

Fred Daley

Social Security Disability Lawyer Set Standard for Demanding Due Process

by Roy Strom

The law practice of Frederick J. Daley Jr. stretches from the East Coast to Chicago and all the way to Hawaii. And from there, one satisfied client even travels to the tiny Pacific Ocean island of Guam to spread the word about Daley's work.

Out of a four-story brick building on Randolph Avenue in the West Loop, **Daley Disability Law P.C.** has become one of the most sought-after names for clients and attorneys battling the government to receive Social Security disability benefits as well as Railroad Retirement Board disability benefits.

Daley was among the vanguard of lawyers to apply legal tenants such as demanding experts produce verifiable proof upon which they base their opinion and appeals to the U.S. Courts of Appeals in a process

that was once largely bureaucratic.

Today, Daley specializes in federal appeals on behalf of clients who have been denied Social Security disability insurance benefits. He represents people who have been largely unable to work and have been fighting to receive benefits for years, often causing financial stress, strain on marriages and depression.

Such was the case with Jim, a 20-year military veteran from Hawaii who had been declared disabled by the U.S. Department of Veterans Affairs but spent eight years trying to receive benefits from Social Security disability.

Jim had worked with an attorney in Hawaii and was denied disability benefits at an early stage in the process at a hearing before an administrative law judge. After a referral, Daley appealed the decision to the U.S.

Circuit Court in Hawaii. First, a magistrate judge affirmed the ALJ's ruling. Then a district court judge did the same thing.

Some attorneys may have thrown in the towel. But once Daley takes a case, he rarely gives up.

"I enjoy taking cases where I feel the person didn't get a fair shake, where I believe they should have won under the law," Daley says. "And I do feel sometimes that I look at something and I say, 'I think I can win this.'"

So he took Jim's case to the 9th U.S. Circuit Court of Appeals in Hawaii. The justices ruled in his client's favor, reversing and remanding the case to the ALJ, due to an error in law. Daley flew to Hawaii to represent Jim at the hearing, which he



won. The past due benefits were worth about \$105,000. In addition, Jim would receive monthly benefits until he retired. But that was not the end.

Under the Equal Access to Justice Act, clients who have been wrongfully denied disability can petition the government to pay a portion of their legal fees in federal court cases. While most fees are paid by the clients, EAJA claims can offset the ultimate fee award and are capped at \$125 an hour with a cost-of-living adjustment.

Filing an EAJA claim does not postpone a client's receipt of disability payments. In addition, it saves them from paying the maximum of 25 percent of the past due benefits they have won.

In Jim's case, that fee petition was denied at every level until Daley got back to the 9th Circuit. It again sided with him after an October 2014 oral argument in San Francisco. Finally, after eight years, Jim's fight was over. The government paid a portion of Daley's legal fees, effectively boosting Jim's disability payment.

"Whatever you want to go after, he goes along with it and he goes after it for you," Jim says. "And I didn't have to lift a finger to help him."

Jim has since moved to California with his wife, who has family in Guam, an island which Jim says is without a Social Security disability lawyer. He is trying to change that.

"I've gotten Fred's business cards, and I spread them all over Guam," Jim says, "to let people know there's an advocate who's knowledgeable and an expert in his field who can help you."

The First of Many

Daley grew up in Rhode Island and still speaks, at times, with an East Coast accent. He went to the University of Miami in Florida and became interested in the law for social reasons around the time of the Vietnam War.

After he graduated from New England School of Law in Boston in 1973, he moved to Chicago to work at the Cook County Legal Assistance Foundation.

His first case — ironically, he says — involved a Social Security disability claim. At the time, lawyers typically did not handle those cases.

"Even at legal aid we had the paralegals do Social Security disability," Daley says.

The case gave him an in-depth look at the administrative and legal process that he has now come to master.

The first step in a Social Security

disability case is to file a claim. If that is denied, a client can file for reconsideration. If denied, the next step is a hearing before an administrative law judge. If denied, a client next goes to the Appeals Council, the final step in the administrative level.

An appeal of a final administrative denial is to the Federal Courts, beginning with the U.S. District Court and then the U.S. Circuit Court of Appeals for the circuit in which the claimant resides.

In Daley's first case, the client had been granted disability status by an ALJ. The Appeals Council directed the client to see a doctor for an evaluation. The doctor's report was used to reverse the ALJ's decision.

The client came to Daley, telling him the doctor had made up portions of his report. He was disagreeing with the doctor, but he was given no venue to fight. Fresh out of law school, Daley had due process on his mind.

"Before you take property away from a person, you give him something of a due process hearing," Daley says. "And I figured, 'This is wrong. The guy didn't get to confront this person he disagreed with.'"

After losing at the U.S. District Court



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for the Northern District of Illinois, Daley filed an appeal to the 7th Circuit.

"So there I was, not even practicing law for a year, and I was filing a due process claim in the Federal Court and, before long, briefing and then arguing before a three-judge panel in the 7th Circuit Court of Appeals," he says.

The court agreed in a case called *Lonzollo v. Weinberger*, finding he was denied a right to due process.

A Disability Trendsetter

That was the first time Daley's litigation had an impact on Social Security cases going forward. It was far from the last.

In his more than 40 years of practicing law, Daley has won at least 12 precedent-setting rulings at the 7th Circuit and elsewhere that have reshaped the Social Security disability landscape. In total, he's been involved in 76 cases in federal circuit courts of appeals.

He left legal aid in 1980 to start his own practice. Shortly afterwards he began focusing

almost exclusively on disability work.

