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36th Annual Regional

Social Security Seminar

Presented by the Cincinnati Bar Association Social Security Law Practice Group

Friday, May 3, 2019

36th Annual Regional Social Security Seminar

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8:55 a.m.	**Welcome & Opening Remarks**	
9 a.m.	**Policy and Government Affairs Update** Lisa D. Ekman, JD, MSW, *Director of Government Affairs, National Organization of Social Security, Claimants' Representatives (NOSSCR)*	**TAB A**
10 a.m.	**A Disciplined Approach to Training a New Attorney - What's Your Succession Strategy?** Jessica Davis, Esq. and David W. Kapor, Esq., *David W. Kapor & Associates LLC*	**TAB B**
11 a.m.	**Break**	
11:15 a.m.	**Office of Hearing Officers Panel** Hon. Sherry Thompson, *Regional Chief Administrative Law Judge, Office of Hearing Operations* Nikki Thomas*, Cincinnati Office of Disability Adjudication and Review*	**TAB C**
12 p.m.	**Group Luncheon** (included in your registration)	
1 p.m.	**Attorney/Vocational Expert Panel** Robert Breslin, *Vocational Expert, The Rehabilitation Approach* Michael C. Arnold, Esq., *Arnold & Griffith PLC* Teresa L. Trent, *Vocational Expert, The Rehabilitation Approach* James R. Williams, Esq., *Young Reverman & Mazzei Co. LPA*	**TAB D**
2:30 p.m.	**Self-Employment and Substantial Gainful Activity (SGA)** Michael A. Walters, Esq., *Pro Seniors*	**TAB E**
3:15 p.m.	**BREAK**	
3:30 p.m.	**POMS and RULINGS: Updates on the Most Important Social Security Rulings and POMS** Michael C. Arnold, Esq. and James R. Williams, Esq.	**TAB F**
4 p.m.	**Ethics and Professionalism: New Attorney Conduct/Disciplinary Regulations** David W. Kapor, Esq. and Jessica M. Davis, Esq.	**TAB G**
5 p.m.	**Adjourn**	

TAB
A

Lisa Ekman
Biography April 2019

Lisa Ekman is Director of Government Affairs for the National Organization of Social Security Claimants' Representatives (NOSSCR). In that capacity, she represents the organization to congress, the administration, and advocacy coalitions in matters of importance to people with disabilities pertaining to the Social Security disability programs, including advocating for improvements in the Social Security disability programs and to ensure that individuals with disabilities applying for Social Security Disability Insurance and SSI benefits have access to highly qualified representation and receive fair decisions. Prior to her current position, she was the Director of Federal Policy for Health & Disability Advocates, as well as President of Ekman Advocates for Progress, a disability policy consulting firm.

Lisa Ekman has been a disability rights advocate focused on improving the economic security of people with disabilities for nearly two decades, focusing on the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs, health care (including Medicare and Medicaid), employment programs, and long-term services and supports. Ms. Ekman started her disability policy career as a Presidential Management Intern at the Social Security Administration, where she worked on the development and implementation of the Ticket to Work Program. She later went on to serve as a Policy Analyst for the Ticket to Work and Work Incentives Advisory Panel. Ms. Ekman also served as a disability advisor to U.S. Senators Edward M. Kennedy, Tom Harkin, and Jim Jeffords on the Senate Health, Education, Labor, and Pensions (HELP) Committee. After her time on the Hill, she served as a Senior Policy Analyst in Legislative Affairs for the Association of University Centers on Disabilities before returning to school to earn her law degree.

Lisa also represents NOSSCR in the Consortium for Citizens with Disabilities, serving as Chair of its Board of Directors, as well as a co-chair of its Social Security, Fiscal Policy, and Ad Hoc Poverty Task Forces. She is a member of the National Academy of Social Insurance, American Bar Association, and Federal Bar Association. Ms. Ekman received her J.D., cum laude, from Georgetown University, her Masters in Social Work from the University of Denver, and a Bachelors in Communications from Northwestern University.

ADMINISTRATIVE & LEGISLATIVE UPDATE

Lisa Ekman, Director of Government Affairs

National Organization of Social Security Claimants' Representatives (NOSSCR)

May 2019

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Overview

- Congress: committee and subcommittee membership, new/potential legislation, FY19 and FY20 appropriations, Congressional Hearings
- Social Security Update: Trustee's report nominations, proposed regulations, hearing scheduling, NOSSCR advocacy, fee agreement
- Recent Supreme Court Decisions
- How you can help

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What's Happening [to Social Security] in Congress?

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Committees of Jurisdiction

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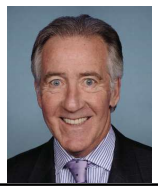
House

- **Ways and Means**: Chair Richard Neal (D-MA). Ranking Member Kevin Brady (R-TX)
  - Social Security Subcommittee: Chair John Larson (D-CT-1)/Ranking member Tom Reed (R-NY)
  - Human Resources renamed— Worker and family Support "WorkFam", Chair Danny Davis (D-IL)/ Ranking member Jackie Walorski (R-Ind)
  - Oversight subcommittee. Chair John Lewis (D.GA) ranking member Mike Kelly (R-Pa)
- **Oversight and Reform**: Chair Elijah Cummings (D-Md), Ranking Member Jim Jordan (R-Oh)

Neal | Larson | Davis | Lewis | Cummings





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SENATE COMMITTEES OF JURISDICTION

- **Finance**: Chair Charles Grassley (R-IA), Ranking Member Ron Wyden (D-OR)
  - Subcommittee on Social Security Pensions, and Family Policy
    - Rob Portman (R-OH) – Chair
    - Sherrod Brown (D-OH) – Ranking Member
- **Special Committee on Aging:** Chair Susan Collins (R-ME), Ranking Member Bob Casey (D-PA)
- **Homeland Security and Governmental Affairs Chair**, Ron Johnson (R-WI), Ranking member, Gary Peters (D-MI**)**

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Congressional Hearings
House Ways and Means Committee

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- Social Security Subcommittee - series of hearings on Protecting and Improving Social Security.
  - March 12: The first hearing in the series, "Protecting and Improving Social Security: Enhancing Social Security to Strengthen the Middle Class,"
  - March 13: The second hearing in the series: "Protecting and Improving Social Security: Benefit Enhancements"
  - April 10: The third hearing in the series: "Comprehensive Proposals to Enhance Social Security"

Family Support Subcommittee

- March 7: "Leveling the Playing Field for Working Families: Challenges and Opportunities"

- Full House Ways and Means Committee
  - February 6: Improving Retirement Security for America's Workers

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New and Pending Legislation

- **No bill has a good chance of passing, given divided government. Title II change is harder than SSI, because of Byrd rule**
- Other bills from 115th likely to be reintroduced
- 3 groups of bills
  - Social Security Solvency and Expansion
  - Eliminating the 5-Month SSDI Waiting Period for Certain Claimants
  - Paid Family Leave Through the Social Security Administration

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New and Pending Legislation (cont)

- Social Security Solvency and Expansion:
  - H.R. 860: Social Security 2100 (Larson) reintroduced January 30 with over 200 co-sponsors
  - H.R.1540 - Protecting Our Widows and Widowers in Retirement (POWR) Act: Sponsor: Rep. Linda Sanchez (D-CA-38); Cosponsors: 14;
  - H.R. 2302 – Protecting and Preserving Social Security Act (S.1132): Sponsor: Rep. Ted Deutch (D-FL-22)(Sen. Mazie Hirono (D-HI)); Cosponsors: 3 (3)

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Social Security 2100 Act
H.R. 860. Rep John Larson (D-CT)

- Increases benefits for all current and future Social Security recipients
  - Provides an increase for all beneficiaries that is the equivalent to about 2% of the average benefit.
  - Improves the annual cost-of-living adjustment (COLA) formula to better reflect the costs incurred by seniors through adopting a CPI-E formula
  - The new minimum benefit will be set at 25% above the poverty line and would be tied to wage levels to ensure that the minimum benefit does not fall behind
- Cuts taxes for almost 12 million seniors
  - Almost 12 million Social Security recipients would see a tax cut

Ensures the system remains solvent for the rest of the century – strengthens the trust fund

Have millionaires and billionaires pay the same rate as everyone else
Gradually increase the contribution rate to 7.4% by 2043
Create one trust fund for retirement, survivor and disability benefits

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New and Pending Legislation (cont)

- Eliminating the 5-Month Waiting Period for Certain Claimants:
  - H.R. 142: Phased-in benefits during Title II wait period for people with terminal illness (Rodney Davis, R-IL 1/3/19)
  - H.R.2178 - Metastatic Breast Cancer Access to Care Act: Sponsor: Rep. Peter King (R-NY-2); Cosponsors: 24; S. 578:
  - H.R.1407 - ALS Disability Insurance Access Act of 2019 (S. 578): Sponsor: Rep. Seth Moulton (D-MA-6)(Sen. Sheldon Whitehouse (D-RI); Cosponsors: 136 (41)

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New and Pending Legislation (cont)

- Paid Family Leave Through the Social Security Administration
  - H.R.1940 - New Parents Act of 2019 (S. 902): Sponsor: Rep. Ann Wagner (R-MO-2) (Sen. Marco Rubio (R-FL)); Cosponsors: 8 (1)
- NOSSCR is supportive of providing paid leave to workers but:
  - Opposes any proposal that would require an individual to delay (which is a cut) or otherwise decrease existing Social Security benefits to receive a paid leave benefit.
  - Is also concerned about creating new responsibilities for SSA without ensuring that SSA has adequate administrative funding

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FY 2019 and 2020 Appropriations

SSA has full-year appropriation for FY19. FY20 process has begun

	FY17	FY18	FY19
Total Limitation on Administrative Expense (LAE)	$12,357,945,000	$12,753,945,000	$12,741,945,000
Program Integrity	$1,819,000,000 (14.7%)	$1,735,000,000 (13.6%)	$1,683,000,000 (13.2%)
"Core" (non-PI)	$10,538,945,000	$11,018,945,000	$11,058,945,000
SSAB	$2.3 million	$2.3 million	$2.4 million
Research and Demonstrations	$58 million	$101 million	
No-year IT	0	$280 million	$45 million
OHO backlog reduction	$90 million	$100 million	$100 million

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FY 2019 and 2020 Appropriations

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SSA has full-year appropriation for FY19. President's FY20 proposal was released on March 14. Congress will make final appropriations.

	FY17	FY18	FY19	FY20
Total Limitation on Administrative Expense (LAE)	$12,357,945,000	$12,753,945,000	$12,741,945,000	$12,642,000,000
Program Integrity	$1,819,000,000 (14.7%)	$1,735,000,000 (13.6%)	$1,683,000,000 (13.2%)	$1,582,000,000 (12.5%
"Core" (non-PI)	$10,538,945,000	$11,018,945,000	$11,058,945,000	$
SSAB	$2.3 million	$2.3 million	$2.4 million	
Research and Demonstrations	$58 million	$101 million	$101 million	$101 million
No-year IT	0	$280 million	$45 million	
OHO backlog reduction	$90 million	$100 million	$100 million	0

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SOCIAL SECURITY ADMINSTRATION

- **Nominations**
- **Reconsideration**
- **Proposed regulations**
- **Hearing scheduling**
- **NOSSCR advocacy**
- **Fee Agreement Form**
- **Appointment of Representative Form**

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2019 Social Security Trustees Report

- Released April 22
- The Trustees project that our Social Security system can continue to pay all scheduled old age, survivors, and disability benefits until 2035, one year later than last year.
  - Thereafter, the combined Social Security Trust Funds will be able to pay roughly 80 percent of scheduled benefits
- This year's report projects that the DI Trust Fund will be able to pay full benefits until 2052, **twenty years later than last year**;
  - Thereafter, the DI Trust Fund will be able to pay roughly 91 percent of scheduled benefits.

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Nominee Update

Commissioner nominee in 115th Congress: Andrew Saul (current and 2019-2025 term). Renominated 1/16/19 for term ending 1/19/2025

Deputy Commissioner nominee in 115th: David Black (term expiring 1/19/19.Never had confirmation hearing or committee vote.
Renominated 1/16/19 for term ending 1/19/2025

Inspector General: Gail Ennis, retired securities litigation partner at WilmerHale. Hearing in September 2018; confirmed by voice on January 2, 2019. Sworn in as Inspector General January 30.

145 pending nominations expired at the end of the 115th Congress; some have been renominated.

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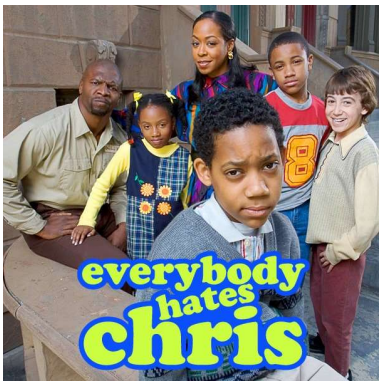
Reinstating Reconsideration

- Began 1/1 in CA, CO, LA, NH, NY; PA 4/1/19
- House letter (every subcommittee member) https://waysandmeans.house.gov/johnson-larson-lead-bipartisan-letter-to-ssa-calling-for-halt-to-changes-to-disability-appeals-process/
- Also a letter from House Dems (including ranking members from full W&M and both subcommittees, and full Approps and relevant subcommittees)
- Senate letter (9Ds, 1R from prototype states) https://www.aging.senate.gov/imo/media/doc/SSAReconsiderationLtr--Accessible09-06-18.pdf
- Even Heritage supports ending reconsideration: https://www.heritage.org/social-security/report/the-making-di-work-all-americans-act-2018-how-it-would-improve-social



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Heritage on Reconsideration

"Applying for SSDI benefits is a lengthy and time-consuming process that, for many people, involves three different levels of applications and hearings. The second reconsideration stage is particularly inefficient; in 2015, fewer than 11 percent of applicants had their initial decision reversed at the reconsideration stage, which requires applicants to wait another 108 days, on average, before moving on to the next stage in the appeal process. Individuals are far more likely to receive an SSDI allowance at the next appeal level before an ALJ. In 2015, 56 percent of decisions at the ALJ level or above received allowances. A 10-state test of removing the reconsideration stage found that doing so resulted in more accurate decisions at the initial level and significantly shorter wait times for applicants. Removing the reconsiderations stage would save administrative costs and allow better allocation of resources, leading to more accurate and timely decisions."

But numerous problems with the rest of the bill they are discussing.

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Regulations and forms

- Regulations
  - Video hearings
  - Remove inability to communicate in English as an Educational Category
  - Pain ANPRM
  - Payee Order of Preference
  - Musculoskeletal
- Centralized scheduling and VSP
- New optional fee agreement form.
- New 1696 & withdrawal form
- NOSSCR advocacy
  - Delayed fee payments
  - Improving DDS-level decisionmaking
  - ERE: document categories, access at DDS levels and at PERC
- President's FY 2020 proposed budget

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Proposed VTC Rules

- Proposed rule : 83 Fed. Reg. 57368 (November 15, 2018)
  - No ability for claimants to opt out of video hearings at ALJ or DHO (CDR) hearings
  - "In general, we would schedule witnesses to appear at hearings by VTC or telephone"
  - Amended notices of hearing would be sent at least 20 days before hearing, not 75.
- NOSSCR submitted comments—comment period closed 1/14/19
  - Focuses: Flaws in video hearing sites, Section 504 compliance, no evidence these rules will improve efficiency or accuracy of decisions
  - Why not a focus on award rates?
  - Note: to some extent, claimants and reps are collateral damage here in a labor-management dispute between SSA and ALJs.
- 243 comments submitted at https://www.regulations.gov/docket?D=SSA-2017-0015, with most opposed to proposed regulations.
- Letter from democrats opposing this change.
- NOSSCR board members made Hill visit in December; NOSSCR staff making Hill visits.

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Proposal to remove inability to communicate in English as an Educational Category

- Comments were due April 2, 2019
- Submit at regulations.gov
- 215 comments received– mixed opinions

- Proposed Rules published February 1, 2019. 84 Fed. Reg. 1006
- Comments were due April 2, 2019.
- Would revise grid rules in section 201, 202, 203
- Would revise 20 CFR sec 404.1564 and 416.964
- Reason: Inability to communicate in English is no longer a reliable indicator of someone's education of vocational impact of education.
  - Many who can't read, write or speak English do have formal education
  - Expansion of programs internationally
  - US workforce is more linguistically diverse
- NOSSCR submitted comments – thanks to everyone else who did as well

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Proposal to Remove Inability to Communicate in English as an Educational Category

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National Organization of Social Security Claimants' Representatives

NOSSCR's comments:

- This comes in to play at step 5 – Only after finding that claimant can't do past relevant work
- Focus on national program
- Don't want to chip away at the grids
- Statistics and rationales in proposed rules are misleading

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Proposal to remove inability to communicate in English as an Educational Category

- Under the proposed regulations, we would not consider an individual's educational attainment to be at a lower education category than his or her highest numeric grade level solely because the education occurred in a language other than English, the individual participated in an English language learner program, such as an English as a second language class, or the individual is deemed to have LEP under current Federal standards. These proposed rules retain our longstanding and well-supported recognition that more formal education, work experience, and training improve an individual's ability to adjust to other work.

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Proposal to remove inability to communicate in English as an Educational Category

- Instead, we would apply our current rules for determining an individual's education category for all claimants regardless of which language they use to communicate. We will use an individual's numerical grade level to determine the education category of the individual, and we may adjust an individual's education category if there is evidence that his or her attained educational abilities are higher or lower than the highest numerical grade level completed in school.

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Proposed changes to 20 CFR 404.1564 & 416.964

- 20 CFR 404.1564 – Education as a vocational factor
- Proposed regulation would remove 6th sentence of 20 CFR 404.1564(b) *How we evaluate your education*: The term education also includes how well you are able to communicate in English since this ability is often acquired or improved by education.

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Proposed changes to 20 CFR 404.1564 & 416.964

- Proposed regulation would remove 20 CFR 404.1564(b)(5): *Inability to communicate in English*. Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn't speak and understand English to do a job, regardless of the amount of education the person may have in another language. Therefore, we consider a person's ability to communicate in English when we evaluate what work, if any, he or she can do. It generally doesn't matter what other language a person may be fluent in.

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Proposal to Remove Inability to Communicate in English as an Educational Category

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- **We also propose to revise the grid rules**. First, we propose to revise all grid rules referencing an inability to communicate in English.
- Specifically, we would revise "Illiterate or unable to communicate in English" to "Illiterate" (201.17, 201.23, 202.09, 202.16) and "Limited or less—at least literate and able to communicate in English" to "Limited or Marginal, but not Illiterate" (201.18, 201.24, 202.10, 202.17). For clarity and ease of use, we propose to revise "Marginal or none" to "Marginal or Illiterate" (203.01). Second, we propose to make other conforming changes throughout the grid rules consistent with the revisions discussed above.
- Grid changes would affect only a few categories of claimants – disabled vs not disabled.

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See also POMS DI 25015.010 Education as a Vocational Factor

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- **Education Categories**
- For adjudicative purposes, we have five education categories:
- **1. Illiterate or Unable to Communicate in English**
- **a. Illiterate**
- An illiterate person generally has little or no formal schooling, but is often able to sign his or her name. Illiteracy is the inability to read or write a simple message such as short instructions or inventory lists, even if the person is capable of signing his or her name.
- **b. Unable to communicate in English**
- A person is unable to communicate in English when he or she cannot speak, understand, read, or write a simple message in English.
- **IMPORTANT:** For making determinations of capacity for other work, it is generally immaterial in what, if any, non-English language an individual may be fluent. This is true regardless of where a person resides (in other words, even if a person resides in an area where English is not the predominant language)
- **c. When to apply illiterate or unable to communicate in English**
- This category applies when the claimant is unable to:
- read a simple message (such as short instructions or inventory lists) in English,
- write a simple message in English,
- speak or understand a simple message in English, or
- any combination of the above.

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Other Pending Regulations

- Representative Payees (83 FR 64422)
  - "We are requesting information on the appropriateness of our order of preference lists for selecting representative payees (payees) and the effectiveness of our policy and operational procedures in determining when to change a payee." Comments due 1/28/19. 24 comments received
- Pain ANPRM (83 FR 64493)
  - "We are soliciting public input to ensure that the manner in which we consider pain in adult and child disability claims under titles II and XVI of the Social Security Act (Act) remains aligned with contemporary medicine and health care delivery practices. Specifically, we are requesting public comments and supporting data related to the consideration of pain and documentation of pain in the medical evidence we use in connection with claims for benefits." Comments due 2/15/19. 231 comments received
- Musculoskeletal (May 2018): NOSSCR (& 45 others) submitted comments
- Pending OMB Review: AAJs holding hearings, revise listings: digestive, cardiovascular, skin

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Final regulations

Code of Conduct Final regs published July 2, 2018

- Issues we've seen:
  - ALJs requiring reasons to withdraw if hearing is scheduled
  - ALJs granting or denying "request" to withdraw after hearing is scheduled.
- ALJs should not require reasons, but will ask for reasons when considering whether to refer to OIG.
- ALJs do not have to grant or deny permission to withdraw.
- "A representative should not withdraw after we set the time and place for a hearing unless the representative can show that a withdrawal is necessary due to extraordinary circumstances, as we determine on a case by case basis. 404.1740(3)(iv).
- When requested, representative must provide SSA with potential dates and times for hearings.
  - This is for Centralized scheduling
  - Concern about ability to change

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Centralized Scheduling

- Part of Representative Code of Conduct rules
- Already rolled out in several areas with varying rules and success
- NOSSCR has principles about scheduling developed with the help of our policy committee. SSA should:
  - Recognize that some reps do hearings in more than one region
  - Recognize that some hearings take longer than others
  - Check for conflicts before scheduling
  - Contact rep or have a system for submitting availability
  - Give 75 days' notice before hearings, unless waived
  - Allow for changes in schedules
  - Fix problems promptly

Voluntary Standby Pilot

- CARES Initiative
- Rolling out in 14 hearing offices
- NOSSCR had phone call meeting with CARES coordinator to raise concerns and share principles like need to contact reps & waive five-day rule

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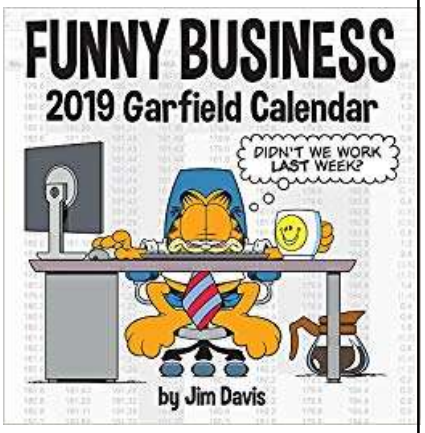

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Form SSA-1693

- Fee Agreement for Representation Before the Social Security Administration
- New Form
- Sample Fee Agreement
- Optional
- Most of NOSSCR Comments Accepted
- Make sure it conforms to your local rules

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Form SSA-1696 (proposed 2019)

- Appointment of Representation Before the Social Security Administration
- Proposed New Form
- Includes forms for discharge and withdrawal
- Most of NOSSCR Comments Accepted
- Not yet final

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Delayed Fee Payments

- Waiting more than 9 months for approval (fee petition)
- Authorized and waiting more than 9 months to be paid
- Be sure SSA has all information (w/c offset, representative payee)
- Send to our contacts when possible

Improving Initial and Reconsideration-level Decisionmaking

- I testified before Congress and spoke at National Disability Forum
- Despite Congressional opposition, reconsideration back in certain prototype states, with all back by 3/1/20.

ERE

- More document types in ARS: Representative Correspondence, HA-85 (Withdrawal of Hearing Request), Objections to the issues in the Notice of Hearing, Subpoena requests, Correspondence regarding efforts to obtain evidence, Third Party (Non-medical) Statements, Request for Medical Expert at the hearing
- Access to electronic file at initial and recon levels (ideally, including CDR and non-medical appeals like overpayments as well as applications)
- Access to electronic file after case has been won to assist with efficient pre-effectuation review contacts

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President's FY 2020 Proposed Budget

- The president's proposed budget is not very useful for estimating how much money SSA will have for administrative expenditures next fiscal year. Declared "dead on arrival" by Congress.
- Congress will still need to pass a spending bill or continuing resolution and get it signed by the President before September 30, 2019.
- Proposed budget was released on March 11.
  - It was due the first Monday of February.
  - Is often submitted later
  - Was delayed due to shutdown – OMB was furloughed.
- The proposed budget is a good source of data, like the "waterfall chart" and annual performance plan and review.
- Legislative proposals can be interesting

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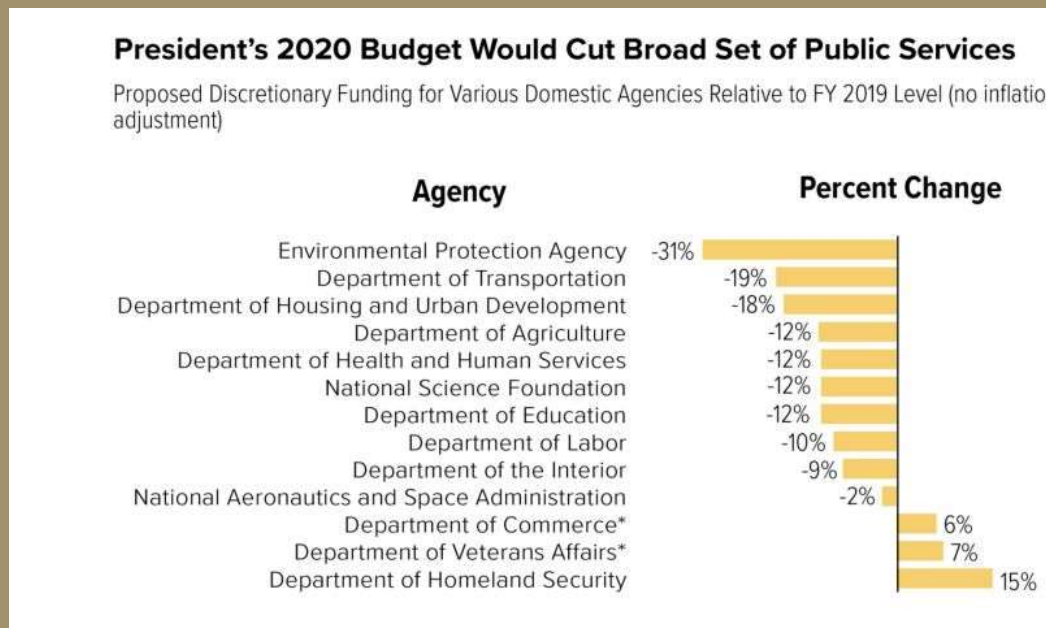

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President's FY 2020 Proposed Budget

NOSSCR
National Organization of Social Security Claimants' Representatives

- Among the legislative proposals in the Fiscal Year 2020 budget proposals that NOSSCR opposes are:
  - Reducing potential retroactive SSDI benefits from 12 months to 6 months
  - Eliminating direct payment of representative fees with an abolition of the fee cap (it is worth noting that this proposal is estimated to cost SSA money; for this and other reasons Congress chose not to take it up when it was proposed last year)
  - Eliminating travel reimbursements for representatives
  - Excluding SSA debts from discharge in bankruptcy proceedings and increasing debt collection tools for civil monetary penalties
  - Creating a sliding scale that reduces benefits for families that include multiple SSI recipients
  - Offsetting SSDI when a beneficiary receives unemployment benefits
- Each proposal would have to be introduced and passed into law.

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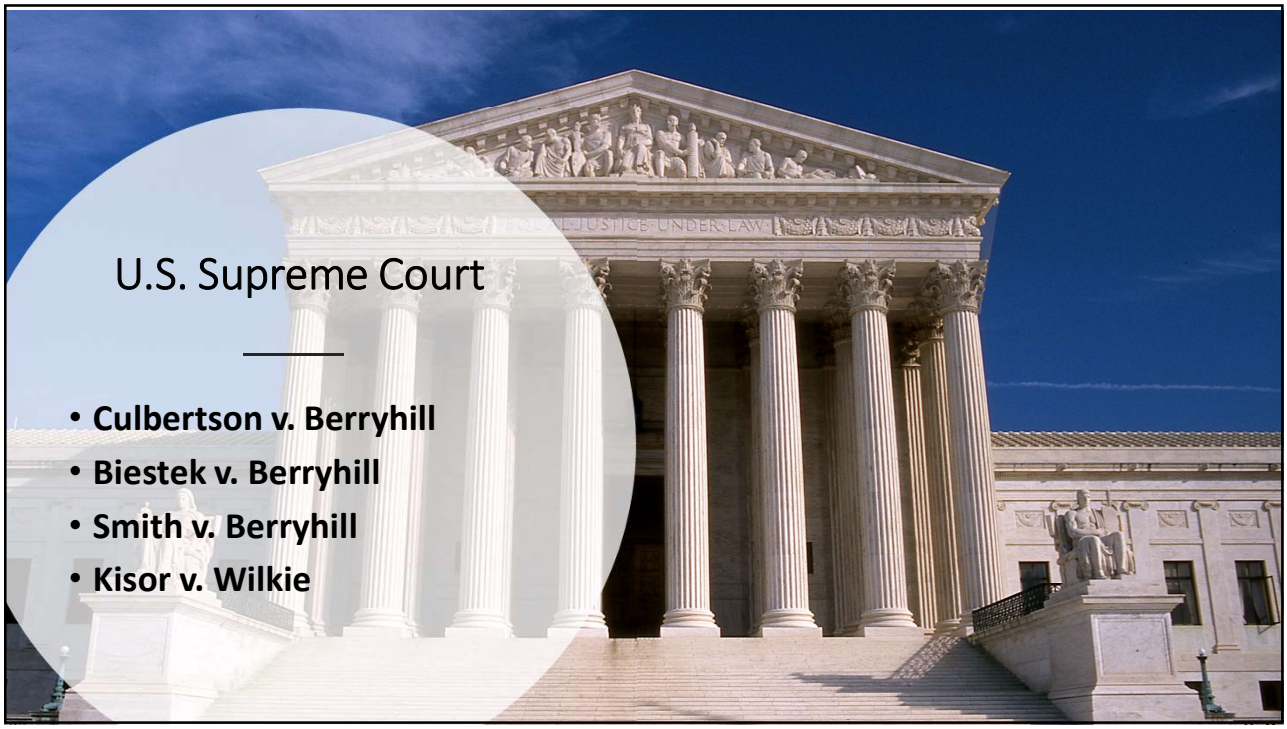

U.S. Supreme Court

- **Culbertson v. Berryhill**
- **Biestek v. Berryhill**
- **Smith v. Berryhill**
- **Kisor v. Wilkie**

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Culbertson v. Berryhill, 586 U.S.___ January 8, 2019

- 25% cap on fees in 42 U.S.C. 406(b) applies only to federal court work.
- 25% is not an aggregate for administrative and court fees
- Supreme Court did not tell SSA to withhold more than 25%
- Supreme Court did not talk about EAJA offset
- Effect of Culbertson v. Berryhill?
  - Court can approve 25% of past due benefits for court work independent of administrative work.
  - EAJA offset rules still apply.
  - No change to approval rules for administrative work (fee agreement or fee petition).
  - Maximum of 25% of past due benefits will be withheld for fee payment.

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Biestek v. Berryhill, 17-1184

- Question presented: whether a vocational expert's testimony on the number of jobs available can constitute substantial evidence of "other work" that the plaintiff can perform when the vocational expert refuses to provide the source of the underlying data, despite being requested to do so.
- The conflict was between the 6th and 7th circuits.
- ALJ denied claim, finding claimant could work.
- District Court and 6th Circuit affirmed
- Oral Argument held on December 4, 2018
- NOSSCR submitted amicus brief
- Decision Adjudged to be AFFIRMED. Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas, Breyer, Alito, and Kavanaugh, JJ., joined. Sotomayor, J., filed a dissenting opinion. Gorsuch, J., filed a dissenting opinion, in which Ginsburg, J., joined.
- holding "[a] vocational expert's refusal to provide private market-survey data upon the applicant's request does not categorically preclude the testimony from counting as 'substantial evidence.'"
- Petitioner probably asked for too much by asking for a categorical rule finding refusal to provide source of data would mean the VE's testimony could not be considered substantial evidence.

40

Smith v. Berryhill, 17-1606

- The question presented is whether the Appeals Council's decision to reject a disability claim on the ground that the claimant's appeal was untimely is a "final decision" subject to judicial review under Section 405(g).
- Appeals Council dismissed as untimely
- District Court dismissed for lack of jurisdiction
- 6th Circuit affirmed dismissal
- Oral argument was March 18, 2019
- NOSSCR submitted amicus brief

41

Kisor v. Wilkie, 18-15
decision below 869 F.3d 1360

- US Supreme Court granted *cert* December 10, 2018
- Oral Argument was March 27, 2019
- Question presented is whether the Court should overrule *Auer* and *Seminole Rock*
  - Auer v. Robbins, 519 U.S. 452 (1997), and Bowles Seminole Rock & Sand Co., 325 U.S. 410 (1945), direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.
  - Petitioner seeks to overturn Auer, after the lower court involved Auer deference to the VA's interpretation of an ambiguous regulation to refuse to award him retroactive benefits.
  - 27 amicus briefs filed. 22 in support of petitioner. 3 in support of neither party and 3 in support of respondent. (as of 3/8/19)

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How You Can Be Involved

- Contact your members of Congress
  - Share your opinions
  - Offer support/training for their constituent services folks (help them so they can help you)
- Write letters to the editor of local newspapers (NOSSCR can help!)
- Share your stories with NOSSCR: Useful in hearing testimony and other advocacy
  - Five-day rule and SSR 17-4p issues
  - Ways of improving initial and reconsideration level decisionmaking
  - Effects of delays in holding hearings and writing decisions
  - Video Hearings
- Tell us when you are experiencing issues
  - Example: iClaims changes (some due to security measures against anomalous claims, but other error messages too that we were able to help fix)

43

NOSSCR Events

June 2019 – Washington DC

Group Admission to the US Supreme Court
Conference focused on medical issues
Capitol Hill Advocacy Day

September 2019 – New Orleans LA

40th anniversary conference
Special gala reception
Special recognitions

CELEBRATING 40 YEARS NOSSCR
NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES

44

NOSSCR
National Organization of Social Security Claimants' Representatives

Questions?

45

TAB
B

David W. Kapor, Esq.

EDUCATION: Graduated Woodward High School 1973, B.A. Miami University 1977, J.D. John Marshall Law School, Chicago 1980

EMPLOYMENT: Sole practitioner with a practice limited to Personal Injury and Social Security Disability claims. Extensive trial practice.

LICENSES: Licensed in all state and federal courts in Ohio (1981) and Illinois (1980).

PROFESSIONAL ASSOCIATIONS

- 1997-Present, Chairperson of the Cincinnati Bar Association's Committee on Social Security
- Member of the Hamilton County Trial Lawyers Association
- Member of the Ohio State Bar Association
- Member of the Cincinnati Bar Association
- Member of the Chicago Bar Association
- Member of the Negligence Law Committee
- Member of the Conference with the Cincinnati Academy of Medicine Committee
- Member of The Ohio Academy of Trial Lawyers
- Member of the National Organization of Social Security Claimant's Representatives (NOSSCR)

Jessica M. Davis, Esq.

EDUCATION:

- Washington State University 2012, B.A. Management Operations
- Salmon P. Chase College of Law 2017, J.D.

EMPLOYMENT: Associate Attorney with practice limited to Social Security Disability claims.

LICENSES: Licensed in all State and Federal Courts in Ohio (2018).

PROFESSIONAL ASSOCIATIONS:

- Ohio State Bar Association, Member
- Cincinnati Bar Association, Member
- National Organization of Social Security Claimant's Representatives (NOSSCR), Member

A Disciplined Approach to Training a New Attorney What's Your Succession Strategy?

David W. Kapor, Esq. & Jessica M. Davis, Esq. | David W. Kapor & Associates, LLC

1

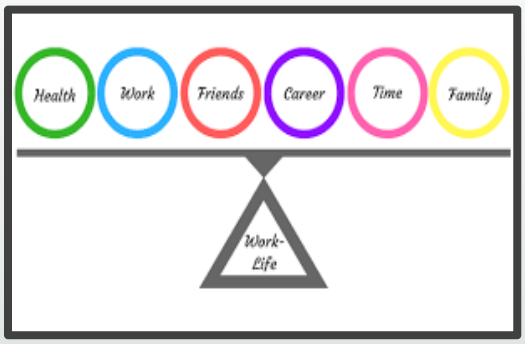
WHY MAKE A PLAN?

- **Future Of SSA Advocacy**
- **Interest of Current Clients**
- **Professional Legacy**
- **Personal Reward**

2

IT IS NEVER TOO LATE TO HAVE A PLAN

- Things to Consider:
  1. Do you need to stay in the game?
  2. What are your personal needs?
  3. What are your financial needs?
  4. Do you have a retirement date?
  5. Do you live to work, or work to live?



3

THE CHOICES

4

1. WINDING DOWN PRACTICE
2. SELLING PRACTICE
3. FINDING POTENTIAL PARTNER(S)

5

WINDING DOWN

- Personal/Professional Loss
- Risk to Future of SSA Advocacy
- Time/Money
- Impact on Client Interests
- Lost Opportunities in Profession

6

SELLING

- Who is going to buy the practice ?
- What is the total (current/future) value of the practice?
- Is the practice ready for acquisition?
- Who is needed to help facilitate the sale?
- How should the sale be structured?
- What backup plans are needed?

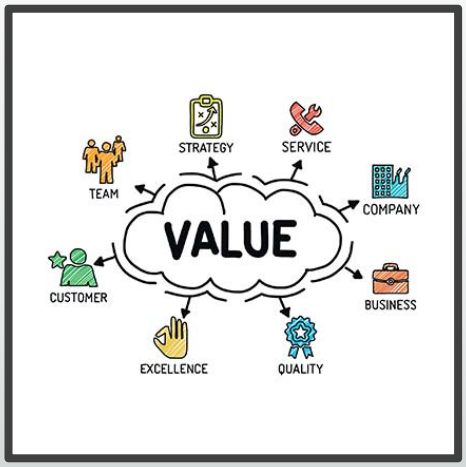
7

FINDING A BUYER

BARRIER TO ENTRY + REPUTATION = VALUE

8

VALUE: OTHER FACTORS



- Former Client Referrals
- Practice Size
- Profitability
- Employees
- Terms of Sale

9

PREPARE FOR TRANSITION

- Set a timeframe
- Educate yourself
- Get your office in good order
- Get your team in place
- Value your practice
- Set specific goals
- Develop your strategy
- Be patient

10

ASSEMBLE A TEAM

- Transactional Attorney
- CPA
- Financial Advisor
- Valuation Expert
- Insurance Advisor
- Law Practice Broker

11

STRUCTURE THE SALE

- Merger
- Outright Sale
- Equity Partner Transfer
- Partner Sale

12

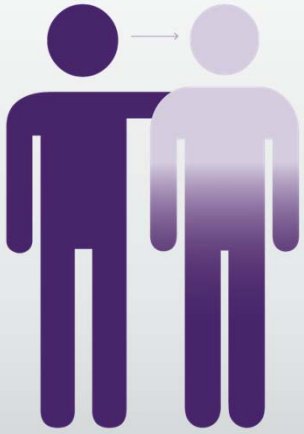
PLAN FOR CONTINGENCIES

- Retirement
- Disability
- Death
- Relocation
- Other Transition

13

THE BENEFITS OF TRAINING YOUR SUCCESSOR

- Ability to Drive Practice Culture
- Opportunity to Ensure Success
- Control Over Benchmarks for Quality
- Ease in Transition
- Financial Benefit
- Personal Reward



14

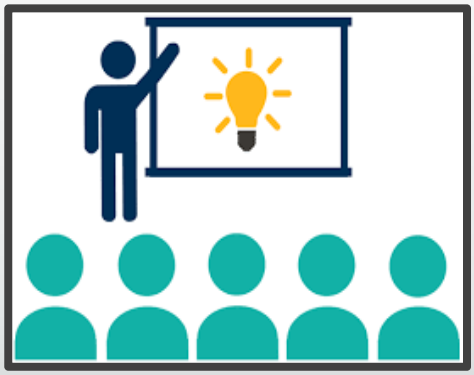
FINDING THE "RIGHT" SUCCESSOR

- Are they curious and inquisitive?
- Do they have the right balance of intellect and street smarts?
- Do they have suitable life experience?
- Are they trainable and adaptable?
- Are they driven and self motivated?
- Are they trustworthy?
- Do they have ideal interpersonal skills?
- Do they possess the necessary values and ethics?

15

TRAINING A NEW ATTORNEY

- Understand Different Learning Styles
- Set Realistic Expectations
- Provide Resources and Training Aides
- Demonstrate Flexibility and Balance
- Be Available for Mentoring and Questions
- Establish Personal and Professional Trust
- Capitalize on Strengths of Each Individual
- Demonstrate Strong Leadership*



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RECOMMEDED READING

Necessary Endings by Dr. Henry Cloud

Leadership and Self Deception by The Arbinger Institute

17

PERSPECTIVES OF A NEW ATTORNEY

18

Q & A

19

TAB
C

SOCIAL SECURITY

Office of Disability Adjudication and Review

Sherry Thompson
Regional Chief Administrative Law Judge
Chicago Region

Judge Sherry Thompson is the Regional Chief Administrative Law Judge for the Chicago Region (Region V).

Judge Thompson has over 17 years experience with Social Security. She began her career as a decision writer with ODAR, formerly known as the Office of Hearings and Appeals (OHA), in August 1994. Judge Thompson has held progressively responsible supervisory positions, including Group Supervisor in the Orland Park Hearing Office; Hearing Office Director in the Chicago Hearing Office; and Division Director in the Office of the Federal Reviewing Official in Falls Church, Virginia. Prior to her current assignment, Judge Thompson served as an Administrative Law Judge in the Orland Park Hearing Office.

Her previous government experience includes positions with the Department of Housing and Urban Development and the City of Chicago, Department of Law.

A native of Chicago, Judge Thompson holds a B.A. in Public Administration from the University of Evansville and received her law degree from the University of Iowa. She is admitted to the Illinois Bar. Judge Thompson is married and has two children.

Elizabeth Stewart-Pirone, Esq.

Elizabeth Stewart-Pirone is a Supervisory Attorney Advisor in the Cincinnati Hearing Office of the Social Security Administration (SSA). She began her career with SSA in 2010 as an Attorney Advisor. Prior to joining SSA, Elizabeth worked for Welcome House of Northern Kentucky, a non-profit social services agency, and, before that, she clerked for the Honorable Marilyn Shea-Stonum, Bankruptcy Judge for the Northern District of Ohio. Elizabeth received her Juris Doctorate from the University of Akron School of Law, where she served as a member of the *Akron Law Review* and the Moot Court Honor Society. Prior to law school, Elizabeth worked for several years as an aide to Ohio State Senator Eric D. Fingerhut. She earned her Bachelor's degree in History and Political Science from The Ohio State University.

Nikki Thomas

Nikki Thomas is the Hearing Office Director for the Cincinnati Office of Hearings Operations (OHO). Ms. Thomas recently moved to Cincinnati from St. Louis, Missouri. She has worked with various components of the Social Security Administration for more than 15 years of which nearly 10 years have been as a part of management. Ms. Thomas has served in various components in the agency within the Chicago and Kansas City Regions such as the Field Office, the Area Director's Office, the Teleservice Center, National Case Assistance Center as well as the Hearing Office. In addition, to her regular job duties she has also served on various work groups (Area Quality Workgroup) and serves as a mentor. Ms. Thomas brings a diverse wealth of knowledge as the Hearing Office Director of OHO.

RULES OF CONDUCT AND STANDARDS OF RESPONSIBILITY FOR APPOINTED REPRESENTATIVES

REGULATORY CHANGES

20 CFR 404.1740 and 416.1540; 404.1705(b) and 416.1505(b); 404.1745 and 416.1545

1

REGULATORY BACKGROUND

- The Social Security Administration's (SSA) regulations prescribe standards of conduct for individuals who represent claimants before the agency. The Final Rule, published July 2, 2018, more clearly defines these standards of conduct by adding several affirmative duties and prohibited actions. The Rule became effective on August 1, 2018.

2

2

OBJECTIVES

- We'll cover the major changes in the representative rules of conduct.
- We'll discuss specific procedures that apply to the individual hearing office.

3

3

5 KEY PARTS TO THE REVISED RULES

- Scheduling Hearings
- Withdrawal of Representation
- Diligence and Timely Communication
- Mandatory Disclosures
- Responsibility for Employees and Contractors

4

4

SCHEDULING HEARINGS

20 CFR 404.1740(b)(3)(iii) and 416.1540(b)(3)(iii)

- Representatives should be prepared to provide sufficient availability to each hearing office at which he or she appears.
- Each local hearing office will communicate how representative scheduling availability should be provided.
- Representatives need to communicate any change in availability as soon as possible to avoid disrupting claim processing.

5

5

SCHEDULING HEARINGS (Cont'd)

20 CFR 404.936(f)(2)(iii) and 416.1436(f)(2)(iii)

- We will not hold a representative responsible for scheduling errors we make.
- We are taking steps to avoid scheduling conflicting hearings of representatives.
- Representatives should inform us as soon as possible if we schedule conflicting hearings.

6

6

WITHDRAWAL OF REPRESENTATION

20 CFR 404.1740(b)(3)(iv) and 416.1540(b)(3)(iv)

- Representatives may withdraw in a manner that will not disrupt the processing or adjudication of a claim. Once the hearing is scheduled, a representative should not withdraw unless the representative can show necessity due to extraordinary circumstances.
  - The revised rules do not require ALJ approval prior to a representative's withdrawal, nor can an ALJ prohibit withdrawal. However, an ALJ may make the determination that no extraordinary circumstances are present justifying withdrawal.
  - Determined on a case-by-case basis
  - In comments for the Final Rule, we noted the following examples of extraordinary circumstances:
    - serious illness;
    - death or serious illness in the representative's immediate family;
    - failure to locate a claimant despite active and diligent attempts to contact the claimant

7

7

WITHDRAWAL (cont'd)

- If the representative withdraws in violation of 20 CFR 404.1740 or 416.1540, SSA may file charges seeking sanctions against the representative.
- The effective date of the new regulations, August 1, 2018, is the controlling date regarding withdrawal, not when the application was filed or when the hearing was scheduled.
- If a new representative is appointed after we schedule the hearing, and there is no disruption to case processing, then the initially appointed representative's withdrawal is not a violation of the rules.

