearing review of the file approximately 20 working days prior to the hearing. By that time we ask that you will have provided your "statement of the case". This statement should include:
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> - A statement of the issues before the Administrative Law Judge, and, if the issue is disability, the period of alleged disability, with any amended onset or duration;
> - A short rationale for each "step" in the sequential evaluation process, always using our exhibit number to refer to supporting evidence;
> - Acknowledgement and discussion of any strongly conflicting evidence known to you;
> - Acknowledgement that you have diligently provided all reasonably available medical updates known to you, and explaining any missing updates that are material to your case.

Our firm has been providing a “statement of the case,” or hearing brief, to ALJs for over 5 years now. During that time, we have learned a few things, and I am pleased to share them with you.

A. WHY write a brief

1. Be a Professional

Do the best job possible for your client. Just getting the medical records, a medical source statement or two, and attending the hearing with the client is not enough. Your opening statement to the judge is likely to be forgotten by the time the next hearing starts.

A Social Security disability claim often has 30 thousand dollars or more of back benefits. The future benefits may be hundreds of thousands of dollars. Why wouldn't you write a hearing memorandum to help win the claim?

2. Be More Prepared for the Hearing

Writing a good pre-hearing memorandum makes you better prepared for the hearing. It forces you to go through the entire record and put everything in context. Furthermore, you can refer to

your brief at the hearing. Need the exhibit and page number for that 2nd MRI when the judge asks about it? It's in the brief. Having your reopening request in the brief ensures that you do not forget to ask for reopening at the hearing.

3. Test Drive Your "Theory of the Case"

Every hearing memorandum should explain how the evidence and regulations affect each step of the 5-step sequential evaluation process. Writing the hearing brief will help you to evaluate your theory of the case. If you can't get past step 4 in your memorandum, you can't expect a judge to reach a different result.

4. The Judge Wants a Memorandum

A hearing brief is helpful to the judge. That's the point, after all. Since the memorandum is part of the disability claim file, it is available to the judge to reference before, during and after the hearing.

A concise pre-hearing memorandum is on the list of best practices for claimants' representatives published on the SSA’s website.

5. The Claim has a Problem

Sometimes a claim has a glitch that must be addressed before a fully favorable decision can be issued. Maybe there was work after onset that is close to SGA, or an unsuccessful work attempt. Maybe there is a remote date last insured. Maybe there is a DAA issue. Perhaps a particular listing, regulation or ruling should be reviewed prior to the hearing. All these issues can be addressed in your prehearing brief. If there is something quirky about your claim, deal with the issue in your memorandum.

6. Have the Judge "On the Same Page"

This is an important benefit of the hearing brief. Let the judge know ahead of the hearing what the claim is about. When a claim is unexpectedly denied, it sometimes seems that the judge had a completely different view of the claim than you did. A hearing memorandum reduces the risk of these unexpected denials, by clearly setting forth your assessment of the medical evidence and the legal reasoning supporting the claim.

7. Differentiate Your Claim

ALJs hear a lot of claims - hundreds every year. A hearing memorandum provides an opportunity to differentiate your claim. There is something unique about your claimant's story. Maybe there is an outstanding prior work record, or the claimant tried hard to go back to work after onset, or the claimant's injury occurred during military service. Be sure to tell the judge about it in your hearing memorandum.

8. Your Client Deserves It

Would you ever tell your client that his claim is not important enough for you to spend a few hours writing a pre-hearing memorandum? Your client is relying on you to do everything possible to achieve an award of disability benefits. You know how important those benefits are to your client.

9. Win More Claims

This is the reason that initially persuaded me to invest more time writing hearing briefs. I learned that the judges were really reading them. And I won more cases. You will win more cases, and you will receive more on the record decisions and bench decisions, if you write a good hearing brief

B. WHEN to file the brief

1. Get the brief in as early as possible.

Try to submit the brief seven to ten days in advance of the hearing, and even earlier if possible.

You want the brief to be in the record when the judge first reviews the claim.