One case that led to a change in Social Security disability proceedings began a dozen years later when Festus McKinnie, a grinder and X-ray technician for Union Tank Car Company, suffered a knee injury. He quit working in 1992 as a result.

In a hearing before an ALJ, an expert witness on the government's behalf testified that McKinnie could work as a telephone quotation clerk, telemarketing clerk or a bench sorter. The expert said there were thousands of each of those types of jobs available in the regional economy.

Daley jumped at this. "Show us how you arrived at those figures," he asked, according to a court ruling.

The expert replied that she extrapolated the numbers based on reports from the Department of Labor Statistics and Census Bureau, among others.

"How did you perform this extrapolation?" Daley asked. She said she relied on Labor Market surveys. She refused to supply them, and the ALJ denied a request for production. It was another due process issue.

The 7th Circuit ruled in McKinnie's favor and remanded the case. Because the expert could provide no data or citations for the reference in forming an opinion, there was not "substantial evidence" that the jobs existed.

Today, *McKinnie v. Barnhart* is cited frequently when experts testify without documentation.

"The not-so-very-well-kept secret is that the testimony is not very scientific, although it is supposed to be verifiable," says James R. Comerford of Comerford Law Office, a former associate at Daley's firm.

"And Fred kind of attacked that and made sure that if they couldn't prove their testimony, that he'd win the case. And none (of the lawyers) I knew of were doing it at the time."

Wanted: Strong Advocates

Daley's three-lawyer firm still handles a number of hearings in front of ALJs. But he also takes cases on appeal to the District Court and Court of Appeals from lawyers and non-lawyers whose clients have been denied at the administrative level.

He relies on good advocates at the administrative level — advocates who, like he did in the McKinnie case, question everything and demand evidence.

"If you don't demand evidence, if you don't ask for it, it's waived forever," Daley says.

"I can get the case at federal district court

and I can argue that a job this vocational expert says is skilled is really unskilled. And I can point out that an expert's description of a job is inaccurate according to the Dictionary of Occupational Titles. But the judge will say, 'Too late! The client was represented and the counsel waived. Too late.'

Daley often attends and speaks at conferences for Social Security disability advocates.

"I can't tell you how many times at these conferences I've given talks saying, 'Don't waive!'" Daley says. "But they waive anyway!"

Dannelly Smith is one advocate who has heard Daley's message. Working out of Michigan, Smith has been sending cases to Daley for nearly a decade. He says Daley's advice has changed the way he works.

"Fred is very good about helping you shape your work and reduce errors that you might make that would adversely affect the ultimate attempt to try and get someone benefits," Smith says.

"I have changed how I look at cases. There are things I do in hearings now that I wouldn't have done before."

For instance, Smith said, he often files motions for a vocational expert's supporting data. ALJs will often ignore that motion.

"They won't even bring it up in the decision," Smith says. "And that's an error of law."

Smith appeals any case where an ALJ ignores a motion he files, arguing there has been a violation of the procedural aspects of the law.

"I'm not going to let a judge get away with that," Smith says. "And I think that's true of a lot of people who work with Fred."

Daley has about 150 cases ongoing at any time, and he files about 50 a year. He tells lawyers and non-lawyers who send him cases not to be offended that, if he does the appeal on a case, he also does any resulting administrative hearings. That's because his fees depend on it.

"If you think a case is decent, you should always try to find an appellate lawyer to take the case," Daley says.

"Don't be thinking it's not going to get me anything if the appellate lawyer takes the case. Be thinking that you'll have a client who speaks highly of you because you found this person. And the second thing I think is really important, and I've had judges tell me this, they think twice if they know the case may be coming back on appeal....I often say there's only one thing judges hate worse than pro se plaintiffs and that is getting reversed."

Tough Cases, Impressive Results

Daley won another landmark 7th

Circuit ruling in 2006 in a case known as *Kangail v. Barnhart*.

The case involved a 36-year-old female who had been diagnosed with bipolar disorder and who also had a history of drug and alcohol abuse. An ALJ denied her disability claim, noting that a doctor said the claimant "seemed pretty normal" during office visits and, in addition, attributing the plaintiff's bipolar disorder to her drug and alcohol abuse.

The ALJ also said it did not matter that the woman was unable to hold jobs because she did not always take medications as prescribed. Daley, however, presented medical evidence that says bipolar disorder can itself be a cause for a patient's inability to take prescribed medicines. Appellate Justice Richard Posner agreed.

"Mental illness in general and bipolar disorder in particular...may prevent the sufferer from taking her prescribed medicines or otherwise submitting to treatment," Posner wrote in a ruling that remanded and vacated the ALJ's decision. "The administrative law judge did not consider this possibility."

Stephanie Lake is a Social Security disability lawyer in Phoenix who has known Daley for 15 years. They often attend bi-annual conferences held by National Organization of Social Security Claimants' Representatives. For years, Daley has been an active speaker at these conferences, where he dishes out practice tips and discusses new trends in litigation.

Lake says she is impressed by Daley's work in the *Kangail* case and on cases involving substance abuse. She says a client with a substance abuse problem has the chance of earning disability diminished by 80 percent.

"Many lawyers just don't take the cases where there is a substance abuse angle," Lake says. "So to go all the way to federal appeals court on that case is just very, very difficult."

Despite his accomplishments, Lake says Daley does not widely advertise how successful he has been creating law in this area.

"You just gradually find out that he's done everything, knows everything and is a really successful appellate lawyer since he came around in the '70s," she says. "And this area of law has only been around since the '70s, so that's pretty impressive."

If Jim has any luck, Daley will soon be bringing this area of law halfway around the world: Is Guam next? ■