8

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DILIGENCE & TIMELY COMMUNICATION

- Representatives must respond timely to our requests for information. (20 CFR 404.1740(b)(3)(ii) and 416.1540(b)(3)(ii))
- Representatives must maintain timely communication with claimants. (20 CFR 404.1740(b)(3)(v) and 416.1540(b)(3)(v))
  - Reasonably inform claimant of all matters concerning representation
  - Consult with the claimant on an ongoing basis during the entire representational period
  - Promptly respond to a claimant's reasonable requests for information
- We will consider difficulties in locating a particular claimant (e.g. homeless and indigent claimants). (20 CFR 404.1740(b)(3)(v) and 416.1540(b)(3)(v))
  - Best practice for representatives is to document efforts taken to contact claimants when unsuccessful

9

9

MANDATORY DISCLOSURES

- Representatives now have affirmative duty to disclose information to us, including:
  - Vocational or medical opinion drafted, prepared, or issued (even in part) by the representative, or representative's employee or contractor. (20 CFR 404.1740(b)(5)(i) and 416.1540(b)(5)(i))
    - Includes standard forms or questionnaires provided by representative
    - Disclosure in writing, at time opinion submitted, or as soon as representative is aware of submission
  - If representative referred or suggested that claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence. (20 CFR 404.1740(b)(5)(ii) and 416.1540(b)(5)(ii))
    - Disclosure in writing, at the time opinion submitted, or as soon as representative is aware of submission
- Immediately notify SSA if a representative discovers that a claimant used representative's services to commit fraud against the Agency. (20 CFR 404.1740(b)(6) and 416.1540(b)(6))

10

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MANDATORY DISCLOSURES (cont'd)

- Suspension or disbarment (20 CFR 404.1740(b)(7) and 416.1540(b)(7))
  - When: Before representation commences, or immediately if occurs after representation has begun
- Disqualification from a participating federal program or agency (20 CFR 404.1740(b)(8) and 416.1540(b)(8))
  - When: Before representation commences, or immediately if occurs after representation has begun
- Suspension or removal from licensing authority (20 CFR 404.1740(b)(9) and 416.1540(b)(9))
  - For reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary

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11

RESPONSIBILITY FOR EMPLOYEES & CONTRACTORS

(20 CFR 404.1740(b)(10) and 416.1540(b)(10))

- Rules of Conduct apply to all of a representative's employees, assistants, partners, contractors, or any person assisting the representative on a claim Representative must have "managerial or supervisory" authority, or otherwise have oversight of the work.
  - Representative must take remedial actions for violations by those he or she oversees.
  - Representative can be held responsible and sanctioned for staff violations.
- ALJs may inquire as to the facts surrounding subordinate's actions and representative's response.

12

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Additional Affirmative Duties

- A representative must provide "competent" representation. (20 CFR 404.1740(b)(3)(i) and 416.1540(b)(3)(i))
  - This is **NOT** a policy departure from earlier conduct rules, just more detailed.
  - Includes knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
  - Must know significant issue(s), have reasonable and adequate familiarity with the evidence in the case.
  - "Working knowledge" of the applicable provisions of the Social Security Act, as amended, the regulations, the Social Security Rulings, and any other applicable provisions of law.

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Additional Prohibited Activities

- Cannot provide misleading information, misrepresent facts, or submit false or misleading evidence that affects how we process a claim (20 CFR 404.1740(c)(7)(ii)(B) and 416.1540(c)(7)(ii)(B))
- Cannot communicate with agency staff or adjudicators outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s) (20 CFR 404.1740(c)(7)(ii)(C) and 416.1540(c)(7)(ii)(C))

14

14

Who May Be a Representative

- 20 CFR 404.1705(b) and 416.1505(b) provide a claimant may appoint any person who is not an attorney as his or her representative if the person
  - Is capable of giving valuable help in connection with the claim;
  - Is not disqualified or suspended from acting as a representative in dealings with us;
  - Is not prohibited by any law from acting as a representative; and
  - Is generally known to have good character and reputation.
    - New rule further clarifies that persons lacking good character and reputation include those with final felony convictions or convictions for any crime involving moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft

15

15

APPLICABLE REGULATORY CITES

- 20 CFR 404.1705(b); 416.1505(b)
- 20 CFR 404.1740; 416.1540
- 20 CFR 404.1745; 416.1545

Thank you

16

16

TAB
D

Robert Breslin, M.S., CRC, D/ABVE

Robert Breslin began his career in vocational rehabilitation in 1981 as a Job Placement Specialist for a Chicago consulting firm that specialized in the evaluation, management and placement of individuals with permanent impairments resulting from work accidents and occupational illnesses. He earned a Master of Science in Rehabilitation Counseling from Illinois Institute of Technology at Chicago in 1983 and became a Certified Rehabilitation Counselor the same year. After five years of working primarily with individuals with work related injuries he was involved in the development and management of two major regional rehabilitation facilities, in central Arkansas and northern California, that specialized in the rehabilitation of individuals with acquired traumatic brain injuries.

Mr. Breslin relocated to the Cincinnati area in 1990 to work at the University of Cincinnati Medical Center. From 1990 through 1994 he was worked as a Vocational Rehabilitation Specialist and Disability Management Consultant with the Departments of Physical Medicine and Rehabilitation and Environmental and Occupational Medicine. From 1994 through 2005 he was the Director of Disability Management Services and Industrial Rehabilitation for the U. C. Center for Occupational Health. He also held a faculty appointment with the College of Medicine.

Mr. Breslin has served as a Vocational Expert for the Social Security Administration since 1990 and has been a Diplomate of the American Board of Vocational Experts since 1998.

Michael C. Arnold, Esq.
Arnold & Griffith PLC

Mike practices in disability and injury law. He received his law degree from Salmon P. Chase College of Law.

Mike was chair of the Cincinnati Bar Association's Social Security Committee 1988-1990. He is present holder of Kentucky Bar Association's CLE Recognition Award. Mike is a member of the Cincinnati Bar Association, Northern Kentucky Bar Association and a sustaining member of the National Organization of Social Security Claimants' Representatives (NOSSCR).

Mike has give presentations to various organizations, including the Cincinnati Bar Association, the University of Cincinnati, the Cincinnati Society of Physical Medicine and Rehabilitation Physicians, Chase College of Law, NOSSCR, Northern Kentucky Bar Association, the NKBA/Northern Kentucky Cable Television Programs, the Kentucky Academy of Trial Attorneys' Peoples Law School and others. Mike is a co-author of a chapter in the University of Kentucky College of Law CLE Handbook: Workers' Compensation in Kentucky (3rd Ed., UK/CLE) (2002).

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(513) 934-7304-telephonic hearings only
(513) 932-6928-FAX
ttrent-tra@roadrunner.com

CURRICULUM VITAE

TERESA L. TRENT, ABVE/D, CRC, CDMS, CCM
THE REHABILITATION APPROACH, LLC
PO BOX 1005
SPRINGBORO, OHIO 45066

EDUCATION
1989-1990 M.Ed./Guidance and Counseling, Bowling Green State University, Bowling Green, Ohio
1984-1988 B.S. Education and Allied Professions, Bowling Green State University, Bowling Green, Ohio

CERTIFICATIONS
American Board of Vocational Experts/Diplomate (ABVE/D)
Certified Rehabilitation Counselor (CRC)
Certified Disability Management Specialist (CDMS)
Certified Case Manager (CCM)

PROFESSIONAL MEMBERSHIPS
American Board of Vocational Experts/member 2013-present
International Association of Rehabilitation Professionals/Member 1995-present

PROFESSIONAL RESPONSIBILITIES
International Association of Rehabilitation Professionals: Southern Ohio Representative 2004-2006 & 2008-2010; member of multiple committees related to OBWC vocational issues

LEGAL JURISTICTION QUALIFICATIONS
United States Secretary of Health and Human Services
Miami County, Ohio Court of Common Pleas, General and Domestic Relations Division
Montgomery County, Ohio Court of Common Pleas, Domestic Relations Division

PROFESSIONAL EXPERIENCE

Vocational Expert Witness 2013-present
The Rehabilitation Approach

- Prepare reports and provide expert witness testimony relative to vocational issues affecting employment. Areas of practice include Social Security Administration, Domestic Relations Courts (ECA), Veteran Attorneys (TDIU) and Workers' Compensation Attorneys (PTD).

Vocational Rehabilitation Counselor
The Rehabilitation Approach 1995-present
First Choice Rehabilitation 1993-1995
Jewish Vocational Services/Tri-State Industrial Accident Division (TRIAD) 1991-1993

- Provide vocational evaluations and vocational rehabilitation case management to Long Term Disability and Workers' Compensation claimants.
- Adept at assessment of vocational and medical information required to determine employability and or transferable skills/appropriate job goals. Thorough report writing and documentation skills.
- Provide ancillary vocational services including job seeking skills training, job placement and development, labor market surveys and job-site analyses.

Vocational Consultant
Sports Therapy, Inc. 2006-present

- Address questions/concerns regarding vocational issues related to patients participating in industrial rehabilitation programs.

CE COURSES INCLUDE BUT ARE NOT LIMITED TO:

Layton Burt Trial Preparation for VE's

Shiro Geist Vawdrey The Changing Legal Landscape

Wexler Start or Expand a Successful Family Law Practice - What Are the Unique Issues & Themes

Schmidt Issues and Intricacies of The Forensic Evaluation

Beveridge Impressions of the CORE_CACREP Merger and Current Earnings of Vocational Experts

Weiss Yent Expert Final Options - A Case for SSA Work Incentives for Future Earnings Capacity

Berg Grimley Ethics in Social Media

Layton Sharpe EC Self Employed

Dodge Whole-Person Assessment-Getting The Most Out of Cognitive and Non-Cognitive Test

Schiro Geist Boudreau What Do You Really Need To Know About Testifying In Workers Compensation Cases

Becker Ethical considerations in Voc Testing ASD

Remas Zagorsky Standards of Practice: ABVE Code of Ethics

Remas Zagorsky CRC Code of Ethics

Spergel Ethical Issues in the Practice of Testifying as a Vocational Expert

Leslie Best Business Practices-Professional Services Retainer Agreement

Cody Employability Assessments for Disabled Vets

Lefebvre Yent SSR Table-limitations, SSR Exertional Level Definitions, Role of the Vocational Expert and RFC Form

Caston ABVE Earnings Capacity

Sawyer Thomas Weisse SSR00-4p, Code of Federal Regulations and Be the Strongest Link-PP

Raderstorf DSM-5Update-PTSD-PP

Racicot Skillin FAQ Implications of Head Injuries in Employability Evaluations

Tong Maintaining Credible Testimony

Faulk Formulating Expert Opinions

Dillman What the Economist Expects

Doyle Duzan SSA & BLS Working Together

Truthan Methodologies for Estimating Job Numbers by DOT for SSVE's

Stewart Turner The Reasonable Job Search

James R. Williams, Esq.
Young Reverman & Mazzei Co. LPA

Jim Williams has spent over 25 years in the area of Social Security and Supplemental Security Income (SSI) law. He graduated from Marietta College with a B.A. degree in history and from the Ohio State University College of Law. While in law school, he was a member of the Moot Court National Team. He is licensed to practice law in Ohio , in the United States District Courts for the Southern District of Ohio and for the Eastern District of Kentucky, and in the United States Court of Appeals for the Sixth Circuit.

Shortly after graduation from law school, Jim went to work for the Office of Hearings and Appeals of the Social Security Administration. In this job, he was an attorney-advisor to Administrative Law Judges, helping Judges draft written decisions on disability cases and also doing legal research for Judges on other issues of law. After working there from January, 1976 until November, 1982, he left this job to enter private law practice. In private law practice since November, 1982, he has represented hundreds of claimants for Social Security disability benefits and for Supplemental Security Income benefits at hearings before Administrative Law Judges and on appeals to the Social Security Appeals Council and to the Federal courts. He has written over 400 briefs on Federal court appeals of Social Security and Supplemental Security Income cases in the United States District Courts and in the United States Court of Appeals for the Sixth Circuit. Among his published decisions in these courts are Carter v. Secretary, 834 F. 2d 97 (6th Cir. 1987) and Preston v. Secretary, 854 F. 2d 815 (6th Cir. 1988).; and Lancaster v. Commissioner, 228 F. 2d 563 (6th Cir. 2007). He has also litigated attorney fee issues in Social Security cases before the Sixth Circuit in two en banc proceedings there, Rodriguez v. Secretary, 865 F. 2d 739 (6th Cir. 1989) and Horenstein v. Secretary, 35 F. 3d 261 (6th Cir. 1994).

Jim is a member of the American Bar Association, the Ohio State Bar Association, the Cincinnati Bar Association, and since 1994 a member of the Board of Directors of the National Organization of Social Security Claimants' Representatives (NOSSCR). He has spoken at over 30 seminars on Social Security law sponsored by the Cincinnati Bar Association, the Ohio State Bar Association CLE, the Ohio Academy of Trial Lawyers, the Tennessee Association of Legal Services, Kentucky Legal Services, and the National Organization of Social Security Claimants' Representatives. He has also written a chapter on disability law for the Social Security Practice Guide published by the Matthew Bender Company in 1984. He is very experienced in the area of Social Security and Supplemental Security Income disability law with a wide variety of experiences at all levels of appeals in these areas of law.

The Revised Handbook for Analyzing Jobs

U.S. Department of Labor
Lynn Martin, Secretary

Employment and Training Administration
Roberts T. Jones
Assistant Secretary for Employment Training
1991

CONTENTS

CHAPTER 7

GENERAL EDUCATIONAL DEVELOPMENT

General Educational Development (GED), a component of Worker Characteristics, embraces those aspects of education (formal and informal) which contribute to the worker's (a) reasoning development and ability to follow instructions, and (b) acquisition of "tool" knowledge such as language and mathematical skills. This is education of a general nature which does not have a recognized, fairly specific occupational objective. Ordinarily, such education is obtained in elementary school, high school, or college. However, it may be obtained from experience and self-study.

DIVISIONS OF GED SCALE

The GED Scale is composed of three divisions: Reasoning Development, Mathematical Development, and Language Development. Each should be considered and rated independently of the others in evaluating the levels required for a job. In theory Mathematics and Language are components of Reasoning; therefore, Reasoning should have at least as high a rating as the higher one assigned for Mathematics or Language.

RATIONALE FOR GED SCALE DEFINITIONS

The description of the various levels of language and mathematical development are based on the curriculum taught in schools throughout the United States. An analysis of mathematics courses in school curriculums reveals distinct levels of progression in the primary and secondary grades and in college. These levels of progression facilitated the selection and assignment of six levels of GED for the mathematical development scale.

However, though language courses follow a similar pattern of progression in primary and secondary school, particularly in learning and applying the principles of grammar, this pattern changes at the college level. The diversity of language courses offered at the college level precludes the establishment of distinct levels of language progression for these four years. Consequently, language development is limited to five defined levels of GED.

A sample of job-worker situations for each GED level has been placed on a scale. These situation descriptions do not include all work devices that may be used by the worker. However, they have been written to make the GED level of each as explicit as possible. These situations have been written to make their level value as explicit as possible. Since the discrimination by level is dependent on a verbal expression, it is not precise. Familiarity with the total range of illustrative situations should contribute, however, to the use and application of the scales.

Scale of General Education Development (GED)

LEVEL	REASONING DEVELOPMENT	MATHEMATICAL DEVELOPMENT	LANGUAGE DEVELOPMENT
6	Apply principles of logical or scientific thinking to a wide range of intellectual and practical problems. Deal with nonverbal symbolism (formulas, scientific equations, graphs, musical notes, etc.) in its most difficult phases. Deal with a variety of abstract and concrete variables. Apprehend the most abstruse classes of concepts.	Advanced calculus: Work with limits, continuity, real number systems, mean value theorems, and implicit function theorems. Modern Algebra: Apply fundamental concepts of theories of groups, rings, and fields. Work with differential equations, linear algebra, infinite series, advanced operations methods, and functions of real and complex variables. Statistics: Work with mathematical statistics, mathematical probability and applications, experimental design, statistical inference, and econometrics.	Same as Level 5.
5	Apply principles of logical or scientific thinking to define problems, collect data, establish facts, and draw valid conclusions. Interpret an extensive variety of technical instructions in mathematical or diagrammatic form. Deal with several abstract and concrete variables.	Algebra: Work with exponents and logarithms, linear equations, quadratic equations, mathematical induction and binomial theorem, and permutations. Calculus: Apply concepts of analytic geometry, differentiations, and integration of algebraic functions with applications. Statistics: Apply mathematical operations to frequency distributions, reliability and validity of tests, normal curve, analysis of variance, correlation techniques, chi-square application and sampling theory, and factor analysis.	Reading: Read literature, book and play reviews, scientific and technical journals, abstracts, financial reports, and legal documents. Writing: Write novels, plays, editorials, journals, speeches, manuals, critiques, poetry, and songs. Speaking: Coversant in the theory, principles, and methods of effective and persuasive speaking, voice and diction, phonetics, and discussion and debate.
4	Apply principles of rational systems to solve practical problems and deal with a variety of concrete variables in situations where only limited standardization exists. Interpret a variety of instructions furnished in written, oral, diagrammatic, or schedule form. (Examples of rational systems include: bookkeeping, internal combustion engines, electric wiring systems, house building, farm management, and navigation.)	Algebra: Deal with system of real numbers; linear, quadratic, rational, exponential, logarithmic, angle and circular functions, and inverse functions; related algebraic solution of equations and inequalities; limits and continuity; and probability and statistical inference. Geometry: Deductive axiomatic geometry, plane and solid, and rectangular coordinates. Shop Math: Practical application of fractions, percentages, ratio and proportion, measurement, logarithms, practical algebra, geometric construction, and essentials of trigonometry.	Reading: Read novels, poems, newspapers, periodicals, journals, manuals, dictionaries, thesauruses, and encyclopedias. Writing: Prepare business letters, expositions, summaries, and reports, using prescribed format and conforming to all rules of punctuation, grammar, diction, and style. Speaking: Participate in panel discussions, dramatizations, and debates. Speak extemporaneously on a variety of subjects.

Scale of General Education Development (GED)—Continued

LEVEL	REASONING DEVELOPMENT	MATHEMATICAL DEVELOPMENT	LANGUAGE DEVELOPMENT
3	Apply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form. Deal with problems involving several concrete variables in or from standardized situations.	Compute discount, interest, profit and loss; commission, markup, and selling price; ratio and proportion; and percentage. Calculate surfaces, volumes, weights, and measures. Algebra: Calculate variables and formulas; monomials and polynomials; ratio and proportion variables; and square roots and radicals. Geometry: Calculate plane and solid figures, circumference, area, and volume. Understand kinds of angles and properties of pairs of angles.	Reading: Read a variety of novels, magazines, atlases, and encyclopedias. Read safety rules, instructions in the use and maintenance of shop tools and equipment, and methods and procedures in mechanical drawing and layout work. Writing: Write reports and essays with proper format, punctuation, spelling, and grammar, using all parts of speech. Speaking: Speak before an audience with poise, voice control, and confidence, using correct English and well-modulated voice.
2	Apply commonsense understanding to carry out detailed but uninvolved written or oral instructions. Deal with problems involving a few concrete variables in or from standardized situations.	Add, subtract, multiply, and divide all units of measure. Perform the four operations with like common and decimal fractions. Compute ratio, rate, and percent. Draw and interpret bar graphs. Perform arithmetic operations involving all American monetary units.	Reading: Passive vocabulary of 5,000-6,000 words. Read at rate of 190-215 words per minute. Read adventure stories and comic books, looking up unfamiliar words in dictionary for meaning, spelling, and pronunciation. Read instructions for assembling model cars and airplanes. Writing: Write compound and complex sentences, using cursive style, proper end punctuation, and employing adjectives and adverbs. Speaking: Speak clearly and distinctly with appropriate pauses and emphasis, correct pronunciation, variations in word order, using present, perfect, and future tenses.
1	Apply commonsense understanding to carry out simple one- or two-step instructions. Deal with standardized situations with occasional or no variables in or from these situations encountered on the job.	Add and subtract two-digit numbers. Multiply and divide 10's and 100's by 2, 3, 4, 5. Perform the four basic arithmetic operations with coins as part of a dollar. Perform operations with units such as cup, pint, and quart; inch, foot, and yard; and ounce and pound.	Reading: Recognize meaning of 2,500 (two- or three-syllable) words. Read at rate of 95-120 words per minute. Compare similarities and differences between words and between series of numbers. Writing: Print simple sentences containing subject, verb, and object, and series of numbers, names, and addresses. Speaking: Speak simple sentences, using normal word order, and present and past tenses.

REASONING DEVELOPMENT

Level 1

Apply commonsense understanding to carry out simple one- or two-step instructions. Deal with standardized situations with occasional or no variables in or from these situations encountered on the job.

R-1:1 Mark size, lot number, contents, or other identifying information or symbols on containers or directly on articles by placing stencil on object and rubbing ink or paint brush across open lettering.

R-1:2 Covers drycleaned clothing and household articles with plastic bags, and sorts articles for route delivery. Hangs drycleaned articles on rail according to route number or color of drycleaning ticket.

R-1:3 Scans rags for hardware such as buttons and snaps, and holds rags against rotating blade that cuts hardware from rags and cuts rags into specified size. Sorts rags into bins according to color and fabric.

R-1:4 Tends bandsaw that cuts wooden stock for toys and games. Stacks number of pieces of stock on cutting table against preset ripping fence. Pushes cutting table against saw until stock is severed. Drops cut pieces into tote box.

R-1:5 Feeds eggs into machine that removes earth, straw, and other residue from egg surface prior to shipment. Places eggs in holder that carries them into machine where rotating brushes or water sprays remove residue.

R-1:6 Removes cleaned eggs from discharge trough and packs them in cases for shipment.

Level 2

Apply commonsense understanding to carry out detailed but uninvolved written or oral instructions. Deal with problems involving a few concrete variables in or from standardized situations.

R-2:1 Guards street crossing during school hours when children are going to and from school. Directs actions of children and traffic at street intersections to ensure safe crossing. Records license numbers of vehicles disregarding traffic signals and reports them to police.

R-2:2 Delivers messages, documents, packages, and other items to offices or departments within establishments or to other business concerns by walking, using bicycle or motor cycle, or riding public conveyances.

R-2:3 Screws watch balance and balance bridge assembly to pillar plate. Places pillar plate in holding fixture and positions balance and bridge assembly on plate, securing it with screws. Tests balance for vertical play by gently moving it up and down with tweezers, determining from experience if shake is within acceptable limits. Touches oil-filled hypodermic needle to jewel to oil lower balance jewel prior to assembling. Observes minute parts with aid of loupe and handles parts with tweezers.

R-2:4 Assists customer to launder or dryclean clothes, using self-service equipment. Gives instructions to customer in clothes preparations, such as weighing, sorting, fog-spraying spots, and removing perishable buttons. Assigns machine and points out posted instructions regarding equipment operation.

Level 3

Apply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form. Deal with problems involving several concrete variables in or from standardized situations.

R-3:1 Operates cord or cordless switchboard to provide answering service for clients. Greets caller and announces name or phone number of client. Records and delivers messages, furnishes information, accepts orders, and relays calls. Places telephone calls at request of client or to locate client in emergencies. Files messages.

R-3:2 Requisitions transportation from motor, railroad, and airline companies to ship plant products. Reads shipping orders to determine quantity and type of transportation needed. Contacts company to make arrangements and to issue instructions for loading products. Annotates shipping orders to inform shipping department of loading locations and time of arrival of transportation.

R-3:3 Installs and adjusts television receivers and antennas, using handtools. Selects antenna according to type of set and location of transmitting station. Secures antenna in place with bracket and guy wire, observing insurance codes and local ordinances to protect installation from lightning and other hazards. Tunes receiver on all channels and adjusts screws to obtain desired density, linearity, focus, and size of picture.

R-3:4 Sets up and adjusts compression, injection, or transfer machines used to mold plastic materials to specified shape. Adjusts stroke of ram, using handtools. Connects steam, oil, or water lines to mold or regulates controls to regulate mold temperature. Sets machine controls to regulate forming pressure of machine and curing time of plastic in mold.

Level 4

Apply principles of rational systems to solve practical problems and deal with a variety of concrete variables in situations where only limited standardization exists. Interpret a variety of instructions furnished in written, oral, diagrammatic, or schedule form.

R-4:1 Plans layout and installs and repairs wiring, electrical fixtures, apparatus, and control equipment. Plans new or modified installations according to specifications and electrical code. Prepares sketches showing locations of all wiring and equipment or follows diagrams or blueprints prepared by others. Tests continuity of circuit to ensure electrical compatibility and safety of all components, using standard instruments such as ohmmeter, battery, and oscilloscope.

R-4:2 Inspects internal combustion engine for conformance to blueprints and specifications, using measuring instruments and handtools. Reviews test data to locate assemblies and parts not functioning according to specifications. Measures dimensions of disassembled parts and assemblies, such as pistons, valves, bearings, and injectors, using scale, micrometers, special tools, and gauging setups. Compares measurements against specifications to locate faulty parts.

R-4:3 Draws and letters charts, schedules, and graphs to illustrate specified data, such as wage trends, absenteeism, labor turnover, and employment needs, using drafting instruments, such as ruling and lettering pens, T-squares, and straightedge or using drafting software and computer terminal.

R-4:4 Schedules appointments, gives information to callers, takes dictation, and relieves officials of minor administrative and business details. Reads and routes incoming mail. Composes and types routine correspondence. Greets visitors, ascertains nature of business, and conducts visitors to appropriate person.

R-4:5 Cares for patients and children in private homes, hospitals, sanitariums, and similar institutions. Takes and records temperature, pulse, and respiration rate. Gives standard medications as directed by physician or nurse. Sterilizes equipment and supplies, using germicides, sterilizer, or autoclave. Prepares food trays, feeds patients, and records food and liquid intake and output.

Level 5

Apply principles of logical or scientific thinking to define problems, collect data, establish facts, and draw valid conclusions. Interpret an extensive variety of technical instructions in mathematical or diagrammatic form. Deal with several abstract and concrete variables.

R-5:1 Interviews persons with problems, such as personal and family maladjustment, lack of finances, unemployment, and physical and mental impairment, to determine nature and degree of problems. Obtains and evaluates patient data, such as physical, psychological, and social factors. Counsels patients individually or in groups and assists them to plan for solution of problems.

R-5:2 Studies clerical and statistical methods in commercial or industrial establishments to develop improved and standardized procedures. Consults supervisors and clerical workers to ascertain functions of offices or sections, methods used, and personnel requirements. Prepares reports on procedures and tasks of individual workers.

R-5:3 Interviews property holders and adjusts damage claims resulting from activities connected with prospecting, drilling, and production of oil and gas, and laying of pipelines on private property. Examines property titles to determine their validity and acts as company agent in transactions with property owners. Investigates and assesses damage to crops, fences, and other properties and negotiates claim settlements with property owners. Collects and prepares evidence to support contested damage in court.

R-5:4 Studies traffic conditions on urban or rural arteries from fixed position, vehicle, or helicopter to detect unsafe or congested conditions and to observe locations of alternative routes. Evaluates statistical and physical data supplied by engineering department regarding such considerations as vehicle count per mile, load capacity of pavement, feasibility of widening pavement, and projected traffic load in future.

R-5:5 Prepares and conducts inservice training for company personnel. Evaluates training needs in order to develop educational materials for improving performance standards. Performs research relating to course preparation and presentation. Compiles data for use in writing manuals, handbooks, and other training aids. Develops teaching outlines and lesson plans, determines content and duration of courses, and selects appropriate instructional procedures based on analysis of training requirements for company personnel.

R-5:6 Renders general nursing care to patients in hospital, infirmary, sanitarium, or similar institution. Administers prescribed medications and treatments in accordance with approved techniques. Prepares equipment, and aids physician during treatments and examinations of patients. Observes, records, and reports to supervisor or physician patients' conditions, reactions to drugs, treatments, and significant incidents.

Level 6

Apply principles of logical or scientific thinking to a wide range of intellectual and practical problems. Deal with nonverbal symbolism (formulas, scientific equations, graphs, musical notes, etc.) in its most difficult phases. Deal with a variety of abstract and concrete variables. Comprehend the most abstruse classes of concepts.

R-6:1 Designs and conducts experiments to study problems in human and animal behavior. Formulates hypotheses and experimental designs to investigate problems of growth, intelligence, learning, personality, and sensory processes. Selects, controls, and modifies variables in laboratory experiments with humans and animals. Analyzes data and evaluates its significance in relation to original hypotheses.

R-6:2 Reconstructs records of extinct cultures, especially preliterate cultures. Studies, classifies, and interprets artifacts, architectural features, and types of structures to determine their age and cultural identity. Establishes chronological sequence of development of each culture from simpler to more advanced levels.

R-6:3 Arbitrates, advises, and administers justice in a court of law. Establishes rules of procedures on questions for which standard procedures have not been established by law or by a superior court. Examines evidence in criminal cases to determine if charges are true or to determine if evidence will support charge. Instructs jury on application of facts to questions of law.

R-6:4 Interprets results of experiments in physics, formulates theories consistent with data obtained, and predicts results of experiments designed to detect and measure previously unobserved physical phenomena. Applies mathematical methods to solution of physical problems.

R-6:5 Plans, organizes, and conducts research for use in understanding social problems and for planning and carrying out social welfare programs. Develops research designs on basis of existing knowledge and evolving theory. Constructs and tests methods of collecting data. Collects information and makes judgments through observation and interviews, and review of documents. Analyzes and evaluates data. Interprets methods employed and findings to individuals within agency and community.

MATHEMATICAL DEVELOPMENT

Level 1

Add and subtract two-digit numbers. Multiply and divide 10's and 100's by 2, 3, 4, 5. Perform the four basic arithmetic operations with coins as part of a dollar. Perform operations with units such as cup, pint, and quart; inch, foot, and yard; ounce and pound.

M-1:1 Weighs items as a part of the packing process, using balance scales. Places container on scale and adds to or removes portion of contents from container until scale registers specified weight.

M-1:2 Dips sheets of muslin in shellac, tacks sheets in layers on stretcher frame to dry, and measures and cuts dried fabric into squares of specified size, using tape measure and shears.

M-1:3 Transfers hog-back skins from vat to grading table and measures size and length of skin on graduated board. Separates skins according to size.

M-1:4 Counts novelty case parts to verify amount specified on work ticket and stacks and bundles parts prior to spraying.

M-1:5 Tends battery of automatic machines equipped with circular knives that cut paper tubing into containers for shotgun shells. Fills hopper with tubes and starts machine. Verifies length of containers for conformance to standards, using fixed gauge.

Level 2

Add, subtract, multiply, and divide all units of measure. Perform the four operations with like common and decimal fractions. Compute ratio, rate, and percent. Draw and interpret bar graphs. Perform arithmetic operations involving all American monetary units.

M-2:1 Measures, marks, and cuts carpeting and linoleum with knife to get maximum number of usable pieces from standard size rolls, following floor dimensions or diagrams.

M-2:2 Measures width of pleats in women's garments, using yardstick. Counts number of pleats in garment and multiplies the number by the price per pleat to determine service charge for cleaning garment.

M-2:3 Weighs and measures specified quantities of ingredients of infant formulas, using scales, graduated measures, and spoons. Computes number of calories per fluid ounce of formula.

M-2:4 Sells cigars, cigarettes, corsages, and novelties to patrons in hotels, nightclubs, and restaurants. Collects cash for items sold and makes change.

M-2:5 Drives truck to transport materials to specified destinations such as railroad stations, plants, or residences. Calculates amount of bill and delivery charge, collects payment for goods delivered, making change as necessary.

Level 3

Compute discount, interest, profit, and loss; commission, markup, and selling price; ratio and proportion; and percentage. Calculate surfaces, volume, weights, and measures.

ALGEBRA: Calculate variables and formulas; monomials and polynomials; ratio and proportion variables; and square roots and radicals.

GEOMETRY: Calculate plane and solid figures, circumference, area, and volume. Understand kinds of angles and properties of pairs of angles.

M-3:1 Computes wages and posts wage data to payroll records. Computes earnings from timesheets and work tickets, using calculator. Operates posting machine to compute and subtract deductions, such as income tax withholdings, social security payments, and insurance.

M-3:2 Rents automobiles to customers at hotels and transportation stations. Computes cost of rental, based on per-day and per-mile rates.

M-3:3 Receives cash from customers in payment for goods or services and records amounts received. Computes bill, itemized lists, and tickets showing amount due, using adding machine or cash register. Makes change and cashes checks.

M-3:4 Measures tensile strength, hardness, ductility, or other physical properties of metal specimens on various types of testing machines. Calculates values, such as unit tensile strength and percentage elongation.

M-3:5 Controls purification unit to remove impurities such as moisture and oxygen from helium gas used in balloons. Calculates amount of gas transferred, using slide rule.

Level 4

ALGEBRA: Deal with system of real numbers; linear, quadratic, rational, exponential, logarithmic, angle and circular functions, and inverse functions; related algebraic solution of equations and inequalities; limits and continuity and probability and statistical inference.

GEOMETRY: Deductive axiomatic geometry, plane and solid, and rectangular coordinates.

SHOP MATH: Practical application of fractions, percentages, ratio and proportion, measurement, logarithms, practical algebra, geometric constructions, and essentials of trigonometry.

M-4:1 Inspects flat glass and compiles defect data based on samples to determine variances from acceptable quality limits. Calculates standard control tolerances for flat glass, using algebraic formulas, plotting curves, and drawing graphs.

M-4:2 Keeps records of financial transactions of establishment. Balances books and compiles reports to show statistics, such as cash receipts and expenditures, accounts payable and receivable, profit and loss, and other items pertinent to operation of business.

M-4:3 Calculates tonnage and prepares tonnage report of ship's cargo for assessment of port traffic. Converts metric measurements of foreign manifests into pounds and cubic feet, using formulas and calculating machine.

M-4:4 Lays out and cuts plastic patterns used for pantograph engraving according to sketches or blueprints, using drafting instruments and engraving tools. Establishes reference points on plastic sheet and computes layout dimensions, following blueprints.

M-4:5 Surveys earth's surface, using surveying instruments, and oversees engineering survey party engaged in determining exact location and measurements of points, elevations, lines, areas, and contours of earth's surface to secure data used for construction, mapmaking, land valuation, mining, or other purposes. Verifies by calculations accuracy of survey data secured.

Level 5

ALGEBRA: Work with exponents and logarithms, linear equations, quadratic equations, mathematical induction and binomial theorem, and permutations.

CALCULUS: Apply concepts of analytic geometry, differentiations, and integration of algebraic functions with applications.

STATISTICS: Apply mathematical operations to frequency distributions, reliability and validity of tests, normal curve, analysis of variance, correlation techniques, chi-square application and sampling theory, and factor analysis.

M-5:1 Plans survey and collects, organizes, interprets, summarizes, and analyzes numerical data on sampling or complete enumeration bases. Evaluates reliability of sources of data, adjusts and weighs raw data, and organizes and summarizes data into tabular forms amenable to analysis of variance and principles of statistical inference.

M-5:2 Develops, fabricates, assembles, calibrates, and tests electronic systems and components used in aircraft and missile production and testing operations. Establishes circuit layout dimensions by mathematical calculations and principles.

M-5:3 Applies knowledge of mathematics, probability, statistics, principles of finance and business to problems in life and health insurance, annuities, and pensions. Constructs probability tables regarding fire, natural disasters, and unemployment, based on analysis of statistical data and other pertinent information.

M-5:4 Applies principles of accounting to install and maintain general accounting system. Designs new system or modifies existing system to provide records of assets, liabilities, and financial transactions of establishment.

M-5:5 Plans, designs, conducts, and analyzes results of experiments to study problems in human and animal behavior. Analyzes test results, using statistical techniques, and evaluates significance of data in relation to original hypothesis.

Level 6

ADVANCED CALCULUS: Work with limits, continuity, real number systems, mean value theorems, and implicit function theorems.

MODERN ALGEBRA: Apply fundamental concepts of theories of groups, rings, and fields. Work with differential equations, linear algebra, infinite series, advanced operational methods, and functions of real and complex variables.

STATISTICS: Work with mathematical statistics, mathematical probability and application, experimental design, statistical inference, and econometrics.

M-6:1 Conducts and oversees analyses of aerodynamic and thermodynamic systems and aerophysics problems to determine suitability of design for aircraft and missiles. Establishes computational procedures for and methods of analyzing problems.

M-6:2 Analyzes physical systems, formulates mathematical models of systems, and sets up and operates analog computer to solve scientific and engineering problems. Prepares mathematical model of problem, applying principles of advanced calculus and differential equations.

M-6:3 Observes and interprets celestial phenomena and relates research to basic scientific knowledge or to practical problems such as navigation. Determines mathematically sizes, shapes, brightness, spectra, motions, and positions of sun, moon, planets, stars, nebulas, and galaxies.

M-6:4 Conducts research in fundamental mathematics and solves or directs solutions to problems in research, development, production, and other activities by mathematical methods. Conceives and develops ideas for application of mathematics such as algebra, geometry, number theory, logic, and topology.

M-6:5 Conducts research into phases of physical phenomena, develops theories and laws on basis of observation and experiments, and devises methods to apply laws and theory of physics to industry, medicine, and other fields. Describes and expresses observations and conclusions in mathematical terms.

LANGUAGE DEVELOPMENT

Level 1

READING: Recognize meaning of 2,500 (two- or three-syllable) words. Read at rate of 95-120 words per minute. Compare similarities and differences between words and between series of numbers.

WRITING: Print simple sentences containing subject, verb, and object, series of numbers, names, and addresses.

SPEAKING: Speak simple sentences, using normal word order and present and past tenses.

L-1:1 Delivers telephone directories to residence and business establishments, following oral instructions or address list.

L-1:2 Obtains reels of motion picture film from stock as specified on shipping order. Wraps paper band bearing film identification around each reel, ties reels with string, and sets them aside for shipment.

L-1:3 Pastes labels and tax stamps on filled whiskey bottles passing on conveyor. Looks at bottles to ascertain that labels and stamps have been correctly applied. Packs whiskey bottles in cartons. Pastes identification labels onto cartons.

L-1:4 Packs small arms ammunition in bandoleer belt pockets. Compares ammunition identification data stenciled on belt with work order to ensure packing of correct caliber cartridges. Places cardboard separator between two filled ammunition clips and slides them into cardboard packet.

Level 2

READING: Passive vocabulary of 5,000-6,000 words. Read at rate of 190-215 words per minute. Read adventure stories and comic books, looking up unfamiliar words in dictionary for meaning, spelling, and pronunciation. Read instructions for assembling model cars and airplanes.

WRITING: Write compound and complex sentences, using proper end punctuation and employing adjectives and adverbs.

SPEAKING: Speak clearly and distinctly with appropriate pauses and emphasis, correct pronunciation, variations in word order, using present, perfect, and future tenses.

L-2:1 Announces availability of seats and starting time of show. Answers such questions as length of performances, coming attractions, and locations of telephones or rest rooms.

L-2:2 Delivers messages, documents, packages, and other items to offices or departments within establishment.

L-2:3 Tends machines and equipment that grind, mix, form, and cook raw fish to make fishcakes. Places paste in mixing machine and adds specified amounts of flour, water, and spices.

L-2:4 Fills requisitions, work orders, or requests for materials, tools, or other stock items. Prepares and attaches shipping tags to containers. Keeps records of materials or items received or distributed.

L-2:5 Serves food to patrons at counters and tables of coffee shops, lunchrooms, and other dining establishments. Presents menu, answers questions, and makes suggestions regarding food and services.

Level 3

READING: Read a variety of novels, magazines, atlases, and encyclopedias. Read safety rules, instructions in the use and maintenance of shop tools and equipment, and methods and procedures in mechanical drawing and layout work.

WRITING: Write reports and essays with proper format, punctuation, spelling, and grammar, using all parts of speech.

SPEAKING: Speak before audience with poise, voice control, and confidence, using correct English and well-modulated voice.

L-3:1 Types letters, reports, stencils, forms, addresses, or straight-copy materials from rough draft or corrected copy. Files correspondence, cards, invoices, receipts, and other records in alphabetical or numerical order or according to subject matter, phonetic spelling, or some other system.

L-3:2 Renders personal service to railroad passengers to make their trip pleasant and comfortable. Greets passengers and answers questions about train schedules, travel routes, and railway services.

L-3:3 Keeps records of products returned to manufacturer to credit customer's account, to replace damaged merchandise, or to file damage claims. Verifies incoming items against bills of lading. Prepares routing and shipping forms on outgoing items.

L-3:4 Drives truck over established route to deliver, sell, and display products or render services. Calls on prospective customers to solicit new business. Writes delivery orders.

L-3:5 Services automobiles, buses, trucks, and other automotive vehicles with fuel, lubricants, and accessories. Prepares daily report of fuel, oil, and accessories sold. Answers customers' questions regarding location of streets and highways, points of interest, and recreational areas.

Level 4

READING: Read novels, poems, newspapers, periodicals, journals, manuals, dictionaries, thesauruses, and encyclopedias.

WRITING: Prepare business letters, expositions, summaries, and reports, using prescribed format and conforming to all rules of punctuation, grammar, diction, and style.

SPEAKING: Participate in panel discussions, dramatizations, and debates. Speak extemporaneously on a variety of subjects.

L-4:1 Composes letters in reply to correspondence concerning such items as request for merchandise, damage claims, credit information, delinquent accounts, or to request information. Reads incoming correspondence, types or dictates reply, or selects and completes form letters.

L-4:2 Interviews applicants to obtain such information as age, marital status, work experience, education, training, and occupational interest.

L-4:3 Compiles lists of prospective customers to provide leads to sell insurance. Contacts prospective customers, explains features of policies, and recommends amount and type of coverage based on analyses of prospects' circumstances.

L-4:4 Inspects and tests storage batteries in process of manufacture to verify conformity with specifications. Records inspection and test results, compares them with specifications, and writes reports for use in correcting manufacturing defects.

L-4:5 Repairs and overhauls automobiles, buses, trucks, and other automotive vehicles. Reads technical manuals and other instructional materials.

Level 5

READING: Read literature, book and play reviews, scientific and technical journals, abstracts, financial reports, and legal documents.

WRITING: Write novels, plays, editorials, journals, speeches, manuals, critiques, poetry, and songs.

SPEAKING: Conversant in the theory, principles, and methods of effective and persuasive speaking, voice and diction, phonetics, and discussion and debate.

L-5:1 Introduces various types of radio and television programs, interviews guests, and acts as master of ceremonies. Describes public events, such as parades and conventions, and reads news flashes and advertising copies during broadcasts.

L-5:2 Instructs students in techniques of public speaking and oral reading to develop effective speech and delivery in them. Teaches enunciation of words, intonation, gestures, and other disciplines of voice and delivery.

L-5:3 Collects and analyzes facts about newsworthy events by interview, investigation, or observation, and writes newspaper stories that conform to prescribed editorial techniques and format. Interviews persons and observes events and writes story, referring to reference books, newspaper files, or other authoritative sources to secure additional relevant facts.

L-5:4 Writes service manuals and related technical publications concerned with installation, operation, and maintenance of electronic, electrical, mechanical, and other equipment. Interviews workers to acquire or verify technical knowledge of subject. Rewrites articles, bulletins, manuals, or similar publications.

L-5:5 Assists legal representatives in preparation of written contracts covering other than standardized agreements. Reviews agreement for conformity to company rates, rules, and regulations. Writes agreement in contractual form and obtains necessary legal department approval.

Level 6

(Same as Level 5)[1]

L-6:1 Directs editorial activities of newspaper and negotiates with production, advertising, and circulation department heads. Confers with editorial policy committee and negotiates with department heads to establish policies and reach decisions affecting publications. Writes leading or policy editorials on specific public issues.

L-6:2 Plans, organizes, and conducts research for use in understanding social problems and for planning and carrying out social welfare programs. Constructs and tests methods of data collection. Collects, analyzes, and evaluates data. Writes reports containing descriptive, analytical, and evaluative content; interprets methods employed; and submits findings to individuals within agency and community.

L-6:3 Conducts and oversees analyses of aerodynamic and thermodynamic systems and aerophysics problems to determine suitability of design for aircraft and missiles. Evaluates test data and interprets established data to others. Prepares reports covering such subjects as power plant installation, thermal ice protection, air-conditioning, pressurization, and heat transfer.

[1]The diversity of language courses offered at the college level precludes distinguishing the two top levels of language development from each other by specific definitions. Instead, the college levels are characterized as a continuum, during which time language content remains the same but is progressively refined or specialized. Therefore, Levels 5 and 6 of language development share the same definition. Level 6 represents more advanced development of the definition content.

L-6:4 Advises corporations concerning legal rights, obligations, and privileges. Studies Constitution, statutes, decisions, and ordinances. Examines legal data to determine advisability of defending or prosecuting lawsuit.

L-6:5 Teaches one or more subjects, such as economics, chemistry, law, or medicine, within a prescribed curriculum. Prepares and delivers lectures to students. Reviews current literature in field of study. Writes articles for publication in professional journals.

PROCEDURE FOR EVALUATING AND RECORDING GED REQUIREMENTS

Determine the level of General Educational Development required for a worker to acquire the background knowledge and follow the instructions in the specific job-worker situation. Evaluate the job tasks in terms of the three categories of the GED scale. After determining the level required for Reasoning, Math, and Language, based on comparison of job duties with definitions and benchmarks in the HAJ, enter the level number for each category in Item 9 of the JAR.

ATTORNEY / VOCATIONAL EXPERT PANEL

CROSS-EXAMINATION OF THE VOCATIONAL EXPERT

MICHAEL C. ARNOLD, ESQ.

- Questioning of the vocational expert can be a very important part of the hearing. Always prepare thoroughly for the cross-examination of the vocational expert. Don't just show up for the hearing.

