

How does the SSA determine if I am disabled?

As an initial matter, your disability must last longer than 12 months, the SSA does not provide benefits for temporary or short-term conditions. If your disability has or will last longer than 12 months, the SSA will evaluate your claim in a 5 step analysis to determine if you are disabled.

Step 1 asks if you are engaged in substantial gainful activity. If yes, you are not disabled. If no, go to step 2.

SGA: Substantial gainful activity generally means doing significant and productive physical or mental duties and is done (or intended) for pay or profit. 20 CFR § 404.1510. A person who is earning more than a certain monthly amount is ordinarily considered to be engaging in SGA. The monthly SGA amount for 2010 is \$1000 (net).

Step 2 asks if you have a severe medically determinable impairment. If no, you are not disabled. If yes, go to step 3.

To meet this definition, you must have a severe impairment that makes you unable to do your past relevant work or any other substantial gainful work that exists in the national economy.

Severe: If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, the SSA will find that you do not have a severe impairment and are, therefore, not disabled.

Step 3 asks if your impairments meet or equal a listing. If you meet a listing, you are disabled. If not, go to step 4.

You can find the listing of impairments in the Appendix 1 to Subpart P of 20 CFR 404.

Medical equivalence: Your impairment is medically equivalent to a listed impairment in appendix 1 if it is at least equal in severity and duration to the criteria of any listed impairment.

Combination of impairments: If you have a combination of impairments, no one of which meets a listing, the SSA will compare your findings with those for closely related listed impairments. Then combination of impairments might be medically equivalent to a listing.

A physical or mental impairment must be established by medical evidence, not only by your statement of symptoms. You need to provide all medical records to the SSA.

Step 4 asks if, given your impairments, you can do your past relevant work. If yes, you are not disabled. If no, the go to step 5.

Past relevant work is work that you have done in the last 15 years.

Step 5 asks if, given your impairments, there is any work available in significant numbers that you can do. If yes, you are not disabled.

In evaluating whether or not you are disabled at step 5, the administrative law judge will refer to the "grid." The grid is located at Appendix 2 to Subpart P of 20 CFR § 404. The grid utilizes a number of factors to determine whether or not you are disabled at Step 5. The grid uses your residual functional capacity, age, education, and prior work experience in order to determine whether or not you are disabled.

You will need to establish you are unable to perform any work in the national economy due to your limitations. Physical ability will include your ability to stand, lift, walk, sit, push, pull, etc. You can also testify to your subjective pain. At the hearing, a vocational expert may be present to give his or her opinion regarding any jobs that may be available in the national economy. Any mental impairments will take the individual outside of the grid. The grid is not equipped to deal with mental disabilities impairments.

What if my application is denied?

After an applicant submits an application, the SSA will first make an initial determination denying or granting benefits. Generally, most applicants are denied at this stage. You then have 60 days (plus 5 days for mailing) to request a reconsideration of that decision. This is another administrative review. Generally, at this stage, the applicant will be required to attend a consultative evaluation from a doctor contracted with the SSA.

If the decision on reconsideration is still to deny benefits, you then have 60 days to request a hearing before an ALJ. This hearing may be in person or by video conference. At the hearing the ALJ will evaluate your claim based on the 5 step process discussed above. You will be given the opportunity to present updated medical records and will be allowed to testify about your physical and mental limitations.

If you are unhappy with the ALJ's decision, you can request that the decision be reviewed by the SSA's Appeals Council. This review is simply an appellate review of the judge's decision to determine if that decision is supported by evidence and is consistent with the law. The opportunity to submit additional evidence is limited.

If the Appeals Council affirms the ALJ decision, the final step is to seek judicial review in Federal District Court. A federal judge will act in an appellate capacity, reviewing the decision of the SSA to determine whether it is supported by substantial evidence and whether it is consistent with the applicable law.

PLEASE NOTE: Laws are subject to change. Information contained in this pamphlet is based on the laws in effect at date of publication: 6/10.



SUPPLEMENTAL SECURITY INCOME (SSI)



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What are the two types of disability benefits?

There are two general types of social security disability benefits: Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI). The difference between the two types depends on the claimant's work history. The disability rules for both are the same. Also, with SSDI, the amount of assets you have does not matter, but for SSI you must not have assets over \$2,000 and you must be low income.

Am I eligible for SSDI benefits?

In order to be eligible for SSDI, you must have worked enough quarters to give you "insured status". Basically, you must have worked enough to be able to receive benefits based on your earnings record. The regulations for SSDI benefits are located at 20 CFR § 404. Your insured status is a basic factor in determining if you are entitled to old-age or disability insurance benefits or to a period of disability. It is also a basic factor in determining if dependents' or survivors' insurance benefits or a lump-sum death payment are payable based on your earnings record. There are many different ways you can become fully insured for disability benefits purposes and the definitions are listed in the regulations. If you are neither fully nor currently insured, no benefits are payable based on your earnings.

If I have not worked enough to have fully insured status, am I still eligible for disability benefits?

If you are not eligible for SSDI benefits, you may still be eligible for SSI - Supplemental Security Income. You are eligible for SSI benefits if you meet all of the following requirements (20 CFR § 404.202):

- (a) You are—
 - (1) Aged 65 or older;
 - (2) Blind; or
 - (3) Disabled.
- (b) You are a resident of the United States (§416.1603), and—
 - (1) A citizen or a national of the United States (§ 416.1610);
 - (2) An alien lawfully admitted for permanent residence in the United States (§ 416.1615);
 - (3) An alien permanently residing in the United States under color of law (§ 416.1618); or
 - (4) A child of armed forces personnel living overseas as described in § 416.216.
- (c) You qualify based upon your income.
- (d) You do not have excessive resources.