One of the benefits of a hearing brief is that it is in the record for the judge to read whenever the judge happens to look at the claim file. Take advantage of that benefit by getting your brief in early, before the judge has formed an opinion about the claim.

2. Consider an "on the record" request that will double as a hearing brief.

One way to have a hearing brief filed early is to make an on the record (OTR) request.

If the medical evidence is updated, and a fully favorable decision is mandated, file an OTR request. Should the OTR request be denied, nothing is lost and the brief remains in the file. Only a short update is needed before the hearing.

C. WHAT to include in the brief

1. Discuss the medical evidence in a helpful way.

Organize the medical exhibits and give the judge an overview of the medical record. Include important diagnoses and descriptive snippets from the treatment notes, citing the exhibit and page number.

This often is the most time-consuming part of the hearing brief. Yet a one or two page summary is much easier for an ALJ to digest than 300+ pages of medical records.

Emphasize favorable medical source statements.

2. Brief the 5 steps of the sequential evaluation.

Having each step of the sequential evaluation briefed is reassuring to the judge.

If there is no issue with a particular step, there is no reason to write more than a sentence about that step.

Step 1 often requires little explanation. However, if there was work after onset, give the judge the details in the brief, so the issue doesn't take up time at the hearing. Demonstrate that the work was under SGA or an unsuccessful work attempt. File a Work Activity Report as soon as you learn about the work after onset.

If a listing appears to be met, *explain* how the elements of the listing are met. Cite to the record by exhibit and page number for each element of the listing. This is particularly important for complicated listings, such as 1.04A.

In general, not enough time is spent briefing step 4 issues. Be sure to clarify the claimant's past relevant work. Be careful about making an admission against the interest of the claimant; do not concede that past work was past relevant work.

For step 5, specify what evidence precludes other work. If the medical-vocational guidelines specify a finding of "disabled," then explain why and cite the appropriate grid rule.

More importantly, briefing each step ensures that you have a complete and detailed theory of the case. According NOSSCR President Charles Martin, the "failure to formulate a complete and detailed theory of the case, covering ALL FIVE steps of the sequential evaluation" is the #1 reason that a Social Security disability claim may be lost at a hearing.

3. Tell a compelling story.

There is something special about this claim and this claimant. Tell the judge about it in the brief. Sometimes the claimant has an interesting life story. Sometimes there are good details involving the sacrifice and loss that has accompanied the claimant's disability.

Stories help to humanize the claimant, and drive home the point that work is not possible.

4. Educate the judge on a critical issue of the claim.

Sometimes one particular issue needs special attention. Perhaps the judge should review a particular listing, regulation or ruling prior to the hearing. The hearing memorandum is the perfect place to address the issue.

When an unusual listing appears to be met, it should be briefed ahead of the hearing. Certain listings don't come up that often.

If there is a date last insured issue, be sure to tell the judge how the DLI is satisfied.

Transferable skills – Ruling 82-41 is still the touchstone.

DAA – give the judge the facts and the regulations (and do not forget Emergency Teletype EM-96200).

If there was an unsuccessful work attempt, make sure the brief has the details, particularly the dates of work, that the judge needs to make an appropriate finding. You do not want to amend your onset date at the hearing.

If you have good medical opinion evidence from a non-acceptable medical source, tell the judge why it should be given great weight.

5. Discuss the DDS determination.

Say why the DDS determination was wrong, but also highlight the favorable aspects of the DDS decision. I like to do this, because it gives the judge good reasons supporting a fully favorable decision. These arguments can occasionally offer compelling reasons to grant the claim.

My favorite is the DDS durational denial. DDS denied the claim because the claimant's limitations would not last 12 months. Now, 14 months later at the hearing, the claimant has the same limitations.

Sometimes DDS never received or never reviewed key evidence. Often there is additional medical development after the DDS determination. Sometimes DDS gives very little weight to a treating doctor's medical opinion, without adequate explanation. Point out all this to the judge.