- Your cross-examination preparation starts well before the hearing with your evidence gathering. Submit all of the evidence you can prior to the hearing documenting all of the specific restrictions and limitations resulting from the impairments. Specifically document the claimant's residual functional capacity. Residual functional capacity is defined in 20 CFR 404.1545 and 20 CFR 416.945 as the most the claimant can still do despite their limitations. It is set forth that the residual functional capacity will be assessed "based on all the relevant evidence in your case record." It is crucial to obtain specific RFC medical assessment reports, RFC documentation, evidence from the treating physicians and medical sources, and all other evidence from all other sources.

- Be prepared to offer to the vocational expert your hypotheticals. If you go into a hearing with a vocational expert without good RFC documentation from the treating sources, you are asking for trouble. The only RFCs in the file would be from the non-examining state agency physicians used by the state agency for the previous denials. Use the RFC documentation you obtain from the treating sources to present the vocational expert on cross-examination with hypotheticals taken straight from the evidence of record which result in the vocational expert's testimony that there would be no jobs which the claimant can do.

- Establish specific restrictions and limitations not only through the medical evidence but also through the claimant's testimony. Clarify the specific restrictions and limitations from which the claimant suffers, and the specific degree of those restrictions and limitations. Develop with the claimant's testimony additional relevant factors and items over and above what is documented in specific RFC reports and evidence from the treating physicians and sources. These items include:

  - Pain, symptoms, and the specific functional limitations that result, such as physical limitations, difficulty with concentration and attention, difficulty with focusing for a specific amount of time or on a sustained basis, etc.

  - Absenteeism, the need to miss time from work, and missed days of work per month.

  - Naps.

  - The need to take breaks in number and duration beyond normally scheduled breaks throughout an 8 hour workday.

  - Treatment and medication implications and side-effects.

  - Off task. The ability or inability to focus for an entire workday, to persist at a specific activity for a specific amount of time on a sustained basis, to sustain concentration and persistence to complete work tasks in a normal amount of time.

  - The ability to work 8 hours per day, 40 hours per week.

- Reasons the claimant could not do any of their past jobs.

- Reasons the claimant could not do any work.

- Mental symptoms and implications. Capacity to relate effectively to peers, supervisors, and the public. Capacity to respond to criticism in a work setting with the risk of deterioration or decompensation. Ability to sustain attention and pace to permit timely completion of tasks commonly found in a work setting. The ability to adapt to and respond effectively to stress and pressures normally found in a day to day work setting.

- Crying spells.

- Stress - - it is "highly individualized" per SSR 85-15.

- Restrictions with regard to bilateral manual dexterity and the use of the hands, arms and fingers for job tasks.

- The need to alternate positions and the need to alternate periods of sitting and standing.

- The necessity to use a cane or other hand-held assistive device for ambulation.

- Etc.

- Always present your own hypothetical questions to the vocational expert based upon your evidence and documentation of the specific restrictions and limitations involved on a function-by-function basis (SSR 96-8p). Be thorough. Take your hypothetical questions straight from the evidence of record. Include consideration of all restrictions and limitations from all impairments. Add restrictions and limitations to the ALJ's hypothetical(s).

- Documentation of the claimant's past relevant work is important. Document the correct specifics of the claimant's past relevant work history. Don't assume that the SSA/DDS form information and details are correct because they frequently are not. Items on those forms are frequently misunderstood, not understood, or put down incorrectly. Make sure that the vocational expert has the benefit of the correct information with regard to the claimant's past jobs and past relevant work history.

- Examine the specifics of the claimant's past relevant work and any jobs which the VE lists in terms of the Dictionary of Occupational Titles and the Selected Characteristics.

- Vocational Expert Handbook. If you don't know about this, you should. SSA has published for many years a training manual handbook for vocational experts. The SSA handbook for vocational experts testifying in hearings, published and republished by SSA in various years including 1970, 1984, 1990, 2006, and most recently in August 2017, tells the VE that, "This handbook provides the basic information you will need when you participate in administrative law judge (ALJ) hearings. The handbook explains Social Security's disability programs, the appeals process we use, your role and responsibilities, and technical information you must know."

- In addition to providing "technical information you must know," the Vocational Expert Handbook contains much useful information and sets parameters. If you have been wondering about eternal questions such as "Where Do You Fit In?", "What is a VE?", or "What is an ALJ?", answers are provided. In discussing residual functional capacity, the Handbook sets forth that "the RFC is generally what an individual can still do on a 'regular and continuing basis,' 8 hours a day, for 5 days a week, or an equivalent work schedule; that is, in a work setting." The Vocational Expert Handbook states in bold letters to vocational experts that, "The most important thing to remember is that the ALJ cannot rely on your testimony if it is inconsistent with or contradicts our rules, so you must be aware of our various definitions and of how the grid rules work." The Handbook also specifically informs the vocational expert that, "You should have available, at the hearing, any vocational resource materials that you are likely to rely upon and should be able to thoroughly explain what resource materials you used and how you arrived at your opinions." The Handbook repeatedly emphasizes that at all hearings the vocational expert should be prepared to cite, explain, and furnish any sources relied upon to support their testimony. The Handbook also repeats and emphasizes that, "It is also important to remember a principle we have stated earlier in this Handbook: the ALJ cannot accept an explanation from you that conflicts with our policies."

- The end of the Vocational Expert Handbook is perhaps the least known part. Under List of References, various regulation sections and Social Security Rulings (SSRs) are listed as reference material for vocational experts to use and with which they should be familiar. The Handbook states that, "The following is a list of regulation sections and SSRs with which you should be familiar. Familiarity with the regulations and SSRs is essential to a complete understanding of the role of vocational evidence

in Social Security disability adjudication." The Social Security Rulings include SSR 83-10, SSR 83-12, SSR 83-14, SSR 85-15, SSR 96-8p, SSR 96-9p, SSR 00-4p, etc. The Handbook emphasizes to VEs that the most important thing to remember is that the ALJ cannot rely on the VE testimony if it is inconsistent with or contradicts SSA rules and policies. The Handbook states that the list of references is a partial list of references with which the vocational expert should be familiar - - "However, we do not intend this list to be a complete reference to all Social Security policy related to disability benefits. The ALJ will tell you if there are other policy statements with which you must be familiar in a given case." Cross-examine the vocational expert on whether the VE's testimony is consistent with or inconsistent with any of the Social Security Rulings, regulation sections, or policies included in the Vocational Expert Handbook and with which the vocational expert should be familiar. A vocational expert's testimony should not be contrary to Social Security Rulings, regulation sections, or the Vocational Expert Handbook.

- The *Biestek* case. There is certainly a great deal of concern that vocational expert opinions about numbers of jobs vary widely. Where appropriate, further cross-examine the vocational expert with regard to the numbers of jobs in light of the resource documents and sources used by the VE and how the VE arrived at the job numbers. There is also concern about inconsistent vocational expert testimony with regard to other areas in addition to job numbers, such as off task and number of days missed testimony.

- Questions attorneys should or should not ask. The Magic Question.

- The following table lists a few restrictions with corresponding Rulings and references containing important statements applicable to those restrictions.

Restriction	See
Lifting	20 CFR 404.1567; SSR 96-9p; SSR 96-8p; SSR 83-10
Standing/Walking	SSR 96-9p; SSR 83-12; SSR 83-10; 20 CFR 404.1567
Sitting	SSR 96-9p; SSR 96-8p; SSR 83-12; SSR 83-10; 20 CFR 404.1567
Postural Activities Including Stooping & Bending Balancing Climbing	SSR 96-9p; SSR 85-15; SSR 83-10; SSR 83-12 SSR 83-14
Bilateral Manual Dexterity Manipulative Limitations Reaching & Handling Pushing & Pulling	SSR 96-9p; SSR 85-15; SSR 83-12; SSR 83-14 SSR 83-10 ; Section 201.00(h) of Appendix 2
Mental	SSR 96-9p; SSR 85-15; SSR 96-8p
Effects of Medical Treatment	SSR 96-8p
Visual	SSR 96-9p
Use of Cane or Assistive Device For Standing & Walking	OPP 80-24; 20 CFR 404.1567(a); SSR 83-10

VOCATIONAL EXPERT HANDBOOK

August 2017

Social Security Administration

Office of Hearings Operations

Office of the Chief Administrative Law Judge

VOCATIONAL EXPERT HANDBOOK
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Preface

Thank you for becoming a vocational expert (VE) for the Office of Hearings Operations (OHO). This handbook provides the basic information you will need when you participate in administrative law judge (ALJ) hearings. The handbook explains Social Security's disability programs, the appeals process we use, your role and responsibilities, and technical information you must know.

We hope that you will find this handbook interesting and useful. If you have any comments or questions about it, please write or call:

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Table of Contents

In General-Disability Overview, Vocational Experts, and the Social Security Appeals Process

What are Social Security's Disability Programs?

The Social Security Administration (SSA or agency) administers several programs that pay disability benefits to individuals. Under Title II of the Social Security Act[1] (Act), disability benefits may be paid to people who work in "covered" employment or self-employment and who pay sufficient Social Security taxes[2] to become "insured" for disability benefits. There are also disability benefits that may be paid to the disabled adult children of insured workers who retire, die, or are themselves disabled, and disability benefits that may be paid to certain disabled widows and widowers of insured workers. We often refer to these as "Title II" disability benefits in reference to the title of the Act that provides for these benefits.

We administer another disability program under Title XVI of the Act. Title XVI provides payments of Supplemental Security Income (SSI) to individuals who are age 65 or older, or blind or disabled, and who have limited income and resources. Title XVI (SSI) payments are funded from general tax revenues and not from Social Security taxes, because eligibility for Title XVI programs is not based on payment of Social Security taxes.

Where Do You Fit In?

We use vocational experts (VE) to provide evidence at hearings before an administrative law judge (ALJ).[3] At this level of our *administrative review process* people ask for a *de novo* hearing before an ALJ regarding a prior determination on their claim for benefits under the Social Security disability program.

The administrative review process is our term for a multi-step process of application (or other initial determination) and appeals.

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[1] The Social Security Act, 42 U.S.C. 301 *et seq.*, is the federal law governing Social Security benefits.

[2] Federal Insurance Contributions Act (FICA) or Self-Employment Contributions Act (SECA) taxes.

[3] Hearing office staff select VEs in rotation, subject to the VE's availability. HALLEX I-2-5-52.

In general, there are four levels in the SSA administrative review process:

- Initial determination
- Reconsideration
- ALJ hearing
- Appeals Council review

After they complete the administrative review process, claimants who are still dissatisfied with our final decision generally have the right to appeal to federal district court.

At the initial and reconsideration levels, State agencies (often called "Disability Determination Services," or *DDSs*) make disability determinations for us. Although DDSs are State agencies, we fully fund their operations, and they make disability determinations using our rules. DDSs obtain medical, vocational, and other evidence they need to make these determinations, including arranging for independent medical examinations, which we call "consultative examinations" (CE), when they need them. In general, the determination at the DDS is made by a team consisting of one or more medical professionals (called a *medical consultant* or *psychological consultant*; and sometimes a *medical advisor*) and a lay *disability examiner*.[4] While DDS adjudicators routinely contact claimants to collect information, they usually do not meet with claimants. The DDS disability determination is based on an evaluation of the evidence in the claimant's case file.

Most people who qualify for disability benefits are found disabled by the DDS at the initial and reconsideration levels. Nevertheless, people whose claims are denied or who are otherwise dissatisfied with their determinations[5] may

[4] Depending on where you work, you may encounter variations to the foregoing procedures. For example, in some states there is no reconsideration level, and in some, a special kind of disability examiner called a "single decisionmaker" (SDM) may make the initial determination alone in some cases without getting input from a medical or psychological consultant. This is because we are testing variations to our usual processes in some states. However, section 832 of the Bipartisan Budget Act of 2015, Pub. L. 114-74, 129 Stat. 584, 613, affects the use of an SDM in that the SDM testing modification under 20 CFR 404.906(b)(2) and 416.1406(b)(2) is scheduled to end by the end of calendar year 2018, as well as the other modification being tested, the disability examiner authority, which allows the examiners to make fully favorable determinations in quick disability determinations (QDD) and compassionate allowance (CAL) claims under 20 CFR 404.1615(c)(3) and 416.1015(c)(3). See 81 FR 73027 (10/24/16) and 81 FR 58544 (8/25/16).

[5] For example, some people are found disabled at the DDS level, but not for the entire period they claimed.

appeal their claims to the ALJ hearing level, the level at which you will be asked to provide evidence.

At certain times, we also review whether people who are already receiving disability benefits continue to be disabled. When such people are dissatisfied with our determination about whether they are still disabled, they too can appeal. The process is somewhat different from the initial claims process, but like the initial process, it has an ALJ hearing level, and you may be asked to provide evidence for such a hearing. We provide more information about this step beginning on page 22.

What is a "VE"?

VEs are vocational professionals who provide impartial expert opinion evidence about a claimant's vocational abilities that an ALJ considers when making a decision about disability. As a VE, you will usually testify over the telephone, although you may be asked to testify by video teleconferencing (VTC) technology or in person at a hearing.[6] Sometimes you may provide opinions in writing by answering written questions called *interrogatories* (which we explain on page 41). At all hearings, you should be prepared to cite, explain, and furnish any sources that you rely on to support your testimony.

For more information, please refer to Hearings, Appeals, and Litigation Law (HALLEX) manual section I-2-5-48.

What is an ALJ?

An ALJ is the official who presides at our administrative hearings. Our ALJs perform a number of duties, including administering oaths, examining witnesses, receiving evidence, making findings of fact, and deciding whether an individual is or is not disabled. Our ALJs are SSA employees and hold hearings on behalf of the Commissioner of Social Security.

What is "Disability" for Social Security Programs?

The Act provides two definitions of disability. One definition applies to all Title II claims and to claims of individuals age 18 and older under Title XVI (SSI). There is a separate definition for children (individuals who have not attained age 18) under the Title XVI (SSI) program.[7]

[6] See 20 CFR 404.936(c)(2) and 416.1436(c)(2).

[7] The children's definition is not based on work, so you will not be asked to testify in cases in which the only issue is whether a child is disabled for Title XVI (SSI) purposes; therefore, we will not discuss Title XVI (SSI) childhood disability further in this handbook.

The general definition of disability under Title II and for adults under Title XVI is:

> [The] inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.[8]

Under Title II of the Act, a person may also be disabled based on blindness, which is defined as:

> [C]entral visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered . . . as having a central visual acuity of 20/200 or less.[9]

The Title XVI (SSI) program contains an identical definition of the term "blindness" for purposes of determining whether an individual is eligible for benefits based on blindness under the Title XVI (SSI) program.

Additionally, to be found disabled, the Act requires the person's impairments to be so severe that the person is not only unable to do his or perevious work but cannot, considering his or her age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. This provision requires the ALJ to determine the claimant's ability:

- To do previous work, and
- To make an adjustment to other work considering the effects of his or her medical condition(s) and the *vocational factors* of age, education, and work experience.

We have detailed regulations and other rules defining all the terms in the Act and explaining our requirements for determining disability. We describe these rules in more detail beginning on page 13.

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[8] See sections 223(d)(1)(A) and 1614(a)(3)(A) of the Act.
[9] See sections 216(i)(1) and 1614 (a)(2) of the Act.

What Happens at the ALJ Hearing?[10]

In the vast majority of cases at the hearing level, ALJs hold hearings at which claimants, and sometimes other people,[11] appear and testify. This hearing is generally the first time in the administrative review process that the claimant has a chance to see and talk to the person who will make the disability decision. However, a claimant may ask the ALJ to make a decision without an in-person hearing, based only on the documents in his or her case record. You may be asked to provide evidence in both kinds of cases, either by testifying at a hearing or by submitting written responses to written interrogatories.

At the hearing, the ALJ will have all of the documentary information that the DDS considered at the initial and reconsideration levels. The claimant generally also has submitted more evidence in connection with his or her appeal. Although ALJ hearings are more informal than court proceedings, the ALJ will swear in the claimant and any other witnesses, including you. Most claimants are represented by an attorney or other representative, but there is no requirement that the claimant have a representative. The hearing is non-adversarial; that is, there is no representative for SSA who argues in favor of the DDS determination. The ALJ is responsible for assisting the claimant and following the Act, regulations, and other rules, and is an impartial decisionmaker.

The ALJ will ask you questions before you testify to establish your independence and impartiality, and your qualifications and competence to testify in vocational matters. If the ALJ does not already have it, you should provide him or her with a written résumé or curriculum vitae summarizing your experience and background, which the ALJ will enter into the case record as evidence. The ALJ will also ask you whether the résumé or curriculum vitae is accurate and up to date, and will likely ask you whether you are familiar with applicable SSA regulations and other rules. The ALJ will also ask the claimant and his or her representative, if any, whether they object to your testifying.

In most cases, VEs will testify by telephone. Increasingly, we have been using VTC technology to improve our capacity to hold timely hearings. In some cases, all of the participants in the hearing will be present in the same room for the hearing. Regardless of how the testimony is given, the ALJ will question the claimant, you, and any other witnesses. The claimant and his

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[10] See page 10 of this handbook for additional information about prehearing review and preliminary questions the ALJ will ask you to establish your expertise and impartiality.
[11] Such as family members and medical and vocational expert witnesses.

or her representative will also have an opportunity to question you and other witnesses and to make arguments to the ALJ. The ALJ has the authority to determine the propriety of any questions asked. The agency makes an audio recording of the hearing.

You may be present throughout the entire hearing or the ALJ may decide that you should come into the hearing at a specific time. If you are not present throughout the hearing, the ALJ may summarize the claimant's relevant vocational testimony.

After the hearing, the ALJ will generally consider all the evidence and issue a written decision. Sometimes the ALJ will get more information after the hearing that necessitates obtaining additional information from the vocational expert. The ALJ may then ask you to answer written interrogatories.[12] These may be the ALJ's own questions or questions submitted by the claimant or his or her representative. The ALJ may also decide to hold another hearing, called a *supplemental hearing*.

What is the Appeals Council?

The Appeals Council is the last level of appeal within SSA. There are no local Appeals Council offices. The Appeals Council's headquarters is in Falls Church, Virginia; it also has offices in Arlington, Virginia and Baltimore, Maryland.

If the claimant is dissatisfied with the ALJ's decision, he or she may request Appeals Council review. The Appeals Council may grant, deny, or dismiss the request for review. If the Appeals Council denies the request to review the ALJ's decision, the ALJ's decision will become SSA's final decision. If the Appeals Council grants the request for review, it may make its own decision reversing, modifying, or affirming the ALJ's decision. In that case, the Appeals Council's decision becomes SSA's final decision.

In most cases, when the Appeals Council grants a request for review, it does not make its own decision. Instead, the Appeals Council *remands* (*i.e.*, returns) the case to the ALJ for additional action, including possibly a new hearing and decision. You may be asked to testify at an ALJ hearing that results from an Appeals Council remand.

[12] Interrogatories are explained on page 41.

What are Federal Court Appeals?

If the claimant is dissatisfied with SSA's final decision in the administrative review process, he or she may file a civil action in a federal district court. The district court may affirm, modify, or reverse SSA's final decision. In some cases, the district court will remand the case to SSA for further proceedings, which may include a new ALJ hearing and decision. You may be asked to testify at an ALJ hearing that results from a district court remand.

The claimant can continue to appeal his or her case in the federal courts to a United States Court of Appeals ("circuit court") and eventually to the Supreme Court of the United States, although this is extremely rare. At each of these levels, it is possible that the court will remand the case to SSA for a new hearing at which you may be asked to testify.

Role of the VE

Responsibilities of the VE

ALJs use VEs in many cases in which they must determine whether a claimant can do his or her previous work or other work.[13] A VE provides both factual and expert opinion evidence based on knowledge of:

- The skill level and physical and mental demands of occupations.
- The characteristics of work settings.
- The existence and incidence of jobs within occupations.
- Transferable skills analysis and SSA regulatory requirements for *transferability* of work skills.

While not a definitive list of job requirements, an ideal VE will have:

- Up-to-date knowledge of, and experience with, industrial and occupational trends and local labor market conditions.
- An understanding of how we determine whether a claimant is disabled, especially at steps 4 and 5 of the *sequential evaluation process* we describe beginning on page 14.
- Involvement in or knowledge of vocational counseling and the job placement of adult, handicapped workers into jobs.
- Knowledge of, and experience using, vocational reference sources of which the agency has taken administrative notice under 20 CFR 404.1566(d) and 416.966(d), including:
  - → The Dictionary of Occupational Titles (*DOT*) and the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (*SCO*);[14]
  - → *County Business Patterns* and Census reports published by the Bureau of Census;

[13] See 20 CFR 404.1560(b)(2), 404.1566(e), 416.960(b)(2), 416.966(e).
[14] For simplicity, we refer only to the *DOT* in the remainder of this handbook. It should be understood that when we refer to the *DOT*, we mean the *SCO* as well whenever appropriate.

→ The *Occupational Outlook Handbook* published by the Bureau of Labor Statistics; and

→ Any occupational analyses prepared for SSA by various state employment agencies.

We have rules for determining whether a claimant can make an adjustment to work other than work that he or she previously performed. ALJs frequently ask for VE testimony in these cases. We provide more details regarding these issues later in this handbook.

At the Hearing

You will provide evidence by answering questions posed by the ALJ and the claimant or the claimant's representative. Questions will typically be framed based on hypothetical[15] findings of age, education, work experience, and functional limitations. You *may* answer questions about issues that could be decisive in a case, such as whether a claimant could still do his or her previous work given hypothetical findings about functional limitations an ALJ will provide you. You should never comment on medical matters, such as what you believe the medical evidence indicates about the claimant's diagnosis or the functional limitations caused by the claimant's impairment(s) (SSA's term for medical conditions), or whether you believe the claimant is disabled.

If you have any questions—*e.g.*, about an aspect of a claimant's testimony—or you need more information, you should inform the ALJ. The ALJ will decide whether the information is pertinent and how it should be elicited.

The ALJ will not rely on your testimony alone to make his or her ultimate decision about disability or any of the vocational findings that go into the decision. The ALJ will consider your testimony together with the other evidence in the case record, including the claimant's testimony at the hearing and any other testimony. Your testimony may also help the ALJ determine whether he or she needs more evidence in order to make a decision.

Conduct of the VE

You are giving sworn testimony and should conduct yourself as if you are testifying in a civil or criminal court. Give complete answers to the questions you are asked, and do not volunteer information. Whenever possible, you

[15] See page 35 for further information on hypothetical findings.

should phrase your answers in lay terms. To ensure impartiality, you must avoid any substantive contact with the ALJ before or after the hearing, and avoid face-to-face or telephone contact with the claimant or his or her representative, both before and after the hearing. You must disqualify yourself if you believe that you cannot be completely impartial, have prior knowledge of the case, or have had prior contact with the claimant. However, the ALJ will not disqualify you merely because you testified in a previous case regarding the same claimant.

Pre-Hearing Preparation

The ALJ will generally provide you with relevant portions of the case file before the hearing. (You must fully understand the importance of proper handling of this information; please read the next section "Protecting Personally Identifiable Information (PII)" carefully.) This information will give you a chance to become familiar with the vocational evidence in the claim. It will also prepare you to answer the kinds of questions—such as questions about the requirements of the claimant's previous work—you can expect to get at the hearing. If after reviewing this information you believe that you need more information to provide adequate testimony, you should prepare a written list of your questions and refer them to the ALJ.

Generally, the period under consideration for establishing disability in initial claims begins with the date the claimant alleges that he or she became disabled (commonly referred to as the *alleged onset date*, or AOD) and goes through the date of the ALJ's decision. However, there are situations requiring evaluation of the claimant's medical condition at an earlier time[16] or starting at a later time. The ALJ will advise you of the period under consideration.

Protecting Personally Identifiable Information (PII)

SSA defines PII as any information that can be used to distinguish or trace an individual's identity (such as his or her name, Social Security number, biometric records, etc.) alone, or when combined with other personal or identifying information that is linked or linkable to a specific individual (such as date and place of birth, mother's maiden name, etc.). SSA is mandated to safeguard and protect the PII entrusted to the agency[17] and to immediately report breaches to the Department of Homeland Security.

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[16] For example, as we note in the next section, a worker's insured status under Title II can expire. In this situation, the worker can still qualify for disability benefits, but must show that he or she was disabled on or before this *date last insured.*

[17] See section 1106 of the Act and 5 U.S.C. 552a.

The claimant information the ALJ provides to you, which may be in paper or electronic form, must be protected against loss, theft, or inadvertent disclosure. Failure to take the proper steps to protect this information, or failure to immediately report to SSA when you suspect PII is compromised, could adversely affect your standing and may result in termination of your contract. To maintain good standing with SSA, follow these instructions to reduce the risk of PII loss, theft, or inadvertent disclosure:

- Ensure your employees or associates are fully aware of these procedures and the importance of protecting PII.
- If you are expecting to receive claimant information from SSA, and you have not received it within the expected time frame, immediately notify your SSA contact or alternate contact.
- Secure all SSA claimant information in a locked container, such as a locked filing cabinet, or while in transit, in a locked briefcase.
- Once you arrive at your destination, always move PII to the most secure location. Do not leave PII locked in a car trunk overnight.
- When viewing a claimant's file, prevent others in the area from viewing the file's contents.
- Ensure PII is appropriately returned or, upon receiving SSA's approval, destroyed when no longer needed. Media must be destroyed in a manner that prevents unauthorized disclosure of sensitive information. Appropriate destruction techniques include shredding, pulverizing, and burning.

In the event of a loss, theft, or disclosure you must *immediately* notify your primary SSA contact or alternate contact. Report the following information, as completely and accurately as possible:

- Your contact information
- A description of the loss, theft, or disclosure, including the approximate time and location of the incident
- A description of safeguards used, as applicable
- Whether you have contacted, or been contacted, by any external organizations (*i.e.*, other agencies, law enforcement, press, etc.), and whether you have filed any other reports
- Any other pertinent information

If you are unable to reach your SSA contacts, call SSA's National Network Service Center (NNSC) toll free at 1-877-697-4889. Provide them with the

information outlined above. Record the Change, Asset, and Problem Reporting System (CAPRS) number which the NNSC will assign to you. Limit disclosure of the information and details about the incident to only those with a need to know. The security/PII loss incident reporting process will ensure that SSA's reporting requirements are met and that security/PII loss incident information is only shared appropriately.

Delay in reporting may adversely affect SSA's ability to investigate and resolve the incident and may contribute to suspension or termination of your contract.

Determining Disability

You may be asked to give evidence in any kind of disability case under the programs we administer, except childhood disability cases under Title XVI. Most often, you will be giving evidence in cases of insured workers (see page 1) under Title II and adults claiming SSI disability benefits under Title XVI, or "concurrent" claims for both types of benefits. Less often, you may testify at hearings concerning the other kinds of disability cases described below.

Detailed Definitions of Disability

The Act defines disability in all Title II claims and in adult Title XVI claims as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than 12 months.[18] The latter part of the definition is the "duration requirement."

"Inability to engage in any substantial gainful activity" means that a claimant's impairment(s) must not only prevent him or her from performing previous work but from making an adjustment to any other kind of substantial gainful work that exists in significant numbers in the national economy, considering his or her age, education, and previous work experience. The law specifies that it is irrelevant whether:

- The work exists in the immediate area where the claimant lives,
- A specific job vacancy exists, or
- The claimant would be hired if he or she applied for work.

In other words, the question is not whether the claimant can *get* a job, only whether he or she can *do* it.

[18] As we have already noted, there is also a statutory definition of blindness under Titles II and XVI, but under Title II, blindness is a kind of "disability," while under Title XVI it is a category separate from "disability." There is also a separate definition of disability under Title II for people who are at least 55 years old and blind. These technical, legal distinctions do not affect your work as a vocational expert. We provided the statutory definition of blindness on page 4 of this handbook.

Determining Initial Disability for All Title II and Adult Title XVI Cases

The Sequential Evaluation Process

We have extensive regulations and other rules that interpret the provisions of the Act described above and instruct our ALJs and other adjudicators on how to determine whether a claimant is disabled. The rules interpreting the basic definition of disability for adults provide a five-step *sequential evaluation process* that we use to determine whether a claimant is disabled. We use different sequential processes to determine whether beneficiaries continue to be disabled (*Continuing Disability Review*, or CDR, and redeterminations of the disability of individuals who qualified for Title XVI (SSI) benefits as children when they reach age 18).

The sequential evaluation process requires the adjudicator to follow the steps in order, and at each step, either make a decision, in which case the evaluation stops, or decide that a decision cannot be made at that step. When the ALJ determines that a decision cannot be made at a given step, he or she goes on to the next step(s) until a decision can be made. 20 CFR 404.1520 and 416.920.[19]

Note that for each of the first four steps described below, we explain that the ALJ may stop and make a decision. However, with some exceptions,[20] ALJs generally do not make their decisions at the hearing. ALJs generally issue a written decision some time after the hearing. ALJs generally ask for information relevant to all of the steps of the sequential evaluation process at the hearing. The description below explains the steps that an ALJ follows when making disability decisions.

STEP 1: Is the claimant engaging in substantial gainful activity?[21]

Substantial gainful activity (SGA) is work activity that: (a) involves doing significant physical or mental activities; and (b) is usually done for pay or

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[19] "20 CFR" is a reference to Title 20 of the *Code of Federal Regulations* (CFR). The CFR is a compilation of all federal regulations, and Title 20 contains SSA's regulations. Regulation section numbers that start with the number "404" are Title II regulations; those that start with the number "416" are for Title XVI. See the List of References at the end of this handbook for more information about our regulations and other rules.

[20] The most common exception is under a rule we have that allows an ALJ to announce at the hearing that he or she has found that the claimant is disabled. ALJs cannot announce denial decisions at the hearing.

[21] 20 CFR 404.1574, 404.1575, 416.974, and 416.975 provide evaluation guides for determining whether work is SGA.

profit, whether or not a profit is realized. Generally, we do not consider activities like self-care, household tasks, hobbies, therapy, school attendance, club activities, or social programs to be substantial gainful activity.

SGA is most often measured by gross monthly earnings. When countable monthly earnings are above a prescribed amount, which increases each year, the claimant is generally considered to be engaging in SGA. Self-employed individuals are engaging in SGA when they perform significant services in a business, work comparable to unimpaired individuals, or work which is worth the prescribed monthly SGA amount. Since the basic definition of disability is "inability to engage in any substantial gainful activity," we find that a claimant who is actually doing SGA is "not disabled" regardless of the severity of his or her impairment(s).

STEP 2: Does the claimant have a "severe" impairment?

The ALJ will generally consider two issues at this step: whether the claimant has a "medically determinable impairment" and, if so, whether it is "severe" and meets the duration requirement.[22] The Act requires that the claimant show the existence of an impairment by medically acceptable clinical and laboratory diagnostic techniques, which we often refer to as "objective" medical evidence.

The word "severe" is a term of art in SSA's rules. An impairment or a combination of impairments is "severe" if it significantly limits a claimant's ability to do one or more basic work activities needed to do most jobs. See 20 CFR 404.1520(c), 404.1521, 416.920(c), and 416.921. Under SSA's rules, abilities and aptitudes necessary to do most jobs include physical functions, such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, handling, seeing, hearing, and speaking. They also include mental functions, such as understanding, carrying out and remembering simple instructions; using judgment; responding appropriately to supervision, co-workers, and usual work situations; and dealing with changes in a routine work setting. 20 CFR 404.1521 and 416.921.

Even though the rules defining a "severe" impairment refer to basic work-related activities, you should not expect to provide any testimony about this step of the process. The ALJ will determine whether the claimant has any medically determinable impairments, whether they result in limitations, and

[22] There is no requirement to establish a medically determinable impairment that results in blindness under Title XVI.

whether any limitations affect the claimant's ability to do basic work-related activities, and should not need any information from you for these issues.

If the claimant does not have a medically determinable impairment, or if the medically determinable impairment(s) is not "severe," the claimant is not disabled and the analysis stops. If the claimant has at least one "severe" medically determinable impairment or a number of non-severe impairments that are severe when considered in combination, the ALJ goes to the next step.

STEP 3: Does the claimant have an impairment(s) that meets or medically equals a listed impairment in the Listing of Impairments?

The ALJ will find that the claimant is disabled when the objective medical evidence and other findings associated with the claimant's medically determinable impairment(s) satisfies all of the criteria for an impairment described in the Listing of Impairments (Listings) set out in Appendix 1, Subpart P of Part 404 of our regulations,[23] and meets the duration requirement. Disability may also be established when the claimant has an impairment or a combination of impairments with findings that do not meet the specific requirements of a listed impairment but are medically equivalent in severity to the findings of a listed impairment and meet the duration requirement.

The Listings describe, for each "body system," medically determinable impairments and associated findings that we consider severe enough to prevent an adult from doing "any gainful activity" regardless of his or her age, education, or work experience. Note that this is a stricter standard than the standard in the basic definition of disability for adults: "any *substantial* gainful activity." The listings describe a higher level of severity because they do not consider the vocational factors of previous work experience, age, and education that are considered at the last step of the sequential evaluation process.

You will not be asked to testify about anything related to the Listings.

Residual Functional Capacity (RFC)

If the claimant is not engaging in SGA and has at least one severe impairment that does not meet or medically equal a listing, the ALJ must

[23] We print the Listings only in Part 404 (the Title II regulations) to save space in the CFR. They also apply to Title XVI.

assess the claimant's RFC before going on to step 4. The RFC assessment is a description of the physical and mental work functions the claimant can still perform in a work setting on a sustained basis despite his or her impairment(s).

The RFC is the *most* that the claimant can still do despite the limitations caused by his or her impairment(s), including any related physical or mental symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness. However, at the hearing the ALJ may describe the claimant's functioning in terms of limitations and restrictions as well.

Note that the ALJ must consider limitations from *all* of the claimant's impairments, including limitations from any medically determinable impairment that is not "severe." As you saw under step 2, our definition of "severe" is based on work functioning. Therefore, an impairment that is not "severe" might still cause some slight or minimal limitations in functioning, and those limitations might affect the claimant's ability to do some jobs or job functions.

You should not be asked your opinion about the claimant's RFC, functional abilities, limitations, or restrictions. If you are asked about these topics (by an ALJ, a claimant, or a representative), you should not respond. Instead, as we explain below, the ALJ will pose one or more questions to you (called *hypotheticals,* see page 35) that will include various possible RFC findings that he or she might make.

There are two important additional agency policies about RFC you should know:

- First, the RFC is generally what an individual can still do on a "regular and continuing basis," 8 hours a day, for 5 days a week, or an equivalent work schedule; that is, in a work setting.[24]

- Second, the RFC considers only the effects of the claimant's medically determinable impairment(s). By rule, the ALJ cannot consider the claimant's age, sex, body habitus,[25] or overall

[24] In some cases, the ALJ may ask you a hypothetical that is not consistent with full-time work. There are two main situations in which this will happen: 1. The ALJ is posing a hypothetical RFC that assumes that he or she has accepted a claimant's alleged limitations, and those allegations are inconsistent with full-time employment. 2. The ALJ is trying to determine whether the claimant is capable of doing previous work that was part-time work.
[25] Note, however, that SSA may consider obesity to be a medically determinable impairment. Social Security Ruling (SSR) 02-01p.

conditioning when determining RFC, but only limitations that result from documented medically determinable impairments.

See SSR 96-8p, *Titles II and XVI: Assessing Residual Functional Capacity in Initial Claims*.[26]

The ALJ evaluates the claimant's ability to meet the physical, mental, sensory, and other requirements of work. The ALJ considers physical abilities, including: exertional activities (*e.g.*, sitting, standing, walking, lifting, carrying, pushing, and pulling); postural activities (*e.g.*, stooping, climbing); manipulative activities (*e.g.*, reaching, handling); vision; the physical aspects of communication (hearing, speaking); and environmental factors (*e.g.*, tolerance of temperature extremes or dusty environments). The ALJ will also consider mental functions (*e.g.*, understanding and remembering instructions of various complexities, concentrating, getting along with coworkers and the public, responding appropriately to supervision, and responding to changes in the workplace).

As suggested in the preceding paragraph, our rules recognize the same seven *exertional* (strength) limitations as in the *DOT.* All other physical limitations (including postural, manipulative, communicative, visual, and environmental) and mental limitations are *nonexertional.* Our rules also use the same strength ratings to categorize work as in the *DOT* (sedentary, light, medium, heavy, and very heavy).

STEP 4: Can the claimant do past relevant work?

After assessing the RFC, the ALJ will decide whether the claimant is able to do any *past relevant work* (PRW), either as the claimant actually performed it or as the work is generally performed in the national economy. The term "PRW" is generally defined as the work the claimant performed at the SGA level within the last 15 years (or before certain ending dates specified in our rules) and includes only jobs that lasted long enough for the claimant to learn to do them.

The ALJ will make this determination by comparing the claimant's RFC with the requirements of these jobs. For this step of the sequential evaluation process, the ALJ may call on you to provide information about such issues as:

[26] Although SSRs do not have the force and effect of the law or regulations, they are binding on all components of SSA, including ALJs and other adjudicators. See the List of References at the end of this handbook, or click here, for a list of important SSRs that you may need to consult.

- What a claimant's jobs were in the 15 years before the hearing or another date that the ALJ specifies,
- Whether they lasted long enough for the claimant to learn how to do them,
- The physical and mental demands of a job as the claimant says he or she *actually* performed it, and
- The physical and mental requirements of the job as it is usually performed in the national economy, if it is performed in the national economy.[27]

At each hearing, please be prepared to cite, explain, and furnish any sources upon which you rely in your testimony.

If there is PRW that the claimant can still do, the claimant is not disabled and the analysis stops. If the claimant cannot do any PRW, or does not have any PRW, the ALJ will continue to the last step.

STEP 5: Can the claimant do other work?

If the ALJ finds that the claimant can no longer do any PRW, or the claimant does not have any PRW, the ALJ must finally consider whether the claimant can make an adjustment to other work that exists in significant numbers in the national economy. In making this finding, the ALJ must consider the claimant's RFC, age, education, and past relevant work experience. To do this, the ALJ must refer to the *Medical-Vocational Guidelines,* in Appendix 2 of Subpart P of Part 404 of our regulations[28] (often called the *grid rules* or the *grids*).[29] Appendix 2 includes three tables with rules that provide a matrix of various combinations of RFC, age, education, and past relevant work experience. When the facts of a claimant's case match a grid rule exactly, the rule directs a conclusion of either "disabled" or "not disabled."

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[27] Work a claimant performed outside of the United States can be PRW, but in that case, we consider only how the claimant actually performed it, not how it is usually performed in another country. See SSR 82-40. Also **note** that PRW does not have to exist in significant numbers, so you will not have to be prepared to testify about numbers of jobs with regard to a claimant's PRW. The issue of significant numbers arises only at step 5.

[28] In some cases, an ALJ can find that a claimant is disabled under special rules that do not involve the grid rules we discuss in the rest of this paragraph and in more detail later in this handbook. You do not need to know about these rules. In the unlikely event that an ALJ needs your testimony to determine whether one of the special medical-vocational profiles applies in a case, he or she will give you instructions.

[29] We print the grid rules only in Part 404 (the Title II regulations) to save space in the CFR. They also apply to Title XVI.

If the claimant's characteristics do not match a grid rule, the ALJ must use the rules in Appendix 2 as a *framework* for decisionmaking. You will often be asked to testify in the latter type of case. We provide more information about the grid rules, the vocational factors, the other terms related to step 5, and questions you should be prepared to answer beginning on page 24 of this handbook.

Again, at the hearing, please be prepared to cite, explain, and furnish any sources that you rely on to support your testimony.

At this last step of the sequential evaluation process, the ALJ must decide whether the claimant is disabled. If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, he or she is not disabled. If the claimant cannot make an adjustment to other work that exists in significant numbers in the national economy, the claimant is disabled.

NOTE: The Act provides that a claimant will not be found disabled if the claimant has drug addiction or alcoholism (DAA) and the DAA is a contributing factor that is "material" to the finding that the claimant is disabled. In other words, if the ALJ determines that a claimant is disabled and that he or she has DAA, the ALJ must also determine whether the claimant would still be disabled if he or she stopped using drugs or alcohol. In this case, the ALJ will go through the sequential evaluation process again and make findings based on an assumption that the claimant has stopped substance use. This means that the ALJ may pose more questions to you about a claimant's ability to do previous work or other work based on a hypothetical RFC assessment that assumes that the claimant's DAA has stopped.

Determining Continuing Disability

In addition to adjudicating appeals involving a claimant's initial entitlement to disability benefits, ALJs also adjudicate appeals of determinations that individuals who were previously awarded disability benefits are no longer "disabled." There are two basic types of cases in this category.

- From time to time, we review the continuing disability of both adults and children under Titles II and XVI.[30] We refer to these cases as *continuing disability reviews* (CDR), or "cessation" cases.

- Title XVI also requires that we *redetermine* the eligibility of individuals who qualified for Title XVI (SSI) as children when they reach age 18, using the adult rules for initial disability claims. We refer to these cases as *age-18 redetermination* cases.

In these type of cases, the DDS will have already determined that the individual's disability ended on a specific date. The ALJ then considers whether the individual's disability actually ended on that date, at a later date, or not at all. In some—but not all—cases, the ALJ will consider whether the individual has become disabled again even if the disability did end in the past. The ALJ will give you instructions, and you will be asked questions, appropriate to the issues of the specific case.

As we have already noted, we use a different sequential evaluation process to evaluate whether an individual continues to be disabled than the one we use in initial claims for disability benefits. This is because there are different standards in the Act for determining, with a CDR, whether disability has ended. 20 CFR 404.1594, 416.994, and 416.994a.[31] In a CDR, the ALJ must determine whether the evidence shows *medical improvement* in the individual's condition from the most recent favorable medical decision that the claimant was disabled or continued to be disabled. There are few differences between the opinions you will be asked to give in these cases and the opinions you are asked to give in cases involving initial applications for benefits.

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[30] We review cases at frequencies ranging from as little as 6 months after the decision date, up to about 7 years, depending on the probability that the individual's impairment(s) will improve to the point of nondisability. We do not send all individuals' cases to the DDS for a medical review. In many cases, we determine through a questionnaire we call a "mailer" that the individual's disability continues.

[31] The CDR sequential evaluation processes in Title II and Title XVI are slightly different from each other, but the differences do not affect your work as a VE.

CDRs and Medical Improvement

The Act provides that we generally cannot find that an individual's disability has ended unless we have evidence showing that:

- The impairment(s) upon which we last found him or her to be disabled or still disabled has medically improved, [32]
- The medical improvement is "related to the ability to work," in the case of adults,[33] *and*
- The individual is not disabled under the basic definition of disability.

To determine whether medical improvement has occurred, the ALJ will look only at the impairment(s) the individual had at the time of our most recent favorable disability decision; that is, either our initial decision that the individual was disabled or, if more recent, our last determination that the individual was still disabled. We call this the *comparison point decision* (CPD). The ALJ will compare the medical severity of the CPD impairment(s) at the time of the DDS's cessation determination to the severity of those impairments at the time of the CPD.[34] Medical improvement is any decrease in the medical severity of those CPD impairments as shown by changes (improvement) in the signs, symptoms, and laboratory findings associated with the impairment(s).[35]

We have complex rules defining what the term "related to the ability to work" means. Even if there has been medical improvement related to the ability to work, the ALJ will find that disability continues if the individual has an impairment(s)—including any new impairment(s) that was not present at the time of the CPD— or a combination of impairments that meets the basic definition of disability; that is, if he or she is unable to engage in SGA. Suffice it to say that an ALJ may ask for your opinions about the same issues on which you will be testifying in hearings on initial claims.

NOTE: There is one important policy of which you should be aware. As we have explained, PRW is generally work that was performed in the past 15 years. However, we have a special rule for CDRs. We do not count work a person is doing or has done during a current period of entitlement based on

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[32] There are certain specific and very limited exceptions to the requirement for showing medical improvement. See 20 CFR 404.1594(d) and (e), 416.994(b)(3) and (4), and 416.994a(e) and (f).
[33] There is no corresponding provision for children under Title XVI.
[34] 20 CFR 404.1594(b)(7), 416.994(b)(1)(vii), and 416.994a(b)(1).
[35] 20 CFR 404.1594(c)(2), 416.994(b)(2), and 416.994a(c).

disability as PRW when an ALJ determines whether the individual's disability has ended and must determine:

- Whether the individual has regained the ability to do any PRW, or
- Whether the individual has regained the ability to do other work.

See 20 CFR 404.1594(i) and 416.994(b)(8).

Age-18 Redeterminations

Title XVI of the Act requires that we "redetermine" the eligibility of individuals who were eligible for a Title XVI (SSI) payment as a child when they reach age 18. The Act specifies that we must use the rules we use when we determine initial disability in adults, and not the medical improvement review standard we use in CDRs. Under our regulations, for age-18 redeterminations, we use the adult sequential evaluation process we use to evaluate disability in initial adult claims, except that we do not use step 1 (Is the claimant engaging in SGA?). 20 CFR 416.987. Any testimony you give in these cases will be the same kind of testimony you give in initial adult claims.

The Medical-Vocational Guidelines in Appendix 2 to Subpart P of Part 404 (the "Grid Rules")

Our rules for determining disability at step 5 are very complex, and it would be impossible to explain them all in this handbook. Most of your testimony will be in cases involving determinations at step 5, so it is important that you read Appendix 2 (the *Medical-Vocational Guidelines,* or "grid rules"), the other regulations about how we make determinations at step 5,[36] and the SSRs we list at the end of this handbook, to gain an understanding of what the ALJ will consider and ask you to testify about.

We begin with an overview of the grid rules and how the ALJ will make decisions using them. We follow with definitions of the vocational factors and other terms we use at this step and under the grid rules.

The most important thing to remember is that the ALJ cannot rely on your testimony if it is inconsistent with or contradicts our rules, so you must be aware of our various definitions and of how the grid rules work.

Introduction to the Grid Rules

In legal terms, the claimant generally has the "burden" of proving his or her disability claim. However, our rules provide that SSA has a limited burden of providing evidence that work exists in significant numbers in the national economy that the claimant can do given his or her RFC and vocational factors, when we find that a claimant is not disabled at step 5 of the sequential evaluation process. Proper application of the grid rules can satisfy this burden. The grid rules provide necessary supporting evidence of the existence of work in the national economy. They also help to ensure consistent decisionmaking at step 5. Nevertheless, VEs are also an important source of information about the existence of work and claimants' abilities to adjust to other work. ALJs frequently use VEs to help them make their decisions at step 5.