What if I have used drugs and/or alcohol in the past?

The Administrative Law Judges that hear SSI and SSDI appeals may determine that you do not qualify for benefits because of drug or alcohol use. The limitation on drug and alcohol use is often misinterpreted. The provision from 20 CFR § 404.202:

(e) You are disabled, drug addiction or alcoholism is a contributing factor material to the determination of disability (see § 416.935), and you have not previously received a total of 36 months of Social Security benefit payments when appropriate treatment was available or 36 months of SSI benefits on the basis of disability where drug addiction or alcoholism was a contributing factor material to the determination of disability.

So, as listed in (e) above, the drug addiction or alcoholism must have been a "contributing" factor "material" to the determination of disability. It is generally not enough that the person used drugs or alcohol during the period they are claiming they were disabled. The question is whether or not the person would still be disabled without the drug or alcohol abuse. This leads to a but for test: but for the drugs or alcohol use would the person be disabled – if yes, then the SSA cannot find the claimant ineligible due to drug and alcohol abuse.

Am I entitled to benefits if the SSA says I have a warrant out for my arrest?

You may not be eligible for benefits if you were actively fleeing arrest or prosecution for a felony charge. You are only eligible if:

- (f) You are not —
 - (1) Fleeing to avoid prosecution for a crime, or an attempt to commit a crime, which is a felony under the laws of the place from which you flee;
 - (2) Fleeing to avoid custody or confinement after conviction for a crime, or an attempt to commit a crime, which is a felony under the laws of the place from which you flee; or
 - (3) Violating a condition of probation or parole imposed under Federal or State law.

The SSA was terminating benefits of SSI recipients simply for having an outstanding warrant. A new settlement agreement in a case called *Martinez v. Astrue* challenges this practice. Now, the SSA must actually show the person was "fleeing" to avoid prosecution and not simply have an active warrant in order to terminate benefits. Whether or not you may be eligible for repayment of suspended benefits based on the fleeing felon provision depends on when your benefits were initially suspended and may depend on when you appealed that suspension.

Martinez v. Astrue

There are 3 general groups of SSI beneficiaries that may be entitled to recover benefits that were suspended or even collected if an overpayment was alleged based on the fleeing felon provision. Most individuals in Group I will be entitled to recover all of their back benefits from the date the benefits ceased if benefits were suspended based on the fleeing felon provision after January 1, 2007. In Group II, benefit recipients may be entitled to all of the benefits they otherwise would have been entitled had their initial applications not been denied under the fleeing felon provision. If you are in Group III—benefits were stopped or denied between January 1, 2000, and December 31, 2006 AND there was no pending appeal after January 1, 2007—you will need to reapply for benefits within 6 months of receiving notice you need to reapply.

If you were denied or terminated from receiving social security benefits because of the "fleeing felon" provision, please feel free to contact Nevada Legal Services as we may be able to assist you in recovering benefits improperly denied.

What are the income limits for SSI eligibility?

Income is anything you receive in cash or in kind that you can use to meet your needs for food and shelter – such as wages, regular gifts from family or friends, Social Security benefits and pensions. Income also includes any money received for or in-kind payments for food and shelter. The amount of income you can receive each month and still get SSI depends partly on where you live. See 20 CFR § 416.1100.

Some income is also not counted to determine if you qualify for SSI. For example, the following do not count:

- The first \$20 a month of most income you receive;
- The first \$65 a month you earn from working and half the amount over \$65;
- The first \$60 of any irregular gifts;
- Medical assistance – either in kind or cash used to pay for medical assistance received from a government entity;
- Food stamps;
- Shelter you get from private nonprofit organizations; and
- Most home energy assistance.

Income can be counted when actually received or when set aside and available for use. Your benefits will be reduced based upon the amount of income the SSA attributes to you. Currently, the maximum monthly award of SSI benefits is \$674 for an individual and \$1,011 a month for a couple.

Will the Social Security Administration count income my spouse or other family members receive?

If you are married, part of your spouse's income and resources are included when deciding whether you qualify for SSI. If you are younger than age 18, part of your parents' income and resources are included. And, if the disabled person is a sponsored noncitizen, the sponsor's income and resources may also count. This is called deeming.

The SSA may also deem the value of in-kind support, such as the value of housing. If you are a student, some of the wages or scholarships you receive may not count. If you are disabled but work, Social Security does not count wages you use to pay for items or services that help you to work. For example, if you need a wheelchair, the wages you use to pay for the wheelchair do not count as income when we decide whether you qualify for SSI. If you are disabled or blind, some of the income you use (or save) for training or to buy things you need to work may not count.

What are resources and what is the limit for SSI?

Resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. Resources are limited to \$2,000 for an individual; \$3,000 for a married couple.

Not all resources are counted, some exemptions are allowed such as the primary residence, an automobile, and household goods. 20 CFR § 416.1210. If the property cannot be liquidated, it is not a resource. Non-liquid resources - resources that cannot be converted to cash within 20 days - will be evaluated based on the equity value of the property. If an individual does have resources that put him or her over the resource limit, that person can still qualify and receive benefits if they make reasonable efforts to properly dispose of the resource. Generally, a person must dispose of resource for fair market value in 9 months if the resource is real property and 3 months if it is personal property. Any net proceeds from the sale of the resource would then need to be used to pay any benefits received pending the sale of the resource.

The SSA can look back 24 months to determine if an applicant transferred property for less than fair market value. For example, if you own property that is not your primary residence and decide to give the property to your brother so you can qualify for SSI, the SSA will look back at that transaction to determine if you disposed of the property for less than fair market value. If the transaction occurred within the 24 months before you applied for benefits, you will be charged with the difference between the compensation actually received and the actual value of the property as a resource and potentially ineligible for benefits for a period of time.