



*Disability Benefits
Explained: SSI, SSDI,
DAC, Medicare, Medicaid
and ABLE accounts*

David Lillesand, Esq.

Lillesand, Wolasky, Waks & Hitchcock, P.L.

U. S. Supreme Court:

The Supreme Court has said that “the Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction . . . makes the Act almost unintelligible to the uninitiated.” *Schweiker v. Gray Panthers*, 1983.

Our goal in two presentations

- **Part I at 9:30 – 10:30 am:** Understanding the Social Security Act's benefit primary programs, their administration, relationships and general eligibility rules in lay terms, and the new ABLE Act
- **Part II at 10:45 – 11:45 am:** Private estate planning tools to maintain your child's access to public benefits, using Special Needs Trusts, Wills, Family Trusts and other planning techniques to supplement the income & resources to persons with disabilities

Context is key to understanding

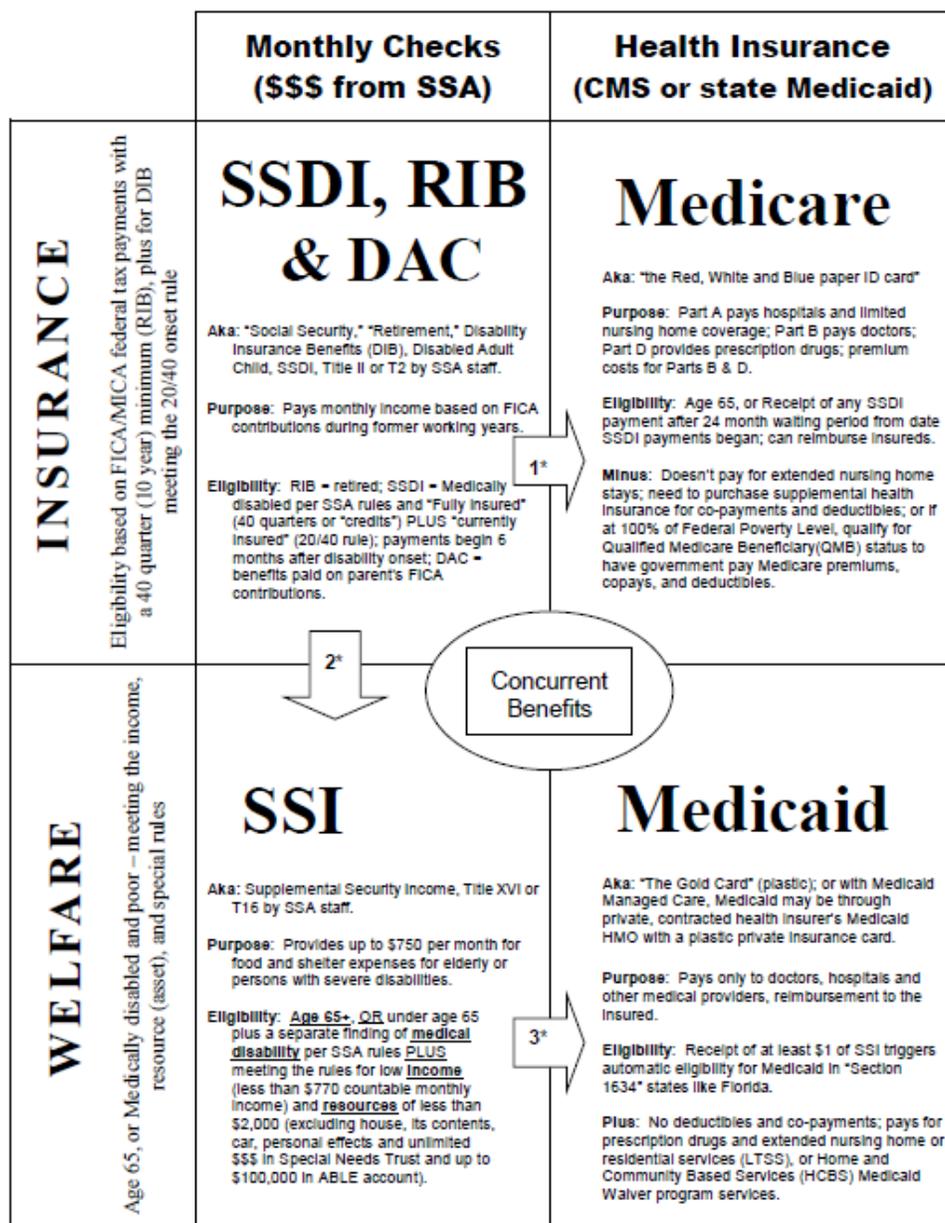
- The Social Security Act is broken into Titles each with a separate subject matter
- Some of the Titles describe programs which provide **cash income** (SSDI, SSI & DAC), others concern **medical care** (Medicare, Medicaid & QMB/SLMB)
- Some Titles relate to or trigger each other, but not always consistently...
 - ...because Congress did not pass the Social Security Act as one coherent, single piece of legislation