The grid rules take *administrative notice* of the existence of unskilled jobs in the national economy so that the ALJ does not need to obtain other evidence of the existence of such work in every case that he or she denies at step 5. The regulations establish that there are approximately 200 unskilled sedentary occupations, 1,400 light unskilled occupations (or a total of 1600 sedentary and light occupations), and 900 medium unskilled occupations (or a total of 2500 sedentary, light, and medium occupations), with each

[36] See page 19 and the List of References.

occupation representing numerous jobs in the national economy. This information was established by various vocational resources SSA consulted when the rules were issued and at various times since; because the information has already been established in our regulations, we can take "administrative notice" of it without have to prove it again in every case.

Appendix 2 provides both a series of general and specific narrative guidelines for considering the effects of RFC, age, education, and work experience in determining whether an individual can make an adjustment to other work, and three "tables" that contain the specific rules. Each table addresses a different "maximum sustained work capability" or RFC; sedentary unskilled occupations (Table No. 1), light unskilled occupations (Table No. 2), and medium unskilled occupations (Table No. 3). Within each table are rules for people with the defined exertional RFC for the table and different combinations of age, education, and previous work experience.[37] When all of the facts of an individual's case match with all of the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled.

In order to do the *full range* of unskilled work in each of the exertional categories in the three tables,[38] the individual must have the capability to do all or substantially all occupations existing at an exertional level required of the work as defined in our regulations and SSRs. Additionally, he or she must not have any nonexertional limitations (physical or mental) that would significantly reduce the number of occupations in one of the tables.

When an individual has an exertional or nonexertional limitation(s) that significantly affects the ability to do the full range of work that is administratively noticed in a table, the rules in the table do *not* direct the decision as to whether the person is or is not disabled. In those cases, the ALJ must use the rules as a *framework* for decisionmaking. The ALJ may obtain VE evidence to help determine whether there are jobs that exist in significant numbers in the national economy that the claimant can do. However, an ALJ may not rely on evidence provided by a VE if that evidence is based on underlying assumptions or definitions that are inconsistent with our regulatory policies or definitions.

To illustrate how the grid rules work, we provide an excerpt from Table No. 2, which we use in cases in which the claimant has the RFC for "light" work.

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[37] Note that the tables do not cover every possible combination of factors.
[38] That is, all or almost all of the 200 sedentary unskilled occupations; 1600 sedentary and light unskilled occupations; or 2500 sedentary, light, and medium unskilled occupations.

Table No. 2—Residual Functional Capacity: Maximum Sustained Work Capability Limited to Light Work as a Result of Severe Medically Determinable Impairment(s)

Rule	Age	Education	Previous work experience	Decision
202.01	Advanced age	Limited or less	Unskilled or none	Disabled.
202.02	.....do.....	.....do.....	Skilled or semiskilled—skills not transferable	Do.*
202.03	.....do.....	.....do.....	Skilled or semiskilled—skills transferable[1]	Not disabled.
202.04	.....do.....	High school graduate or more—does not provide for direct entry into skilled work[2]	Unskilled or none	Disabled.
202.05	.....do.....	High school graduate or more—provides for direct entry into skilled work[2]	.....do.....	Not disabled.
202.06	.....do.....	High school graduate or more—does not provide for direct entry into skilled work[2]	Skilled or semiskilled—skills not transferable	Disabled.
202.07	.....do.....	.....do.....	Skilled or semiskilled—skills transferable[2]	Not disabled.
202.08	.....do.....	High school graduate or more—provides for direct entry into skilled work[2]	Skilled or semiskilled—skills not transferable	Do.
202.09	Closely approaching advanced age	Illiterate or unable to communicate in English	Unskilled or none	Disabled.
202.10	.....do.....	Limited or less—at least literate and able to communicate in English	.....do.....	Not disabled.
202.11	.....do.....	Limited or less	Skilled or semiskilled—skills not transferable	Do.
202.12	.....do.....	.....do.....	Skilled or semiskilled—skills transferable	Do.
202.13	.....do.....	High school graduate or more	Unskilled or none	Do.
202.14	.....do.....	.....do.....	Skilled or semiskilled—skills not transferable	Do.
202.15	.....do.....	.....do.....	Skilled or semiskilled—skills transferable	Do.
202.16	Younger individual	Illiterate or unable to communicate in English	Unskilled or none	Do.
202.17	.....do.....	Limited or less—at least literate and able to communicate in English	.....do	Do.

*"Do." is an abbreviation for "Ditto."

202.18	.....do.....	Limited or less	Skilled or semiskilled—skills not transferable	Do.
202.19	.....do.....	.....do.....	Skilled or semiskilled—skills transferable	Do.
202.20	.....do.....	High school graduate or more	Unskilled or none	Do.
202.21	.....do.....	.....do.....	Skilled or semiskilled—skills not transferable	Do.
202.22	.....do.....	.....do.....	Skilled or semiskilled—skills transferable	Do.

As you can see in the table excerpt, the older a claimant is, the issue of work adjustment becomes more significant. For example, under rules 202.13-202.15, we would not find a 54-year-old[39] high school graduate who can do the full range of light work disabled, regardless of his or her work experience. At age 55,[40] we would find the same person disabled, unless he or she has skills that are transferable to skilled or semiskilled work that is within his or her RFC. Education, including literacy and the ability to communicate in English, can also have an effect on the disability decision; see rule 202.09.

In many cases, the rules do not direct a decision. For example, under our definition of "sedentary" work, a claimant must be able to sit for approximately 6 hours in an 8-hour workday on a sustained basis in order to do the full range of sedentary work. In order to do the full range of light work, a claimant must be able to stand and walk for a total of approximately 6 hours in an 8-hour workday on a sustained basis. In many cases, the rules do not direct a decision. For example, a claimant's exertional limitations might fall between the exertional levels of sedentary and light work, such that the claimant might not be able to perform the "full range" of sedentary or light unskilled work represented by the rules. In such cases, the ALJ cannot use a grid rule to "direct" the decision.

In such cases, an ALJ may ask you to testify about the existence of occupations that a claimant with this RFC could do and about the claimant's ability to make an adjustment to other work considering the claimant's age, education, and any past relevant work experience. You will also have to be prepared to provide estimates of the number of jobs within each occupation both locally and nationally, whether the occupations are described in the *DOT,* and if they are, whether your description of the occupation is consistent with the *DOT's* description. Your testimony must also be consistent with our regulatory definitions and requirements, including the grid rules. For example, as we illustrated above, under the grid rules a 55-

[39] That is, "closely approaching advanced age." See definitions in section 2 below.
[40] That is, "advanced age."

year-old high school graduate who can do the *full* range of light and sedentary work is disabled unless he or she has transferable skills. Therefore, you should not testify that there are sedentary or light occupations that a hypothetical 55-year-old high school graduate who is limited to *less than* the full range of light work can do.[41]

VEs can also be especially helpful in cases in which claimants have only nonexertional limitations or both nonexertional and exertional limitations. For example, claimants with mental impairments and no physical limitations generally have the *exertional* capability to do work at every exertional level, including heavy and very heavy work, but may not be able to do every job that we take administrative notice of because of limitations from their mental disorders; *e.g.*, they may not be able to do jobs that require frequent interaction with the public. In such cases, the ALJ may ask you for information about the effect of the impairment on the individual's *occupational base*, a term we use to describe the number of occupations that an individual is capable of performing. See SSRs 83-10 and 85-15.

As noted above, at the hearing, you must be prepared to cite, explain, and furnish any sources relied upon in your testimony.

In the following sections, we provide brief definitions and guidance about the three vocational factors, the exertional levels of work, and our concepts of work "skills" and transferability. You should not rely on the descriptions in this handbook. It is essential that you become thoroughly familiar with the important policy statements we list at the end of this handbook. The information below is simply to give you a brief introduction to our terms and related rules, and the kinds of questions you can expect to be asked at an ALJ hearing.

Vocational Factors

Under our rules for step 5, there are three *vocational factors* the ALJ must consider: *age*, *education*, and *work experience*.[42]

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[41] This is only a simple illustration of how you have to be aware that the grid rules might not match up with your experience in placing people in jobs. In a case like this, an ALJ would not need your testimony because the "framework" of the rules would establish that the claimant is disabled: the claimant would be disabled under the grid rules even if the ALJ found that he or she could do *more* than he or she could actually do. You should also know that an ALJ cannot use your testimony to rebut the conclusions in the grid rules. In the example in the text above, the ALJ cannot make a decision contrary to the mandate of the grid rules even if you are able to name occupations that the claimant can do.

[42] The vocational factors apply only at step 5. Even though we consider a claimant's previous work (PRW) at step 4, it is a different sort of inquiry, based solely on the claimant's RFC. We use the vocational factors at step 5, together with RFC, to determine

a. Age

Age refers to a claimant's chronological age. We consider advancing age to be an increasingly limiting factor in the person's ability to make an adjustment to other work.

Our regulations use three broad age categories, although there are subcategories in two of them that apply in some cases.[43]

- Younger Person: Claimants under age 50. We also have a rule for some claimants who are age 45-49 and who are illiterate in English or unable to communicate in English.
- Person Closely Approaching Advanced Age: Claimants age 50-54.
- Person of Advanced Age. Claimants age 55 or older. We also have separate rules for some claimants in this category who are *closely approaching retirement age* (age 60 or older).

20 CFR 404.1563 and 416.963.

b. Education

Education primarily means formal schooling or other training that contributes to a claimant's ability to meet vocational requirements (for example, reasoning ability, communication skills, and arithmetical ability). Our rules provide that lack of formal schooling does not necessarily mean that the claimant is uneducated or lacks abilities achieved in formal education, although the ALJ will use the claimant's formal education level if there is no evidence to contradict it.

Our rules recognize that the importance of a claimant's education may depend on how much time has passed between the completion of formal education and the alleged onset of disability. The ALJ may also consider what the claimant has done with his or her education in a work or other setting (*e.g.*, in hobbies). The rules provide the ALJ with the authority to determine that a given claimant's education is higher or lower than the

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whether a claimant can make an adjustment to other work in the national economy; *i.e.*, work he or she has not done before.

[43] However, our regulations provide that we do not apply the age categories mechanically in a borderline situation. 20 CFR 404.1563(b) and 416.963(b). It is the ALJ's responsibility to determine when to use an age category that is different from the claimant's chronological age.

actual grade he or she attained depending on a variety of factors, but such a finding is unusual.

The term "education" also includes how well the claimant is able to communicate in English since this ability is often acquired or improved by education.

Our regulations define five educational categories:[44]

- Illiterate: The claimant cannot read or write a simple message, such as instructions or inventory lists, even if the claimant can sign his or her name.

- Inability to communicate in English: The claimant does not speak and understand English.

- Marginal Education: Generally, formal schooling at the 6th grade level or below. Marginal education means ability in reasoning, arithmetic, and language skills that are needed to do simple, unskilled types of jobs.

- Limited Education: Generally, formal schooling at the 7th through 11th grade level. Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person to do most of the more complex job duties needed in semi-skilled or skilled jobs.

- High School Education or Above: Generally, high school graduate or above. The term includes high school equivalency diplomas. We generally consider that someone with these educational abilities can do semi-skilled through skilled work.

20 CFR 404.1564 and 416.964.

c. Work Experience

Work experience means the claimant's PRW.[45]

The ALJ will often ask you the following questions about a claimant's work experience:

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[44] However, note that the grid rules treat illiteracy and inability to communicate in English as a single category.
[45] See the "Step 4" discussion on page 18.

- The *exertional level* of the occupation (in terms of "sedentary," "light," "medium," "heavy," and "very heavy"),
- The *specific exertional and nonexertional physical and mental requirements* of the occupation,
- The *skill level* of the occupation, and
- If the occupation was semiskilled or skilled, the *skills* the claimant used in the occupation and whether any of those skills are *transferable* to other occupations that are within the claimant's RFC.[46]

20 CFR 404.1565 and 416.965.

The ALJ may ask you these questions from the perspective of the job duties as described by the claimant, as described in the *DOT,* and based on your professional experience. At the hearing, be prepared to cite, explain, and furnish any sources you rely upon in your testimony.

Exertional Categories

As we have already noted, we use the same terms as the *DOT* to categorize occupations according to their strength demands. We define these terms in our regulations and rulings, and you must be familiar with our definitions. **The ALJ cannot accept any testimony you give that is inconsistent or conflicts with SSA's definitions.**

We have a number of instructions that define the exertional categories. The following is only a brief summary of key features of our definitions. It is essential that you read and become familiar with the definitions in the policy documents we list at the end of this handbook.

- Sedentary Work: Sedentary occupations generally require sitting for up to 6 hours in an 8-hour workday. Although sedentary jobs involve sitting, a certain amount of walking and standing is often necessary to carry out job duties. Periods of standing or walking should generally total no more than about 2 hours out of an 8-hour workday. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket

[46] We define the terms in this list in the sections that follow.

files, ledgers, and small tools.[47] Most unskilled sedentary jobs require good use of both hands and the fingers (bilateral manual dexterity) and sufficient vision to work with small objects.

- Light Work: Light work involves lifting no more than 20 pounds at a time, with frequent lifting or carrying of objects weighing up to 10 pounds.[48] Even though the weight the claimant may lift may be very little, a job is in the "light" category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. Since frequent lifting or carrying requires an individual to be on his or her feet up to two-thirds of a workday, the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday. Sitting may occur intermittently during the remaining time. We consider that, if a claimant can do the full range of light work, he or she can also do the full range of sedentary work, unless there is some other limiting factor, such as loss of fine dexterity or inability to sit for long periods of time. While light occupations require use of the arms and hands to grasp and to hold and turn objects, they generally do not require use of the fingers for fine activities to the extent required in much sedentary work.

- Medium Work: Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. A full range of medium work requires standing or walking for a total of approximately 6 hours in an 8-hour work day. Medium work generally requires use of the arms and hands only to grasp, hold, or turn objects. It also often requires both considerable lifting and frequent bending or stooping.

- Heavy Work: Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds.

- Very Heavy: Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting and carrying of objects weighing 50 pounds or more.

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[47] *Occasionally* means occurring from very little up to one-third of the workday, or up to about 2 hours out of an 8-hour workday.
[48] *Frequent* means occurring from one-third to two-thirds of the workday, or about 2-6 hours out of an 8-hour workday.

Skill Levels

Our rules classify work as *skilled, semiskilled,* and *unskilled.* A *skill* is knowledge of a work activity that requires the exercise of significant judgment beyond the carrying out of simple job duties. Skills are practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them in practice in a proper and approved manner. This includes activities like making precise measurements, reading blueprints, and setting up and operating complex machinery. A skill gives a person a special advantage over unskilled workers in the labor market. Skills are generally acquired through the performance of an occupation which is above the unskilled level. Under SSA's rules, *a claimant cannot gain skills from performing unskilled work.*[49]

We distinguish "skills" from worker "traits." Traits are inherent qualities that a worker brings to the job, such as good eyesight or good eye-hand coordination. When an ALJ asks you whether a claimant has a "skill," you must be careful not to confuse the two terms. For example, the *traits* of coordination and dexterity may be contrasted with a *skill* in the use of the hands or feet for the rapid performance of repetitive work tasks. It is the acquired capacity to perform the work activities with facility that gives rise to potentially transferable skills.

You must be prepared to classify the claimant's past relevant work and any jobs that you identify in response to hypothetical questions (see page 35) as "skilled," "semiskilled," or "unskilled," as defined in our regulations and SSRs. These descriptions of the skill levels are based on the *DOT*'s specific vocational preparation (SVP) ratings for each described occupation. Unskilled work corresponds to an SVP of 1-2; semiskilled work to an SVP of 3-4; and skilled work to an SVP of 5-9. In general, we use the following definitions:

- Unskilled Work: Unskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time, usually 30 days or less. For example, unskilled occupations include work where the primary work duties are handling, feeding, and off-bearing, or machine tending in which a person can usually learn to do the job in 30 days or less, and little specific vocational preparation and judgment are needed. ***A person does not gain work skills by doing unskilled jobs.***

[49] Our rules also provide for the possibility that a claimant may have gained skills from education that provides for direct entry into skilled work, although this is rare in our cases.

- Semiskilled Work: Semiskilled occupations are more complex than unskilled ones and simpler than the more highly skilled types of occupations. They contain more variables and require more judgment than unskilled occupations. Even though semiskilled occupations typically require more than 30 days to learn, the content of work activities in some semiskilled occupations may be little more than unskilled. Therefore, close attention must be paid to the actual complexities of the job in dealing with data, people, or objects and to the judgments required to do the work. Semiskilled occupations may require alertness and close attention to machine processes; inspecting, testing or looking for irregularities; tending or guarding equipment, property, materials, or persons against loss, damage or injury; or other types of activities that are similarly less complex than skilled work, but more complex than unskilled work. An occupation may be classified as semiskilled when coordination and dexterity are necessary, as when hands or feet must be moved quickly to do repetitive tasks.

- Skilled Work: Skilled occupations are more complex and varied than unskilled and semiskilled occupations. They require more training time and often a higher educational attainment. Abstract thinking in specialized fields may be required. For example, skilled work may require judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality or quantity of material to be produced; laying out work, estimating quality, determining the suitability and necessary quantities of materials, making precise measurements, reading blueprints or other specifications, or making necessary computations or mechanical adjustments to control or regulate the work; or dealing with people, facts, figures, or abstract ideas at a high level of complexity.

Transferability of Skills

As you become more familiar with the grid rules, you will see that in many cases the skill level of a claimant's PRW does not affect the decision; *i.e.*, the decision will be the same regardless of whether the claimant's PRW was unskilled or involved skills and whether the claimant has skills he or she can use in other work. However, as we have already noted, there are some situations in which a determination regarding transferability of skills can be decisive. In simple terms, *transferable skills* are skills that a claimant has from PRW that he or she can no longer perform but can use in other skilled or semiskilled work that is within his or her RFC.

Under our rules, transferability depends largely on the similarity of occupationally significant work activities among different jobs. Transferability is found most probable and meaningful among jobs in which:

- The same or a lesser degree of skill is required (from a skilled to a semiskilled or another skilled job, or from one semiskilled to another semiskilled job), because the claimant is not expected to perform more complex jobs than he or she performed in the past;
- The same or similar tools and machines are used; and
- The same or similar raw materials, products, processes or services are involved.

20 CFR 404.1568 and 416.968; and SSR 82-41.

Generally, the greater the degree of acquired work skills, the less difficulty the claimant will have in transferring skills to other jobs, except when the skills are such that they are not readily usable in any other industries, jobs, and work settings. Reduced RFC and advancing age are important factors associated with transferability because reduced RFC limits the number of occupations an individual can do, and advancing age decreases the possibility of making a successful vocational adjustment. In this regard, we have strict rules regarding transferability for some claimants who are at least 55 years old and even stricter rules for some claimants beginning at age 60.

When you are reviewing the evidence for the case before the hearing or in connection with interrogatories, you should note whether the claimant has any skilled or semiskilled PRW. If so, you should also be prepared to describe the skills. The ALJ may also pose hypothetical questions to you that assume one or more different RFC assessments, and you should be prepared to cite occupations to which the skills may be transferred or to explain why there are no transferable skills. If the claimant is age 55-59 or age 60 and older, you must also be prepared to testify about whether there is transferability under the rules for claimants of those ages.

Hypothetical Questions

In addition to questions requesting factual information—such as how the *DOT* describes the duties of a particular occupation—ALJs will often ask you hypothetical questions (often referred to as "hypotheticals"). As we explained earlier, ALJs do not know what their decisions will be when they enter the hearing. Therefore, in many cases, the ALJ will not have

determined what the claimant's RFC is when he or she asks you for opinions about work.

Because of this, the ALJ will phrase some of his or her questions to you in hypothetical terms, posing potential findings in terms like this: "Assume an individual of the claimant's age, education level, and past work experience. If that person can sit for so many hours, stand for so many hours, lift so many pounds, and has the following mental limitations..."[50] The ALJ may ask you more than one such hypothetical question. Often, ALJs provide a hypothetical that assumes that they agree with all of a claimant's allegations and at least one other that assumes that they disagree to some extent or in certain particulars; for example, that the claimant has limitations in lifting weights, but not to the extent he or she alleges.

The first hypothetical may be about step 4 of the sequential evaluation process; that is, whether a person with hypothetical physical and mental limitations the ALJ specifies could do the claimant's PRW. More often, the ALJ will ask hypotheticals that will help him or her determine at step 5 whether the claimant can make an adjustment to other work that exists in the national economy, considering the claimant's age, education, work experience, and RFC. The ALJ will specify what facts you are to assume.

If you respond to a hypothetical that there are occupations the hypothetical individual can perform given the facts assumed, the ALJ will then ask you to give examples of those occupations. You should be prepared to provide:

- At least three examples (if possible), with an explanation of why you believe that the individual would be able to do the jobs given the hypothetical facts.

- Information about the numbers of jobs in each occupation nationally. Some ALJs may inquire about local job numbers (*e.g.*, by state or region). Remember that it does not matter whether work exists in the immediate area in which the claimant resides, whether he or she would actually be hired, or if a specific vacancy exists. Rather, it only matters how many of the jobs exist in the national economy.

- The *DOT* numbers for the occupations if they are listed in the *DOT,* and whether there are any conflicts or apparent conflicts between the description of an occupation in the *DOT* and your testimony. See section 7 below for more information about this subject.

[50] The ALJ may even refer to a hypothetical claimant.

You **must** not give your opinion about:

- The claimant's diagnosis, prognosis, physical and mental limitations or restrictions, or any other medical issue.
- Whether the number of jobs within a given occupation is "significant."
- The claimant's residual functional capacity.
- Whether the claimant is disabled.

The ALJ will decide these issues. If you are asked your opinion about any of these issues, you should not answer.

The ALJ will also give the claimant and his or her representative a chance to ask you questions. They may ask you hypotheticals as well.

If you believe that any hypothetical question is incomplete (*e.g.*, a hypothetical does not adequately describe the functional abilities of a hypothetical person for you to determine whether there is work they could do), you should ask the ALJ for clarification before you answer.

You should be prepared to provide a complete explanation for your answers to hypothetical questions and other questions. You should have available, at the hearing, any vocational resource materials that you are likely to rely upon and should be able to thoroughly explain what resource materials you used and how you arrived at your opinions. In some cases, the ALJ may ask you to provide relevant portions of materials you rely upon.

SSR 00-4p: Your Testimony, the *DOT*, and SSA's Rules

There is one more very important policy you must know about, set out in SSR 00-4p. Generally, occupational evidence you provide should be consistent with the *DOT*. SSR 00-4p provides that the ALJ must ask you about any possible conflict between the information you provide and the information in the *DOT*. If there is an inconsistency or conflict—or even an apparent inconsistency or conflict—between your testimony and a description in the *DOT*, the ALJ must ask you for a reasonable explanation

for the difference (or apparent difference) between your testimony and the description in the *DOT.*

It is important that you identify these conflicts, if any, to the ALJ. The ALJ is required to elicit an explanation from you for any conflict or apparent conflict between occupational information you provide and the information in the *DOT*. Neither VE testimony nor *DOT* information automatically "trumps" when there is a conflict. However, the ALJ cannot rely on such testimony without eliciting your explanation and documenting whether it provides a reasonable basis for relying on your testimony rather than the conflicting *DOT* information. SSR 00-4p provides examples of common reasons for conflicts between VE testimony and the *DOT* including, but not limited to the follow scenarios:

- Your testimony may include information that is not listed in the *DOT*. The *DOT* contains information about most, but not all, occupations. The *DOT's* occupational definitions are the result of comprehensive studies of how similar jobs are performed in different workplaces. The term "occupation," as used in the *DOT*, refers to the collective description of those jobs. Each occupation represents numerous jobs. Information about a particular job's requirements or about occupations not listed in the *DOT* may be available in other reliable publications, information obtained directly from employers, or from your experience in job placement or career counseling. You should be prepared to explain why your sources are reliable.

  NOTE: During your testimony, maintain easy access to any sources you rely upon, as the ALJ, claimant, or representative may have questions about your sources. Particularly, any sources outside of those listed under 20 CFR 404.1566(d) and 416.966(d).

- The *DOT* lists maximum requirements of occupations as generally performed, not the range of requirements of a particular job as it is performed in specific settings. You may be able to provide more specific information about how jobs or occupations are performed than in the *DOT*.

You must also be alert to apparent conflicts. For example:

- Descriptions of jobs in the *DOT* may refer to job materials or processes that have been replaced by more modern materials or processes. If you name an occupation that currently exists but that is performed differently from the way the *DOT* describes it, you should explain that

there is a difference between the way the job is performed now (an apparent conflict) and explain it.

- An ALJ's hypothetical may limit the claimant to "simple" or "repetitive" tasks, and you identify jobs with a GED[51] reasoning level of 3 or higher. There is an apparent conflict between a job that requires reasoning level 3, and a hypothetical individual that can perform only "simple" or "repetitive" tasks.[52] Be prepared to explain how the hypothetical individual could perform this job.

- An ALJ's hypothetical may contain some type of reaching limitation, for example, occasional overhead reaching. You identify a job that requires some degree of reaching, although perhaps not overhead. There is an apparent conflict if a job requires reaching, and a hypothetical claimant that cannot perform overhead reaching. Be prepared to explain how a person with the claimant's particular reaching limitation can perform the cited job(s).

It is also important to remember a principle we have stated earlier in this handbook: the ALJ cannot accept an explanation from you that conflicts with our policies. For example:

- You may reasonably classify the exertional demands of an occupation you name differently than in the *DOT* based on other reliable occupational information, including your own experience; *e.g.*, describing a particular occupation as "light" when the *DOT* classifies it as "medium." However, you may not redefine our terms for the exertional levels. For example, if all available evidence (including your testimony) establishes that the exertional demands of an occupation meet our regulatory definition of "medium" work (20 CFR 404.1567 and 416.967), the ALJ would not be able to rely on your testimony that the occupation is "light" work.

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[51] Appendix C to the DOT describes the General Education Development (GED) Scale, composed of three divisions: Reasoning Development, Mathematical Development, and Language Development. The GED Scale includes six levels of Reasoning Development, ranging from level 1 (the least complex level) to level 6 (the most complex level). The DOT assigns a reasoning level to most occupations.

[52] An occupation with reasoning level 3 requires individuals to "[a]pply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form. Deal with problems involving several concrete variables in or from standardized situations." It could be argued that occupations requiring reasoning level 3 are too complex for an individual limited to "simple" or "repetitive" tasks. Therefore, an apparent conflict exists.

- Similarly, our definitions of skill levels are controlling. Again, there may be a good reason for classifying an occupation's skill level differently than in the *DOT,* but an ALJ would not accept your testimony if you said that unskilled work involves complex duties that take many months to learn, because that is inconsistent with our regulatory definition of unskilled work in 20 CFR 404.1568 and 416.968.

Interrogatories

As we have already noted, we may ask you to respond in writing to specific written questions referred to as *interrogatories*. You may receive interrogatories from the ALJ, but you may also receive interrogatories from hearing office staff before a case is assigned to an ALJ for a hearing.

After the case is assigned to an ALJ, you may receive interrogatories from the ALJ before or after the hearing. You may receive a copy of evidence—especially new evidence—pertinent to the interrogatories or a summary of case information. If you provide responses to interrogatories before a hearing, the ALJ may or may not ask you to also appear and testify at a hearing.

An ALJ may also send you interrogatories that were posed by the claimant or the claimant's representative. The ALJ must approve any interrogatories proposed by a claimant or representative. You should never answer interrogatories submitted directly to you from the claimant or his or her representative, and you should send your responses to interrogatories only to the ALJ. The ALJ and his or her staff will ensure that the claimant and his or her representative receive a copy.

Usually, the interrogatories will be in the form of a questionnaire. You may type or legibly write your responses directly on the questionnaire if space permits. If you need more space to answer a question, attach separate sheets of paper with your responses. You should answer all questions completely. It is especially important that you explain and support your responses with references to specific evidence in the case record you received from the hearing office. Identify the reports in which the information is contained. All correspondence between you and the ALJ will become part of the official case record.

If you have a question about any of the interrogatories, you should request clarification from the ALJ (or the Hearing Office Chief Administrative Law Judge if the case is not yet assigned to a particular ALJ) in writing.[53] If you cannot answer a particular question or cannot answer it completely because of conflicts in the evidence or because the evidence is incomplete, you should respond by explaining why you cannot answer the question. If possible, you should also provide an opinion and recommendation to the ALJ about what evidence he or she could obtain to resolve the conflict or complete the record.

[53] Any requests for clarification should be in writing, not over the phone or through other means.

If the interrogatories relate to new evidence the ALJ received after you testified or responded to other interrogatories, you should state whether the new evidence changes any of your prior responses and why.

Note that in all cases, the ALJ will submit the questions and your responses for review to the claimant's representative (if the claimant has a representative) with a copy to the claimant (or just to the claimant if unrepresented). The claimant has the right to request a supplemental hearing or to produce other information, to rebut any of your responses.

List of References

Social Security's regulations are compiled in Title 20 of the *Code of Federal Regulations*. Social Security Rulings (SSR) are published by the Commissioner to explain and give detail to principles set out in the Social Security Act and regulations. The following is a list of regulation sections and SSRs with which you should be familiar. Familiarity with the regulations and SSRs is essential to a complete understanding of the role of vocational evidence in Social Security disability adjudication. However, we do not intend this list to be a complete reference to all Social Security policy related to disability benefits. The ALJ will tell you if there are other policy statements with which you must be familiar in a given case.

You can find the full text of the Act, regulations, SSRs, and other instructions online at https://www.socialsecurity.gov/regulations/. You can also find a link to these sources and other resources at: https://www.socialsecurity.gov/disability/.

- To go directly to the regulations that start with the number "404" (Part 404 – Title II), go to this page: https://www.socialsecurity.gov/OP_Home/cfr20/404/404-0000.htm.

- The table of contents for the Part 416 (Title XVI) regulations is on this page: https://www.socialsecurity.gov/OP_Home/cfr20/416/416-0000.htm.

- To find the SSRs by year, go to this page: https://www.socialsecurity.gov/OP_Home/rulings/rulfind1.html. The first number in an SSR citation is the year of publication. For example, SSR 96-8p was published in 1996.

The grid rules are found at 20 CFR Part 404, Subpart P, Appendix 2: https://www.ssa.gov/OP_Home/cfr20/404/404-app-p02.htm.

Note: SSA keeps the online "Blue Book" (*Disability Evaluation Under Social Security*) up to date, while we update the listings in the regulations link above only once a year. We prefer that you refer to the online "Blue Book" to ensure that you are considering the most recent version of the listings.

Regulation sections

20 CFR 404.1520, *Evaluation of disability in general*

20 CFR 416.920, *Evaluation of disability of adults, in general*

20 CFR 404.1545 and 416.945, *Your residual functional capacity*

20 CFR 404.1560 and 416.960, *When we will consider your vocational background*

20 CFR 404.1563 and 416.963, *Your age as a vocational factor*

20 CFR 404.1564 and 416.964, *Your education as a vocational factor*

20 CFR 404.1565 and 416.965, *Your work experience as a vocational factor*

20 CFR 404.1566 and 416.966, *Work which exists in the national economy*

20 CFR 404.1567 and 416.967, *Physical exertion requirements*

20 CFR 404.1568 and 416.968, *Skill requirements*

20 CFR 404.1569, *Listing of Medical-Vocational Guidelines in appendix 2,* and 416.969, *Listing of Medical-Vocational Guidelines in appendix 2 of subpart P of part 404 of this chapter*

20 CFR 404.1569a and 416.969a, *Exertional and nonexertional limitations*

Social Security Rulings

SSR 82-40
Titles II and XVI: The Vocational Relevance of Past Work Performed in a Foreign Country

SSR 82-41
Titles II and XVI: Work Skills and Their Transferability as Intended by the Expanded Vocational Factors Regulations effective February 26, 1979

SSR 82-61
Titles II and XVI: Past Relevant Work — The Particular Job or the Occupation as Generally Performed

SSR 82-62
Titles II and XVI: A Disability Claimant's Capacity to Do Past Relevant Work, In General

SSR 83-5a
Sections 205, 216(i), 223(d), and 1614(a)(3) (42 U.S.C. 405, 416(i), 423(d), and 1382c(a)(3)) Disability — Medical-Vocational Guidelines — Conclusiveness of Rules

SSR 83-10
Titles II and XVI: Determining Capability To Do Other Work — The Medical-Vocational Rules of Appendix 2

SSR 83-11
Titles II and XVI: Capability to Do Other Work — The Exertionally Based Medical-Vocational Rules Met

SSR 83-12
Titles II and XVI: Capability To Do Other Work — The Medical-Vocational Rules as a Framework for Evaluating Exertional Limitations Within a Range of Work or Between Ranges of Work

Note: SSR 83-13 was replaced by SSR 85-15 in 1985

SSR 83-14
Titles II and XVI: Capability to Do Other Work — The Medical-Vocational Rules as a Framework for Evaluating a Combination of Exertional and Nonexertional Impairments

SSR 85-15
Titles II and XVI: Capability To Do Other Work — The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments

SSR 86-8
Titles II and XVI: The Sequential Evaluation Process

SSR 96-8p
Policy Interpretation Ruling Titles II and XVI: Assessing Residual Functional Capacity in Initial Claims

SSR 96-9p

Policy Interpretation Ruling Titles II and XVI: Determining Capability to Do Other Work — Implications of a Residual Functional Capacity for Less Than a Full Range of Sedentary Work

SSR 00-4p

Titles II and XVI: Use of Vocational Expert and Vocational Specialist Evidence, and Other Reliable Occupational Information in Disability Decisions

SSR 03-3p

Policy Interpretation Ruling — Titles II and XVI: Evaluation of Disability and Blindness in Initial Claims for Individuals Aged 65 or Older

SSR 11-2p

Titles II and XVI: Documenting and Evaluating Disability in Young Adults

No. 17-1184

In The
Supreme Court of the United States

MICHAEL J. BIESTEK,

Petitioner,

v.

NANCY A. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES; AARP & AARP FOUNDATION IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICI CURIAE[1]

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a national membership organization comprising approximately 2,900 individuals, mostly attorneys, who represent individuals applying and appealing claims for Social Security and Supplemental Security Income (SSI) benefits. NOSSCR members include employees of legal services organizations, educational institutions, and other nonprofits; employees of for-profit law firms and other businesses; and individuals in private practice.

NOSSCR members represent Social Security and SSI claimants before the Social Security Administration and in the courts. Approximately 70% of claimants who appeared in disability hearings before administrative law judges in the fiscal year ending September 30, 2017, were represented by attorneys or non-attorney representatives.

NOSSCR has a great interest in ensuring that its members' clients are awarded benefits when they meet the criteria under the Social Security Act and the Commissioner's regulations, and that their clients continue to have due process hearings where the claimants and

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[1] Under Supreme Court Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than Amici or their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Petitioner filed a blanket consent to the filing of amicus briefs. Respondent has consented to Amici filing an amicus brief.

their representatives have the opportunity to engage in relevant cross-examination of vocational experts.

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. AARP and AARP Foundation support ensuring access to disability benefits under the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs because older workers with disabilities rely heavily on those benefits to stay out of poverty. Mikki Waid, *Social Security Disability Benefits: A Lifeline for Workers with Disabilities*, Pub. Policy Inst. (Apr. 2015) https://bit.ly/2BZCgIM (last visited Aug. 29, 2018).

SUMMARY OF THE ARGUMENT

This case concerns step five of the five-step sequential evaluation of the adjudication of disability claims under the Social Security Act. At step five, the Commissioner has the burden to provide evidence of jobs that a claimant can perform which exist in

significant numbers in the economy. 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. §§ 404.1566(d); 1560(c)(2) (2018).[2] The vocational expert in this case testified to the existence of work as a sorter and final assembler, relying not only upon the Dictionary of Occupational Titles, but also on her own experience. Biestek asked for the job analysis supporting the vocational expert's testimony. The ALJ stated that she would "not require that." Pet. App. at 119a. Biestek could not examine the foundation of that testimony once the ALJ stated that she would not require production of foundational material. Biestek had no opportunity to identify potential flaws in the analysis and argue to the ALJ that a preponderance of the evidence did not support the expert's opinion. Without access to the basis of the testimony, Biestek also lacked an adequate record upon which to argue on judicial review that the vocational expert's analysis did not support her testimony. Thus the vocational expert's testimony lacked a foundation which a reasonable mind might accept as adequate to support the ALJ's conclusion that there was a significant number of jobs in the economy which Biestek could perform. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Moreover, the Commissioner has made clear that vocational experts should be prepared to cite, explain, and furnish any sources relied upon to support the testimony. Soc. Sec. Admin., *Vocational Expert Handbook* (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf, at 3, 19, 20, 28, 31, 38 (last visited Aug. 29, 2018) (hereafter

[2] All citations are to the April 1, 2018 20 C.F.R.

"*Handbook*"). The evidentiary standard in *Perales* should apply to vocational expert testimony, and vocational experts should be prepared to explain why the sources which provide the basis for their testimony are reliable. *Id.* at 38.

ARGUMENT

I. Vocational Expert Testimony About the Number of Jobs is Not Consistent or Inherently Reliable, and an Inability to Verify the Basis of Vocational Expert Testimony Would Result in Denial of Meritorious Claims.

The regulations require a five-step sequential evaluation process to resolve disability claims. 20 C.F.R. § 404.1520. Step five consists of two distinct parts: (1) whether a claimant's vocational profile (age, education, work experience, and limitations resulting from physical and mental impairments) allows for the performance of specific jobs in the economy, and (2) whether the jobs identified exist in "significant numbers either in the region where you live or in several regions of the country."[3] 20 C.F.R. § 404.1566(d). The Commissioner has the responsibility "for providing evidence that demonstrates that other work exists in significant numbers in the national economy that you can do." 20 C.F.R. § 404.1560(c)(2). ALJs frequently use

[3] The Commissioner does not define "significant numbers" in the regulation and offers no guidance in any sub-regulatory rulings or manuals.

vocational experts to answer questions about the existence of work and the numbers of jobs. 20 C.F.R. § 404.1566(e).

The Commissioner provides some protection to claimants regarding the first part of step five in Social Security Ruling 00-4p, which places an "affirmative responsibility" on the ALJ "to ask about any possible conflict" between the vocational expert's testimony and the *Dictionary of Occupational Titles* (DOT), U.S. Dep't of Labor, *Dictionary of Occupational Titles* (4th ed. rev. 1991), https://www.oalj.dol.gov/LIBDOT.HTM.[4] If an apparent conflict exists between the expert testimony and the DOT, the ALJ must resolve the conflict and explain in the decision how the conflict was resolved. *Id.* The DOT describes job titles, industry, duties, exertion, education, and training requirements of jobs, but does not provide numbers of jobs in the economy.

The Commissioner's institutional effort to obtain reliable evidence from vocational experts does not extend to vocational expert testimony regarding the numbers of jobs in the economy. *Shaibi v. Berryhill*, 883 F.3d 1102, 1108-09 (9th Cir. 2018) (no *sua sponte* duty

[4] Social Security Ruling 00-4p recognizes that vocational expert testimony will sometimes conflict with information in the DOT. "Neither the DOT nor the VE [vocational expert] or VS [vocational specialist] evidence automatically 'trumps' when there is a conflict. The adjudicator must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on the VE or VS testimony rather than on the DOT information." SSR 00-4p, 65 Fed. Reg. 75,759 (Dec. 4, 2000). Neither the regulations nor the rulings define the qualifications of a vocational expert.

to resolve conflicts regarding the numbers of jobs in the economy). Vocational expert opinions about numbers of jobs vary widely. In this case, for example, the vocational expert testified that there were 120,000 sorter jobs in the nation.[5] Recent district court cases show that there is no consensus on the number of nut sorter jobs in the national economy. As shown in the table below, vocational experts in other cases have opined that there are as few as 274 nut sorter jobs nationally, and as many as 471,000, with a range of opinions in between.

Number of nut sorter jobs in the national economy	Month and year of vocational expert opinion
274[6]	October/November 2016
5,000[7]	September 2008
16,000[8]	September 2014
26,000[9]	June 2015
40,000[10]	October 2014

[5] The vocational expert referred to this job as "sorter." Pet. App. at 116a. The DOT code provided corresponds to the title of nut sorter. DOT 521.687-086. The DOT states that a nut sorter "[r]emoves defective nuts and foreign matter from bulk nut meats." *Id.*

[6] *Wood v. Berryhill*, No. 3:17-cv-5430-RJB-BAT, 2017 WL 6419313, at *3 (W.D. Wash. Nov. 17, 2017).

[7] *Binger v. Astrue*, No. EDCV 08-0852-RC, 2009 WL 2848999, at *6 (C.D. Cal. Aug. 31, 2009).

[8] *Wolfanger v. Colvin*, No. 6:16-CV-06688 (MAT), 2018 WL 2425811, at *2 (W.D.N.Y. May 30, 2018).

[9] *Kruppenbacker v. Berryhill*, No. 6:17-CV-06068-MAT, 2017 WL 6275727, at *2 (W.D.N.Y. Dec. 11, 2017).

[10] *Alexander v. Berryhill*, No. 5:16-CV-747-BO, 2017 WL 3624238, at *3 (E.D.N.C. Aug. 23, 2017).

50,000[11]	November 2013
75,000[12]	October 2011
135,000[13]	September 2012
471,000[14]	December 2014

The vocational expert in this case also testified that there were 240,000 final assembler jobs in the nation.[15] Pet. App. at 116a. Recent cases show variable responses for the number of final assembler jobs in the national economy.

Number of final assembler jobs in the national economy	Month and year of vocational expert opinion
4,800[16]	September 2008
6,500[17]	December 2014

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[11] *Flores v. Berryhill,* No. CV H-17-30, 2017 WL 3412163, at *10 (S.D. Tex. Aug. 7, 2017).

[12] *Stone v. Colvin,* No. 1:13CV52/MCR/CAS, 2014 WL 1017929, at *9 (N.D. Fla. Mar. 17, 2014).

[13] *Woodby v. Colvin,* No. CV.A. 1:14-952-RMG, 2015 WL 628482, at *9 (D.S.C. Feb. 12, 2015).

[14] *Mora v. Berryhill,* No. 1:16-CV-01279-SKO, 2018 WL 636923, at *3 (E.D. Cal. Jan. 31, 2018).

[15] The vocational expert referred to the job as "bench assembler," but the DOT code given refers to final assembler, DICOT 713.687-018. According to the DOT, a final assembler "[a]ttaches nose pads and temple pieces to optical frames, using handtools." *Id.*

[16] *Binger,* 2009 WL 2848999, at *6.

[17] *Kotok v. Berryhill*, No. C17-191-BAT, 2017 WL 2859507, at *3 (W.D. Wash. Jul. 5, 2017).

7,000[18]	June 2013
14,000[19]	October 2012
20,000[20]	June 2015
75,000[21]	September 2014
175,000[22]	November 2013
239,500[23]	May 2013
280,160[24]	March 2011

These experts were all asked questions meant to elicit whether there were jobs for a hypothetical claimant, and they all: (a) stated that either nut sorter or final assembler could be performed; and (b) then gave widely disparate answers as to the numbers of jobs available nationally. The answers are not reconcilable through any published data. ALJs have accepted and relied on this evidence to deny claims for benefits. The courts review a small percentage of ALJ decisions and only those where the claimant files a complaint for judicial review of the Commissioner's final decision. The

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[18] *Wilson v. Berryhill*, No. 1:16-CV-01861-SKO, 2018 WL 1425963, at *35 (E.D. Cal. Mar. 22, 2018).

[19] *Razo v. Colvin*, No. 1:14-CV-00945-NYW, 2015 WL 6689400, at *13 (D. Colo. Nov. 3, 2015).

[20] *Kruppenbacker v. Berryhill*, No. 6:17-CV-06068-MAT, 2017 WL 6275727, at *2 (W.D.N.Y. Dec. 11, 2017).

[21] *Davis v. Comm'r of Soc. Sec.*, No. 15-CV-10176, 2015 WL 12683814, at *3 (E.D. Mich. Nov. 19, 2015).

[22] *Flores v. Berryhill*, No. CV H-15-3462, 2017 WL 698528, at *11 (S.D. Tex. Feb. 21, 2017).

[23] *Paul v. Colvin*, No. 3:15CV123/EMT, 2016 WL 1169475, at *6 (N.D. Fla. Mar. 22, 2016).

[24] *Steigerwald v. Comm'r of Soc. Sec.*, No. 1:12 CV 02739, 2013 WL 5330837, at *2 (N.D. Ohio Sept. 23, 2013).

courts do not review favorable decisions where ALJs rely on vocational expert testimony to find that a claimant's impairments preclude the performance of jobs which exist in significant numbers. There may well be many cases where the vocational expert testified to the existence of even fewer numbers of the same jobs and approved the claims.

Claimants should have right to review, comment on, and rebut evidence in administrative hearings, and vocational expert opinions should not be treated differently. The right of claimants to comment on and rebut vocational expert opinions prevents the denial of meritorious claims. An ALJ who relies on vocational expert testimony that there are hundreds of thousands of nut sorter and final assembler jobs may find that there are a significant number of jobs the claimant can perform and deny the claim. However, if the lower estimates of 274 jobs, 5,000 jobs, or even 16,000 jobs in the nation are more accurate, an ALJ may find that the claimant cannot perform a significant number of jobs and award benefits. If a claimant challenges the basis of a vocational expert's opinion, the claimant must be permitted to review the basis of the opinion to ensure that it is reasonably accurate. *See* 5 U.S.C. § 556(d) ("A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.")[25] Without the

[25] This Court has not decided whether the Administrative Procedure Act generally applies to Social Security hearings. However, in *Perales*, this Court stated that the provisions of 5 U.S.C.

ability to review the basis of the testimony, a claimant cannot present an effective challenge to the vocational expert's opinions. A claimant must be able to meaningfully comment on and rebut a vocational expert's opinion. A "claimant will rarely, if ever, be in a position to anticipate the particular occupations a [vocational expert] might list and the corresponding job numbers to which a [vocational expert] might testify at a hearing." *Shaibi*, 883 F.3d at 1110. The courts must remain cognizant "that the lack of pretrial discovery in Social Security hearings can make the task of cross-examining a [vocational expert] quite difficult." *Britton v. Astrue*, 521 F.3d 799, 804 (7th Cir. 2008).

