

Here's a "Golden Nugget"... Win Your Disability Case by Obtaining Your Personnel File from Work

Article by: Scott E. Davis

Sometimes as a disability lawyer, one must be more creative than usual in order to win a client's disability claim. Such a situation presented itself recently in one of all places, the city of creativity, Las Vegas, Nevada.

I am blessed with a great disability practice as I have the opportunity to represent very honest, hard working people throughout the United States who are unable to work. I am fond of saying that we represent people who have good cases to begin with...our job is to make them better.

However, occasionally a client's case does not "come together" the way we had hoped. This problem manifests itself in many different ways. It can be the treating doctor who does not want to help, or the medical records are of poor quality, are illegible, or do not assist anyone in understanding the severity of the client's medical conditions.

Unfortunately for my client in Las Vegas, a number of things fell apart in her case - we were left with scant evidence. In fact, two doctors (worker's compensation and social security) opined she could work during the same time she alleged she became disabled. At 32 years old, her age was not on our side.

Quite frankly, the outcome on her case looked grim. However, I've learned when a case does not come together one must get creative and dig deeper rather than quit.

While reviewing the file before the hearing I asked myself, "How in the world are we going to win this case?" Suddenly, I ran across the proverbial Golden Nugget in the case. Had we turned an apparent empty hand into a Royal Flush?

Let me break the suspense...my client with fibromyalgia and chronic migraine headaches won her case. Although I have traveled throughout the country and seen a lot happen at hearings, I was amazed at what transpired.

At the hearing, this evidence roared like the MGM Hotel's Lion. What was it? The client's personnel file from a job she was fired from 5 years before she became disabled. Yes, 5 years! How in the world was this even relevant if she managed to work for years after this? Many SSA bureaucrats and judges would not look at this evidence due to that fact ...but this judge did.

The personnel file was relevant because it corroborated her story. As stated, she was disabled due to chronic pain from fibromyalgia and migraine headaches. She testified at the hearing she was fired from "many jobs" due to poor attendance and productivity problems.

One can testify to anything at a hearing; but it's a whole 'nother blackjack game when you have documents corroborating your testimony. Her personnel file contained a "warning letter" and "termination letter" two months later for excessive absences; due to...you guessed it...migraine headaches. There was also a letter from her treating doctor asking the company to accommodate her medical problems as he explained her medical problems were genuine and would cause her to miss work.

The company documented she was missing work over 30% of the time prior to and after the warning letter. For two months following the warning letter her attendance problems continued. The inevitable termination letter offered condolences, but also documented the significant negative impact her problems were having on this small company. The company explained it needed an employee who was "reliable." The letter was perfect evidence to support a disability claim.

At the hearing, I quickly referenced the personnel file and the judge made it clear he was indeed, very impressed with it. I developed testimony from my client about how the problem did not resolve over the ensuing five year period, resulting in several more job terminations and the filing of a disability claim.

The judge, bless his heart, was candid with me following the hearing as he explained he was not impressed with the case as there were many problems. I agreed. But 10 minutes after the hearing began, it was over.

You should be aware this is not the first time a client of mine has won their case using primarily a personnel file. Follow these tips to get the most out of your personnel file and evidence you submit in your disability claim.

1. How to obtain your personnel file

First, it is obvious you must obtain the file. This may be as simple as sending a letter or authorization to release records to your former employer. But beware, many companies are reluctant to part with this information due to concern over you suing them for various reasons including the failure to accommodate under the American's with Disability Act (ADA). Ameliorate this fear by telling them why you want it, it usually works.

I usually have my client ask for the file because if I call, an alarm goes off. Try to turn on the charm and deal directly with the Human Resource department; if the corporate bean counters get involved or worse, their lawyers, you'll likely never see the file.

If the company says "No" you've got a problem unless your disability claim is pending a hearing before a judge. This is because you lack subpoena power; you can't force the company to turn it over. But, upon a showing to the judge why the file is relevant, you can ask him/her to issue a subpoena and the company should comply. By the way, if you have dealt with a nasty Human Resource department in trying to get your file, it is therapeutic to hear them moan and groan after being subpoenaed. Gotcha!

Only get the judge involved if you are certain the file contains (or should) evidence that advances your disability case.

2. What your looking for in the personnel file

The things I look for are attendance records, records documenting how much sick leave has been used, warning letters regarding performance problems and job evaluations. Rarely does a personnel file contain all these potential "Golden Nuggets," but most will contain at least one if you documented your problems while working. Often an employee's job evaluations will begin to deteriorate toward the tail end of employment. However, good evaluations are relevant as they bolster your credibility when you testify that you enjoyed working and would like to return if only you could.

If there is good evidence in the file, then submit it to SSA and/or the judge.

3. How to document your personnel file

This is a very delicate issue, and I confess I am not an employment law attorney. There is a fine line between documenting your personnel file with your medical problems while working and creating your demise by losing your job.

However, if you are sure you are unable to continue working and plan on filing a disability claim, I think it is prudent to document your problems. If you are missing time from work or are having problems functioning due to a medical problem, get that into your personnel file. If you are exhausting your vacation or sick time, let the company know why. Get a letter from your doctor to address the reasons for your absences. Once confronted with this documentation, most companies will likely go out of their way to accommodate your medical condition and special needs, at least for a period of time.

Remember, in a disability claim, you should always try to have another independent source corroborating the story about your trials and tribulations which led to your inability to work. Affidavits are one source of evidence and I encourage you to view your personnel file another means to this end. Best of luck in pursuing your disability claim and remember, never quit! Scott E. Davis is a social security and long-term disability insurance attorney in Phoenix, Arizona. Mr. Davis represents clients throughout the United States. Although Mr. Davis has experience representing clients with a broad spectrum of physical and/or psychological disorders, the majority of his disability practice is devoted to representing individuals with chronic pain and chronic fatigue disorders. In almost every case, a fee is charged only if his client obtains benefits. Mr. Davis invites your questions and inquiries regarding representation via telephone (602) 482-4300, or email: info@scottdavispc.com