The Matrix is a context tool

For special needs planning purposes, the big four programs are

- **Title II** - Retirement, Survivors, Disability (SSDI) and Disabled Adult Child (DAC) benefits
- **Title XVI** - Supplemental Security Income (SSI)
- **Title XVIII** - Medicare health insurance
- **Title XIX** - Medicaid health insurance

Lillesand's Matrix of Public Benefits for Children and Adults – 2018
 Understanding the relationships between Social Security, SSI, Medicare and Medicaid.



*① SSDI triggers Medicare after 24 month waiting period. *② SSDI/RIB of less than \$770 permits eligibility for concurrent SSI disability benefits.

*③ Receipt of at least \$1 of SSI triggers full eligibility for Medicaid per SSA §1634 if state implemented the statute (e.g., F.S. §409.903 in Florida).

Social Security Act funds the...

- **Retirement** insurance – you and your spouse
- **Survivors** insurance – your survivors if you die
- **Dependents** insurance – your dependents if your disabled or retired
- **Disability insurance** – covers you and your family
- **Disabled Adult Child** – covers your disabled adult child, for life
- **Medicare** – Hospital and Medical insurance

Amount of an individual's cash benefits out are based on wage taxes (FICA) paid in during working years

Social Security required minimum covered earnings of...

40 quarters (“credits”) (ten years) of FICA taxes paid...

...unless under age 31 when disabled (1/2 the number of quarters between age 21 and 31)

Plus FICA taxes paid on minimum gross wages to earn each quarter (3 month period) one SSA credit; currently the minimum is paid FICA taxes on at least \$1320 of wages

Yields payment of...

...up to \$2,788/mo. Retirement if FICA taxes paid at maximum wages

How much is the SSDI disability check?

- It's the amount you would receive if you were already full retirement age (66)
- Receipt of disability check for 24 months triggers eligibility for Medicare
- Pays dependent children under age 18 or graduation from high school
- Average SSDI worker and family = \$2,051/month

SSDI, like SS Retirement, is not means-tested!

What if the person is disabled from birth,
never worked, and not eligible for SSDI?

Supplemental Security Income (SSI)

- Paid to elderly (persons age 65+)
- Paid to disabled persons of any age (from birth)

Unlike SSDI or SS Retirement...

SSI benefits ARE means-tested!

What does “means-tested” mean?

SSI eligibility depends on being **old** or **disabled**, **PLUS** having, in any month:

“Countable income” of less than \$750 per month

AND

“Countable resources” (assets) of less than \$2,000

BUT THE GOOD NEWS...

...SSI payments alone trigger Medicaid health insurance immediately in most states

Can a disabled person get both SSDI & SSI, plus Medicare & Medicaid?

Yes! For persons born disabled, for example, but may have worked a little for a long enough time to get SSDI

- It's called “**Concurrent Benefits**”
- The amount of SSDI is subtracted from the SSI Federal Benefit Rate (2018 = \$750/month)
- **Example**: \$320 of SSDI yields \$450 from SSI for a total income of \$770

PLUS both Medicare & Medicaid health insurance

SSI Program in more depth...

The basic purpose – “to assure a minimum level of income for persons age 65 and over, or who are blind or disabled, and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level.”

20 CFR 416.110

The Six Basic Principles of the SSI Program

1. **Objective tests** – “to provide objective measurable standard for determining each person’s benefits.”
2. **Legal right to payments** – how much and under what conditions defined in the law, with limited administrative discretion, but SSI claimant has full appeal rights
3. **Protection of personal dignity** – “No restrictions are placed on how the recipient spends the Federal payments.”

The Six Basic Principles of the SSI Program

4. **Nationwide uniformity of standards** – “eligibility requirements are identical throughout the 50 states and D.C.”