Requiring vocational experts to produce data on demand serves the interests of both claimants and the Commissioner. Amici recognize that the Social Security Administration has both an interest in ensuring that benefits are paid promptly to those who are entitled to them, and also an interest in protecting the disability trust fund against non-meritorious claims. If data must be available on demand, both claimants and the Commissioner can expect greater reliability from vocational expert testimony, more uniformity in the adjudicative system, and more efficient resolution of conflicts in or questions about the testimony. As the Fourth Circuit explained in *U.S. Steel Min. Co., Inc. v.*

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§ 556(d) were consistent with the Social Security Act. *Perales*, 402 U.S. at 409-10. The APA either applies or informs the principles of administrative notice and rebuttal evidence in Social Security disability claims.

Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, 187 F.3d 384 (4th Cir. 1999):

> The ALJ's duty to screen evidence for reliability, probativeness, and substantiality similarly ensures that final agency decisions will be based on evidence of requisite quality and quantity. As the Supreme Court has observed, in enacting § 556(d) of the Administrative Procedure Act, "Congress was primarily concerned with the elimination of agency decision-making premised on evidence which was of poor quality-irrelevant, immaterial, unreliable, and nonprobative-and of insufficient quantity." *Steadman v. SEC,* 450 U.S. 91, 102, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981).

Id. at 389.

The requirement to produce the data upon which the vocational expert relied on demand ensures fairness in evaluation of a claimant's questions about vocational expert testimony. While the substantial evidence standard applies to judicial review of Social Security cases, claims at the administrative level before the ALJ are decided based on a preponderance of the evidence. 20 C.F.R. § 404.953(a). If a claimant questions vocational expert testimony, and on production of the vocational expert's data the claimant identifies a flaw in the analysis, the claimant then can point out the flaw to the ALJ and argue that a preponderance of the evidence supports a conclusion that there are not jobs in significant numbers that the claimant can perform. If the ALJ agrees with the claimant, then further

litigation has been prevented, and a deserving claimant has been awarded benefits. If the ALJ does not agree with the claimant, then the ALJ should provide an explanation in the decision. If this explanation satisfies the claimant, or is at least not legally or factually incorrect, litigation may be prevented. If the ALJ does not agree with the claimant's challenge, and the claimant believes the ALJ's decision is not supported by substantial evidence, the record will include the detail necessary for a reviewing court to evaluate the ALJ's decision to rely on the vocational expert's opinion. Requiring vocational experts to produce the foundation and reasoning underlying their opinions on demand and allowing claimants to comment on and rebut those opinions is consistent with principles of reliability, consistency, and fairness which serve the interests of both claimants and the Commissioner.

II. Requiring Vocational Experts to Provide Data Underlying Their Opinions Will Not Unduly Burden the Agency.

The Seventh Circuit's requirement that vocational experts provide the reasoning underlying their opinions on demand does not impose a significant burden on the agency. *McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004). Social Security published the top ten reasons for remands from District Courts for each year from 2010 through 2017, and no vocational expert

issue appears on any list.[26] Even if the "other" category includes vocational issues, the incidence of vocational expert testimony forming the basis for remand from federal courts is uncommon. The rule that vocational experts be able to produce the basis for their testimony on demand has been the law in the Seventh Circuit for over fifteen years. *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). Despite the right of claimants to challenge vocational expert testimony at hearings, processing times at hearing offices within the Seventh Circuit generally fall within the average range.[27] There is no evidence that vocational expert challenges have caused any significant delays or increase in litigation.

The Court in *Perales*, 402 U.S. at 406, was concerned with the burden on the Social Security Administration in different circumstances, but those concerns do not apply here. The petitioner in *Perales* objected to four medical opinions and asked the court to require all doctors who provided a written opinion to submit to

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[26] Office of Hearings Operations, Soc. Sec. Admin., *Top 10 Remand Reasons Cited by the Court on Remands to SSA*, https://www.ssa.gov/appeals/DataSets/AC08_Top_10_CR.html (last visited Aug. 29, 2018).

[27] Social Security operates 164 hearing offices. The fastest processing time for offices within the Seventh Circuit is Fort Wayne, IN which ranks 34th, and the slowest is Madison, WI which ranks 133rd. Of the hearing offices within the Seventh Circuit, seven of them are in the top half in processing time (Fort Wayne, IN, Chicago, IL, Evanston, IL, Orland Park, IL, Oak Brook, IL, Peoria, IL, and Evansville, IN). Office of Hearings Operations, Soc. Sec. Admin., https://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html (last visited Aug. 29, 2018).

cross-examination. To require the administration to arrange for cross-examination of all doctors whose written opinions are already contained in the record would be a significant administrative burden, and also a financial burden, as the Commissioner would have to pay the doctors to review the files and appear at a hearing.

Requiring vocational experts to cite, explain, and furnish the sources relied upon for their testimony imposes little or no burden on the Commissioner. The vocational expert is either physically present at the hearing, appears by telephone or video teleconferencing, or answers interrogatories.[28] The vocational expert should have the basis of the opinion at the time it is given, so it should not be difficult or time-consuming for the expert to cite, explain, and furnish the sources relied upon for their testimony to a claimant's representative if it is requested. This process would likely prevent rather than cause delays by ensuring that vocational experts are well-prepared and give supportable testimony, and would give greater confidence to ALJs in relying on that testimony at step five. If the basis for vocational expert testimony is available on demand, nearly all questions of reliability could be resolved during or shortly after the hearing.

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[28] In cases where interrogatories are posed after the hearing the responses are proffered to the claimant, the claimant then has "the opportunity to review responses, submit comments or rebuttal evidence, object to questions, or to propose additional questions." *HALLEX*, § I-2-5-30.

The vocational expert in this case stated that some of the information relied upon was from individual labor market surveys and was confidential. The ALJ did not require the vocational expert to provide documentation from the surveys which provided the basis for the opinion. It is not clear from the record that this evidence was confidential, but even if it was confidentiality could readily be preserved by redacting any private information in the documents. Redaction would take little time for vocational experts and would not cause additional cost or delay to the agency.

III. Due Process Concerns in *Perales* Support Petitioner's Position.

The Court held the following in *Perales*:

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.

Perales, 402 U.S. at 402. The circumstances in *Perales* differ from the circumstances in this case in several respects, and those differences support Biestek's position.

The claimant in *Perales* was afforded far greater due process regarding medical opinions than Biestek was afforded in his challenge to vocational expert testimony. In *Perales*, the claimant had access to the medical reports in question well before the hearing; the reports were completed by physicians who had examined the claimant, several of whom were treating physicians retained by the claimant; the reports contained the details of the examinations which provided the bases for the doctors' conclusions; the regulations specifically provided the claimant with the right to request a subpoena, though the claimant did not take advantage of that right; the reports were available to the claimant prior to the hearing, so he had the opportunity to review the evidence in advance and submit rebuttal evidence. *Id.* at 402-06.

Claimants do not have the same protections regarding vocational expert testimony. Claimants cannot anticipate the testimony, review the foundation of the testimony, or submit rebuttal evidence prior to the hearing. *Britton*, 521 F.3d at 804. Under the regulations, claimants do not ordinarily have a right to submit rebuttal evidence following the hearing. 20 C.F.R. § 404.935(a); 20 C.F.R. § 404.949. A claimant must submit written statements to the ALJ "no later than 5 business days before the date set for the hearing,

unless you show that your circumstances meet the conditions described in § 404.935(b)." 20 C.F.R. § 404.949.

Claimants must ask the ALJ for a continuance or supplemental hearing when surprised by evidence adduced at the hearing. *See HALLEX*, § I-2-6-80. Even if a claimant could submit rebuttal evidence, the best the claimant can do is submit competing evidence post-hearing. *Shaibi*, 883 F.3d at 1110. Without knowing the basis for the vocational expert's conclusions, it may be difficult or even impossible to determine whether there are errors underlying those conclusions.

Opinions regarding medical conditions and resulting limitations are very different from opinions regarding work requirements and numbers of jobs in the economy. *Perales* involved conflicting medical opinions concerning the limiting effects of a back injury. The basis of a claimant's impairments is apparent from the results of examinations and the treatment record in the file, but a medical opinion of limitations resulting from those impairments requires professional judgment. While vocational expert testimony can require professional judgment in some cases, the requirements of jobs are factual and should be verifiable to some degree. The number of jobs in the national or regional economy is a statistical fact. It is reasonable to expect vocational experts to produce the data supporting their opinions on request, since the vocational expert should know the basis at the time of the hearing. The Commissioner recognizes this in the *Handbook* by stating that vocational experts "must be prepared to cite, explain, and furnish any sources relied upon in your

testimony." *Handbook*, at 3, 19, 20, 28, 31, 38. This is consistent with the requirement of the APA that a party be entitled to "conduct such cross-examination as may be required for a full and true disclosure of the facts." *See, e.g.*, 5 U.S.C. § 556(d).

The Commissioner makes it clear in the *Handbook* that the information sought by Biestek should be available at the time of the hearing. The Commissioner should not be heard to argue that a requirement for production of the basis for the vocational expert's testimony is unreasonable or burdensome in the context of non-adversarial administrative disability hearings. A vocational expert should be prepared not only to cite, explain, and furnish any sources relied upon but to also explain why those sources are reliable. *Handbook*, at 38. Biestek and other claimants should have the opportunity "to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Perales*, 402 U.S. at 409 (citing 5 U.S.C. § 556(d)).

CONCLUSION

The Court should reverse the judgment of the Sixth Circuit Court of Appeals and rule that substantial evidence standard is offended using undisclosed methods or sources for estimating job numbers.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BIESTEK *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 17–1184. Argued December 4, 2018—Decided April 1, 2019

Petitioner Michael Biestek, a former construction worker, applied for social security disability benefits, claiming he could no longer work due to physical and mental disabilities. The Social Security Administration (SSA) assigned an Administrative Law Judge (ALJ) to conduct a hearing, at which the ALJ had to determine whether Biestek could successfully transition to less physically demanding work. For guidance on that issue, the ALJ heard testimony from a vocational expert regarding the types of jobs Biestek could still perform and the number of such jobs that existed in the national economy. See 20 CFR §§404.1560(c)(1), 416.960(c)(1). On cross-examination, Biestek's attorney asked the expert "where [she was] getting [her numbers] from," and the expert explained they were from her own individual labor market surveys. Biestek's attorney then requested that the expert turn over the surveys. The expert declined. The ALJ ultimately denied Biestek benefits, basing his conclusion on the expert's testimony about the number of jobs available to him. Biestek sought review in federal court, where an ALJ's factual findings are "conclusive" if supported by "substantial evidence," 42 U. S. C. §405(g). The District Court rejected Biestek's argument that the expert's testimony could not possibly constitute substantial evidence because she had declined to produce her supporting data. The Sixth Circuit affirmed.

Held: A vocational expert's refusal to provide private market-survey data upon the applicant's request does not categorically preclude the testimony from counting as "substantial evidence."

Substantial evidence is "more than a mere scintilla," and means only "such relevant evidence as a reasonable mind might accept as

Syllabus

adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229. Biestek proposes a categorical rule that the testimony of a vocational expert who refuses a request for supporting data about job availability can never clear that bar. To assess that proposal, the Court begins with the parties' common ground: Assuming no demand, a vocational expert's testimony may count as substantial evidence even when unaccompanied by supporting data.

If that is true, is it not obvious why one additional fact—a refusal to a request for that data—should make an expert's testimony categorically inadequate. In some cases, the refusal to disclose data, considered along with other shortcomings, will undercut an expert's credibility and prevent a court from finding that "a reasonable mind" could accept the expert's testimony. But in other cases, the refusal will have no such consequence. Similarly, the refusal will sometimes interfere with effective cross-examination, which a reviewing court may consider in deciding how much to credit an expert's opinion. But other times, even without supporting data, an applicant will be able to probe the strength of the expert's testimony on cross-examination. Ultimately, Biestek's error lies in his pressing for a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data. The inquiry, as is usually true in determining the substantiality of evidence, is case-by-case. It takes into account all features of the vocational expert's testimony, as well as the rest of the administrative record, and defers to the presiding ALJ, who has seen the hearing up close. Pp. 5–11.

880 F. 3d 778, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, BREYER, ALITO, and KAVANAUGH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion. GORSUCH, J., filed a dissenting opinion, in which GINSBURG, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 17–1184

MICHAEL J. BIESTEK, PETITIONER *v.* NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 1, 2019]

JUSTICE KAGAN delivered the opinion of the Court.

The Social Security Administration (SSA) provides benefits to individuals who cannot obtain work because of a physical or mental disability. To determine whether an applicant is entitled to benefits, the agency may hold an informal hearing examining (among other things) the kind and number of jobs available for someone with the applicant's disability and other characteristics. The agency's factual findings on that score are "conclusive" in judicial review of the benefits decision so long as they are supported by "substantial evidence." 42 U. S. C. §405(g).

This case arises from the SSA's reliance on an expert's testimony about the availability of certain jobs in the economy. The expert largely based her opinion on private market-survey data. The question presented is whether her refusal to provide that data upon the applicant's request categorically precludes her testimony from counting as "substantial evidence." We hold it does not.

I

Petitioner Michael Biestek once worked as a carpenter and general laborer on construction sites. But he stopped working after he developed degenerative disc disease, Hepatitis C, and depression. He then applied for social security disability benefits, claiming eligibility as of October 2009.

After some preliminary proceedings, the SSA assigned an Administrative Law Judge (ALJ) to hold a hearing on Biestek's application. Those hearings, as described in the Social Security Act, 49 Stat. 620, as amended, 42 U. S. C. §301 *et seq.*, are recognizably adjudicative in nature. The ALJ may "receive evidence" and "examine witnesses" about the contested issues in a case. §§405(b)(1), 1383(c)(1)(A). But many of the rules governing such hearings are less rigid than those a court would follow. See *Richardson* v. *Perales*, 402 U. S. 389, 400–401 (1971). An ALJ is to conduct a disability hearing in "an informal, nonadversarial manner." 20 CFR §404.900(b) (2018); §416.1400(b). Most notably, an ALJ may receive evidence in a disability hearing that "would not be admissible in court." §§404.950(c), 416.1450(c); see 42 U. S. C. §§405(b)(1), 1383(c)(1)(A).

To rule on Biestek's application, the ALJ had to determine whether the former construction laborer could successfully transition to less physically demanding work. That required exploring two issues. The ALJ needed to identify the types of jobs Biestek could perform notwithstanding his disabilities. See 20 CFR §§404.1560(c)(1), 416.960(c)(1). And the ALJ needed to ascertain whether those kinds of jobs "exist[ed] in significant numbers in the national economy." §§404.1560(c)(1), 416.960(c)(1); see §§404.1566, 416.966.

For guidance on such questions, ALJs often seek the views of "vocational experts." See §§404.1566(e), 416.966(e); SSA, Hearings, Appeals, and Litigation Law

Manual I–2–5–50 (Aug. 29, 2014). Those experts are professionals under contract with SSA to provide impartial testimony in agency proceedings. See *id.*, at I–2–1–31.B.1 (June 16, 2016); *id.*, at I–2–5–48. They must have "expertise" and "current knowledge" of "[w]orking conditions and physical demands of various" jobs; "[k]nowledge of the existence and numbers of [those jobs] in the national economy"; and "[i]nvolvement in or knowledge of placing adult workers[] with disabilities[] into jobs." *Id.*, at I–2–1–31.B.1. Many vocational experts simultaneously work in the private sector locating employment for persons with disabilities. See C. Kubitschek & J. Dubin, Social Security Disability Law & Procedure in Federal Court §3:89 (2019). When offering testimony, the experts may invoke not only publicly available sources but also "information obtained directly from employers" and data otherwise developed from their own "experience in job placement or career counseling." Social Security Ruling, SSR 00–4p, 65 Fed. Reg. 75760 (2000).

At Biestek's hearing, the ALJ asked a vocational expert named Erin O'Callaghan to identify a sampling of "sedentary" jobs that a person with Biestek's disabilities, education, and job history could perform. Tr. 59 (July 21, 2015); see 20 CFR §§404.1567(a), 416.967(a) (defining a "sedentary" job as one that "involves sitting" and requires "lifting no more than 10 pounds"). O'Callaghan had served as a vocational expert in SSA proceedings for five years; she also had more than ten years' experience counseling people with disabilities about employment opportunities. See *Stachowiak* v. *Commissioner of Social Security*, 2013 WL 593825, *1 (ED Mich., Jan. 11, 2013); Record in No. 16–10422 (ED Mich.), Doc. 17–13, p. 1274 (resume). In response to the ALJ's query, O'Callaghan listed sedentary jobs "such as a bench assembler [or] sorter" that did not require many skills. Tr. 58–59. And she further testified that 240,000 bench assembler jobs and 120,000 sorter jobs

existed in the national economy. See *ibid.*

On cross-examination, Biestek's attorney asked O'Callaghan "where [she was] getting those [numbers] from." *Id.*, at 71. O'Callaghan replied that they came from the Bureau of Labor Statistics and her "own individual labor market surveys." *Ibid.* The lawyer then requested that O'Callaghan turn over the private surveys so he could review them. *Ibid.* O'Callaghan responded that she wished to keep the surveys confidential because they were "part of [her] client files." *Id.*, at 72. The lawyer suggested that O'Callaghan could "take the clients' names out." *Ibid.* But at that point the ALJ interjected that he "would not require" O'Callaghan to produce the files in any form. *Ibid.* Biestek's counsel asked no further questions about the basis for O'Callaghan's assembler and sorter numbers.

After the hearing concluded, the ALJ issued a decision granting Biestek's application in part and denying it in part. According to the ALJ, Biestek was entitled to benefits beginning in May 2013, when his advancing age (he turned fifty that month) adversely affected his ability to find employment. See App. to Pet. for Cert. 19a, 112a–113a. But before that time, the ALJ held, Biestek's disabilities should not have prevented a "successful adjustment to other work." *Id.*, at 110a–112a. The ALJ based that conclusion on O'Callaghan's testimony about the availability in the economy of "sedentary unskilled occupations such as bench assembler [or] sorter." *Id.*, at 111a (emphasis deleted).

Biestek sought review in federal court of the ALJ's denial of benefits for the period between October 2009 and May 2013. On judicial review, an ALJ's factual findings—such as the determination that Biestek could have found sedentary work—"shall be conclusive" if supported by "substantial evidence." 42 U. S. C. §405(g); see *supra*, at 1. Biestek contended that O'Callaghan's testimony could

not possibly constitute such evidence because she had declined, upon request, to produce her supporting data. See Plaintiff's Motion for Summary Judgment in No. 16–10422 (ED Mich.), Doc. 22, p. 23. But the District Court rejected that argument. See 2017 WL 1173775, *2 (Mar. 30, 2017). And the Court of Appeals for the Sixth Circuit affirmed. See *Biestek* v. *Commissioner of Social Security*, 880 F. 3d 778 (2018). That court recognized that the Seventh Circuit had adopted the categorical rule Biestek proposed, precluding a vocational expert's testimony from qualifying as substantial if the expert had declined an applicant's request to provide supporting data. See *id.*, at 790 (citing *McKinnie* v. *Barnhart*, 368 F. 3d 907, 910–911 (2004)). But that rule, the Sixth Circuit observed in joining the ranks of unconvinced courts, "ha[d] not been a popular export." 880 F. 3d, at 790 (internal quotation marks omitted).

And no more is it so today.

II

The phrase "substantial evidence" is a "term of art" used throughout administrative law to describe how courts are to review agency factfinding. *T-Mobile South, LLC* v. *Roswell*, 574 U. S. ___, ___ (2015) (slip op., at 7). Under the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains "sufficien[t] evidence" to support the agency's factual determinations. *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 (1938) (emphasis deleted). And whatever the meaning of "substantial" in other contexts, the threshold for such evidentiary sufficiency is not high. Substantial evidence, this Court has said, is "more than a mere scintilla." *Ibid.*; see, *e.g.*, *Perales*, 402 U. S., at 401 (internal quotation marks omitted). It means—and means only—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated*

Edison, 305 U. S., at 229. See *Dickinson* v. *Zurko*, 527 U. S. 150, 153 (1999) (comparing the substantial-evidence standard to the deferential clearly-erroneous standard).

Today, Biestek argues that the testimony of a vocational expert who (like O'Callaghan) refuses a request for supporting data about job availability can never clear the substantial-evidence bar. See Brief for Petitioner 21–34. As that formulation makes clear, Biestek's proposed rule is categorical, rendering expert testimony insufficient to sustain an ALJ's factfinding whenever such a refusal has occurred.[1] But Biestek hastens to add two caveats. The first is to clarify what the rule is not, the second to stress where its limits lie.

Biestek initially takes pains—and understandably so—to distinguish his argument from a procedural claim. Reply Brief 12–14. At no stage in this litigation, Biestek says, has he ever espoused "a free-standing procedural rule under which a vocational expert would always have to produce [her underlying data] upon request." *Id.*, at 2. That kind of rule exists in federal court: There, an expert witness must produce all data she has considered in reaching her conclusions. See Fed. Rule Civ. Proc. 26(a)(2)(B). But as Biestek appreciates, no similar requirement applies

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[1] In contrast, the principal dissent cannot decide whether it favors such a categorical rule. At first, JUSTICE GORSUCH endorses the rule Biestek and the Seventh Circuit have proposed. See *post*, at 2. But in then addressing our opinion, he takes little or no issue with the reasoning we offer to show why that rule is too broad. See *post*, at 4–7. So the dissent tries to narrow the scope of Biestek's categorical rule—to only cases that look just like his. See *post*, at 7–8. And still more, it shelves all the "categorical" talk and concentrates on Biestek's case alone. See *post*, at 1, 4–8. There, JUSTICE GORSUCH's dissent joins JUSTICE SOTOMAYOR's in concluding that the expert evidence in this case was insubstantial. But as we later explain, see *infra*, at 11, Biestek did not petition us to resolve that factbound question; nor did his briefing and argument focus on anything other than the Seventh Circuit's categorical rule. We confine our opinion accordingly.

in SSA hearings. As explained above, Congress intended those proceedings to be "informal" and provided that the "strict rules of evidence, applicable in the courtroom, are not to" apply. *Perales*, 402 U. S., at 400; see 42 U. S. C. §405(b)(1); *supra*, at 2. So Biestek does not press for a "procedural rule" governing "the means through which an evidentiary record [must be] created." Tr. of Oral Arg. 6; Reply Brief 13. Instead, he urges a "substantive rule" for "assess[ing] the quality and quantity of [record] evidence"—which would find testimony like O'Callaghan's inadequate, when taken alone, to support an ALJ's fact-finding. *Id.*, at 12.

And Biestek also emphasizes a limitation within that proposed rule. For the rule to kick in, the applicant must make a demand for the expert's supporting data. See Brief for Petitioner i, 5, 18, 40, 55; Tr. of Oral Arg. 25–26. Consider two cases in which vocational experts rely on, but do not produce, nonpublic information. In the first, the applicant asks for the data; in the second, not. According to Biestek, the expert's testimony in the first case cannot possibly clear the substantial-evidence bar; but in the second case, it may well do so, even though the administrative record is otherwise the same. And Biestek underscores that this difference in outcome has nothing to do with waiver or forfeiture: As he acknowledges, an applicant "cannot waive the substantial evidence standard." *Id.*, at 27. It is just that the evidentiary problem arises from the expert's refusal of a demand, not from the data's absence alone. In his words, the testimony "can constitute substantial evidence if unchallenged, but not if challenged." Reply Brief 18.

To assess Biestek's proposal, we begin with the parties' common ground: Assuming no demand, a vocational expert's testimony may count as substantial evidence even when unaccompanied by supporting data. Take an example. Suppose an expert has top-of-the-line credentials,

including professional qualifications and many years' experience; suppose, too, she has a history of giving sound testimony about job availability in similar cases (perhaps before the same ALJ). Now say that she testifies about the approximate number of various sedentary jobs an applicant for benefits could perform. She explains that she arrived at her figures by surveying a range of representative employers; amassing specific information about their labor needs and employment of people with disabilities; and extrapolating those findings to the national economy by means of a well-accepted methodology. She answers cogently and thoroughly all questions put to her by the ALJ and the applicant's lawyer. And nothing in the rest of the record conflicts with anything she says. But she never produces her survey data. Still, her testimony would be the kind of evidence—far "more than a mere scintilla"—that "a reasonable mind might accept as adequate to support" a finding about job availability. *Consolidated Edison*, 305 U. S., at 229. Of course, the testimony would be even better—more reliable and probative—if she had produced supporting data; that would be a best practice for the SSA and its experts.[2] And of course, a different (maybe less qualified) expert failing to produce such data might offer testimony that is so feeble, or contradicted, that it would fail to clear the substantial-evidence bar. The point is only—as, again, Biestek accepts—that expert testimony can sometimes surmount that bar absent underlying data.

But if that is true, why should one additional fact—a

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[2]The SSA itself appears to agree. In the handbook given to vocational experts, the agency states: "You should have available, at the hearing, any vocational resource materials that you are likely to rely upon" because "the ALJ may ask you to provide relevant portions of [those] materials." SSA, Vocational Expert Handbook 37 (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (as last visited Mar. 28, 2019).

refusal to a request for that data—make a vocational expert's testimony categorically inadequate? Assume that an applicant challenges our hypothetical expert to turn over her supporting data; and assume the expert declines because the data reveals private information about her clients and making careful redactions will take a fair bit of time. Nothing in the expert's refusal changes her testimony (as described above) about job availability. Nor does it alter any other material in the record. So if our expert's opinion was sufficient—*i.e.*, qualified as substantial evidence—before the refusal, it is hard to see why the opinion has to be insufficient afterward.

Biestek suggests two reasons for that non-obvious result. First, he contends that the expert's rejection of a request for backup data necessarily "cast[s her testimony] into doubt." Reply Brief 16. And second, he avers that the refusal inevitably "deprives an applicant of the material necessary for an effective cross-examination." *Id.*, at 2. But Biestek states his arguments too broadly—and the nuggets of truth they contain cannot justify his proposed flat rule.

Consider Biestek's claim about how an expert's refusal undercuts her credibility. Biestek here invokes the established idea of an "adverse inference": If an expert declines to back up her testimony with information in her control, then the factfinder has a reason to think she is hiding something. See *id.*, at 16 (citing cases). We do not dispute that possibility—but the inference is far from always required. If an ALJ has no other reason to trust the expert, or finds her testimony iffy on its face, her refusal of the applicant's demand for supporting data may properly tip the scales against her opinion. (Indeed, more can be said: Even if the applicant makes no demand, such an expert's withholding of data may count against her.) But if (as in our prior hypothetical example, see *supra*, at 7–8) the ALJ views the expert and her testimony as otherwise

trustworthy, and thinks she has good reason to keep her data private, her rejection of an applicant's demand need not make a difference. So too when a court reviews the ALJ's decision under the deferential substantial-evidence standard. In some cases, the refusal to disclose data, considered along with other shortcomings, will prevent a court from finding that "a reasonable mind" could accept the expert's testimony. *Consolidated Edison*, 305 U. S., at 229. But in other cases, that refusal will have no such consequence. Even taking it into account, the expert's opinion will qualify as "more than a mere scintilla" of evidence supporting the ALJ's conclusion. Which is to say it will count, contra Biestek, as substantial.

And much the same is true of Biestek's claim that an expert's refusal precludes meaningful cross-examination. We agree with Biestek that an ALJ and reviewing court may properly consider obstacles to such questioning when deciding how much to credit an expert's opinion. See *Perales*, 402 U. S., at 402–406. But Biestek goes too far in suggesting that the refusal to provide supporting data always interferes with effective cross-examination, or that the absence of such testing always requires treating an opinion as unreliable. Even without specific data, an applicant may probe the strength of testimony by asking an expert about (for example) her sources and methods—where she got the information at issue and how she analyzed it and derived her conclusions. See, *e.g.*, *Chavez* v. *Berryhill*, 895 F. 3d 962, 969–970 (CA7 2018). And even without significant testing, a factfinder may conclude that testimony has sufficient indicia of reliability to support a conclusion about whether an applicant could find work. Indeed, Biestek effectively concedes both those points in cases where supporting data is missing, so long as an expert has not refused an applicant's demand. See *supra*, at 7. But once that much is acknowledged, Biestek's argument cannot hold. For with or without an express

refusal, the absence of data places the selfsame limits on cross-examination.

Where Biestek goes wrong, at bottom, is in pressing for a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data. Sometimes an expert's withholding of such data, when combined with other aspects of the record, will prevent her testimony from qualifying as substantial evidence. That would be so, for example, if the expert has no good reason to keep the data private and her testimony lacks other markers of reliability. But sometimes the reservation of data will have no such effect. Even though the applicant might wish for the data, the expert's testimony still will clear (even handily so) the more-than-a-mere-scintilla threshold. The inquiry, as is usually true in determining the substantiality of evidence, is case-by-case. See, *e.g.*, *Perales*, 402 U. S., at 399, 410 (rejecting a categorical rule pertaining to the substantiality of medical reports in a disability hearing). It takes into account all features of the vocational expert's testimony, as well as the rest of the administrative record. And in so doing, it defers to the presiding ALJ, who has seen the hearing up close.

That much is sufficient to decide this case. Biestek petitioned us only to adopt the categorical rule we have now rejected. He did not ask us to decide whether, in the absence of that rule, substantial evidence supported the ALJ in denying him benefits. Accordingly, we affirm the Court of Appeals' judgment.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–1184

MICHAEL J. BIESTEK, PETITIONER *v.* NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 1, 2019]

JUSTICE SOTOMAYOR, dissenting.

The Court focuses on the propriety of a categorical rule that precludes private data that a vocational expert refuses to provide upon request from qualifying as " 'substantial evidence.' " See *ante*, at 1. I agree with JUSTICE GORSUCH that the question presented by this case encompasses an inquiry not just into the propriety of a categorical rule in such circumstances but also into whether the substantial-evidence standard was met in the narrower circumstances of Michael Biestek's case. See *post*, at 6–7 (dissenting opinion). For the reasons that JUSTICE GORSUCH sets out, the vocational expert's conclusory testimony in this case, offered without even a hint of support, did not constitute substantial evidence.

Once Biestek established that he had impairments, the agency bore the burden of proving that work opportunities were available to someone with his disabilities and individual characteristics. 20 CFR § 416.912(b)(3) (2018). To meet that burden, the agency relied on a vocational expert's testimony that Biestek could qualify for one of 240,000 "bench assembler" jobs or 120,000 "sorter" jobs nationwide. Tr. 59 (July 21, 2015). The expert said that those numbers were based in part on her "professional experience." *Id.*, at 61. When Biestek's counsel under-

standably asked for more details, the expert said only that she got the numbers from a publicly available source as well as from her "own individual labor market surveys" that were part of confidential client files. *Id.*, at 71; see *id.*, at 67, 71–72. Biestek's counsel asked if the names in the files could be redacted, but the administrative law judge (ALJ) interrupted and ruled that she would not require the surveys to be produced in redacted form. *Id.*, at 72; see also *id.*, at 67.

Perhaps the ALJ would have allowed Biestek's counsel to ask followup questions about the basis for the testimony at that point, and perhaps Biestek's counsel should have tried to do so. But a Social Security proceeding is "inquisitorial rather than adversarial." *Sims* v. *Apfel*, 530 U. S. 103, 110–111 (2000); see 20 CFR §§404.900(b), 416.1400(b). The ALJ acts as "an examiner charged with developing the facts," *Richardson* v. *Perales*, 402 U. S. 389, 410 (1971), and has a duty to "develop the arguments both for and against granting benefits," *Sims*, 530 U. S., at 111; see also Social Security Ruling, SSR 00–4P, 65 Fed. Reg. 75760 (2000) (noting "the adjudicator's duty to fully develop the record"). Here, instead of taking steps to ensure that the claimant had a basis from which effective cross-examination could be made and thus the record could be developed, the ALJ cut off that process by intervening when Biestek's counsel asked about the possibility of redaction.

The result was that the expert offered no detail whatsoever on the basis for her testimony. She did not say whom she had surveyed, how many surveys she had conducted, or what information she had gathered, nor did she offer any other explanation of the data on which she relied. In conjunction with the failure to proffer the surveys themselves, the expert's conclusory testimony alone could not constitute substantial evidence to support the ALJ's fact-

finding.*

I agree with much of JUSTICE GORSUCH's reasoning. I emphasize that I do not foreclose the possibility that a more developed record could justify an ALJ's reliance on vocational-expert testimony in some circumstances even if the expert does not produce records underlying that testimony on request. An expert may have legitimate reasons for not turning over data, such as the burden of gathering records or confidentiality concerns that redaction cannot address. In those circumstances, as the majority suggests, the agency may be able to support an expert's testimony in ways other than by providing underlying data, such as by offering a fulsome description of the data and methodology on which the expert relies. See *ante*, at 8. The agency simply did not do so here.

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*I note that the agency's own handbook says that experts "should have available, at the hearing, any vocational resource materials that [they] are likely to rely upon and should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." SSA, Vocational Expert Handbook 37 (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (as last visited Mar. 29, 2019).

SUPREME COURT OF THE UNITED STATES

No. 17–1184

MICHAEL J. BIESTEK, PETITIONER *v.* NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 1, 2019]

JUSTICE GORSUCH, with whom JUSTICE GINSBURG joins, dissenting.

Walk for a moment in Michael Biestek's shoes. As part of your application for disability benefits, you've proven that you suffer from serious health problems and can't return to your old construction job. Like many cases, yours turns on whether a significant number of other jobs remain that someone of your age, education, and experience, and with your physical limitations, could perform. When it comes to that question, the Social Security Administration bears the burden of proof. To meet its burden in your case, the agency chooses to rest on the testimony of a vocational expert the agency hired as an independent contractor. The expert asserts there are 120,000 "sorter" and 240,000 "bench assembler" jobs nationwide that you could perform even with your disabilities.

Where did these numbers come from? The expert says she relied on data from the Bureau of Labor Statistics and her own private surveys. But it turns out the Bureau can't be the source; its numbers aren't that specific. The source—if there is a source—must be the expert's private surveys. So you ask to see them. The expert refuses—she says they're part of confidential client files. You reply by

pointing out that any confidential client information can be redacted. But rather than ordering the data produced, the hearing examiner, herself a Social Security Administration employee, jumps in to say that won't be necessary. Even without the data, the examiner states in her decision on your disability claim, the expert's say-so warrants "great weight" and is more than enough evidence to deny your application. Case closed. App. to Pet. for Cert. 111a–112a, 118a–119a.

Would you say this decision was based on "substantial evidence"? Count me with Judge Easterbrook and the Seventh Circuit in thinking that an agency expert's bottom-line conclusion, supported only by a claim of readily available evidence that she refuses to produce on request, fails to satisfy the government's statutory burden of producing substantial evidence of available other work. See *Donahue* v. *Barnhart*, 279 F. 3d 441, 446 (CA7 2002); *McKinnie* v. *Barnhart*, 368 F. 3d 907, 910–911 (CA7 2004) (*per curiam*).

Start with the legal standard. The Social Security Act of 1935 requires the agency to support its conclusions about the number of available jobs with "substantial evidence." 42 U. S. C. §405(g). Congress borrowed that standard from civil litigation practice, where reviewing courts may overturn a jury verdict when the record lacks "substantial evidence"—that is, evidence sufficient to permit a reasonable jury to reach the verdict it did. Much the same standard governs summary judgment and directed verdict practice today. See 2 K. Hickman & R. Pierce, Administrative Law §10.2.1, pp. 1082–1085 (6th ed. 2019); *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 252 (1986); *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300 (1939).

Next, consider what we know about this standard. Witness testimony that's clearly wrong as a matter of fact cannot be substantial evidence. See *Scott* v. *Harris*, 550

U. S. 372, 380 (2007). Falsified evidence isn't substantial evidence. See, *e.g.*, *Firemen's and Policemen's Civil Serv. Comm'n* v. *Brinkmeyer*, 662 S. W. 2d 953, 956 (Tex. 1984). Speculation isn't substantial evidence. See, *e.g.*, *Cao He Lin* v. *Department of Justice*, 428 F. 3d 391, 400 (CA2 2005); *Alpo Petfoods, Inc.* v. *NLRB*, 126 F. 3d 246, 250 (CA4 1997). And, maybe most pointedly for our purposes, courts have held that a party or expert who supplies only conclusory assertions fails this standard too. See, *e.g.*, *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 888 (1990) ("The object of [summary-judgment practice] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit"); *Regents of Univ. of Minn.* v. *AGA Medical Corp.*, 717 F. 3d 929, 941 (CA Fed. 2013) ("conclusory expert assertions cannot raise triable issues of material fact") (collecting cases); *Mid-State Fertilizer Co.* v. *Exchange Nat. Bank of Chicago*, 877 F. 2d 1333, 1339 (CA7 1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"); *Sea Robin Pipeline Co.* v. *FERC*, 795 F. 2d 182, 188 (CADC 1986) ("[I]nordinate faith in the conclusory assertions of an expert . . . cannot satisfy the requirement [of] substantial evidence").

If clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence, the evidence here shouldn't be either. The case hinges on an expert who (a) claims to possess evidence on the dispositive legal question that can be found nowhere else in the record, but (b) offers only a conclusion about its contents, and (c) refuses to supply the evidence when requested without showing that it can't readily be made available. What reasonable factfinder would rely on evidence like that? It seems just the sort of conclusory evidence courts have long held insufficient to meet the substantial evidence standard. And thanks to its conclusory nature, for all anyone can tell it may have come out of a

hat—and, thus, may wind up being clearly mistaken, fake, or speculative evidence too. Unsurprisingly given all this, the government fails to cite even a single authority blessing the sort of evidence here as substantial evidence, despite the standard's long history and widespread use.

Veteran Social Security practitioners must be feeling a sense of *déjà vu*. Half a century ago, Judge Henry Friendly encountered *Kerner* v. *Flemming*, 283 F. 2d 916 (CA2 1960). There, the agency's hearing examiner offered "nothing save [his own] speculation" to support his holding that the claimant "could in fact obtain substantial gainful employment." *Id.*, at 921. The Second Circuit firmly explained that this kind of conclusory claim is insufficient to meet the substantial evidence standard. In response, the Social Security Administration began hiring vocational experts, like the one in this case, to document the number of jobs available to a given claimant. But if the government can do what it did in this case, it's hard to see what all the trouble was for. The agency might still rest decisions on a hunch—just so long as the hunch comes from an agency contractor rather than an agency examiner.

Instead of addressing the realities of this case, the government asks us to imagine a hypothetical one. Assume, it says, that no one had requested the underlying data. In those circumstances, the government points out, even Mr. Biestek appears to accept that the agency's decision could have stood. And if that's true, the government asks, why should it make a difference if we add only one additional fact—the expert's refusal to produce the data? See *ante*, at 7–9 (presenting the same argument).

The answer is an old and familiar one. The refusal to supply readily available evidentiary support for a conclusion strongly suggests that the conclusion is, well, unsupported. See, *e.g.*, *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclu-

sion that the strong would have been adverse"); *Clifton* v. *United States*, 4 How. 242, 248 (1846) (the withholding of "more direct" proof suggests that "if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal"); 31A C. J. S., Evidence §156(2), p. 402 (1964) ("The unfavorable inference . . . is especially applicable where the party withholding the evidence has had notice or has been ordered to produce it"). Meanwhile, a similar inference may not arise if no one's bothered to ask for the evidence, or if the evidence is shown to be unavailable for a good reason. In cases like those, there may be just too many other plausible and innocent excuses for the evidence's absence. Maybe, for example, nobody bothered to seek the underlying data because everyone knew what it would show.

Fine, the Court responds, all that's true enough. But even if we accept that an expert's failure to produce the evidence underlying her conclusion *may* support an inference that her conclusion is unsupported, that doesn't mean such an inference *must* follow. Whether an inference is appropriate depends on the facts of the particular case. See *ante*, at 9–10.

But what more do we need to know about the facts of *this* case? All of the relevant facts are undisputed, and it remains only to decide the legal question whether they meet the substantial evidence standard. We know that the expert offered a firm and exact conclusion about the number of available jobs. We know that the expert claimed to have private information to support her conclusion. We know Mr. Biestek requested that information and we have no reason to think any confidentiality concerns could not have been addressed. We know, too, that the hearing examiner had "no other reason to trust the expert['s]" numbers beyond her say-so. *Ibid.* Finally and looking to the law, we know that a witness's bare conclu-

sion is regularly held insufficient to meet the substantial evidence threshold—and we know that the government hasn't cited a single case finding substantial evidence on so little. This is *exactly* the sort of case where an adverse inference should "tip the scales." *Ibid.*

With so much now weighing against the government, everything seems to turn on a final hypothetical. Now we are asked to imagine that the expert had offered detailed oral testimony about the withheld data. Her testimony was so detailed, we are asked to suppose, that Mr. Biestek could have thoroughly tested the data's reliability through cross-examination. (You might wonder just how effective this cross-examination could be if Mr. Biestek didn't have access to the data. But overlook that.) Surely in *those* circumstances it wouldn't matter whether the expert failed to produce the data even in bad faith. Any failure to produce would be harmless as a matter of law because the expert's testimony, all by itself, would amount to substantial evidence on which a rational factfinder might rely. *Ante*, at 10.

The problem is that this imaginary case has nothing to teach us about our real one. In Mr. Biestek's case, it is undisputed that the expert offered only a bare conclusion about the number of available jobs. No other relevant testimony was offered or received: no testimony about the underlying data, no testimony about its specific sources, no testimony about its reliability. In our real case, there is simply no way to shrug off the failure to produce the data as harmless error. To the contrary, and as we have seen, cases like *this* routinely fail to satisfy the substantial evidence standard. And if the government has a "duty to fully develop the record," *ante*, at 2 (SOTOMAYOR, J., dissenting), that conclusion should follow all the more strongly.

What leads the Court to a different conclusion? It says that it views Mr. Biestek's petition as raising only the

"categorical" question whether an expert's failure to produce underlying data always and in "every case" precludes her testimony from qualifying as substantial evidence. *Ante*, at 1, 9–11. And once the question is ratcheted up to that level of abstraction, of course it is easy enough to shoot it down: just point to a series of hypothetical cases where the record contains *additional* justification for the expert's failure to produce or *additional* evidence to support her opinion. In such counterfactual cases, the failure to produce either would not be enough to give rise to an adverse inference under traditional legal principles or could be held harmless as a matter of law. See *ante*, at 7–10.

But as I understand Mr. Biestek's submission, it does not require an all-or-nothing approach that would cover "every case." As the Court acknowledges, Mr. Biestek has focused us "on the Seventh Circuit's categorical rule." *Ante*, at 6, n. 1. And that "rule" targets the narrower "category" of circumstances we have here—where an expert "'give[s] a bottom line,'" fails to provide evidence "underlying that bottom line" when challenged, and fails to show the evidence is unavailable. *McKinnie*, 368 F. 3d, at 911 (quoting *Donahue*, 279 F. 3d, at 446). What to do about *that* category falls well within the question presented: "[w]hether a vocational expert's testimony can constitute substantial evidence of 'other work' . . . when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised." Pet. for Cert. i. The answer to that question may be "always," "never," or—as the Court itself seems to acknowledge—"[s]ometimes." *Ante*, at 11. And if the answer is "sometimes," the critical question becomes "in what circumstances"?

I suppose we could stop short and leave everyone guessing. But another option is to follow the Seventh Circuit's lead, resolve the smaller yet still significant "category" of

cases like the one before us, and in that way begin to offer lower courts meaningful guidance in this important area. While I would not hesitate to take this course and make plain that cases like Mr. Biestek's fail the substantial evidence standard, I understand the Court today to choose the first option and leave these matters for another day.

There is good news and bad news in this. If my understanding of the Court's opinion is correct, the good news is that the Court remains open to the possibility that in real-world cases like Mr. Biestek's, lower courts may—and even should—find the substantial evidence test unmet. The bad news is that we must wait to find out, leaving many people and courts in limbo in the meantime. Cases with facts like Mr. Biestek's appear to be all too common. See, *e.g.*, Dubin, Overcoming Gridlock: *Campbell* After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs, 62 Admin. L. Rev. 937, 966 (2010). And many courts have erred in them by finding the substantial evidence test met, as the Sixth Circuit did in the case now before us. Some courts have even conflated the substantial evidence standard—a substantive standard governing what's needed to sustain a judgment as a matter of law—with procedural rules governing the admission of evidence. These courts have mistakenly suggested that, because the Federal Rules of Evidence don't apply in Social Security proceedings, anything an expert says will suffice to meet the agency's burden of proof. See, *e.g.*, *Welsh* v. *Commissioner of Social Security*, 662 Fed. Appx. 105, 109–110 (CA3 2016); *Bayliss* v. *Barnhart*, 427 F. 3d 1211, 1218, and n. 4 (CA9 2005). Definitively resolving this case would have provided more useful guidance for practitioners and lower courts that have struggled with a significant category of cases like Mr. Biestek's, all while affording him the relief the law promises in disputes like his.

The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking. See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1313–1314 (1975). Without it, people like Mr. Biestek are left to the mercy of a bureaucrat's caprice. Over 100 years ago, in *ICC* v. *Louisville & Nashville R. Co.*, 227 U. S. 88 (1913), the government sought to justify an agency order binding private parties without producing the information on which the agency had relied. The government argued that its findings should be "presumed to have been supported." *Id.*, at 93. In essence, the government sought the right to "act upon any sort of secret evidence." Gellhorn, Official Notice in Administrative Adjudication, 20 Texas L. Rev. 131, 145 (1941). This Court did not approve of that practice then, and I would not have hesitated to make clear that we do not approve of it today.

I respectfully dissent.