Take advantage of beneficial DDS findings. DDS credibility assessments in the RFC are sometimes favorable. Let the judge know that DDS found the claimant's allegations of pain to be credible. Also, if DDS ruled out past work, tell the judge that even DDS ruled out past work based on its RFC.

6. Cite Rulings and other authority.

Give the judge the authority that supports your claim. These citations flesh out a brief, and can be important regarding key elements of a claim. Here are a few examples:

If you have a medical source statement from a treating doctor, remind the judge of the criteria for evaluating opinion evidence contained in 20 CFR 404.1527(d)(2) and Ruling 96-2p.

Do you have a favorable medical source statement from a medical professional that is not an acceptable medical source under 20 CFR 404.1513? Cite Ruling 06-03p (information from

“other sources” provides insight into the “severity of the claimant's impairments and how they affect the claimant's ability to function”).

Claimant can’t sustain full-time work? Ruling 96-8p.

Does the claimant have a stellar prior work record? Both 20 CFR 404.1529 and Ruling 96-7p state that prior work record can be considered when assessing credibility.

7. Don’t forget the negative evidence.

Negative evidence can take many forms. Maybe there are references in the medicals to DAA or illicit drug use. Maybe there are references to work after onset. Maybe a doctor’s note wonders if the claimant is malingering. Often the DDS consultative examination reports are less than helpful. The DDS RFCs are certainly negative evidence.

I urge you to acknowledge the negative evidence in the claim file – do not assume that the ALJ won’t notice it!

Addressing the negative evidence will give your memorandum the appearance of evenhandedness. Acknowledging negative evidence is also good advocacy; it adds to your credibility. So acknowledge the negative evidence, and then explain it away the best you can.

Another reason to acknowledge the negative evidence in the brief is so that the negative evidence does not become the focus of the hearing. Get it out of the way ahead of time by addressing it in your memorandum.

8. Simplify.

“Make things as simple as possible, but not simpler” –Albert Einstein

Every hearing brief should simplify the issues before judge. Let the judge know which issues require the judge’s attention, and which are routine.

It takes time to organize a claim file and distill it to its essence. By investing the time to organize the claim in your brief, you save the judge the trouble. You will also be better prepared for the hearing.

9. Ask for a bench decision or an OTR decision.

For a bench decision, the judge sets forth the reasons for granting the claim orally "from the bench" at the hearing. A bench decision must be a fully favorable decision. The written decision that follows within a few days is just a few paragraphs in length, and basically incorporates by reference the reasons given on the record at the hearing. Bench decisions are governed by HALLEX I-5-1-17.

Depending upon the judge, a bench decision can require some preparation, because there are several administrative requirements that must be met. When a judge has several hearings in a row, there may be no time to prepare a bench decision on the spot. Some judges will shoot from the hip with a bench decision, but other judges prefer to prepare.

Give the judge some notice. If your claim is strong, raise the prospect of a bench decision in your hearing memorandum. I usually just say, “Should you decide to make a fully favorable decision, this claim qualifies for a bench decision under HALLEX I-5-1-17.”

You can also ask the judge to grant the claim *on the record*. I do this when past work is obviously precluded and a favorable decision is directed by the medical-vocational guidelines, or if a listing is clearly met. For example, a hearing should not be necessary in a properly developed claim involving adult listing 12.05C.

You will receive more bench decisions and OTRs with good hearing briefs.

10. Post-hearing briefs

In my view, an oral argument at the close of the hearing is not that much help. When post-hearing argument is needed, I prefer to submit a post-hearing brief. Post-hearing argument is governed by HALLEX I-2-6-76 (“upon request, the ALJ shall allow claimants a reasonable time to present oral argument, or file briefs or other written statements of fact or law).

In what circumstances should the claimant's representative submit a post-hearing brief? A brief should certainly when it is necessary to rebut vocational or medical testimony from the hearing.

Arguably, a post-hearing brief should be done in every case where the judge did not announce a decision at the hearing, to remind the judge why the claim should be granted. In general, I will write a letter to the judge in close cases, when I think the judge is on the fence.

Keep post-hearing briefs short, and file them as quickly as possible after the hearing.