5. **Incentives to work and opportunities for rehabilitation** – “payment amounts are not reduced dollar-for-dollar for work income” to encourage beneficiaries to work

6. **State supplementation** – states may supplement with state funds what claimants get from Federal SSI

General Information on SSI Benefits

Federal Benefit Rate (FBR) payment amount currently:

- Lives alone or with others but pays fair share of food and shelter, maximum payment is...
 - **\$750 for Individual**
 - **\$1,125 for Couple if both are disabled**
- Reduced to \$500 if others or a trust pays for food & shelter
- Reduced to \$30/mo. if claimant is residing in institution

Countable Resources (assets) limits:

- \$2,000 Individual
- \$3,000 Couple if both are disabled

Means-testing: the Resource Rules in general

Resources (assets) are “things you own” such as cash, bank accounts, land, life insurance, personal property, vehicles

Anything else you own that could be converted to cash and used for food and shelter

Deemed resources – the same list of things owned not by the disabled person but by “someone who owes you a duty of support”

- **Residential parent** (and parent’s spouse) of a minor child (a child under age 18; at age 18, parents’ resources stop counting)
- **Residential spouse**

Resource Rules – Four Important Principles

1. **Resources measured only once** each month qualifying period – on the first day of the month
2. “**Income in the month received** if retained becomes a resource on the first of the following month”
3. **Transfer penalty** – you cannot give away assets to then qualify for SSI benefits
4. **Report changes of finances to SSA** by the 10th day of month following receipt – preferably in writing, certified return receipt mail to prove delivery

Resource Rules - Things that don't count

Major resource “exclusions” are:

- **Home** claimant lives in – “the principal residence”
- **Household goods** – furnishings, lawn mower, etc.
- **Personal effects** – the “bling-bling rule”
- **One vehicle** – unlimited amount
- **Up to \$100,000** retained in an IRS ABLE Account
- **Unlimited millions \$\$\$ in a Special Needs Trust**

Income – The Ten Most Important Principles

1. **Income is** “anything that comes in”
2. **“Income”** is defined in the Social Security Act not the IRC, and includes gifts, for example
3. **Some income** is “countable” & some “excluded” by law
4. **Income received throughout a month** is relevant, whereas measurement of resources is only on the first of the month
5. **The Mantra** – “Income in the month received, if retained, becomes a resource on the first of the following month”

The Ten Most Important Income Principles, cont.

6. **Gross wages** and income is used, not net after taxes.
7. **Initial determination by SSA** – thereafter the burden shifts to SSI claimant to report, under criminal and civil penalties
8. **Month-by-month Eligibility** – e.g., an SSI claimant can be eligible in January, not eligible in February, re-eligible in March, April, not eligible in May.
9. **“Retrospective monthly accounting”** means that eligibility for SSI benefits this month is based on income/resources two months back
10. **Mandatory Reporting to SSA** – the receipt of countable AND exempt income and resources must be sent by 10th day of following month – preferably in writing, certified mail

Income Rules – Four Types of Income

Earned Income is wages, net earnings from self-employment, certain royalties, honoraria and sheltered workshop payments.

Unearned Income is all income that is not earned such as Social Security benefits, pensions, State disability payments, unemployment benefits, interest income, dividends, and cash from friends and relatives.

In-Kind Income is food or shelter that you get for free or for less than its fair market value.

Deemed Income is the part of the income of your spouse with whom you live, your parent(s) with whom you live, or your sponsor (if you are an alien), which we use to compute your SSI benefit amount.

Unearned Income Exclusions – Income that doesn't count

A sample of the 61 income “exclusions” are:

- Loans to SSI claimant, including credit card charges
- Payments to an ABLE Act account
- 1/3 of child support payments, unless paid to an SNT
- Income tax refunds, including the Earned Income Tax Credit
- Disaster assistance, if declared by the President but not by a state Governor
- Crime victim's compensation payments

...but there may be specific limitations on the frequency, amount and use of a particular exclusion

If not “excluded”... Income Deductions

Earned Income – subtract \$20 general income disregard if not used on Unearned income, and subtract the first \$65 and $\frac{1}{2}$ of earnings over \$65 in a month

Unearned Income – subtract \$20 only, count the rest

In-Kind Income – a/k/a ISM – In-kind Support and Maintenance triggers a $\frac{1}{3}$ deduction plus \$20 if outside person or a trust pays for TEN and only 10 Specific “Household Costs” listed in the SSI rules.

Deemed Income – all the above deduction formulas are applied to the deemor parent or spouse first, plus some set-asides for the deemor, and for healthy children, and any income left over is “deemed” as unearned income to the SSI claimant.

Example of Some Earned & Unearned Income's Effect on Ed's SSI check

Ed receives \$361 SSDI each month, gross wages of \$289, a total of \$650/month. What is the amount of his SSI check?