Social Security

Program Operations Manual System (POMS)

Effective Dates: 05/30/2018 - Present

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DI 25001.001 Medical and Vocational Quick Reference Guide

CITATIONS: Social Security Act - 216(i)(1), 223(d)(2), 1614 (a)(3)(A) and 1614 (a)(3)(B)

Regulations - 20 CFR §§ 404.1520, 416.920, 404.1545 through 404.1567, 416.965 through 416.967

Social Security Rulings – SSR 03-3p, SSR 00-4p, SSR 96-9p, SSR 96-8p, SSR 85-15, SSR 83-14, SSR 83-12. SSR 83-11, SSR 83-10, SSR 82-63, SSR 82-62, SSR 82-61, SSR 82-41, SSR 82-40

The Preface Materials and Appendices of the Dictionary of Occupational Titles (DOT) and Selected Characteristics of Occupations (SCO)

A. Quick Reference Guide For Medical And Vocational Evaluation

This section provides a brief overview and a central starting point for medical and vocational evaluations. It also provides references to more specific instructions needed to complete sequential evaluation steps 4 and 5. The list of terms in this subsection provides the following information:

1. Summaries of commonly applied vocational concepts;

2. Definitions of commonly used terms for medical-vocational evaluations;

3. Terms relating to jobs or occupations that share the same definition that the Department of Labor uses in its publications, such as the:

   - Dictionary of Occupational Titles (DOT); or

   - Selected Characteristics of Occupations (SCO) defined in the DOT and

     words with a two-letter SCO acronym after them; and

4. Basic information about using the medical-vocational guidelines.

1. Accommodation (Ac)

Adjustment of the lens of the eye to bring an object into sharp focus.

2. Age

Refers to chronological age and the extent to which it affects a claimant's ability to adjust to other work. A claimant reaches a particular age the day before his or her birthday. There are three age categories and two age subcategories. For detailed information on age as a vocational factor, see DI 25015.005.

The medical-vocational rules use the subcategory "younger individual age 45-49" in the sedentary medical-vocational table and "closely approaching retirement age" in the medium medical-vocational table. For the medical-vocational guidelines, see DI 25025.035.

The age categories and subcategories are:

a. Age categories

1. Younger - under age 50
2. Closely approaching advanced age - age 50-54
3. Advanced age - age 55 or over

For more information on age categories see DI 25015.005D.

b. Age subcategories

1. Younger individual age 45-49; and
2. Closely approaching retirement age - age 60 or older.

3. Arduous work

Physical work requiring a high level of strength or endurance. No specific physical action or exertional level denotes arduous work. Such work may be arduous if it demands a great deal of stamina such as repetitive bending or lifting at a very fast pace. For additional information on arduous work see DI 25010.001B.1.

4. Atmospheric conditions (AC)

An environmental factor, rated in the SCO, meaning exposure to conditions that affect the respiratory system, eyes, or the skin such as:

- fumes,
- noxious odors,
- dusts,
- mists,
- gases, and
- poor ventilation.

5. Balancing (Ba)

Maintaining body equilibrium to prevent falling when:

- walking,
- standing,
- crouching,
- running on narrow, slippery, or erratically moving surfaces; or
- performing gymnastic feats.

6. Borderline age issue

For information on how to apply borderline age policy, see DI 25015.006 Borderline Age.

A borderline age issue exists when the claimant is:

- A few days to a few months from attaining the next higher age category;
- Use of the higher age category results in a finding of "disabled';" and
- Use of the chronological age category results in a finding of "not disabled."

7. Carrying

Transporting an object; usually holding it in the hands, arms or on the shoulder.

8. Climbing (Cl)

Ascending or descending ladders, stairs, scaffolding, ramps, poles, ropes, and the like, using the feet and legs or hands and arms.

9. Color vision (CV)

Ability to identify and distinguish colors.

10. Composite job

Work that required significant elements of two or more occupations and that has no counterpart in the DOT. For information on how to determine if work was a composite job and how to consider a composite job at step 4 of sequential evaluation see DI 25005.020B.

11. Constantly

Use of this term in the RFC or SCO means that the activity or condition occurs two-thirds or more of an eight-hour day.

12. Crawling (Cw)

Moving about on the hands and knees or hands and feet.

13. Crouching (Co)

Bending the body downward and forward by bending the legs and spine.

14. Depth perception (DP)

Ability to judge distances and spatial relationships to see objects where and as they actually are in three-dimensional vision.

15. DOT worker function codes chart

A DOT code is comprised of nine numbers subdivided into three sets containing three numbers. In the DOT classification system, each digit has a specific purpose or meaning. Together, these nine numbers provide a unique code that identifies an individual occupation from all others listed in the DOT.

The following table contains information that identifies the various code numbers used to represent the middle three codes (also known as the worker function codes). The worker function codes consist of data function (fourth digit), people function (fifth digit), and things function (sixth digit) of occupations defined in the DOT.

Worker functions – The Middle Three Codes					
Code	**Data 4th Digit**	**Code**	**People 5th Digit**	**Code**	**Things 6th Digit**
0	Synthesizing	0	Mentoring	0	Setting up
1	Coordinating	1	Negotiating	1	Precision Working
2	Analyzing	2	Instructing	2	Operating-Controlling
3	Compiling	3	Supervising	3	Driving-Operating
4	Computing	4	Diverting	4	Manipulating
5	Copying	5	Persuading	5	Tending
6	Comparing	6	Speaking-Signaling	6	Feeding-Off Bearing
		7	Serving	7	Handling
		8	Taking Instructions-Helping		

16. Education

Formal schooling or other training that contributes to the ability to meet vocational requirements (for example, reasoning ability, communication skills, and arithmetical ability). For additional information on education as a vocational factor, see DI 25015.010.

We classify education into five adjudicative categories:

1. Illiterate or unable to communicate in English:

   - The inability to read English,
   - The inability to write English,
   - The inability to speak or understand English, or
   - Any combination of the items in this list.

   NOTE: Regardless of formal education level, use this category for claimants who cannot speak, understand, read, or write a simple message in English such as instructions or inventory lists.

2. Marginal education

   Formal schooling completed at the sixth grade level or less.

3. Limited education

   Formal schooling completed at the seventh through 11th grade level.

4. High school education or above

   Formal schooling completed at the 12th grade level and above. We usually, consider a GED certificate to be in this category.

5. Recent education that provides for direct entry into skilled or semiskilled work

   For additional information on how to determine if recent education or training provides for direct entry into skilled or semiskilled work see DI 25015.010F.

17. Environmental conditions

Conditions that may exist in work environments such as extremes in temperature, humidity, noise, vibrations, fumes, odors, presence of toxic substances, dust, poor ventilation, or hazards.

18. Environmental limitation

An impairment-related inability to tolerate exposure to one or more environmental conditions in a workplace. For additional information on environmental limitations, see DI 25020.015.

19. Exertional activity

One of the primary strength activities:

- sitting,
- standing,
- walking,

- lifting,
- carrying,
- pushing, and
- pulling.

20. Exertional level

A work classification defining the functional requirements of work in terms of the range of the primary strength activities required (that is, sedentary, light, medium, heavy, and very heavy).

The following table details the limits within the ranges for occasional, frequent, and constant exertion:

Limits of Weights Lifted/Carried or Force Exerted by Strength Level			
Rating	**Occasionally**	**Frequently**	**Constantly**
Sedentary	* to 10	*	N/A
Light	* to 20	* to 10	*
Medium	20 to 50	10 to 25	* to 10
Heavy	50 to 100	25 to 50	10 to 20
Very Heavy	100+	50+	20+

*=Negligible Weight; N/A= Not applicable

NOTE: Do not use this information to determine remaining occupational base. Do not determine that a claimant has a remaining occupational base for medium work if he or she can lift 20 pounds occasionally and 10 pounds frequently or if he or she can lift 25 pounds occasionally and 10 pounds frequently.

A claimant must be capable of doing substantially all of the range of work represented by the exertional requirements of a rule in order to use that rule to direct a determination of disability. For that reason, assume that an RFC for less than the top level of weight for an exertional level in the exertional level table represents an RFC falling between two exertional levels of work. For information on how to adjudicate a case in which the RFC falls between two rules, see DI 25025.015.

IMPORTANT: The chart of lifting and carrying requirements is from Appendix C: Components of the Definition Trailer, Component IV. PHYSICAL DEMANDS - STRENGTH RATING (Strength); and reflects how Department of Labor analysts classified jobs into a particular strength level.

Per 20 CFR 404.1567 and 416.967 , SSA uses the strength classifications that are in the DOT.

21. Exertional limitation

An impairment-related limitation that reduces the capacity to sit, stand, walk, lift, carry, push, or pull.

22. Exposure to weather (We)

An environmental factor rated in the SCO meaning exposure to outside atmospheric conditions.

23. Exposure to electrical shock (ES)

An environmental factor rated in the SCO meaning possible bodily injury from electrical shock.

24. Exposure to radiation (Ra)

An environmental factor rated in the SCO meaning possible bodily injury from radiation.

25. Exposure to toxic, caustic chemicals (TC)

An environmental factor rated in the SCO meaning possible bodily injury from toxic or caustic chemicals.

26. Extreme cold (Co)

An environmental factor rated in the SCO meaning exposure to nonweather-related cold temperatures.

27. Extreme heat (Ho)

An environmental factor rated in the SCO meaning exposure to nonweather-related hot temperatures.

28. Far acuity (FA)

Clarity of vision at 20 feet or more.

29. Feeling (Fe)

Perceiving attributes of objects and materials such as size, shape, temperature, or texture, by means of receptors in the skin, particularly those of the fingertips.

30. Field of vision (FV)

The entire area that can be seen when the eye is directed forward, including that which is seen with peripheral vision.

31. Fingering (Fi)

Picking, pinching, or otherwise working with the fingers primarily (rather than with the whole hand or arm as in "Handling").

32. Framework determination

A medical-vocational determination that uses the Appendix 2 Rules as adjudicative guidance because the RFC or a vocational factor does not match an Appendix 2 rule. The RFC and vocational factors of age, education, and past work experience must meet all the rule criteria to **direct** a determination. For additional information on using the medical vocational rules as a framework for a determination see DI 25025.005C.

33. Frequently

Use of this term in the SCO or RFC means that the activity or condition occurs one-third to two-thirds of an 8-hour workday.

34. Frequency of physical demands and environmental condition components in the SCO

The following chart describes the absence or presence of physical demand and environmental condition components:

SCO Code	Frequency	Definition
N	Not Present	Activity or condition does not exist.
O	Occasionally	Activity or condition exists up to one-third of the time.

SCO Code	Frequency	Definition
F	Frequently	Activity or condition exists from one-third to two-thirds of the time.
C	Constantly	Activity or condition exists two-thirds or more of the time.

35. Full range of work

All or substantially all of the unskilled occupations existing at an exertional level.

36. Handling (Ha)

Seizing, holding, grasping, turning, or otherwise working with the hand or hands. Fingers are involved only to the extent that they are an extension of the hand (rather than as in "Fingering").

37. Hearing (He)

Perceiving the nature of sounds by ear.

38. Heavy work

Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. For the range of lifting and carrying requirements the Department of Labor considered when determining whether to classify work as heavy see DI 25001.001A.20. in this section.

Heavy work:

- Requires walking or standing for a significant part of the day.
- Usually requires frequent to constant stooping and crouching.
- Usually involves grasping, holding, and turning objects, but does not require use of the fingers for fine activities to the extent required in most sedentary work.
- Usually includes the functional capacity to perform medium, light, and sedentary work.

39. Job

A position within a work site with significant tasks. Workers may perform the significant tasks slightly differently at different work sites.

Example of work site differences: A server at one restaurant may take orders and check to make sure everything is satisfactory while an assistant carries the food to the table. A server at another restaurant may be required to both take the order and carry the food to the table.

40. Kneeling (Kn)

Bending the legs at the knees to come to rest on the knee or knees.

41. Lifetime commitment to a field of work profile

For complete information on the lifetime commitment profile see DI 25010.001B.3. A lifetime commitment requires 30 years or more of work in one field. Work should be of a similar nature, but does not have to be for the same employer.

42. Lifting

Raising or lowering an object from one level to another. Includes upward pulling.

43. Light work

Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls.

The Department of Labor rated an occupation as light when it requires walking or standing to a significant degree, sitting most of the time while pushing or pulling arm or leg controls, or working at a production rate while constantly pushing or pulling materials even though the weight of the materials in these situations is negligible. For the range of lifting and carrying requirements the DOL considered when determining whether to classify work as light see DI 25001.001A.20. in this section.

Light work usually:

- Requires walking or standing for approximately 6 hours of the day.
- Requires only occasional, rather than frequent stooping and no crouching.
- Involves grasping, holding and turning objects, but does not require use of the fingers for fine activities to the extent required in most sedentary work.
- Includes the functional capacity to perform sedentary work.
- Performed primarily in one location with the ability to stand being more critical than the ability to walk.

44. Material discrepancy

A discrepancy that affects the ultimate decision of "disabled" or "not disabled."

45. Maximum sustained work capacity

The highest functional level a person can perform on a regular and continuing basis.

46. Medium work

Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work. For the range of lifting and carrying requirements the Department of Labor considered when determining whether to classify work as medium see DI 25001.001A.20. in this section

Medium work usually:

- Requires walking or standing for approximately 6 hours of the day.
- Requires frequent stooping and crouching.
- Requires the ability to grasp, hold, and turn objects.

- requires the ability to frequently lift or carry objects weighing up to 25 pounds, which is often more critical than being able to lift up to 50 pounds at a time.

- Includes the functional capacity to perform sedentary and light work.

NOTE: There are very few medium occupations in the national economy performed primarily in a seated position.

47. Near acuity (NA)

Clarity of vision at 20 inches or less.

48. Never

An RFC rating that means not even once during an eight-hour day.

49. Noise level

A rating in the SCO based on the following coding system:

Code	Level	Illustrative Examples
1	Very quiet	Isolation booth for hearing test
2	Quiet	Library, many private offices
3	Moderate	Department or grocery store
4	Loud	Large earth movers, heavy traffic
5	Very loud	Rock concert, jack hammer

50. No work experience

No relevant work experience. For the definition of relevant work experience see DI 25001.001A.59.

51. Nonexertional limitation

An impairment-caused limitation on a work activity that is not one of the seven strength factors (that is, lifting, carrying, standing, walking, sitting, pushing, and pulling).

52. Not present

Use of this rating in the SCO means that the activity or condition does not exist.

53. Occasionally

Use of this term in the SCO or RFC means that the activity or condition occurs at least once up to one-third of an 8-hour workday.

54. Occupation

A group of jobs in many different worksites with a common set of tasks. In order to look at the millions of jobs in the U.S. economy in an organized way, the DOT groups jobs into "occupations" based on their similarities and defines the structure and content of all listed occupations. Occupational definitions are the result of comprehensive studies of how workers performed similar jobs in worksites across the nation and are composites of data collected from diverse sources. The DOT organizes work in a variety of ways. Nearly every job in the economy is performed slightly differently

from any other job due to technological, economic, and sociological influences. Every job is also similar to a number of other jobs.

The term "occupation," as used in the DOT, refers to this collective description of a number of individual jobs performed, with minor variations, in many establishments.

There are seven basic parts to an occupational definition. The following list displays the parts in the order that they appear in every definition:

a. The Occupational Code Number

b. The Occupational Title

c. The Industry Designation

d. Alternate Titles (if any)

e. The Body of the Definition

1. Lead Statement

2. Task Element Statements

3. "May" Items

4. Glossary words

5. Unbracketed Reference Title

6. Bracketed Title

f. Undefined Related Titles (if any)

g. Definition Trailer

55. Occupational base

The number of unskilled occupations that a claimant is capable of performing. If a claimant has transferable skills or direct entry into skilled work, he or she may have some skilled and semi-skilled occupations in his or her occupational base. For additional information on occupational base, see DI 25025.001.

56. Occupational code number

Occupational code numbers use the following format:

a. The first three digits of a code number identify the occupational group:

- The first digit is one of nine broad categories.
- The categories are divided into 83 more specific divisions (the first two digits).
- The divisions are then divided into small groups (the first three digits). The DOT contains 564 groups.

b. The middle three digits of the occupational code address the worker functions. For a list of the middle three-digit designations see DI 25001.001A.15. in this section.

c. The last three digits differentiate a particular occupation from all others:

- When a six-digit code is applicable to only one occupation, the final three digits are always 010.
- When there is more than one occupation with the same first six digits, the final three are usually assigned in multiples of four, such as: 010, 014, 018, and 022.

57. Other environmental conditions (Ot)

An environmental factor rating in the SCO used to capture uncategorized environmental conditions. These conditions may include:

- Demolishing parts of buildings to reach and combat fires and rescue persons endangered by fire and smoke;
- Mining ore or coal underground;
- Patrolling assigned beat to prevent crime or disturbance of peace and subjected to bodily injury or death from law violators;
- Diving in the ocean and subjected to the bends or other conditions associated with high water pressure and oxygen deprivation; and
- Patrolling ski slopes prior to allowing public use and exposed to danger of avalanches.

58. Other work

Work other than a claimant's past relevant work.

59. Past relevant work (PRW)

Work that:

- Was performed by the claimant within the relevant work period. (For the relevant work period chart see DI 25001.001A.64. in this section) ;
- Was substantial gainful activity (SGA); and

- Lasted long enough for the claimant to learn to do it.

  In evaluating this last factor, it should have been sufficient time for the claimant to:

  a. learn the techniques;

  b. acquire the necessary information; and,

  c. develop the competence needed for average performance in the job situation.

See also:

DI 25005.001 Determination of Capacity for Past Relevant Work (PRW) --Basics of Step 4 of the Sequential Evaluation Process

DI 25005.005 Expedited Vocational Assessment at Steps 4 and 5 of Sequential Evaluation

DI 25005.010 Whether Past Relevant Work Must Exist in Significant Numbers in the National Economy (SSR 05-1c)--U.S. Supreme Court Decision in the Case of Jo Anne B. Barnhart, Commissioner of Social Security v. Pauline Thomas

DI 25005.015 Determination of Capacity for Past Work-- Relevance Issues

DI 25005.020 Past Relevant Work (PRW) as the Claimant Performed It

DI 25005.025 Past Relevant Work (PRW) as Generally Performed in the National Economy

DI 25005.050 Making the Past Relevant Work (PRW) Determination

60. Pulling

Exerting force upon an object so that the object moves toward the force.

61. Pushing

Exerting force upon an object so that the object moves away from the force.

62. Range of work

Occupations existing at an exertional level (that is sedentary, light, medium, heavy, and very heavy).

63. Reaching

Extending the hands and arms in any direction.

64. Relevant work period

When we can consider a period of the claimant's past work as past relevant work (PRW).

This table provides the most common scenarios of the relevant work period:

TYPE OF CLAIM	RELEVANT PERIOD
Title II Disability Insurance Benefits (DIB) - Date Last Insured (DLI) in the future	Within the 15 years before adjudication*
Title II DIB - DLI in the past	Within the 15 years before DLI

TYPE OF CLAIM	RELEVANT PERIOD
Title II Widow or Widower, or Surviving Divorced Spouse (DWB) Prescribed Period (PP) not expired	Within the 15 years before adjudication *
Title II DWB – PP expired	Within the 15 years before expiration of the PP
Title II or Title XVI Residual Functional Capacity (RFC) projected to a future date.	Within the 15 years before the projected date is reached
Title II Full Retirement Age (FRA) in the past	Within the 15 years before FRA
Title II Childhood Disability Beneficiaries (CDB) – Initial claim filed before age 22	Within the 15 years before adjudication*
Title II CDB – Initial claim filed after age 22, no relevant work after age 22	Within the 15 years before age 22
Title II CDB – Reentitlement Claim, 7-year period applies and ended in the past	Within the 15 years before the end of the reentitlement period
Title II CDB – Reentitlement Claim, 7 year period applies and has not yet ended, or 7-year period does not apply	Within the 15 years before adjudication*
Title XVI Adult	Within the 15 years before adjudication*
Title II or Title XVI Continuing Disability Review (CDR)	Within the 15 years before CDR adjudication**
Appeal of Title II or Title XVI CDR medical cessation	Within the 15 years prior to the initial CDR medical cessation determination**
Any type of claim – closed period of disability ***	Within the 15 years before the end of the closed period

* Indicates the date we adjudicate the claim at the initial, reconsideration, administrative law judge levels or for Appeals Council decisions. The date of adjudication does not freeze at the initial determination but is the date of determination or decision at any level of review.

** We will not count work performed during the current period of disability as PRW or as work experience for CDR cases per DI 28005.015A.7. However, SGA done during a current period of disability may change a claimant's vocational outlook for the purposes of applying collateral estoppel to a new claim. For additional information on potential adoption cases involving work activity see DI 27515.001.

*** A closed period of disability is when the claimant was unable to engage in SGA for a continuous period of at least 12 months, but by the time we make the determination or decision, improvement has occurred and the claimant is no longer disabled.

65. Remaining occupational base

The occupations that a claimant is capable of adjusting to considering his or her RFC, age, education, and past work experience.

66. Residual functional capacity (RFC)

An administrative assessment of a claimant's maximum remaining capacity for work on a sustained basis.

See details:

- DI 24510.001 Residual Functional Capacity (RFC) Assessment - Introduction
- DI 24510.005 General Guidelines for Residual Functional Capacity (RFC) Assessment
- DI 24510.006 Assessing Residual Functional Capacity (RFC) in Initial Claims (SSR 96-8p)
- DI 24510.010 Medical Source Statements About What Claimants Can Still Do
- DI 24510.020 Projecting the RFC
- DI 24510.050 Completion of the Physical RFC Assessment Form
- DI 24510.055 Physical RFC Assessment Form SSA-4734-BK - Exhibit
- DI 24510.057 Sustainability and the Residual Functional Capacity (RFC) Assessment
- DI 24510.060 Mental Residual Functional Capacity Assessment
- DI 24510.061 Summary Conclusions and Narrative Statement of Mental RFC
- DI 24510.062 Completion of Heading of SSA-4734-F4-SUP
- DI 24510.063 Completion of Section I of SSA-4734-F4-SUP
- DI 24510.064 Completion of Section II of SSA-4734-F4-SUP - Remarks
- DI 24510.065 Section III of SSA-4734-F4-SUP - Functional Capacity Assessment
- DI 24510.066 Options to Simplify Case Processing
- DI 24510.090 Mental RFC Assessment Form SSA-4734-F4-SUP - Exhibit

67. Restriction

A restriction is what a claimant should not do because of an impairment-related risk to self or others or because it would be medically inadvisable. A restriction can be exertional or non-exertional.

68. Sedentary work

For the range of lifting and carrying requirements the Department of Labor considered when determining whether to classify work as sedentary see DI 25001.001A.20.

Most **unskilled** sedentary jobs require good use of the hands and fingers for repetitive hand-finger actions.

Regardless of skill level, sedentary work involves:

- Periods of standing or walking generally totaling no more than about 2 hours and sitting generally totaling approximately 6 hours of an 8-hour workday.

- Work performed primarily in a seated position, which entails no significant stooping.

69. Semi-skilled work

Semi-skilled work requires some skills but does not require complex duties. Usually, Specific Vocational Preparation (SVP) of three or four as rated in the SCO. For the definition of SVP see DI 25001.001A.77.

70. Severe medically determinable impairment (MDI)

An MDI that significantly limits a claimant's physical or mental ability to perform one or more basic work activities needed to do most jobs. For additional MDI information see, Individual Must Have a Medically Determinable Physical or Mental Impairment per DI 24515.001.

71. Significant erosion

Significant erosion is a **considerable** reduction in the available occupations at a particular exertional level. Usually, we use a lower exertional rule as a framework for a decision when there is a significant erosion in the occupational base.

Slight erosion is a **minimal** impact in the available occupations at an exertional level. Where there is only slight erosion of an occupational base, do not use a lower level exertional rule as a framework for a determination.

For instructions on Using a Rule as a Framework When Exertional Capacity Falls between Two Rules see DI 25025.015 and For additional information on Applying the Medical-Vocational Rules When the Claimant has Exertional and Nonexertional Limitations see DI 25025.020.

72. Sitting

Remaining in a seated position.

73. Skill

For disability program purposes, claimants can gain skills from experience and demonstrated proficiency with work activities in past relevant skilled or semi-skilled work.

For disability program purposes, claimants cannot gain skills from:

- unskilled work,

- work that was not relevant,

- volunteer work or hobbies, or

- education.

For additional information about skills, see Transferability of Skills Assessment in DI 25015.017.

74. Skill level

A work classification that divides occupations into unskilled, semi-skilled, or skilled work.

75. Skilled work

Skilled work involves good cognitive functioning, skilled job functions, and has an SVP of 5 to 9 in the SCO.

Cognitive function:

- Requires high levels of judgment and adaptability;
- Involves setting realistic goals or making plans independently;
- Requires understanding, carrying out, remembering complex instructions; and
- Encompasses abstract ideas and problem solving.

Skilled job functions require both:

- work activity exercising judgment beyond carrying out simple duties; and
- knowledge of principles and processes of an art, science, or applied trade and the ability to apply that knowledge in a proper and approved manner.

76. Special medical-vocational profiles

Unfavorable combinations of vocational factors that adjudicators must consider before applying the medical vocational rules.

Find a claimant who cannot do past relevant work and meets a profile unable to adjust to other work. For a listing of the profiles, see DI 25010.001.

77. Specific vocational preparation (SVP)

The amount of time required for a typical claimant to:

- Learn the techniques,
- Acquire the information, and
- Develop the facility needed for average performance in a job.

A claimant may acquire SVP in a school, military, institutional or vocational environment through such settings as:

- Vocational training,
- Apprenticeship training,
- In plant training,
- On-the-job training,

- Essential experience in other jobs.

We use the SVP rating as a guideline for determining how long it would take a claimant to achieve average performance in a job as part of our evaluation of whether the claimant's past work is relevant. At the skilled levels of SVP (5-9), education figures heavily into the SVP rating.

Consider the claimant's education when evaluating whether the claimant did the job long enough to learn it. Per the Department of Labor, a 4-year college degree is equal to 2 years of SVP. Each year of graduate school is equal to 1 year of SVP. For additional information on using SVP at **step 4** of sequential evaluation, see DI 25005.015D.

Example of combined education and work experience:

A registered nurse (RN) has an SVP of seven, which means that a claimant can learn this job in about 2-4 years. If the nurse has a 4 year college degree, which counts for 2 years of SVP, and 2 years of nursing experience, the adjudicator would determine that the claimant did the job long enough to learn it unless there was evidence to the contrary.

Level	Time
1	Short demonstration only.
2	Anything beyond short demonstration up to and including 1 month.
3	Over 1 month up to and including 3 months.
4	Over 3 months up to and including 6 months.
5	Over 6 months up to and including 1 year.
6	Over 1 year up to and including 2 years.
7	Over 2 years up to and including 4 years.
8	Over 4 years up to and including 10 years.
9	Over 10 years.

78. Standing

Remaining on one's feet in an upright position at a workstation without moving about.

79. Stooping (St)

Bending the body downward and forward by bending the spine at the waist.

80. Strength factors of work

Lifting, carrying, standing, walking, sitting, pushing, and pulling are strength factors of work.

Any one of the following five levels can define the strength factor:

1. Sedentary,

2. Light,

3. Medium,

4. Heavy, and

5. Very Heavy.

When rating the strength factor of occupations, the Department of Labor considered how the claimant's body position and the frequency of the repetition of the task affected the amount of energy expended.

81. Substantially all activities

Nearly all of the activities required in an exertional range of work.

82. Substantial gainful activity (SGA)

The performance of significant physical or mental activities in work for pay or profit or in work of a type usually performed for pay or profit. Work may be substantial even if seasonal or part-time, or even if the claimant:

- does less,
- is paid less, or
- has less responsibility than in previous work.

Although the field office has jurisdiction to determine if work since onset is SGA, the adjudicator must determine whether past work was at SGA level in order to determine if it was relevant.

If the claimant has not worked for a full year at a job, it is not appropriate to apply the yearly SGA limit to his or her earnings to determine if it represented earnings at the SGA level.

For SGA for blind employees see DI 10501.015.

The following is a Monthly SGA Chart for Nonblind Employees for countable earnings. NOTE: "Countable earnings" of employees indicate SGA if the amount is more per month than indicated in this chart:

Monthly SGA CHART for Nonblind Employees

For mos./Yrs.	1 Mo.	2 Mos.	3 Mos.	4 Mos.	5 Mos.	6 Mos.	7 Mos.	8 Mos.	9 Mos.	10 Mos.	11 Mos.	12 Mos.
2019	$1220	$2440	$3660	$4880	$6100	$7320	$8540	$9760	$10,980	$12,200	$13,420	$14,640
2018	$1180	$2360	$3540	$4720	$5900	$7080	$8260	$9440	$10,620	$11,800	$12.980	$14,160
2017	$1170	$2340	$3510	$4680	$5850	$7020	$8190	$9360	$10,530	$11,700	$12,870	$14,040
2016	$1130	$2260	$3390	$4520	$5650	$6780	$7910	$9040	$10,170	$11,300	$12,430	$13,560
2015	$1090	$2180	$3270	$4360	$5450	$6540	$7630	$8720	$9810	$10,900	$11,990	$13,080
2014	$1070	$2140	$3210	$4280	$5350	$6420	$7490	$8560	$9630	$10,700	$11,770	$12,840

For mos./Yrs.	1 Mo.	2 Mos.	3 Mos.	4 Mos.	5 Mos.	6 Mos.	7 Mos.	8 Mos.	9 Mos.	10 Mos.	11 Mos.	12 Mos.
2013	$1040	$2080	$3120	$4160	$5200	$6240	$7280	$8320	$9360	$10,400	$11,440	$12,480
2012	$1010	$2020	$3030	$4040	$5050	$6060	$7070	$8080	$9090	$10,100	$11,110	$12,120
2011	$1000	$2000	$3000	$4000	$5000	$6000	$7000	$8000	$9000	$10,000	$11,000	$12,000
2010	$1000	$2000	$3000	$4000	$5000	$6000	$7000	$8000	$9000	$10,000	$11,000	$12,000
2009	$980	$1960	$2940	$3920	$4900	$5880	$6860	$7840	$8820	$9800	$10,780	$11,760
2008	$940	$1880	$2820	$3760	$4700	$5640	$6580	$7520	$8460	$9400	$10,340	$11,280
2007	$900	$1800	$2700	$3600	$4500	$5400	$6300	$7200	$8100	$9000	$9900	$10,800
2006	$860	$1720	$2580	$3440	$4300	$5160	$6020	$6880	$7740	$8600	$9460	$10,320
2005	$830	$1660	$2490	$3320	$4150	$4980	$5810	$6640	$7470	$8300	$9130	$9960
2004	$810	$1620	$2430	$3240	$4050	$4860	$5670	$6480	$7290	$8100	$8910	$9720
2003	$800	$1600	$2400	$3200	$4000	$4800	$5600	$6400	$7200	$8000	$8800	$9600
2002	$780	$1560	$2340	$3120	$3900	$4680	$5460	$6240	$7020	$7800	$8580	$9360
2001	$740	$1480	$2220	$2960	$3700	$4440	$5180	$5920	$6660	$7400	$8140	$8880
7/99-12/00	$700	$1400	$2100	$2800	$3500	$4200	$4900	$5600	$6300	$7000	$7700	$8400
1/90-6/99	$500	$1000	$1500	$2000	$2500	$3000	$3500	$4000	$4500	$5000	$5500	$6000
1980-1989	$300	$600	$900	$1200	$1500	$1800	$2100	$2400	$2700	$3000	$3300	$3600
1979	$280	$560	$840	$1120	$1400	$1680	$1960	$2240	$2520	$2800	$3080	$3360

83. Training

An instructional program designed to prepare a person (or further enhance his or her ability) for performing a specific type or field of work.

84. Transferability

Applying work skills that a claimant has demonstrated in past relevant skilled or semi-skilled work to meet the requirements of other skilled or semi-skilled work. For a detailed discussion of transferability see, DI 25015.015 and DI 25015.017.

85. Transferable skills

Skills obtained from performing past relevant skilled or semi-skilled work that a claimant can use to adjust to the requirements of other skilled or semiskilled work that falls within the claimant's RFC.

86. Unskilled work

Work that requires little or no judgment to do simple duties that a claimant can learn on the job in a short period of time (i.e., 30 days or less). Usually SVP of 1 or 2 as rated in the SCO.

For the definition of SVP see DI 25001.001A.76. in this section.

87. Very heavy work

For the range of lifting and carrying requirements the Department of Labor considered when determining whether to classify work as very heavy see DI 25001.001A.20.

Very heavy work usually:

- Requires walking or standing for a significant part of the day.
- Requires frequent to constant stooping crouching.
- Involves grasping, holding and turning objects, but does not require use of the fingers for fine activities to the extent required in most sedentary work.
- Includes the functional capacity to perform heavy, medium, light, and sedentary work.

88. Vibration (Vi)

An environmental factor rated in the SCO meaning exposure to a shaking object or surface.

89. Vocational factors

The vocational factors are age, education, and past work experience. We consider the factors along with the claimant's RFC to determine whether we expect he or she could adjust to other work that exists in significant numbers in the national economy.

90. Vocational specialist

A vocational specialist (VS) is a senior disability examiner, quality control supervisor, or other appropriately qualified staff, with specialized knowledge and experience who serves as a vocational resource for a state DDS or federal adjudicating unit. For additional information on the role of the VS see DI 25003.001.

91. Walking

Moving about on foot.

92. Wet or Humid (Hu)

An environmental factor rated in the SCO meaning contact with water or other liquids or exposure to nonweather-related humid conditions.

93. Work experience

The experience acquired from a claimant's PRW.

94. Working in high, exposed places (HE)

An environmental factor rated in the SCO meaning exposure to possible bodily injury from falling.

95. Working with explosives (Ex)

An environmental factor rated in the SCO meaning exposure to possible injury from explosives.

B. Related References

- DI 25003.010 Vocational Policy References
- DI 25025.001 The Medical-Vocational Guidelines
- DI 25025.005 Using the Medical-Vocational Guidelines
- DI 25025.010 Using Rule 204.00 as a Framework for a Determination
- DI 25025.015 Using a Rule as a Framework When Exertional Capacity Falls between Two Rules
- DI 25025.020 Applying the Medical-Vocational Rules When the Claimant has Exertional and Nonexertional Limitations
- DI 25025.022 Using a Medical-Vocational Rule as a Framework When the Issue of Transferable Skills is Not Material to the Determination
- DI 25025.025 Vocational Factors do Not Match a Medical-Vocational Rule
- DI 25025.030 A Significant Number of Jobs to Support a Framework "Not Disabled" Determination
- DI 25025.035 Tables No. 1, 2, 3, and Rule 204.00

VOCATIONAL TESTIMONY

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May, 2019

There are questions that you can ask to the vocational expert at every hearing if the ALJ does not ask these.

Are the jobs you listed unskilled?

How many days a month can the claimant miss on the jobs (see attached statistics from the Bureau of Labor Statistics on absences on jobs).

What breaks are given on the jobs you listed?

Did you review the medical records in the file? If the V.E. has done this, you can then refer to the Exhibit number for a residual functional capacity form and save time on this.

Are the jobs you listed 40 hours a week under Social Security Ruling 96-8p (1996)?

What are the Dictionary of Occupational Title numbers of the jobs you cited? When was that job last updated in that publication (the DLU)? Are these jobs now outdated? Where are the specific jobs located in this geographical area so that I can contact that employer about the nature of the jobs (unskilled, sedentary for example).

What are the specific sources of the jobs the vocational expert listed? Do these sources break down the jobs by exertion? Do the sources list the jobs by alternate sitting and standing or walking away from the work station, by the contact with co-workers and supervisors on the jobs (superficial and occasional for example). Does a claimant have any control over the amount of contact on unskilled jobs?

20 CFR 404.1566 (d) defines the sources as census data, County Business Patterns, the Occupational Outlook Handbook, Occupational Analyses, and the outdated Dictionary of Occupational Titles. What specific data is contained in each of these publications?

Also note that the Vocational Expert Handbook issued in August, 2017 states at page 3 that the vocational expert should be prepared to cite, explain, and furnish any sources the vocational expert relies on to support their testimony!

If the vocational expert cites to a specific publication, ask for the volume and page number of the publication so that you can check this out after the hearing! David Travers notes this in his publications. You can submit rebuttal evidence to the ALJ after the hearing under 20 CFR 498.217 (g)!

bls.gov.cps - 2018 ABSENCES

Labor Force Statistics from the Current Population Survey

HOUSEHOLD DATA
ANNUAL AVERAGES
47. Absences from work of employed full-time wage and salary workers by occupation and industry
[Numbers in thousands]

Occupation and industry	2018						
	Full-time wage and salary workers(1)	Absence rate(1)			Lost worktime rate(2)		
		Total	Illness or injury	Other reasons	Total	Illness or injury	Other reasons
Total employed	115,558	2.9	2.0	0.9	1.5	1.0	0.5
OCCUPATION							
Management, professional, and related occupations	48,605	2.6	1.7	0.9	1.4	0.8	0.6
Management, business, and financial operations occupations	19,813	2.3	1.5	0.8	1.2	0.7	0.5
Management occupations	13,530	2.1	1.4	0.8	1.2	0.7	0.5
Business and financial operations occupations	6,282	2.6	1.6	0.9	1.2	0.7	0.5
Professional and related occupations	28,792	2.8	1.8	1.0	1.5	0.8	0.6
Computer and mathematical occupations	4,723	2.4	1.6	0.8	1.1	0.6	0.5
Architecture and engineering occupations	2,977	2.1	1.5	0.7	1.1	0.7	0.5
Life, physical, and social science occupations	1,291	2.7	1.8	0.9	1.4	0.8	0.6
Community and social service occupations	2,193	3.7	2.5	1.2	2.1	1.3	0.8
Legal occupations	1,433	2.4	1.5	0.8	1.1	0.6	0.5
Education, training, and library occupations	7,131	2.7	1.7	1.0	1.5	0.8	0.7
Arts, design, entertainment, sports, and media occupations	1,820	3.0	2.0	1.0	1.3	0.8	0.5
Healthcare practitioners and technical occupations	7,225	3.2	2.0	1.2	1.8	1.0	0.8
Service occupations	16,249	3.4	2.4	1.0	1.7	1.2	0.5
Healthcare support occupations	2,590	4.0	2.7	1.3	2.2	1.4	0.8
Protective service occupations	2,817	2.6	1.9	0.7	1.6	1.2	0.4
Food preparation and serving related occupations	4,427	3.3	2.3	1.0	1.5	1.0	0.5
Building and grounds cleaning and maintenance occupations	3,659	3.8	2.9	0.9	1.8	1.3	0.4
Personal care and service occupations	2,755	3.2	2.1	1.0	1.4	0.9	0.5
Sales and office occupations	23,719	3.1	2.1	1.0	1.5	1.0	0.5
Sales and related occupations	10,006	2.5	1.7	0.8	1.2	0.8	0.4
Office and administrative support occupations	13,712	3.6	2.5	1.1	1.8	1.2	0.6
Natural resources, construction, and maintenance occupations	11,693	2.7	2.1	0.6	1.4	1.1	0.3

Email Address
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Occupation and industry	2018						
	Full-time wage and salary workers[1]	Absence rate[1]			Lost worktime rate[2]		
		Total	Illness or injury	Other reasons	Total	Illness or injury	Other reasons
Farming, fishing, and forestry occupations	871	2.7	2.0	0.8	1.2	0.9	0.3
Construction and extraction occupations	6,480	2.7	2.1	0.6	1.4	1.1	0.3
Installation, maintenance, and repair occupations	4,342	2.6	2.1	0.6	1.4	1.1	0.3
Production, transportation, and material moving occupations	15,292	3.0	2.3	0.7	1.7	1.3	0.4
Production occupations	7,692	3.0	2.3	0.7	1.7	1.3	0.4
Transportation and material moving occupations	7,600	3.0	2.3	0.7	1.7	1.3	0.4
INDUSTRY							
Private sector	97,400	2.8	1.9	0.9	1.4	1.0	0.5
Agriculture and related industries	1,164	2.8	2.0	0.7	1.3	1.1	0.3
Nonagricultural industries	96,236	2.8	1.9	0.9	1.4	1.0	0.5
Mining, quarrying, and oil and gas extraction	726	2.0	1.5	0.5	1.1	0.8	0.2
Construction	7,659	2.4	1.8	0.6	1.2	0.9	0.3
Manufacturing	14,166	2.7	2.0	0.7	1.5	1.1	0.4
Durable goods	9,012	2.5	1.9	0.7	1.4	1.0	0.3
Nondurable goods	5,154	2.9	2.2	0.8	1.6	1.2	0.4
Wholesale and retail trade	13,928	2.8	2.0	0.8	1.4	1.0	0.4
Wholesale trade	3,138	2.3	1.7	0.6	1.3	0.9	0.3
Retail trade	10,790	3.0	2.1	0.9	1.5	1.0	0.5
Transportation and utilities	5,743	2.6	1.9	0.7	1.5	1.1	0.4
Transportation and warehousing	4,734	2.7	1.9	0.7	1.5	1.1	0.4
Utilities	1,009	2.4	1.9	0.5	1.6	1.3	0.3
Information	2,206	2.7	1.9	0.8	1.4	0.9	0.5
Financial activities	8,385	2.6	1.6	0.9	1.3	0.8	0.5
Finance and insurance	6,406	2.5	1.6	0.9	1.3	0.7	0.5
Finance	4,003	2.3	1.4	0.8	1.2	0.7	0.5
Insurance	2,403	2.8	1.8	1.0	1.4	0.9	0.6
Real estate and rental and leasing	1,979	2.9	1.9	1.0	1.5	0.8	0.6
Professional and business services	13,340	2.5	1.6	0.9	1.2	0.7	0.5
Professional and technical services	8,841	2.3	1.4	0.9	1.1	0.7	0.5
Management, administrative, and waste services	4,499	2.9	2.0	0.9	1.4	0.9	0.5
Education and health services	17,977	3.3	2.2	1.2	1.8	1.1	0.7
Educational services	3,553	2.7	1.8	0.9	1.4	0.8	0.6
Health care and social assistance	14,424	3.5	2.3	1.2	1.9	1.2	0.7
Leisure and hospitality	7,625	3.1	2.1	0.9	1.4	0.9	0.4
Arts, entertainment, and recreation	1,555	2.8	1.9	0.9	1.2	0.7	0.4
Accommodation and food services	6,071	3.1	2.2	0.9	1.4	1.0	0.4
Accommodation	1,088	3.2	2.4	0.8	1.6	1.2	0.4
Food services and drinking places	4,983	3.1	2.2	0.9	1.4	0.9	0.5
Other services[3]	4,481	2.9	2.0	0.9	1.3	0.8	0.5
Other services, except private households	4,104	2.7	1.9	0.8	1.3	0.8	0.5
Public sector	18,158	3.3	2.3	1.0	1.8	1.1	0.6
Federal government	3,468	3.6	2.6	1.0	1.9	1.3	0.5

Occupation and industry	2018						
	Full-time wage and salary workers[1]	Absence rate[1]			Lost worktime rate[2]		
		Total	Illness or injury	Other reasons	Total	Illness or injury	Other reasons
State government	6,060	3.4	2.4	0.9	1.7	1.2	0.6
Local government	8,630	3.2	2.1	1.1	1.7	1.1	0.7

Footnotes

(1) Absences are defined as instances when persons who usually work 35 or more hours per week (full time) worked less than 35 hours during the reference week for one of the following reasons: own illness, injury, or medical problems; child care problems; other family or personal obligations; civic or military duty; and maternity or paternity leave. Excluded are situations in which work was missed due to vacation or personal days, holiday, labor dispute, and other reasons. For multiple jobholders, absence data refer only to work missed at their main jobs. The absence rate is the ratio of workers with absences to total full-time wage and salary employment.

(2) Hours absent as a percent of hours usually worked.

(3) Includes other industries, not shown separately.

NOTE: All self-employed workers are excluded, both those with incorporated businesses and those with unincorporated businesses. The estimates of full-time wage and salary employment shown in this table do not match those in other tables because the estimates in this table are based on the full CPS sample and those in the other tables are based on a quarter of the sample only. Updated population controls are introduced annually with the release of January data.

Last Modified Date: January 18, 2019

U.S. Bureau of Labor Statistics | Division of Labor Force Statistics, PSB Suite 4675, 2 Massachusetts Avenue, NE Washington, DC 20212-0001
www.bls.gov/CPS | Telephone: 1-202-691-6378 | Contact CPS

20 CFR

§ 498.217. Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence, but may be guided by them in ruling on the admissibility of evidence.

(c) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(d) Although relevant, evidence must be excluded if it is privileged under Federal law, unless the privilege is waived by a party.

(e) Evidence concerning offers of compromise or settlement made in this action will be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(f)(1) Evidence of crimes, wrongs or acts other than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme.

(2) Such evidence is admissible regardless of whether the crimes, wrongs or acts occurred during the statute of limitations period applicable to the acts which constitute the basis for liability in the case, and regardless of whether they were referenced in the IG's notice sent in accordance with § 498.109.

(g) The ALJ will permit the parties to introduce rebuttal witnesses and evidence as to those issues raised in the parties' case-in-chief.

(h) All documents and other evidence offered or taken for the record will be open to examination by all parties, unless otherwise ordered by the ALJ for good cause.

[61 FR 65471, Dec. 13, 1996]

TAB
E

Michael A. Walters

Michael A. Walters manages the legal Hotline at Pro Seniors, Inc. in Cincinnati Ohio. Mike has practiced law since 1991, with an emphasis in the area of Social Security law as well as elder law. Mike is admitted to practice law in the state of Ohio and the Commonwealth of Kentucky, the Federal District Courts for the Southern District of Ohio and the Eastern District of Kentucky, as well as the United States Court of Appeals for the Sixth Circuit. Mike is a member of the Cincinnati Bar Association, the Northern Kentucky Bar Association, the American Bar Association, and the National Organization of Social Security Claimants' Representatives.

SEI & SGA

May 3, 2019

Michael Walters
Legal Hotline Managing Attorney
Pro Seniors, Inc.

1

Ohio's Senior Legal Hotline:

1) Staffed by experienced attorneys
2) Pre-set appointments
3) By telephone
4) 30 minutes
5) Free legal advice and counsel
6) Call 1.800.488.6070 or 513.345.4160
7) Hotline Attorney Referral Panel

2

Substantial Gainful Activity

- See form at https://www.ssa.gov/forms/ssa-820.pdf
- See 20 CFR § 416.975 https://www.law.cornell.edu/cfr/text/20/416.975

Three Tests

- Test one: You have engaged in substantial gainful activity if you render services that are significant to the operation of the business and receive a substantial income from the business.
- Test two: You have engaged in substantial gainful activity if your work activity, in terms of factors such as hours, skills, energy output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in your community who are in the same or similar businesses as their means of livelihood.

Three Tests (continued)

- Test Three: You have engaged in substantial gainful activity if your work activity, although not comparable to that of unimpaired individuals, is clearly worth the amount shown in § 404.1574(b)(2) when considered in terms of its value to the business, or when compared to the salary that an owner would pay to an employee to do the work you are doing.

Significant Services

If you are not a farm landlord and you operate a business entirely by yourself, any services that you render are significant to the business. If your business involves the services of more than one person, we will consider you to be rendering significant services if you contribute more than half the total time required for the management of the business, or you render management services for more than 45 hours a month regardless of the total management time required by the business.

Substantial Income

(1) Determining countable income. We deduct your normal business expenses from your gross income to determine net income. Once we determine your net income, we deduct the reasonable value of any significant amount of unpaid help furnished by your spouse, children, or others. Miscellaneous duties that ordinarily would not have commercial value would not be considered significant. We deduct impairment-related work expenses that have not already been deducted in determining your net income. Impairment-related work expenses are explained in § 404.1576. We deduct unincurred business expenses paid for you by another individual or agency. An unincurred business expense occurs when a sponsoring agency or another person incurs responsibility for the payment of certain business expenses, e.g., rent, utilities, or purchases and repair of equipment, or provides you with equipment, stock, or other material for the operation of your business. We deduct soil bank payments if they were included as farm income. That part of your income remaining after we have made all applicable deductions represents the actual value of work performed. The resulting amount is the amount we use to determine if you have done substantial gainful activity. For purposes of this section, we refer to this amount as your countable income. We will generally average your countable income for comparison with the earnings guidelines in § 404.1574(b)(2). See § 404.1574a for our rules on averaging of earnings.

Substantial Income (continued)

(2) When countable income is considered substantial. We will consider your countable income to be substantial if—

(i) It averages more than the amounts described in § 404.1574(b)(2); or

(ii) It averages less than the amounts described in § 404.1574(b)(2) but it is either comparable to what it was before you became seriously impaired if we had not considered your earnings or is comparable to that of unimpaired self-employed persons in your community who are in the same or a similar business as their means of livelihood.

Substantial Income (cont.)

Year	Blind	Non-blind
2015	$1,820	$1,090
2016	1,820	1,130
2017	1,950	1,170
2018	1,970	1,180
2019	2,040	1,220

Unsuccessful Work Attempt

(1)General. Ordinarily, work you have done will not show that you are able to do substantial gainful activity if, after working for a period of 6 months or less, you were forced by your impairment to stop working or to reduce the amount of work you do so that you are no longer performing substantial gainful activity and you meet the conditions described in paragraphs (d)(2), (3), and (4) of this section.

Unsuccessful Work Attempt (continued)

(2)Event that must precede an unsuccessful work attempt. There must be a significant break in the continuity of your work before we will consider you to have begun a work attempt that later proved unsuccessful. You must have stopped working or reduced your work and earnings below substantial gainful activity because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work. Examples of such special conditions may include any significant amount of unpaid help furnished by your spouse, children, or others, or unincurred business expenses, as described in paragraph (c) of this section, paid for you by another individual or agency. We will consider your prior work to be "discontinued" for a significant period if you were out of work at least 30 consecutive days. We will also consider your prior work to be "discontinued" if, because of your impairment, you were forced to change to another type of work.

Unsuccessful Work Attempt (continued)

If you worked 6 months or less. We will consider work of 6 months or less to be an unsuccessful work attempt if you stopped working or you reduced your work and earnings below the substantial gainful activity earnings level because of your impairment or because of the removal of special conditions that took into account your impairment and permitted you to work.

If you worked more than 6 months. We will not consider work you performed at the substantial gainful activity level for more than 6 months to be an unsuccessful work attempt regardless of why it ended or was reduced below the substantial gainful activity level.

Impairment Related Work Expenses

(a)General. When we figure your earnings in deciding if you have done substantial gainful activity, we will subtract the reasonable costs to you of certain items and services which, because of your impairment(s), you need and use to enable you to work. The costs are deductible even though you also need or use the items and services to carry out daily living functions unrelated to your work. Paragraph (b) of this section explains the conditions for deducting work expenses.

Impairment Related Work Expenses (continued)

(b)Conditions for deducting impairment-related work expenses. We will deduct impairment-related work expenses if -

(1)You are otherwise disabled as defined in §§ 404.1505, 404.1577 and 404.1581-404.1583;

(2) The severity of your impairment(s) requires you to purchase (or rent) certain items and services in order to work;

(3)You pay the cost of the item or service. No deduction will be allowed to the extent that payment has been or will be made by another source. No deduction will be allowed to the extent that you have been, could be, or will be reimbursed for such cost by any other source (such as through a private insurance plan, Medicare or Medicaid, or other plan or agency). For example, if you purchase crutches for $80 but you were, could be, or will be reimbursed $64 by some agency, plan, or program, we will deduct only $16;

(4)You pay for the item or service in a month you are working (in accordance with paragraph (d) of this section); and

(5)Your payment is in cash (including checks or other forms of money). Payment in kind is not deductible.

Impairment Related Work Expenses (continued)

(c)What expenses may be deducted -

(1)Payments for attendant care services.

(2)Payments for medical devices. If your impairment(s) requires that you utilize medical devices in order to work, the payments you make for those devices may be deducted. As used in this subparagraph, medical devices include durable medical equipment which can withstand repeated use, is customarily used for medical purposes, and is generally not useful to a person in the absence of an illness or injury. Examples of durable medical equipment are wheelchairs, hemodialysis equipment, canes, crutches, inhalators and pacemakers.

Impairment Related Work Expenses (continued)

(3)Payments for prosthetic devices. If your impairment(s) requires that you utilize a prosthetic device in order to work, the payments you make for that device may be deducted. A prosthetic device is that which replaces an internal body organ or external body part. Examples of prosthetic devices are artificial replacements of arms, legs and other parts of the body.

Impairment Related Work Expenses (continued)

4)Payments for equipment.

(i)Work-related equipment. If your impairment(s) requires that you utilize special equipment in order to do your job, the payments you make for that equipment may be deducted. Examples of work-related equipment are one-hand typewriters, vision aids, sensory aids for the blind, telecommunication devices for the deaf and tools specifically designed to accommodate a person's impairment(s).

Impairment Related Work Expenses (continued)

(ii)Residential modifications. If your impairment(s) requires that you make modifications to your residence, the location of your place of work will determine if the cost of these modifications will be deducted. If you are employed away from home, only the cost of changes made outside of your home to permit you to get to your means of transportation (e.g., the installation of an exterior ramp for a wheelchair confined person or special exterior railings or pathways for someone who requires crutches) will be deducted. Costs relating to modifications of the inside of your home will not be deducted. If you work at home, the costs of modifying the inside of your home in order to create a working space to accommodate your impairment(s) will be deducted to the extent that the changes pertain specifically to the space in which you work. Examples of such changes are the enlargement of a doorway leading into the workspace or modification of the workspace to accommodate problems in dexterity. However, if you are self-employed at home, any cost deducted as a business expense cannot be deducted as an impairment-related work expense.

Impairment Related Work Expenses (continued)

(iii)Nonmedical appliances and equipment. Expenses for appliances and equipment which you do not ordinarily use for medical purposes are generally not deductible. Examples of these items are portable room heaters, air conditioners, humidifiers, dehumidifiers, and electric air cleaners. However, expenses for such items may be deductible when unusual circumstances clearly establish an impairment-related and medically verified need for such an item because it is essential for the control of your disabling condition, thus enabling you to work. To be considered essential, the item must be of such a nature that if it were not available to you there would be an immediate adverse impact on your ability to function in your work activity. In this situation, the expense is deductible whether the item is used at home or in the working place. An example would be the need for an electric air cleaner by an individual with severe respiratory disease who cannot function in a non-purified air environment. An item such as an exercycle is not deductible if used for general physical fitness. If it is prescribed and used as necessary treatment of your impairment and necessary to enable you to work, we will deduct payments you make toward its cost.

Impairment Related Work Expenses (continued)

(5)Payments for drugs and medical services.

(i) If you must use drugs or medical services (including diagnostic procedures) to control your impairment(s) the payments you make for them may be deducted. The drugs or services must be prescribed (or utilized) to reduce or eliminate symptoms of your impairment(s) or to slow down its progression. The diagnostic procedures must be performed to ascertain how the impairment(s) is progressing or to determine what type of treatment should be provided for the impairment(s).

Impairment Related Work Expenses (continued)

(ii) Examples of deductible drugs and medical services are anticonvulsant drugs to control epilepsy or anticonvulsant blood level monitoring; antidepressant medication for mental disorders; medication used to allay the side effects of certain treatments; radiation treatment or chemotherapy for cancer patients; corrective surgery for spinal disorders; electroencephalograms and brain scans related to a disabling epileptic condition; tests to determine the efficacy of medication on a diabetic condition; and immunosuppressive medications that kidney transplant patients regularly take to protect against graft rejection.

Impairment Related Work Expenses (continued)

(iii) We will only deduct the costs of drugs or services that are directly related to your impairment(s). Examples of non-deductible items are routine annual physical examinations, optician services (unrelated to a disabling visual impairment) and dental examinations.

Impairment Related Work Expenses (continued)

(6)Payments for similar items and services -

(i)General. If you are required to utilize items and services not specified in paragraphs (c) (1) through (5) of this section but which are directly related to your impairment(s) and which you need to work, their costs are deductible. Examples of such items and services are medical supplies and services not discussed above, the purchase and maintenance of a dog guide which you need to work, and transportation.

Impairment Related Work Expenses (continued)

(ii)Medical supplies and services not described above. We will deduct payments you make for expendable medical supplies, such as incontinence pads, catheters, bandages, elastic stockings, face masks, irrigating kits, and disposable sheets and bags. We will also deduct payments you make for physical therapy which you require because of your impairment(s) and which you need in order to work.

Impairment Related Work Expenses (continued)

(iii)Payments for transportation costs. We will deduct transportation costs in these situations:

(A)Your impairment(s) requires that in order to get to work you need a vehicle that has structural or operational modifications. The modifications must be critical to your operation or use of the vehicle and directly related to your impairment(s). We will deduct the costs of the modifications, but not the cost of the vehicle. We will also deduct a mileage allowance for the trip to and from work. The allowance will be based on data compiled by the Federal Highway Administration relating to vehicle operating costs.

Impairment Related Work Expenses (continued)

(B)Your impairment(s) requires you to use driver assistance, taxicabs or other hired vehicles in order to work. We will deduct amounts paid to the driver and, if your own vehicle is used, we will also deduct a mileage allowance, as provided in paragraph (c)(6)(iii)(A) of this section, for the trip to and from work.

Impairment Related Work Expenses (continued)

(C)Your impairment(s) prevents your taking available public transportation to and from work and you must drive your (unmodified) vehicle to work. If we can verify through your physician or other sources that the need to drive is caused by your impairment(s) (and not due to the unavailability of public transportation), we will deduct a mileage allowance, as provided in paragraph (c)(6)(iii)(A) of this section, for the trip to and from work.

Impairment Related Work Expenses (continued)

(7)Payments for installing, maintaining, and repairing deductible items. If the device, equipment, appliance, etc., that you utilize qualifies as a deductible item as described in paragraphs (c) (2), (3), (4) and (6) of this section, the costs directly related to installing, maintaining and repairing these items are also deductible. (The costs which are associated with modifications to a vehicle are deductible. Except for a mileage allowance, as provided for in paragraph (c)(6)(iii) of this section, the costs which are associated with the vehicle itself are not deductible.)

Legality of Business Doesn't Matter

See SSR 94-1c https://www.ssa.gov/OP_Home/rulings/di/03/SSR94-01-di-03.html

Dotson v. Shalala, 1 F.3d 571 (7th Cir. 1993)

Harold Wayne Dotson, a Supplemental Security Income claimant, appeals the district court's grant of summary judgment in favor of Donna E. Shalala, Secretary of the Department of Health and Human Services. In granting summary judgment, the district court upheld an administrative law judge's finding that Dotson was engaging in substantial gainful activity by supporting a $200- to $300-per-day heroin and cocaine habit through illegal means. See Dotson v, Sullivan, 813 F. Supp. 651 (C.D. Ill. 1992). Because we agree that illegal activity can constitute substantial gainful activity, we affirm.

TAB
F

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Mike practices in disability and injury law. He received his law degree from Salmon P. Chase College of Law.

Mike was chair of the Cincinnati Bar Association's Social Security Committee 1988-1990. He is present holder of Kentucky Bar Association's CLE Recognition Award. Mike is a member of the Cincinnati Bar Association, Northern Kentucky Bar Association and a sustaining member of the National Organization of Social Security Claimants' Representatives (NOSSCR).

Mike has give presentations to various organizations, including the Cincinnati Bar Association, the University of Cincinnati, the Cincinnati Society of Physical Medicine and Rehabilitation Physicians, Chase College of Law, NOSSCR, Northern Kentucky Bar Association, the NKBA/Northern Kentucky Cable Television Programs, the Kentucky Academy of Trial Attorneys' Peoples Law School and others. Mike is a co-author of a chapter in the University of Kentucky College of Law CLE Handbook: Workers' Compensation in Kentucky (3rd Ed., UK/CLE) (2002).

James R. Williams, Esq.
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Jim Williams has spent over 25 years in the area of Social Security and Supplemental Security Income (SSI) law. He graduated from Marietta College with a B.A. degree in history and from the Ohio State University College of Law. While in law school, he was a member of the Moot Court National Team. He is licensed to practice law in Ohio , in the United States District Courts for the Southern District of Ohio and for the Eastern District of Kentucky, and in the United States Court of Appeals for the Sixth Circuit.

Shortly after graduation from law school, Jim went to work for the Office of Hearings and Appeals of the Social Security Administration. In this job, he was an attorney-advisor to Administrative Law Judges, helping Judges draft written decisions on disability cases and also doing legal research for Judges on other issues of law. After working there from January, 1976 until November, 1982, he left this job to enter private law practice. In private law practice since November, 1982, he has represented hundreds of claimants for Social Security disability benefits and for Supplemental Security Income benefits at hearings before Administrative Law Judges and on appeals to the Social Security Appeals Council and to the Federal courts. He has written over 400 briefs on Federal court appeals of Social Security and Supplemental Security Income cases in the United States District Courts and in the United States Court of Appeals for the Sixth Circuit. Among his published decisions in these courts are Carter v. Secretary, 834 F. 2d 97 (6th Cir. 1987) and Preston v. Secretary, 854 F. 2d 815 (6th Cir. 1988).; and Lancaster v. Commissioner, 228 F. 2d 563 (6th Cir. 2007). He has also litigated attorney fee issues in Social Security cases before the Sixth Circuit in two en banc proceedings there, Rodriguez v. Secretary, 865 F. 2d 739 (6th Cir. 1989) and Horenstein v. Secretary, 35 F. 3d 261 (6th Cir. 1994).

Jim is a member of the American Bar Association, the Ohio State Bar Association, the Cincinnati Bar Association, and since 1994 a member of the Board of Directors of the National Organization of Social Security Claimants' Representatives (NOSSCR). He has spoken at over 30 seminars on Social Security law sponsored by the Cincinnati Bar Association, the Ohio State Bar Association CLE, the Ohio Academy of Trial Lawyers, the Tennessee Association of Legal Services, Kentucky Legal Services, and the National Organization of Social Security Claimants' Representatives. He has also written a chapter on disability law for the Social Security Practice Guide published by the Matthew Bender Company in 1984. He is very experienced in the area of Social Security and Supplemental Security Income disability law with a wide variety of experiences at all levels of appeals in these areas of law.

SOCIAL SECURITY RULINGS UPDATES

MICHAEL C. ARNOLD, ESQ.

- SSR 18-1p Determining the Established Onset Date (EOD) in Disability Claims

- SSR 18-2p Determining the Established Onset Date (EOD) in Blindness Claims

- SSR 18-3p Failure to Follow Prescribed Treatment

- SSR 19-1p Effect of the Decision in *Lucia v. Securities and Exchange Commission (SEC)* on Cases Pending at the Appeals Council

- SSR 83-20 Onset of Disability is rescinded and replaced by SSR 18-1p.

- Please remember that the Revisions to Rules Regarding the Evaluation of Medical Evidence issued by SSA on 1/18/17 are effective for any claims filed on or after March 27, 2017. These Revisions to Rules Regarding the Evaluation of Medical Evidence rescind SSR 96-2p Giving Controlling Weight to Treating Source Medical Opinions; SSR 96-5p Medical Source Opinions on Issues Reserved to the Commissioner; SSR 96-6p Consideration of Administrative Findings of Fact by State Agency Medical and Psychological Consultants and Other Program Physicians and Psychologists at the Administrative Law Judge and Appeals Council

Levels of Administrative Review and Medical Equivalence; and SSR 06-3p Considering Opinions and Other Evidence From Sources Who Are Not "Acceptable Medical Sources" in Disability Claims, Considering Decisions On Disability by Other Governmental and Nongovernmental Agencies. SSR 17-2p Evidence Needed by Adjudicators at the Hearings and Appeals Council Levels of the Administrative Review Process to Make Findings about Medical Equivalence, was also issued.

- SSR 96-7p Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements, has been rescinded and replaced by SSR 16-3p Evaluation of Symptoms in Disability Claims. SSR 16-3p has been applicable to all decisions made on or after March 28, 2016. Effective June 14, 2018, SSA rescinded SSR 96-3p Considering Allegations of Pain and Other Symptoms in Determining Whether a Medically Determinable Impairment is Severe, and SSR 96-4p Symptoms, Medically Determinable Physical and Mental Impairments, and Exertional and Nonexertional Limitations, explaining that these Rulings are unnecessarily duplicative of SSR 16-3p Evaluation of Symptoms in Disability Claims.

Social Security

Social Security Rulings

Effective Date:
October 2, 2018
Federal Register,
vol. 83, No. 191,
page 49613 .

Policy Interpretation Ruling

Titles II and XVI: Determining the Established Onset Date (EOD) in Disability Claims

We are providing notice of SSR 18-01p, which rescinds and replaces SSR 83-20, "Titles II and XVI: Onset of Disability," except as noted here. Concurrently, we published a separate SSR, SSR 18-02p, "Titles II and XVI: Determining the Established Onset Date (EOD) in Blindness Claims," to discuss how we determine the EOD in statutory blindness claims. SSR 18-02p rescinds and replaces two parts of SSR 83-20. Specifically, SSR 18-02p rescinds and replaces the subsection, "Title II: Blindness Cases," under the section, "Technical Requirements and Onset of Disability"; and the subsection, "Title XVI—Specific Onset is Necessary," which is also under the section "Technical Requirements and Onset of Disability," as it applies to statutory blindness claims. Therefore, as of October 2, 2018, the date this SSR was published in the *Federal Register*, SSR 83-20 is completely rescinded and replaced by SSR 18-01p and SSR 18-02p.

Purpose: This SSR explains what we mean by EOD and clarifies how we determine the EOD in disability claims under titles II and XVI of the Act. Specifically, it addresses how we

determine the EOD in claims that involve traumatic, non-traumatic, and exacerbating and remitting impairments. This ruling also addresses special considerations related to the EOD, such as work activity and previously adjudicated periods. Additionally, this SSR clarifies that an administrative law judge (ALJ) may, but is not required to, call upon the services of a medical expert (ME), to assist with inferring the date that the claimant first met the statutory definition of disability.

Citations: Sections 223 and 1614 of the Act, as amended; 20 CFR 404.130, 404.303, 404.315-.316, 404.320-.321, 404.335-.336, 404.350-.351, 404.988-.989, 404.1505, 404.1510, 404.1512-.1513, 404.1520, 404.1574, 416.202, 416.325, 416.905-.906, 416.910, 416.912-.913, 416.920, 416.924, 416.974, and 416.1488-.1489; 20 CFR part 404, subpart P, appendices 1 and 2.

Policy Interpretation

To be entitled to disability benefits under title II of the Act or to be eligible for Supplemental Security Income (SSI) payments based on disability under title XVI of the Act, a claimant must file an application, meet the statutory definition of disability,[1] and satisfy the applicable non-medical requirements. If we find that a claimant meets the statutory definition of disability and meets the applicable non-medical requirements during the period covered by his or her application, we then determine the claimant's EOD. Generally, the EOD is the earliest date that the claimant meets both the definition of disability and the non-medical requirements for entitlement to benefits under title II of the Act or eligibility for SSI payments under title XVI of the Act during the period covered by his or her application. Because entitlement and eligibility depend on non-medical requirements, the EOD may be later than the date the claimant first met the definition of disability, and some claimants who meet the definition of disability may not be entitled to benefits under title II or eligible for disability payments under title XVI.[2]

Outline

I. How do we determine the EOD?

A. What are the non-medical requirements for entitlement and eligibility under the Act?

B. How do we determine whether a claimant meets the statutory definition of disability and, if so, when the claimant first met that definition?

1. How do we determine when a claimant with a traumatic impairment first met the statutory definition of disability?

2. How do we determine when a claimant with a non-traumatic or exacerbating and remitting impairment first met the statutory definition of disability?

3. How do we determine when a claimant with more than one type of impairment first met the statutory definition of disability?

II. What are some special considerations related to the EOD?

A. How does work activity affect our determination of the EOD?

B. May we determine the EOD to be in a previously adjudicated period?

III. When is this SSR applicable?

Discussion

I. How do we determine the EOD?

When we need to determine a claimant's EOD, we start by considering whether we can establish the EOD as of the claimant's potential onset date (POD) of disability. The POD is the first date when the claimant met the non-medical requirements during the period covered by his or her application. The POD is the earliest date that we consider for the EOD because it affords the claimant the maximum possible benefits for the period covered by his or her application. The POD may be the same as, earlier than, or later than the claimant's alleged onset date, which is the date that the claimant alleges he or she first met the statutory definition of disability.

The period covered by an application refers to the period when a claimant may be entitled to benefits under title II or eligible for SSI payments under title XVI of the Act based on a particular application. The period covered by an application depends on the type of claim. For example, the Act and our regulations explain that if a claimant applies for disability insurance benefits under title II of the Act after the first month that he or she could have been entitled to them, he or she may receive benefits for up to 12 months immediately before the month in which the application was filed.[3] If a claimant applies for SSI payments based on disability under title XVI of the Act after the first month that he or she meets the other eligibility requirements, we cannot make SSI payments based on disability for the month in which the application was filed or any months before that month.[4] That is, we cannot make retroactive payments based on disability under title XVI of the Act.

If the claimant meets the statutory definition of disability on his or her POD, we use the POD as the EOD because it would be the earliest date at which the claimant meets both the statutory definition of disability and the non-medical requirements for entitlement to benefits under title II or eligibility for SSI payments under title XVI during the period covered by his or her application. In contrast, if the claimant first meets the statutory definition of disability after his or her POD, we use the first date that the claimant meets both the statutory definition of disability and the applicable non-medical requirements as his or her EOD.

A. What are the non-medical requirements for entitlement and eligibility under the Act?

The non-medical requirements vary based on the type(s) of claim(s) the claimant filed. To illustrate, we identify below the most common types of disability claims and some of the regulations that explain the non-medical requirements for that type of claim.

Disability insurance benefits: 20 CFR 404.315, 404.316, 404.320, and 404.321;

Disabled widow(er)'s benefits: 20 CFR 404.335 and 404.336;

Childhood disability benefits: 20 CFR 404.350 and 404.351; and

Supplemental Security Income: 20 CFR 416.202 and 416.305.

B. How do we determine whether a claimant meets the statutory definition of disability and, if so, when the claimant first met that definition?

We need specific medical evidence to determine whether a claimant meets the statutory definition of disability. In general, an individual has a statutory obligation to provide us with the evidence to prove to us that he or she is disabled.[5] This obligation includes providing us with evidence to prove to us when he or she first met the statutory definition of disability. The Act also precludes us from finding that an individual is disabled unless he or she submits such evidence to us.[6] The Act further provides that we:

[S]hall consider all evidence available in [an] individual's case record, and shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability.[7]

In addition, when we make any determination, the Act requires us to:

[M]ake every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on a consultative basis.[8]

"Complete medical history" means the records from the claimant's medical source(s) covering at least the 12-month period preceding the month in which the claimant applied for disability benefits or SSI payments.[9] If the claimant says his or her disability began less than 12 months before he or she applied for benefits, we will develop the claimant's complete medical history beginning with the month he or she says his or her disability began, unless we have reason to believe the claimant's

disability began earlier.[10] If applicable, we will develop the claimant's complete medical history for the 12-month period prior to the month he or she was last insured for disability insurance benefits,[11] the month ending the 7-year period when the claimant must establish his or her disability if he or she applied for widow's or widower's benefits based on disability,[12] or the month the claimant attained age 22 if he or she applied for child's benefits under title II[13] based on disability.[14]

We consider all of the evidence of record when we determine whether a claimant meets the statutory definition of disability.[15] The period we consider depends on the type of claim and the facts of the case. For example, a claimant who has applied for disability insurance benefits under title II of the Act must show that:

- He or she met the statutory definition of disability before his or her insured status expired, and
- He or she currently meets the statutory definition of disability,[16] or his or her disability ended within the 12-month period before the month that he or she applied for benefits.[17]

As another example, a claimant who has applied for child's benefits under title II must show that:

- He or she met the statutory definition of disability before he or she attained age 22, and
- He or she currently meets the statutory definition of disability,[18] or his or her disability ended within the 12-month period before the month that he or she applied for benefits.[19]

As a final example—because we cannot make SSI payments based on disability for the month in which the application was filed or any months before that month—a claimant who has applied for SSI payments under title XVI must show that he or she currently meets the statutory definition of disability.[20] during the period under consideration, then we will determine when the claimant first met that definition. However, we will not consider

whether the claimant first met the statutory definition of disability on a date that is beyond the period under consideration.

1. How do we determine when a claimant with a traumatic impairment first met the statutory definition of disability?

For impairments that result from a traumatic injury or other traumatic event, we begin with the date of the traumatic event, even if the claimant worked on that date. An example of a traumatic event that could result in a traumatic injury is an automobile accident. If the evidence of record supports a finding that the claimant met the statutory definition of disability on the date of the traumatic event or traumatic injury, we will use that date as the date that the claimant first met the statutory definition of disability.

2. How do we determine when a claimant with a non-traumatic or exacerbating and remitting impairment first met the statutory definition of disability?

Non-traumatic impairments may be static impairments that we do not expect to change in severity over an extended period, such as intellectual disability; impairments that we expect to improve over time, such as pathologic bone fractures caused by osteoporosis; or progressive impairments that we expect to gradually worsen over time, such as muscular dystrophy. Exacerbating and remitting impairments are impairments that diminish and intensify in severity over time, such as multiple sclerosis. When a claimant has a non-traumatic or exacerbating and remitting impairment(s), and we determine the evidence of record supports a finding that the claimant met the statutory definition of disability, we will determine the first date that the claimant met that definition. The date that the claimant first met the statutory definition of disability must be supported by the medical and other evidence[21] and be consistent with the nature of the impairment(s).

We consider whether we can find that the claimant first met the statutory definition of disability at the earliest date within the period under consideration, taking into account the date the claimant alleged that his or her disability began. We review the

relevant evidence and consider, for example, the nature of the claimant's impairment; the severity of the signs, symptoms, and laboratory findings; the longitudinal history and treatment course (or lack thereof); the length of the impairment's exacerbations and remissions, if applicable; and any statement by the claimant about new or worsening signs, symptoms, and laboratory findings. The date we find that the claimant first met the statutory definition of disability may predate the claimant's earliest recorded medical examination or the date of the claimant's earliest medical records, but we will not consider whether the claimant first met the statutory definition of disability on a date that is beyond the period under consideration.

If there is information in the claim(s) file that suggests that additional medical evidence relevant to the period at issue is available, we will assist with developing the record and may request existing evidence directly from a medical source or entity that maintains the evidence. We may consider evidence from other non-medical sources such as the claimant's family, friends, or former employers, if we cannot obtain additional medical evidence or it does not exist (e.g., the evidence was never created or was destroyed), and we cannot reasonably infer the date that the claimant first met the statutory definition of disability based on the medical evidence in the file.

At the hearing level of our administrative review process, if the ALJ needs to infer the date that the claimant first met the statutory definition of disability, he or she may call on the services of an ME by soliciting testimony or requesting responses to written interrogatories (i.e., written questions to be answered under oath or penalty of perjury). The decision to call on the services of an ME is always at the ALJ's discretion. Neither the claimant nor his or her representative can require an ALJ to call on the services of an ME to assist in inferring the date that the claimant first met the statutory definition of disability.

The Appeals Council may review the ALJ's finding regarding when the claimant first met the statutory definition of disability, or any other finding of the ALJ, by granting a claimant's request for review or on its own motion authority.[22] The Appeals Council

may also exercise its removal authority and assume responsibility of the request for hearing. The Appeals Council will review a case if there is an error of law; the actions, findings, or conclusions of the ALJ are not supported by substantial evidence; there appears to be an abuse of discretion by the ALJ; or there is a broad policy or procedural issue that may affect the general public interest.[23] The Appeals Council will also review a case if it receives additional evidence that meets certain requirements.[24] If the Appeals Council grants review, it will issue its own decision or return the case to the ALJ for further proceedings, which may include obtaining evidence regarding when the claimant first met the statutory definition of disability. If the Appeals Council issues a decision, it will consider the totality of the evidence (subject to the limitations on Appeals Council consideration of additional evidence in 20 CFR 404.970 and 416.1470) and establish the date that the claimant first met the statutory definition of disability, which is both supported by the evidence and consistent with the nature of the impairment(s).

3. How do we determine when a claimant with more than one type of impairment first met the statutory definition of disability?

If a claimant has a traumatic impairment and a non-traumatic or exacerbating and remitting impairment, we will consider all of the impairments in combination when determining when the claimant first met the statutory definition of disability. We will consider the date of the traumatic event as well as the evidence pertaining to the non-traumatic or exacerbating and remitting impairment and will determine the date on which the combined impairments first caused the claimant to meet the statutory definition of disability.

II. What are some special considerations related to the EOD?

A. How does work activity affect our determination of the EOD?

We consider the date the claimant stopped performing substantial gainful activity (SGA) when we establish the EOD. SGA is work that involves doing significant and productive physical or mental duties and is done (or intended) for pay or profit.[25] If

medical and other evidence indicates the claimant's disability began on the last day he or she performed SGA, we can establish an EOD on that date, even if the claimant worked a full day. Generally, we may not determine a claimant's EOD to be before the last day that he or she performed SGA.

We may, however, determine a claimant's EOD to be before or during a period that we determine to be an unsuccessful work attempt (UWA). A UWA is an effort to do work that discontinues or reduces to the non-SGA level after a short time (no more than six months) because of the impairment or the removal of special conditions related to the impairment that are essential for the further performance of work.[26]

B. May we determine the EOD to be in a previously adjudicated period?

Yes, if our rules for reopening are met[27] and the claimant meets the statutory definition of disability and the applicable non-medical requirements during the previously adjudicated period.[28] Reopening, however, is at the discretion of the adjudicator.[29]

III. When is this SSR applicable?

This SSR is applicable on October 2, 2018. We will use this SSR beginning on its applicable date. We will apply this SSR to new applications filed on or after the applicable date of the SSR and to claims that are pending on and after the applicable date. This means that we will use this SSR on and after its applicable date, in any case in which we make a determination or decision. We expect that Federal courts will review our final decisions using the rules that were in effect at the time we issued the decisions. If a court reverses our final decision and remands a case for further administrative proceedings after the applicable date of this SSR, we will apply this SSR to the entire period at issue in appropriate cases when we make a decision after the court's remand.

[1] *See* 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A); 20 CFR 404.1505(a), 416.905(a) (defining disability for adults); 42 U.S.C. 1382c(a)(3)(C); 20 CFR 416.906 (defining disability for children); *see also* 20 CFR 404.1520(a)(4), 416.920(a)(4)

(setting forth the five-step sequential evaluation we use to determine disability for adults); 20 CFR 416.924 (setting forth the three-step sequential evaluation we use to determine disability for children).

[2] Under title II of the Act, a claimant may be entitled to a period of disability even though he or she does not qualify for monthly cash benefits. 20 CFR 404.320(a).

[3] 42 U.S.C. 423(b); 20 CFR 404.621(a).

[4] 42 U.S.C. 1382(c)(7); 20 CFR 416.335.

[5] To meet the statutory definition of disability, the claimant must show that he or she is unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A); 20 CFR 404.1505(a), 416.905(a).

[6] 42 U.S.C. 423(d)(5)(A), 1382c(a)(3)(H)(i); 20 CFR 404.1512(a), 416.912(a).

[7] 42 U.S.C. 423(d)(5)(B), 1382c(a)(3)(H)(i).

[8] *Id.*

[9] 20 CFR 404.1512(b)(1)(ii), 416.912(b)(1)(ii).

[10] *Id.*

[11] *See* 20 CFR 404.130.

[12] *See* 20 CFR 404.335(c)(1).

[13] *See* 20 CFR 404.350.

[14] 20 CFR 404.1512(b)(1)(ii).

[15] *See* 20 CFR 404.1513, 416.913 (describing the categories of evidence we consider).

[16] For a disability insurance benefits claim under title II, an adjudicator may also determine that the claimant had a closed period of disability when the claimant was disabled for at least 12 continuous months and his or her disability ceased after the month of filing, but prior to the date of adjudication.

[17] *See* 42 U.S.C. 416(i), 423(a)(1); 20 CFR 404.315(a), 404.320. For title II claims, if we find that the claimant did not meet the statutory definition of disability before his or her insured status expired, we will not determine whether the claimant is currently disabled or was disabled within the 12-month period before the month that he or she applied for benefits. If, however, the claimant also filed a different type of claim—for example, a claim for SSI disability payments—we may have to consider whether the claimant is currently disabled to adjudicate the SSI claim.

[18] For a child's benefits claim under title II, an adjudicator may also determine that the claimant had a closed period of disability when the claimant was disabled for at least 12 continuous months and his or her disability ceased after the month of filing, but prior to the date of adjudication.

[19] *See* 42 U.S.C. 402(d)(1)(B), 416(i); 20 CFR 404.320, 404.350(a)(5). For a child's benefits claim under title II, if we find that the claimant did not meet the statutory definition of disability before he or she attained age 22, we will not determine whether the claimant is currently disabled or was disabled within the 12-month period before the month that he or she applied for benefits. If, however, the claimant also filed a different type of claim—for example, a claim for SSI disability payments—we may have to consider whether the claimant is currently disabled to adjudicate the SSI claim.

[20] 42 U.S.C. 1382(c)(7); 20 CFR 416.335. For a title XVI claim, an adjudicator may also determine that the claimant had a closed period of disability when the claimant was disabled for at least 12 continuous months and his or her disability ceased after the month of filing, but prior to the date of adjudication.

[21] *See* 20 CFR 404.1513, 416.913 (describing the categories of evidence we consider).

[22] 20 CFR 404.969, 416.1469.

[23] 20 CFR 404.970, 416.1470.

[24] 20 CFR 404.970(a)(5), (b) and 416.1470(a)(5), (b).

[25] 20 CFR 404.1510, 416.910.

[26] 20 CFR 404.1574(a)(1), (c) and 416.974(a)(1), (c).

[27] 20 CFR 404.988, 404.989, 416.1488, 416.1489.

[28] *See also* Program Operations Manual System (POMS) DI 25501.250.A.5 (explaining when a period of disability may begin during a previously adjudicated period).

[29] 20 CFR 404.988, 416.1488 (stating that "[a] determination, revised determination, decision, or revised decision *may* be reopened . . .") (emphasis added).

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Social Security

Social Security Rulings

Effective Date:
October 2, 2018
Federal Register,
vol. 83, No. 191,
page 49621 .

POLICY INTERPRETATION RULING

Titles II and XVI: Determining the Established Onset Date (EOD) in Blindness Claims

We are providing notice of SSR 18-02p which rescinds and replaces the following sections of SSR 83-20: "Titles II and XVI: Onset of Disability," – (1) "Title II: Blindness Cases," and (2) "Title XVI—Specific Onset is Necessary," as it applies to blindness claims. Concurrently, we published a separate SSR, SSR 18-01p, "Titles II and XVI: Determining the Established Onset Date (EOD) in Disability Claims," which rescinded and replaced all other parts of SSR 83-20. Therefore, as of October 2, 2018, the date this SSR was published in the *Federal Register*, SSR 83-20 is completely rescinded and replaced by SSR 18-01p and SSR 18-02p.

Purpose: This SSR explains how we determine the EOD in blindness claims under titles II and XVI of the Social Security Act (Act).

Citations: Sections 216, 220, 223, 1602, 1611, and 1614 of the Act, as amended; P.L. 108-203, 118 STAT. 535; 20 CFR 404.110, 404.130, 404.303, 404.315-.316, 404.320-.321, 404.335-.336, 404.350-.351, 404.1505, 404.1510, 404.1512, 404.1572, 404.1581-.1584, 416.202, 416.305, 416.912, 416.981-.984.

Policy Interpretation:

To be entitled to disability insurance (DI) benefits under title II of the Act or eligible for Supplemental Security Income (SSI) payments under title XVI of the Act based on blindness, a claimant must file an application, meet the relevant statutory definition(s), and satisfy the applicable non-medical requirements. If we find that a claimant meets the relevant statutory definitions and meets the applicable non-medical requirements during the period covered by his or her application, we then determine the claimant's EOD. The EOD is the earliest date that the claimant meets both the relevant definitions and non-medical requirements during the period covered by his or her application.

Outline

Discussion

I. What is the EOD?

For title II blindness claims, the EOD is the earliest date that the claimant meets the statutory definitions of blindness and disability[1] and the applicable non-medical requirements [2] for entitlement to benefits during the period covered by his or her application. For title XVI blindness claims, the EOD is the earliest date that the claimant meets the statutory definition of blindness [3] and the applicable non-medical requirements[4] for eligibility for SSI payments during the period covered by his or her application.

A. What is the statutory definition of blindness?

Titles II and XVI of the Act define blindness as central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. We consider an eye to have a central visual acuity of 20/200 or less when it has a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.[5] Under title XVI of the Act, an individual may also be considered blind if he or she: (1) was found blind under a State plan approved under title X or XVI of the Act as in effect for October 1972; (2) received aid under that plan because of blindness for December 1973; and (3) continues to be blind as defined under that plan.[6]

B. What are the statutory definitions of disability for blind claimants and when do they apply?

A claimant who seeks DI benefits under title II based on blindness must show that he or she meets the statutory definition of blindness as well as the statutory definition of disability during the period under consideration. [7] A claimant who seeks SSI payments under title XVI based on blindness need only show that he or she meets the statutory definition of blindness during the period under consideration.[8] Title II of the Act defines disability differently for those who are younger than age 55 and those who are age 55 or older.

1. What is the statutory definition of disability for a title II blind claimant who is younger than 55?

For claimants who meet the statutory definition of blindness during the period under consideration and are younger than age 55, the Act defines disability as the inability to engage in any substantial gainful activity (SGA) [9] by reason of any medically

determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.[10]

2.What is the statutory definition of disability for a title II blind claimant who is age 55 or older?

For claimants who meet the statutory definition of blindness during the period under consideration and are age 55 or older, the Act defines disability as the inability by reason of such blindness to engage in SGA requiring skills or abilities comparable to those of any gainful activity in which the claimant has previously engaged with some regularity and over a substantial period of time.[11]

C. What are the non-medical requirements?

A claimant is not entitled to DI benefits or eligible for SSI payments based on blindness unless he or she meets the applicable non-medical requirements. The non-medical requirements—such as the insured status requirements under title II and the income and resource limitations under title XVI—vary based on the type(s) of claim(s) the claimant filed. To illustrate, we identify below the most common types of claims and some of the regulations that explain the non-medical requirements for that type of claim.

- DI Benefits: 20 CFR 404.315, 404.316, 404.320, 404.321;
- Disabled Widow(er)'s Benefits (DWB): 20 CFR 404.335, 404.336;
- Childhood Disability Benefits (CDB): 20 CFR 404.350, 404.351; and
- SSI: 20 CFR 416.202, 416.305.

II. What are some special considerations related to the EOD?

A. What if a claimant meets all the requirements for DI benefits or SSI payments based on blindness and based on another impairment?

If a claimant meets all the requirements for entitlement to DI benefits or eligibility for SSI payments based on blindness, and also meets all the requirements for entitlement to DI benefits or eligibility for SSI payments based on another impairment, we will establish two EODs. One EOD will be for the first date the claimant meets all the requirements for entitlement to DI benefits or eligibility for SSI payments based on blindness, and the other will be for the first date the claimant meets all the requirements based on the other impairment. The EOD for the other impairment may be before or after the EOD for blindness.

B. What happens when a claimant applies for DI benefits under title II and meets the statutory definition of blindness, but continues to work?

If a claimant applies for DI benefits under title II and meets the insured status requirements [12] and the statutory definition of blindness, but continues to work (even at the SGA level), we may establish a period of disability for him or her. A period of disability must last for at least five consecutive, full calendar months.[13] If we establish a period of disability, we "freeze" the claimant's earnings during that period and will not use them to compute cash benefits (unless it advantages the claimant) or to determine whether the claimant still has insured status.[14] However, a period of disability, or disability freeze, does not automatically entitle the claimant to monthly cash benefits. [15] To be entitled to monthly cash benefits, the claimant must still meet the statutory definitions of blindness and disability and the applicable non-medical requirements during the period covered by his or her application.

For purposes of determining the EOD, if we find that the claimant meets the insured status requirements and the statutory definition of blindness, but he or she is performing SGA, we will establish up to two dates. First, we will establish a disability freeze date, which is the date the claimant first met the insured status requirements and the statutory definition of blindness. If the claimant later stops working or his or her work is no longer SGA, we will establish a second date called the "adjusted blind onset date" (ABOD). The ABOD is the date the claimant stopped

performing SGA and became entitled to monthly cash benefits under title II of the Act, subject to a five-month waiting period.

The five-month waiting period begins with the first full month that the claimant does not perform SGA. However, if the claimant is age 55 or older and performing SGA, we consider how the claimant's work activity compares with work he or she did in the past. [16] We consider work to be non-comparable if it requires skills and abilities that are less than or different from those the claimant used in the work he or she did in the past. [17] If the claimant is age 55 or older and performing "non-comparable" SGA, we will count the months the claimant performs "non-comparable" SGA in the waiting period if they also fall within the period of disability.

We cannot establish a disability freeze for DWB or CDB claimants under title II of the Act. There is also no freeze equivalent for SSI claimants under title XVI of the Act. However, to be eligible for SSI payments based on disability under title XVI, a claimant need only meet the statutory definition of blindness and the applicable non-medical requirements. Thus, a claimant seeking SSI payments based on blindness need not show that he or she is unable to perform SGA, but if the claimant is working, we will consider his or her earnings under the income and resource rules of title XVI of the Act. [18] When a claimant's income or resources exceed the Act's limitations, he or she is ineligible for SSI payments under title XVI because he or she does not meet the applicable non-medical requirements, [19] even though the claimant meets our statutory definition of blindness. [20]

III. When is this SSR applicable?

This SSR is applicable on October 2, 2018. We will use this SSR beginning on its applicable date. We will apply this SSR to new applications filed on or after the applicable date of the SSR and to claims that are pending on and after the applicable date. This means that we will use this SSR on and after its applicable date in any case in which we make a determination or decision. We expect that Federal courts will review our final decisions using the rules that were in effect at the time we issued the decisions. If a court reverses our final decision and remands a case for further

administrative proceedings after the applicable date of this SSR, we will apply this SSR to the entire period at issue in appropriate cases when we make a decision after the court's remand.

[1] 42 U.S.C. 416(i)(1)(B) (defining blindness), 423(d)(1)(A) (defining disability for blind individuals younger than age 55), 423(d)(1)(B) (defining disability for statutorily blind individuals age 55 and older); 20 CFR 404.1581 (defining blindness), 404.1582 (explaining how we determine a period of disability based on blindness), 404.1583 (explaining how we determine disability for blind persons who are age 55 or older).

[2] *See, e.g.*, 20 CFR 404.315, 404.316, 404.320, 404.321 (setting forth some of the non-medical requirements for title II DI benefits), 20 CFR 404.335, 404.336 (same for title II disabled widow(er) benefits (DWB)), 20 CFR 404.350, 404.351 (same for title II childhood disability benefits (CDB)).

[3] 42 U.S.C. 1381a ("every aged, *blind*, or disabled individual who is determined . . . to be eligible on the basis of his income and resources shall, in accordance with and subject to the provisions of this title, be paid benefits by the Commissioner of Social Security") (emphasis added), 1382(a) (defining an eligible individual), 1382c(a)(2) (defining blindness); 20 CFR 416.981 (defining blindness), 419.982 (explaining when we will consider an individual to be blind based on a State plan).

[4] *See, e.g.*, 20 CFR 416.202, 416.305 (setting forth some of the non-medical requirements for title XVI SSI payments).

[5] 42 U.S.C. 416(i)(1)(B), 1382C(a)(2); 20 CFR 404.1581, 416.981.

[6] 42 U.S.C. 1382c(a)(2); 20 CFR 416.982.

[7] 42 U.S.C. 423(d)(1)(A), (B); 20 CFR 404.1512(a), 404.1582, 404.1583.

[8] 42 U.S.C. 1381a (" every aged, *blind*, or disabled individual who is determined . . . to be eligible on the basis of his income and resources shall, in accordance with and

subject to the provisions of this title, be paid benefits by the Commissioner of Social Security") (emphasis added), 1382(a) (defining an eligible individual); 20 CFR 416.912 (providing that, in general, a claimant must prove to us that he or she is blind), 416.981 (defining blindness), 416.982 (explaining when we will consider an individual to be blind based on a State plan).