\$361	SSDI
<u>\$20</u>	General income exclusion
\$341	Countable <u>unearned</u> income

\$289	Earned income
<u>- \$65</u>	Earned income exclusion
\$224	
<u>- 112</u>	1/2 remaining earnings
\$112	Countable <u>earned</u> income

\$341	Countable unearned income (from above)
<u>\$112</u>	+ Countable earned income (from above)
\$453	= Total countable income for SSI purposes

Example, continued

What is **Ed's SSI payment?**

\$750	2016 Federal Benefit Rate (SSI payment for single person)
<u>- \$453</u>	Total countable income from prior slide
\$297	SSI payment

Ed's Available Income:

\$361	SSDI (from above)
\$289	+ Wages (from above)
<u>\$297</u>	+ SSI Payment (from above)
\$947	= Total Monthly Income Available to Ed

Medical Determinations

The previous slides dealt with **FINANCIAL ELIGIBILITY** – the rules for “means-testing.”

Assume that we have resolved all the financial issues, and the SSI claimant now meets the income and resources tests for eligibility.

How does SSA determine if a person is **MEDICALLY DISABLED**?

Medical Determinations, in general

For Social Security determinations (SSDI or SSI):

- **Diagnosis** is NOT the determining factor or even a major factor
- **Functional ability** is the primary criteria
- **As SSA states**, the claimant must have marked functional limitations, such that “the degree of limitation seriously limits your ability to function independently, appropriately, and effectively to initiate, sustain and complete work-related physical or mental activities.”

The Five-Step (Adult) Sequential Evaluation Process

1. Is the claimant engaging in Substantial Gainful Activity?
2. Does the claimant has a “severe” impairment?
3. Does the claimant’s impairment(s) meet or equal one of the Listing of Impairments?
4. Can the claimant return to Prior Relevant Work?
5. Given the claimant’s Residual Functional Capacity, education, and transferable skills, are there any jobs the claimant could do?

At Step 3, the description could be quite specific, such as...

4.04 Ischemic heart disease, with symptoms due to myocardial ischemia, as described in 4.00E3-4.00E7, while on a regimen of prescribed treatment (see 4.00B3 if there is no regimen of prescribed treatment), with one of the following:

A. Sign-or symptom-limited exercise tolerance test demonstrating at least one of the following manifestations at a workload equivalent to 5 METs or less:

1. Horizontal or downsloping depression, in the absence of digitalis glycoside treatment or hypokalemia, of the ST segment of at least -0.10 millivolts (-1.0 mm) in at least 3 consecutive complexes that are on a level baseline in any lead other than a VR, and depression of at least -0.10 millivolts lasting for at least 1 minute of recovery; or...**[you get the idea – it's complicated]**

Or quite general, such as the SSA Listing for “Loss of speech”

“2.09 *Loss of speech* due to any cause, with inability to produce by any means speech that can be heard, understood, or sustained.”

[**NOTE:** “due to any cause” eliminates the need for a particular diagnosis; it is a functional determination only.]

Or quite reliant on specific testing, as for Intellectual Disabilities (IQ scores)

12.05 Intellectual disability: Intellectual disability refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22.

A. Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing, or bathing) and inability to follow directions, such that the use of standardized **measures of intellectual functioning is precluded**; OR

B. A valid verbal, performance, or **full scale IQ of 59 or less**; OR

C. A valid verbal, performance, or **full scale IQ of 60 through 70** plus a physical or other mental impairment imposing an additional and significant work-related limitation of function.

The Sequential Evaluation Process for Children's Claims

Step 1. Is the child working?

Step 2. Does the child have a severe impairment?

Step 3. Does the child's impairment meet, medically equal, or "functionally equal" a Listing of Impairments for Children?

- How does the child's function compare to children the same age?
- What type and amount of help does child need to complete age-appropriate activities?

The Sequential Evaluation Process for Children's Claims, cont.

Finally, SSA evaluates child's functioning in six domains:

- Acquiring and using information
- Attending and completing tasks
- Interacting and relating with others
- Moving about and manipulating objects
- Caring for him/herself
- Maintaining health and physical well-being

If child scores “marked” limitation in two, or “extreme” limitation in one of the domains, the child will be found medically disabled.

SSI at age 18... and later years

Impact of child reaching age 18:

- Disabled child must be re-evaluated under adult medical disability rules, which are more restrictive
- On financial side, Parental Deeming no longer applies

Later years' transition from SSI to DAC:

- Title II DAC benefits may become available, eliminate SSI, acquire Medicare, and retain SSI “if otherwise eligible”
- Amount based on parents' SS contributions – at 50% if parent retired or disabled, and 75% if deceased

Disabled Adult Child (DAC) benefits

Typical family scenario

- Child disabled from birth but is not eligible for SSI during minority (ages 0 to 18) because of parental deeming
- At age 18, now adult-child gets SSI and Medicaid
- When child is in her 30s or 40s, her parents retire on SSA

When parent collects, SSA pays DAC benefits if:

- Child is not married and has not worked at “substantial gainful activity levels”
- Amount based on parents’ SS contributions – at 50% if parent retired or disabled, and 75% when deceased; and triggers **Medicare**
- **Plus Medicaid** can be retained if the child is “otherwise financially eligible” (low income other than DAC check, and “countable assets” of less than \$2,000), for example, has Special Needs Trust

SSA Processing of Claims

Seven steps of application and appeals.

The FOUR SSA administrative review steps:

1. Initial determination
2. Reconsideration
3. Federal Administrative Law Judge (ALJ) Hearing
4. Appeals Council review

SSA Processing of Claims, cont.

Then claimant has **THREE** levels of federal court review:

5. United States District Court
6. United States Circuit Court of Appeals
7. United States Supreme Court

How & When to Apply – Ten Specific Strategies

1. **Lawyer unnecessary** – claimant doesn't need a lawyer to apply but may have one by choice
2. **If in doubt**, apply first, withdraw application later
3. **“Concurrent application”** - SSA Claims staff must take claim for both SSI and SSDI unless it is clear one or the other claim is not viable
4. **Applications filed online** at www.SocialSecurity.gov

Ten Specific Strategies, cont.

5. **SSA Notices** on each type of claim will appear identical. Look at letterhead's second line – “Supplemental Security Income” versus “Retirement, Survivors and Disability Insurance”
6. **Separate Notice of Decisions** on SSDI and SSI will be sent, and sometimes not together (common example, client gets SSA Notice of non-eligibility for SSDI for lack of SS credits, yet no word on SSI disability determination)

Ten Specific Strategies, cont.

7. **Claims can be “filed” telephonically** by calling SSA at **1-800-772-1213** – which...
 - Sets up local office interview appointment time
 - Creates earliest possible date for retroactive benefits

8. **60 day window to complete the filing** of an application, but the **medical claim file is a rolling application** while the financial must be correct from the beginning of the application

Ten Specific Strategies, cont.

9. **Get organized! Reduce frustration!** – There are no legal questions on the application, just data gathering – lists of doctors' & hospitals' contact info and list of medications.
10. **Client rights** – The right to apply, to receive help from SSA staff, to a non-attorney or attorney rep, to written notice of the decision, to examine the file, and to appeal and adverse decision

Lawyer unnecessary, except when...

- **Claim is improperly denied** – claimant wants or needs legal help to file Reconsideration or Request for Hearing
- **No filing fees AND no attorney fees** – attorneys charge only a contingent fee of 25% of the past due benefits SSA wrongfully withheld – no win, no fee
- **SSA pays 25% to attorney and 75% to claimant** from the claimant's past due award, and nothing to attorney from future benefits
- **NOSSCR.org** – the national organization of Social Security attorneys maintains a referral list

The ABLE Act

- **Bipartisan tax legislation** – Internal Revenue Code §529A, modeled after 529 education savings plans
- **Sought by parents of disabled children** who wanted to save \$\$\$ for their children's futures, without affecting the minor or adult child's eligibility for SSI, Medicaid and other public benefits
- **ABLE accounts** – online only, sponsored by state agencies, earn interest, controlled directly by the disabled ABLE account beneficiary or representative

The ABLE Act

- **Disability must have begun prior to age 26**
- **Annual contribution** – \$15,000 per year from all sources
- **Can grow to \$100,000 – and - and** who - and retain SSI eligibility over the \$2,000 limit, and \$400,000+ and retain Medicaid eligibility
- **Medicaid lien on ABLE funds** – upon the death of the ABLE account disabled beneficiary
- **Rate of investment returns** in Florida accounts on the funds in ABLE accounts was – 10% to 18% in last year

Questions?

If not asked during the conference, emailed questions to me are encouraged, phone conferences as necessary.

David Lillesand, Esq.
Lillesand, Wolasky, Waks & Hitchcock, P.L.

635 Court Street
Clearwater FL 33756
David@LillesandLaw.com

(727) 330-7895