[9] 20 CFR 404.1510 (defining SGA as significant and productive physical or mental duties done (or intended) for pay or profit), 404.1572 (providing further details about what we mean by SGA); see also 42 U.S.C. 423(d)(4)(A), 20 CFR 404.1584 (collectively describing how to calculate SGA for claimants who meet the statutory definition of blindness).

[10] 42 U.S.C. 423(d)(1)(A).

[11] *Id.* at (d)(1)(B).

[12] 20 CFR 404.110 (describing how we determine fully insured status and explaining that an individual needs at least six quarters of coverage but not more than 40 quarters of coverage to be fully insured),

404.130(e) (explaining that a claimant is insured in a quarter for purposes of establishing a period of disability or becoming entitled to DI benefits if in that quarter the claimant meets the statutory definition of blindness and is fully insured).

[13] 20 CFR 404.320(a), (b)(4) (explaining that "[a] period of disability is a continuous period of time during which you are disabled" and that one of the requirements to be "entitled to a period of disability ... [is that a]t least 5 consecutive months go by from the month in which [the claimant's period of disability begins and before the month in which it would end"].

[14] 42 U.S.C. 420; 20 CFR 404.1582.

[15] 20 CFR 404.1582.

[16] 20 CFR 404.1584(c).

[17] *Id.*

[18] 20 CFR 416.983(b), 416.984.

[19] 20 CFR 416.202(c), (d) (explaining that to be eligible for SSI payments, a claimant may not have "more ncome than is permitted" or "more resources than are permitted").

[20] 20 CFR 416.984.

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Social Security

Social Security Rulings

Effective Date:
October 29, 2018
Federal Register,
vol. 83, No, 191,
page 49616.

Policy Interpretation Ruling

Titles II and XVI: Failure to Follow Prescribed Treatment

This Social Security Ruling (SSR) rescinds and replaces SSR 82-59: "Titles II and XVI: Failure to Follow Prescribed Treatment."

Purpose: To provide guidance on how we apply our failure to follow prescribed treatment policy in disability and blindness claims under titles II and XVI of the Social Security Act (Act).

Citations (Authority): Sections 216(i), 223(d) and (f), and 1614(a) of the Act, as amended; 20 CFR 404.1530 and 416.930.

Dates: We will apply this notice on October 29, 2018.[1]

Overview

A. *Background*

B. *When we decide whether the failure to follow prescribed treatment policy may apply in an initial claim*

Condition 1: The individual is otherwise entitled to disability or statutory blindness benefits under titles II or XVI of the Act

Condition 2: There is evidence that an individual's own medical source(s) prescribed treatment for the medically determinable impairment(s) upon which the disability finding is based

A. Background

Under the Act, an individual who meets the requirements to receive disability or blindness benefits will not be entitled to these benefits if the individual fails, without good cause, to follow prescribed treatment that we expect would restore his or her ability to engage in substantial gainful activity (SGA).[1]

We apply the failure to follow prescribed treatment policy at all levels of our administrative review process when we decide an initial claim for benefits based on disability or blindness. We also

apply the policy when we reopen a prior determination or decision involving a claim for benefits based on disability or blindness, when we conduct an age-18 redetermination, and when we conduct a continuing disability review (CDR) under titles II or XVI of the Act.

This SSR explains the policy and procedures we follow when we decide whether an individual has failed to follow prescribed treatment as required by the Act and our regulations.[2]

B. When we decide whether the failure to follow prescribed treatment policy may apply in an initial claim

We will determine whether an individual has failed to follow prescribed treatment only if all three of the following conditions exist:

1.The individual would otherwise be entitled to benefits based on disability or eligible for blindness benefits under titles II or XVI of the Act;

2.We have evidence that an individual's own medical source (s) prescribed[3]treatment for the medically determinable impairment(s) upon which the disability finding is based; and

3.We have evidence that the individual did not follow the prescribed treatment.

If all three conditions exist, we will determine whether the individual failed to follow prescribed treatment, as explained below.[4]

Condition 1: The individual is otherwise entitled to disability or statutory blindness benefits under Titles II or XVI of the Act

We only perform the failure to follow prescribed treatment analysis discussed in this SSR after we find that an individual is entitled to disability or eligible for statutory blindness benefits under titles II or XVI of the Act, regardless of whether the individual followed the prescribed treatment. We will not determine whether an individual failed to follow prescribed treatment if we find the individual is not disabled, not blind, or otherwise not entitled to or eligible for benefits under titles II or XVI of the Act.

Condition 2: There is evidence that an individual's own medical source(s) prescribed treatment for the medically determinable impairment(s) upon which the disability finding is based

If we find that the individual is otherwise entitled to disability or eligible for statutory blindness benefits under titles II or XVI of the Act, we will only determine if the individual has failed to follow prescribed treatment for the medically determinable impairment (s) upon which the disability finding is based if the individual's own medical source(s) prescribed the treatment.[5] We will not determine whether the individual failed to follow prescribed treatment if the treatment was prescribed only by a consultative examiner (CE), medical consultant (MC), psychological consultant (PC), medical expert (ME), or by a medical source during an evaluation conducted solely to determine eligibility to any State or Federal benefit.

Prescribed treatment means any medication, surgery, therapy, use of durable medical equipment, or use of assistive devices. Prescribed treatment does not include lifestyle modifications, such as dieting, exercise, or smoking cessation. We will consider any evidence of prescribed treatment, whether it appears on prescription forms or is otherwise indicated within a medical source's records.

We will consider treatment a medical source prescribed in the past if that treatment is still relevant to the individual's medically determinable impairments that are present during the potential period of entitlement or eligibility and upon which the disability finding was based. We will evaluate whether the individual failed to follow the prescribed treatment, and whether there is good cause for this failure, only for the period(s) during which the individual may be entitled to benefits under the Act.

For example: On January 2, 2017, an individual filed for disability benefits based on an impairment related to a lower-extremity amputation. The individual is no longer wearing a prosthesis that her medical source prescribed in 2015. We determine that the individual meets all of the other criteria for disability. In this scenario, we will evaluate whether the individual

is failing to follow the prescribed treatment to wear the prosthesis during the potential entitlement period and whether the individual has good cause for not following the prescribed treatment during this period. However, we will not consider whether the individual failed to follow prescribed treatment prior to the first possible date of entitlement.

Condition 3: There is evidence that the individual did not follow the prescribed treatment

If we have any evidence that the individual is not following the prescribed treatment, this condition is satisfied. For example, a medical source may include in a treatment note that the patient has not been compliant with a prescribed medication regimen.

C. How we will make a failure to follow prescribed treatment determination

If all three conditions exist, we will determine whether the individual has failed to follow prescribed treatment in the claim. To make a failure to follow prescribed treatment determination, we will:

1. Assess whether the prescribed treatment, if followed, would be expected to restore the individual's ability to engage in SGA.
2. Assess whether the individual has good cause for not following the prescribed treatment.

We may make either assessment first. If we first assess that the prescribed treatment, if followed, would not be expected to restore the individual's ability to engage in SGA, then it is unnecessary for us to assess whether the individual had good cause. Similarly, if we first assess that an individual has good cause for not following the prescribed treatment, then it is unnecessary for us to assess whether the prescribed treatment, if followed, would be expected to restore the individual's ability to engage in SGA.

Assessment 1: We assess whether the prescribed treatment, if followed, would be expected to restore the individual's ability to engage in SGA

This assessment focuses on the prescribed treatment. We will determine whether we would expect the prescribed treatment, if followed, to restore the individual's ability to engage in SGA. We are responsible for making this assessment, and we will consider all the relevant evidence in the record. At the initial and reconsideration levels of the administrative review process, an MC or PC will make this assessment. At the hearings and Appeals Council (AC) levels, the adjudicator(s) will make this assessment. Although the conclusion of this assessment ultimately rests with us, we will consider the prescribing medical source's prognosis.

If we first determine that following the prescribed treatment would not be expected to restore the individual's ability to engage in SGA, then it is unnecessary for us to assess whether the individual had good cause for failing to follow the prescribed treatment. If we determine that following the prescribed treatment would restore the individual's ability to engage in SGA, we will then assess whether the individual has good cause for not following the prescribed treatment.

Assessment 2: We assess whether the individual has good cause for not following the prescribed treatment

This assessment focuses on whether the individual has good cause for not following the prescribed treatment.

In adult claims, the individual has the burden to provide evidence showing that he or she has good cause for failing to follow prescribed treatment.

In child claims, the parent or guardian has the burden to provide evidence showing that the child has good cause for failing to follow prescribed treatment. If the child has a representative payee and the parent, guardian, or child asserts that the child would have followed prescribed treatment but for the actions of the representative payee, we will determine whether to obtain a new representative payee. If we decide to obtain a new representative payee, we will provide additional time for the child to follow the prescribed treatment before we continue considering the claim.

To assess good cause in both adult and child claims, we will develop the claim according to the instructions in the

Development procedures section below. The following are examples of acceptable good cause reasons for not following prescribed treatment:

1. *Religion*: The established teaching and tenets of the individual's religion prohibit him or her from following the prescribed treatment. The individual must identify the religion, provide evidence of the individual's membership in or affiliation to his or her religion, and provide evidence that the religion's teachings do not permit the individual to follow the prescribed treatment.
2. *Cost*: The individual is unable to afford prescribed treatment, which he or she is willing to follow, but for which affordable or free community resources are unavailable. Some individuals can obtain free or subsidized health insurance plans or healthcare from a clinic or other provider. In these instances, the individual must demonstrate why he or she does not have health insurance that pays for the prescribed treatment or why he or she failed to obtain treatment at the free or subsidized healthcare provider.
3. *Incapacity*: The individual is unable to understand the consequences of failing to follow prescribed treatment.
4. *Medical disagreement*: When the individual's own medical sources disagree about whether the individual should follow a prescribed treatment, the individual has good cause to not follow the prescribed treatment. Similarly, when an individual chooses to follow one kind of treatment prescribed by one medical source to the simultaneous exclusion of an alternate treatment prescribed by another medical source, the individual has good cause not to follow the alternate treatment.
5. *Intense fear of surgery*: The individual's fear of surgery is so intense that it is a contraindication to having the surgery. We require a written statement from an individual's own medical source affirming that the individual's intense fear of surgery is in fact a contraindication to having the surgery. We will not consider an individual's refusal of surgery as good cause for

failing to follow prescribed treatment if it is based on the individual's assertion that success is not guaranteed or that the individual knows of someone else for whom the treatment was not successful.

6. *Prior history*: The individual previously had major surgery for the same impairment with unsuccessful results and the same or similar additional major surgery is now prescribed.
7. *High risk of loss of life or limb*: The treatment involves a high risk for loss of life or limb. Treatments in this category include:
    - Surgeries with a risk of death, such as open-heart surgery or organ transplant.
    - Cataract surgery in one eye with a documented, unusually high-risk of serious surgical complications when the individual also has a severe visual impairment of the other eye that cannot be improved through treatment.
    - Amputation of an extremity or a major part of an extremity.
8. *Risk of addiction to opioid medication*: The prescribed treatment is for opioid medication.
9. *Other*: If the individual offers another reason for failing to follow prescribed treatment, we will determine whether it is reasonably justified on a case-by- case basis.

We will not consider as good cause an individual's allegation that he or she was unaware that his or her own medical source prescribed the treatment, unless the individual shows incapacity as described above. Similarly, mere assertions or allegations about the effectiveness of the treatment are insufficient to meet the individual's burden to show good cause for not following the prescribed treatment.

D. Development procedures

If evidence we already have in a claim is insufficient to make the required assessment(s) in the failure to follow prescribed

treatment determination, we may develop the evidence, as appropriate. This development could include contacting the individual's medical source(s) or the individual to ask why he or she did not follow the prescribed treatment. Although it may be helpful to have evidence from a CE or ME, we are not required to purchase a CE or obtain testimony from an ME to help us determine whether we expect a prescribed treatment, if followed, would restore the ability to engage in SGA. We are responsible for resolving any conflicts in the evidence, including inconsistencies between statements made by the individual and information received from his or her medical source(s). We may also evaluate the claim using the procedures for fraud or similar fault, if appropriate.

E. Required written statement of failure to follow prescribed treatment determination

When we make a failure to follow prescribed treatment determination, we will explain the basis for our findings in our determination or decision.

F. When we make a failure to follow prescribed treatment determination within the sequential evaluation process for initial claims

Adult claims that meet or equal a listing at step 3

Generally, if we find that an individual's impairment(s) meets or medically equals a listing at step 3 of the sequential evaluation process, and there is evidence of all three conditions listed in Section B above, we will determine whether the individual failed to follow prescribed treatment. We will determine whether an individual would still meet or medically equal a listing had he or she followed the prescribed treatment. If we determine the individual would no longer meet or medically equal the listing had he or she followed prescribed treatment, we will assess whether there is good cause for not following the prescribed treatment. We will determine that the individual is disabled if we find that he or she has good cause for not following the prescribed treatment. If we do not find good cause, we will continue to evaluate the claim

using the sequential evaluation process by determining the individual's residual functional capacity (RFC).[6]

There are two instances when we will not make a failure to follow prescribed treatment determination at step 3 of the sequential evaluation process, even if there is evidence that an individual did not follow prescribed treatment. First, we will not make a failure to follow prescribed treatment determination when we find the individual disabled based on a listing that requires only the presence of laboratory findings. In these claims, treatment would have no effect on the disability determination or decision. Second, we will not make a failure to follow prescribed treatment determination when we find the individual is disabled based on a listed impairment(s) which requires us to consider whether the individual was following that specific treatment as part of the required listing analysis. If either of these exceptions apply, we will find the individual is disabled without making a failure to follow prescribed treatment determination.

Title XVI child claims that meet, medically equal, or functionally equal the listings at step 3

Generally, if we find that a child's impairment(s) meets, medically equals, or functionally equals the listings at step 3 of the sequential evaluation process, and there is evidence of all three conditions listed in Section B above, we will determine whether there has been a failure to follow prescribed treatment. We will determine whether the child's impairment(s) would still meet, medically equal, or functionally equal the listings had he or she followed the prescribed treatment. If we determine the child's impairment(s) would no longer meet, medically equal, or functionally equal the listings had he or she followed prescribed treatment, we will assess whether there is good cause for not following the prescribed treatment. We will find the child is disabled if we determine that he or she has good cause for not following the prescribed treatment. If we determine that there is not good cause for failing to following the prescribed treatment, we will find the child is not disabled.

There are two instances when we will not make a failure to follow prescribed treatment determination at step 3 of sequential

evaluation process even if there is evidence that a child did not follow prescribed treatment. First, we will not make a failure to follow prescribed treatment determination when we find the child is disabled based on a listing that requires only the presence of laboratory findings. In these claims, treatment would have no impact on the disability determination or decision. Second, we will not make a failure to follow prescribed treatment determination when we find the child is disabled based on a listed impairment(s) which requires us to consider whether the child was following that specific treatment as part of the required listing analysis. If either of these exceptions apply, we will find the child is disabled without making a failure to follow prescribed treatment determination.

Adult claims finding disability at step 5

If we find that an individual is disabled at step 5 of the sequential evaluation process and there is evidence the individual is not following treatment prescribed by his or her own medical source(s), before we find the individual is disabled, we will assess whether the individual would still be disabled if he or she were following the prescribed treatment.

We will determine what the individual's residual functional capacity (RFC) would be had he or she followed the prescribed treatment. We will then use that RFC to reevaluate steps 4 and 5 of the sequential evaluation process to determine whether the individual could perform his or her past relevant work at step 4 or adjust to other work at step 5. We will find the individual is disabled if we determine that the individual would remain unable to engage in SGA, even if the individual had followed the prescribed treatment. We will also find the individual is disabled if we find the individual had good cause for not following the prescribed treatment. However, we will find the individual is not disabled if the individual does not have good cause for not following the prescribed treatment and we determine that, had the individual followed the prescribed treatment, he or she could perform past relevant work or engage in other SGA.

G. Reopening a determination or decision

As permitted by our regulations, we may reopen a favorable determination or decision if we discover we did not apply the

failure to follow prescribed treatment policy correctly.[7] We may base our reopening on the evidence we had in the folder at the time we made our determination or decision or based on new evidence we receive. When we reopen a disability or blindness determination or decision and find that an individual does not have good cause for failing to follow prescribed treatment, we will issue a predetermination notice and offer the individual an opportunity to respond before we terminate benefits.

H. Continuing Disability Reviews (CDR)

When we conduct a CDR, we will make a failure to follow prescribed treatment determination when the individual's own medical source(s) prescribed a new treatment for the disabling impairment(s) since the last favorable determination or decision and the individual did not follow the prescribed treatment.

We will also make a failure to follow prescribed treatment determination during a CDR if we find that an individual would continue to be entitled to disability or blindness benefits based upon an impairment first alleged during the CDR and there is evidence that the individual has not followed his or her own medical source's prescribed treatment for that impairment.

If we determine an individual does not have good cause for failing to follow the prescribed treatment that we have determined would restore the individual's ability engage in SGA, we will issue a predetermination notice and, because benefits may be terminated, offer the individual an opportunity to respond before terminating benefits. Individuals are entitled to benefits while we develop evidence to determine whether they failed to follow prescribed treatment. If we determine that an individual failed to follow prescribed treatment without good cause in either situation, we will cease benefits two months after the month of the determination or decision that the individual is no longer disabled or statutorily blind.

I. Duration in disability and Title II blindness claims

If an individual failed to follow the prescribed treatment without good cause within 12 months of onset of disability or blindness, we will find the individual is not disabled because the duration requirement is not met.[8] However, if an individual failed

to follow prescribed treatment without good cause more than 12 months after onset of disability or blindness and is otherwise disabled, we will find the individual is disabled with a closed period that ends when the individual failed to follow the prescribed treatment. In this situation, we will continue to pay benefits as usual through the second month after the month disability or blindness ends.

J. Duration in Title XVI blindness claims

Because title XVI blindness entitlement does not have a duration requirement, an individual meeting the title XVI blindness requirements may be entitled to benefits beginning the month after he or she applies for benefits.[9] If we determine an individual failed to follow prescribed treatment without good cause any time before the first day of the month after filing, we will find the individual is not disabled. However, if we determine the individual failed to follow prescribed treatment without good cause any time after the first day of the month after filing, we will find the individual is disabled with a closed period from the date of entitlement until the date we determined the individual failed to follow the prescribed treatment without good cause. In this situation, we will continue to pay benefits as usual through the second month after the month blindness ends.

If we need further development to determine whether a title XVI blind individual failed to follow prescribed treatment without good cause, the individual is entitled to benefits while we conduct the additional development. At the hearing and Appeals Council levels, we will refer the claim to the effectuating component to develop the evidence necessary to make a failure to follow prescribed treatment determination.

K. Claims involving both drug addiction and alcoholism (DAA) and failure to follow prescribed treatment

In a claim that may involve both DAA and failure to follow a prescribed treatment for an impairment other than DAA, we will first make the DAA determination.[10] If we find that the individual is disabled considering all impairments including the DAA and that DAA is material to our determination of disability, we will deny the claim and not make a failure to follow prescribed treatment

determination. If we find that the individual is disabled considering all impairments including the DAA, but the DAA is not material to our determination of disability, we will then make the failure to follow prescribed treatment determination for the impairment(s) other than DAA. Even if the prescribed treatment for the other impairment(s) may also have beneficial effect on the DAA, we do not reevaluate for DAA materiality a second time.

For example, we cannot find that an individual has failed to follow prescribed treatment for liver disease based on a failure to follow treatment prescribed for alcohol dependence. If the cessation of drinking alcohol would be expected to improve the individual's functioning so that he or she is not disabled, we would find that DAA is material to the determination of disability and deny the claim for that reason.

[1] Our adjudicators will apply this ruling when we make determinations and decisions on or after October 29, 2018. When a Federal court reviews our final decision in a claim, we expect the court will review the final decision using the rules that were in effect at the time we issued the decision under review. If a court finds reversible error and remands a case for further administrative proceedings on or after October 29, 2018, the applicable date of this ruling, we will apply this ruling to the entire period at issue in the decision we make after the court's remand. Our regulations on failure to follow prescribed treatment are unchanged.

[2] Sections 223(f) and 1614(a) of the Act. The ability to engage in SGA is the standard in adult disability claims. However, when this policy is applied in title XVI child disability claims, the standard is "the prescribed treatment is expected to eliminate or improve the child's impairment so that it no longer results in marked and severe functional limitations." Similarly, for claims based on statutory blindness, the standard is the prescribed treatment would be expected to "restore vision to the extent that the individual will no longer be blind."

[3] See 20 CFR 404.1530 and 416.930.

[4] There are two exceptions at step 3 of the sequential evaluation process, explained in section F (below), when we will not make a failure to follow prescribed treatment determination even if these three

[5] See 20 CFR 404.1502 and 416.902 for the definition of "medical source."

[6] See 20 CFR 404.1545 and 416.945.

[7] See 20 CFR 404.988, 404.989, 416.1488, and 416.1489.

[8] See 20 CFR 404.1509 and 416.909.

[9] Section 216(i)(1)(B) of the Act.

[10] See SSR 13-2p: Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 FR 11939 (Mar. 22, 2013).

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Effective Date: March 15, 2019
Federal Register, vol. 84, No. 51, page 9582

Policy Interpretation Ruling

Social Security Ruling (SSR) 19-1p

Titles II and XVI: Effect of the Decision in Lucia v. Securities and Exchange Commission (SEC) on Cases Pending at the Appeals Council

Purpose: This ruling explains how we will adjudicate cases pending at the Appeals Council in which the claimant has raised a timely challenge to the appointment of an administrative law judge (ALJ) under the Appointments Clause of the United States Constitution in light of the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

Citations: 20 CFR 404.970, 404.976(b), 416.1470, and 416.1476(b).

Background: In *Lucia*, the Supreme Court considered a challenge to the manner in which the SEC appointed its ALJs. The Supreme Court held that the SEC's ALJs are "Officers of the United States" within the meaning of the Appointments Clause of the United States Constitution, Art. II, § 2, cl. 2.[1] As a result, the SEC's ALJs should have been (but were not) appointed to their positions by either the President, a court of law, or the Department head. The Supreme Court reversed the lower court's decision finding that the SEC's ALJs were not inferior officers. Having determined that Lucia had raised a timely challenge to the ALJ's appointment, the Supreme Court remanded the case for a new hearing before a properly appointed ALJ who had not previously heard the case, or before the SEC itself.[2] The Supreme Court's decision in *Lucia* did not specifically address the constitutional status of ALJs who work in other Federal agencies, including the Social Security Administration (SSA). To address any Appointments Clause questions involving Social Security claims, and consistent with guidance from the Department of Justice, on July 16, 2018 the Acting Commissioner of Social Security ratified the appointments of our ALJs and approved those appointments as her own.[3] On the same day, the Acting Commissioner took the same actions with respect to the administrative appeals judges (AAJs) who work at the Appeals Council.[4] We are issuing this SSR to explain how the Appeals Council will adjudicate appeals in which the claimant timely raises an Appointments Clause challenge to the authority of the ALJ who decided or dismissed a claim.

Policy Interpretation:

We receive millions of applications for benefits each year.[5] The essential requirement for any system of administrative review in a program as large and complex as ours is that it "must be fair--and it must work."[6] In adjudicating the millions of claims we receive each year, we strive to balance the two overriding concerns of fairness and efficiency, consistent with the law. The Social Security system must be fair and accurate and provide each claimant with appropriate due process protections. At the same time, the Supreme Court has recognized that we must make decisions efficiently in order to ensure that the system continues to work and serve the American people.[7] Because we employ more ALJs than all other Federal agencies combined, and our ALJs issue hundreds of thousands of decisions each year, *Lucia* has the potential to significantly affect our hearings and appeals process. To properly address the issues *Lucia* raises in the context of our hearings and appeals system, we have determined that some claimants are entitled to additional administrative review of their claims.

A claimant who is dissatisfied with an ALJ's decision, or the dismissal of a request for a hearing, may request that the Appeals Council review the decision or dismissal. Under our regulations, the Appeals Council will review a case if:

(1) there appears to be an abuse of discretion by the ALJ;

(2) there is an error of law;

(3) the ALJ's action, findings or conclusions are not supported by substantial evidence;

(4) there is a broad policy or procedural issue that may affect the general public interest; or

(5) the Appeals Council receives additional evidence that the claimant shows is new, material, and relates to the period on or before the date of the ALJ hearing decision, and there is a reasonable probability that the evidence would change the outcome of the decision.[8]

We interpret some challenges to the ALJ's authority to hear and decide a claim, based on the Supreme Court's decision in *Lucia*, as raising "a broad policy or procedural issue that may affect the general public interest" within the meaning of our regulations. Challenges to an ALJ's authority to decide a claim may raise a broadly applicable procedural issue independent of the merits of the individual claim for benefits—that is, whether the ALJ who presided over the claimant's hearing was properly appointed under the Appointments Clause of the Constitution. We will process requests for review that include a timely administrative challenge to the ALJ's authority based on the Appointments Clause in the manner described below.

The Appeals Council will grant the claimant's request for review in cases where the claimant: (1) timely requests Appeals Council review of an ALJ's decision or dismissal issued before July 16, 2018; and (2) raises before us (either at the Appeals Council level, or previously had raised at the ALJ level) a challenge under the Appointments Clause to the authority of the ALJ who issued the decision or dismissal in the case.

When the Appeals Council grants review based on a timely-raised Appointments Clause challenge, AAJs who have been appointed by the Acting Commissioner (or whose appointments the Acting Commissioner has ratified) will vacate the hearing decision or dismissal.[9] In cases in which the ALJ made a decision, the Appeals Council will conduct a new and independent review of the claims file and either remand the case to an ALJ other than the ALJ who issued the decision under review, or issue its own new decision about the claim covering the period before the date of the ALJ's decision. In its review, the Appeals Council will not presume that the prior hearing decision was correct.[10]

In cases in which the ALJ dismissed a request for a hearing, the Appeals Council will vacate the ALJ's dismissal order.[11] It will then either: (1) decide whether the request for a hearing should be dismissed, or (2) remand the case to another ALJ to determine that issue.

When the Appeals Council grants a claimant's request for review in cases that raise a timely Appointments Clause challenge, the claimant may request a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case.[12] Our regulations also allow a claimant to request to appear before the Appeals Council to present oral argument.[13] If the Appeals Council decides that the case raises an important question of law or policy, or that oral argument would help to reach the proper result, the Appeals Council will grant the request to appear. If the Appeals Council grants a request to appear and holds oral argument, it will notify the claimant and his or her representative about the time and place at least 10 days before the date scheduled for the appearance.[14] The Appeals Council will determine whether the appearance, or the appearance of any other person relevant to the proceeding, will be in person, by video teleconferencing, or by telephone.[15]

When the Appeals Council grants a request for review, it will mail a notice to all parties at their last known address stating the reasons for the review and the issues to be considered.[16] Consistent with our regulations, the Appeals Council will consider all the evidence in the ALJ hearing record, as well as additional evidence subject to the limitations on Appeals Council consideration of additional evidence in 20 CFR 404.970 and 416.1470. The Appeals Council will also consider any arguments the claimant or representative made in writing or at the hearing and will also consider any additional arguments submitted to it.

The Appeals Council will either remand the case to a different ALJ; issue a new, independent decision; or, as appropriate, issue an order dismissing the request for a hearing. When the Appeals Council issues a decision, its decision may result in different findings from the ALJ hearing decision that the Appeals Council vacated.[17] When the Appeals Council grants review and issues its own decision, its decision will be based on the preponderance of the evidence.[18]

[1] The Supreme Court explained in Lucia that "[t]he Appointments Clause prescribes the exclusive means of appointing 'Officers.' Only the President, a court of law, or a head of department can do so. *See* Art. II, § 2, cl. 2." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

[2] Lucia v. SEC, 138 S. Ct. at 2055.

[3] See Social Security Emergency Message (EM) 18003 REV 2, § B (available at: https://secure.ssa.gov/apps10/reference.nsf/links/08062018021025PM).

[4] *Id.*

[5] In fiscal year 2017, we completed 5.62 million retirement and survivors insurance claims and 2.485 million initial disability claims. We also received 620,000 hearing requests, and completed 686,000 hearings. FY 2019 Congressional Justification, at 6 (available at: https://www.ssa.gov/budget/FY19Files/2019CJ.pdf).

[6] *Richardson v. Perales*, 402 U.S. 389, 399 (1971).

[7] For example, in *Barnhart v. Thomas*, 540 U.S. 20, 28-29 (2003), the Supreme Court stated that, "As we have observed, '[t]he Social Security hearing system is probably the largest adjudicative system in the western world.'. . . The need for efficiency is self-evident.' " (quoting *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983)).

[8] 20 CFR 404.970(a) and (b), 416.1470(a) and (b).

[9] Under our regulations, whenever the Appeals Council reviews a hearing decision under 20 CFR 404.967, 404.969, 416.1467, or 416.1469, and the claimant does not appear personally or through representation before the Appeals Council to present oral argument, the Appeals Council's review will be conducted by a panel of not less than two members of the Appeals Council designated in the manner prescribed by the Chairman or Deputy Chairman of the Council. In the event of disagreement between a panel composed of only two members, the Chairman or Deputy Chairman, or his or her delegate, who must be a member of the Council, shall participate as a third member of the panel. When the claimant appears in person or through representation before the Appeals Council, the review will be conducted by a panel of not less than three members of the Council designated in the manner prescribed by the Chairman or Deputy Chairman. Concurrence of a majority of a panel shall constitute the decision of the Appeals Council unless the case is considered by the Appeals Council en banc or as a representative body, as provided in 20 CFR 422.205. *See* 20 CFR 422.205(b).

[10] 20 CFR 404.979, 416.1479.

[11] 20 CFR 404.960(a), 416.1460(a).

[12] 20 CFR 404.975, 416.1475.

[13] 20 CFR 404.976(b), 416.1476(b).

[14] *Id.*

[15] *Id.*

[16] 20 CFR 404.973, 416.1473

[17] 20 CFR 404.979, 416.1479.

[18] *Id.*

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POMS UPDATES AND RECENT RULINGS

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POMS UPDATES

You can look for these on the internet. Look under this:

social security.gov/POMS updates

This will give you a list of recent updates for the last 60 days (see attached on this). When you look at this list, the sections starting with DI relate to the disability program. The date of the update is also listed there. There is a link to the updated POMS section.

A number of the updates may be technical changes and not substantive changes. I have marked some of the recent updates for reference. I have also attached a POMS issued on February 25, 2019 regarding disability issues like acceptable medical sources, categories of evidence, considering medical opinions, filing dates, reopening, and collateral estoppel and res judicata.

RECENT RULINGS

These are three 2018 Rulings and one in 2019, Ruling 19-1p (2019). This is attached. It applies to the Lucia ruling by the U.S. Supreme Court in June, 2018 regarding the appointment of ALJ's and remands from the Appeals Council on this.

Look at Ruling 19-1p (2019) and read this with regard to remands on ALJ decisions issued before July 16, 2018 if the claimant or the representative raised before the ALJ or the Appeals Council a challenge under the Appointments Clause to the authority of the ALJ who issued a decision or dismissal in the claim.

I have also attached a recent remand form the Appeals Council dated April 6, 2019 on this. This came from another representative and is not my claim. On remand, the case will be assigned to another ALJ than the previous one.

Social Security

Program Policy Instructions

POMS Recent Changes

Instruction ID	Effective Date	Title
SI 00604 TN 8	06/01/2019	Completion of Form SSA-8000-BK, Application for Supplemental Security Income
DI 81010 TN 18	04/12/2019	FO Procedures - Electronic Process
GN 01758 TN 1	04/09/2019	OEIO, DIO and FSP Processing Under the Agreement with Brazil
GN 02210 TN 42	04/09/2019	Methods of Recovery for Title II, Title VIII, Title XVI, and Title XVIII Overpayments - Part I
GN 00602 TN 13	04/09/2019	Use of Benefits
SI 01120 TN 56	04/09/2019	Clarifying under age 65 for SNTs and fixing two cross-references
GN 02408 TN 30	04/08/2019	Stop Payments and Reclamations
GN 02408 TN 29	04/05/2019	Stop Payments and Reclamations
HI 01101 TN 12	04/04/2019	Medicare Income-Related Monthly Adjustment Amount
DI 80830 TN 2	04/04/2019	Processing Center (PC) Procedures - Certified Electronic Process
DI 80550 TN 3	04/04/2019	ODARs Case Processing and Management System
HI 00805 TN 33	04/04/2019	Supplementary Medical Insurance Entitlement
DI 81030 TN 4	04/04/2019	OQR Procedures - Certified Electronic Process
GN 02402 TN 130	04/03/2019	Direct Deposit - Title II and Title XVI
DI 80630 TN 1	04/03/2019	Processing Center (PC) Procedures
GN 02406 TN 55	04/02/2019	Failure to Receive a Check/Payment - Title II, Title XVI
GN 02402 TN 129	04/02/2019	Direct Deposit - Title II and Title XVI
SI 02901 TN 8	04/02/2019	SSI Administrative Costs
GN 02403 TN 30	04/02/2019	Procedures for Handling Remittances and Premium Payments in the Field Office
GN 00308 TN 36	04/02/2019	Sources and Fees for State and Local Vital Statistics Records
GN 00304 TN 20	04/02/2019	Proof of Death
DI 30005 TN 16	04/02/2019	Adjudicating Component Actions on Deficient Cases
GN 04440 TN 51	04/02/2019	Federal Quality Review of Disability Determinations

RS 00209 TN 7	04/01/2019	Parents Benefits
GN 00502 TN 51	03/30/2019	Determining the Need for, Developing and Selecting a Representative Payee
GN 00605 TN 52	03/29/2019	Representative Payee Accountability
GN 04440 TN 50	03/29/2019	Federal Quality Review of Disability Determinations
RS 02001 TN 23	03/29/2019	International Agreements
DI 24560 TN 1	03/28/2019	Evaluation of Specific Issues - Hematological Disorders
HI 00815 TN 24	03/28/2019	State Enrollment of Eligible Individuals
DI 29025 TN 2	03/27/2019	Preparation of Continuing Review Cases and Reopenings Applicable toDisability Hearings (Pre-DHU Processing)
DI 25501 TN 18	03/27/2019	Onset
DI 81030 TN 3	03/27/2019	OQR Procedures - Certified Electronic Process
HI 00208 TN 7	03/27/2019	Computations/Offsets
GN 00201 TN 25	03/26/2019	Program - Related Claims Practices
GN 00308 TN 35	03/26/2019	Sources and Fees for State and Local Vital Statistics Records
GN 04440 TN 49	03/25/2019	Federal Quality Review of Disability Determinations
HI 03001 TN 13	03/25/2019	Description of the Medicare Prescription Drug Coverage Program
DI 24560 TN BASIC	03/25/2019	Evaluation of Specific Issues - Hematological Disorders
GN 01758 TN BASIC	03/25/2019	OEIO, DIO and FBU Processing Under the Agreement with Brazil
GN 04440 TN 47	03/22/2019	Federal Quality Review of Disability Determinations
GN 04440 TN 48	03/22/2019	Federal Quality Review of Disability Determinations
DI 33020 TN 6	03/22/2019	Procedures Following the Hearing Decision
GN 00506 TN 13	03/22/2019	Payment for Representative Payee Services
RM 01105 TN 7	03/22/2019	Employer Reports - Wage Reports
HI 00805 TN 32	03/22/2019	Supplementary Medical Insurance Entitlement
GN 00602 TN 12	03/22/2019	Use of Benefits
GN 04440 TN 44	03/21/2019	Federal Quality Review of Disability Determinations
GN 04440 TN 43	03/21/2019	Federal Quality Review of Disability Determinations
GN 04440 TN 45	03/21/2019	Federal Quality Review of Disability Determinations
GN 04440 TN 46	03/21/2019	Federal Quality Review of Disability Determinations
GN 00301 TN 48	03/21/2019	General Evidentiary Standards
GN 04440 TN 42	03/21/2019	Federal Quality Review of Disability Determinations

GN 02201 TN 39	03/21/2019	General Information Title II, Title XVI, and Title XVIII Overpayments - Part I
DI 11005 TN 55	03/18/2019	Disability Interviews
GN 01703 TN 6	03/18/2019	DIO Processing of Totalization Claims
HI 01120 TN 10	03/18/2019	New Initial Determinations Using Beneficiary Information
RM 10210 TN 24	03/15/2019	SSN Evidence Requirements
RM 10211 TN 31	03/15/2019	Alien Evidence for an SSN
GN 04440 TN 41	03/15/2019	Federal Quality Review of Disability Determinations
DI 11005 TN 54	03/15/2019	Disability Interviews
DI 81010 TN 16	03/15/2019	FO Procedures - Electronic Process
DI 81005 TN 3	03/15/2019	eView
DI 81001 TN 2	03/15/2019	Certified Electronic Folder (CEF)
GN 01704 TN 5	03/14/2019	Development Support Examiner (DSE) and Benefit Earnings Technician (BET) Processing Instructions
DI 33025 TN 12	03/14/2019	Procedures for Special Cases and Handling
GN 02408 TN 28	03/13/2019	Stop Payments and Reclamations
GN 01702 TN 4	03/13/2019	DO Development and Routing of Totalization Claims
HI 03035 TN 25	03/13/2019	Verification Process and Pre-Decisional Issues
HI 03020 TN 22	03/13/2019	Income
HI 03001 TN 12	03/13/2019	Description of the Medicare Prescription Drug Coverage Program
GN 04440 TN 40	03/13/2019	Federal Quality Review of Disability Determinations
GN 00605 TN 50	03/13/2019	Representative Payee Accountability
SM 03001 TN 1	03/13/2019	TII Redesign System Processing
GN 00605 TN 48	03/13/2019	Representative Payee Accountability
GN 00605 TN 49	03/13/2019	Representative Payee Accountability
GN 02408 TN 27	03/12/2019	Stop Payments and Reclamations
GN 00308 TN 34	03/11/2019	Sources and Fees for State and Local Vital Statistics Records
GN 00308 TN 33	03/11/2019	Sources and Fees for State and Local Vital Statistics Records
GN 00301 TN 47	03/11/2019	General Evidentiary Standards
DI 52135 TN 5	03/11/2019	State Specific Public Disability Benefit (PDB) Procedures
GN 03305 TN 6	03/11/2019	Disclosure With Consent
GN 00301 TN 46	03/11/2019	General Evidentiary Standards

DI 11052 TN 1	03/08/2019	FO Processing of Initial End-Stage Renal Disease (ESRD) Medicare Cases
GN 02408 TN 26	03/08/2019	Stop Payments and Reclamations
GN 02402 TN 128	03/08/2019	Direct Deposit - Title II and Title XVI
GN 00204 TN 88	03/08/2019	Applications
GN 03314 TN 4	03/08/2019	Disclosure to State and Local Agencies and Tribal Authorities
GN 01757 TN BASIC	03/08/2019	Agreement with Brazil
SM 03005 TN 21	03/07/2019	Title II Redesign Front-End Processing (Editor BTH, Weeder, and Event Analyzer)
GN 02408 TN 25	03/06/2019	Stop Payments and Reclamations
GN 02603 TN 8	03/05/2019	Readjustment Procedures
HI 01101 TN 11	03/05/2019	Medicare Income-Related Monthly Adjustment Amount
GN 02402 TN 127	03/01/2019	Direct Deposit - Title II and Title XVI
GN 06010 TN 2	03/01/2019	Providing Copies of the Law, Regulations, and POMS to the Public
GN 00308 TN 31	03/01/2019	Sources and Fees for State and Local Vital Statistics Records
GN 00904 TN 17	03/01/2019	Jurisdiction and Contacts
GN 00301 TN 45	03/01/2019	General Evidentiary Standards
GN 00201 TN 24	03/01/2019	Program - Related Claims Practices
GN 00308 TN 32	03/01/2019	Sources and Fees for State and Local Vital Statistics Records
DI 23022 TN 25	03/01/2019	Processing Quick Disability Determination (QDD) and Compassionate Allowance (CAL) in the Disability Determination Services (DDS)
SI 01415 TN 40	03/01/2019	Elements of State Supplementary Payments
NL 01001 TN 3	03/01/2019	Special Notice Options for the Blind or Visually Impaired
NL 00720 TN 11	03/01/2019	Manual Adjustment, Credit and Award Process (MADCAP) Beneficiary Notice Print Program
GN 00302 TN 27	02/28/2019	Proof of Age
GN 00301 TN 44	02/28/2019	General Evidentiary Standards
DI 52120 TN 33	02/28/2019	State Specific Workers Compensation (WC) Procedures
DI 26510 TN 18	02/28/2019	Completion of Form SSA-831-C3/U3 -- Title II, Title XVI and Concurrent Claims
GN 00210 TN 36	02/27/2019	Same-Sex Marriage Claims
GN 00504 TN 22	02/27/2019	Suspensions for Payee Development and Other Payee Actions
DI 81030 TN 2	02/27/2019	OQR Procedures - Certified Electronic Process

DI 23022 TN 24	02/27/2019	Processing Quick Disability Determination (QDD) and Compassionate Allowance (CAL) in the Disability Determination Services (DDS)
HI 00901 TN 5	02/26/2019	Hospital Insurance Entitlement
GN 02402 TN 126	02/26/2019	Direct Deposit - Title II and Title XVI
DI 52150 TN 9	02/26/2019	Factors in Computing Workers Compensation/Public Disability Benefit (WC/PDB) Offset
DI 24503 TN 3	02/25/2019	Evaluating Evidence
DI 11080 TN 2	02/25/2019	Consolidated Omnibus Budget Reconciliation Act (COBRA)
SI 01730 TN 13	02/25/2019	SSA Determinations of Medicaid Eligibility
DI 52105 TN 2	02/22/2019	When Workers Compensation (WC) Offset Does Not Apply
SI 00830 TN 131	02/22/2019	Unearned Income
RS 02001 TN 22	02/21/2019	International Agreements
GN 02402 TN 124	02/20/2019	Direct Deposit - Title II and Title XVI
GN 00204 TN 87	02/20/2019	Applications
DI 52150 TN 8	02/19/2019	Factors in Computing Workers Compensation/Public Disability Benefit (WC/PDB) Offset
GN 04440 TN 39	02/19/2019	Federal Quality Review of Disability Determinations
DI 81020 TN 11	02/19/2019	DDS Procedures - Electronic Process
RS 02001 TN 21	02/15/2019	International Agreements
SM 31020 TN 3	02/15/2019	Policy on Using the Visitor Intake Process (VIPr) User Guide
GN 02230 TN 11	02/14/2019	Special Overpayment Procedures
RS 00605 TN 64	02/14/2019	Initial Computation of the PIA - Recomputations and Recalculations
RS 00207 TN 26	02/14/2019	Widow(er)s Benefits
NL 00730 TN 31	02/14/2019	Title II Redesign (T2R) Notices Title II Postentitlement (PE) Actions
GN 02402 TN 123	02/13/2019	Direct Deposit - Title II and Title XVI
GN 00312 TN 2	02/13/2019	Sources of Vital Statistics Records outside the U.S.
GN 03350 TN 6	02/13/2019	Freedom of Information Act
RS 00605 TN 63	02/13/2019	Initial Computation of the PIA - Recomputations and Recalculations
DI 81020 TN 10	02/11/2019	DDS Procedures - Electronic Process

Social Security

POMS Recent Change

Effective Dates: 2/25/2019 - Present

Identification Number: **DI 24503 TN 3**
Intended Audience: See Transmittal Sheet
Originating Office: ODP
Title: **Evaluating Evidence**
Type: POMS Transmittals
Program: **Disability**
Link To Reference:

PROGRAM OPERATIONS MANUAL SYSTEM
Part DI – Disability Insurance
Chapter 245 – Medical Evaluation
Subchapter 03 – Evaluating Evidence
Transmittal No. 3, 02/25/2019

Audience

PSC: DE, DEC;
OCO-ODO: DE, DEC, DS, RECONE;
OCO-OEIO: CR, ERE, FDE, RECONE;
ODD-DDS: ADJ, DHU;
OCO: ODD;

Originating Component

ODP

Effective Date

Upon Receipt

Background

This is a Quick Action Transmittal. These revisions do not change or introduce new policy or procedure.

Summary of Changes

DI 24503.050 Determining the Filing Date for Evaluating Evidence

In subsection D, item 7 under the EXCEPTION area, second bullet, after the first sentence:, we added "Or, if a SSI child, the CPD impairment(s) still meets or equals the severity of the listed impairment that it met or equaled before (or functionally equals the listing),"

DI 24503.050 Determining the Filing Date for Evaluating Evidence

A. Background For Evaluating Evidence

1. Significance of the filing date for evaluating evidence

For disability or blindness claims, some rules we use to evaluate medical and nonmedical evidence will depend on a claim's filing date. Adjudicators at all adjudicative levels must identify whether the filing date of the claim is before March 27, 2017, or whether the filing date of the claim is on or after March 27, 2017.

For more information about how the Field Office (FO) determines the filing date of a claim, see GN 00204.007.

2. Specific evidence rules in which the filing date of a claim is relevant

The filing date of a claim is relevant for the following evidence rules:

- The medical sources who are acceptable medical sources (AMS) only for claims filed on or after March 27, 2017. See DI 22505.003;
- The definition of these categories of evidence: medical opinions, opinions, and other medical evidence. See DI 24503.005;

- The rules for considering medical opinions and prior administrative medical findings. See DI 24503.025 and DI 24503.035;

- The articulation requirements for medical opinions and prior administrative medical findings. See DI 24503.030 and DI 24503.035;

- The articulation requirements for statements on issues reserved to the Commissioner. See DI 24503.040; and

- The articulation requirements for decisions from other governmental agencies and nongovernmental entities. See DI 24503.045.

3. Medical Evidence regulation indicator

The purposes of the Medical Evidence regulation indicator (MedEv) in the eView and the electronic claims analysis tool (eCAT) headers are to:

- Help adjudicators understand which set of rules to use; and

- Direct systems at the Office of Hearings Operations (OHO) to produce correct notice language and display correct decisional screens that correspond to the filing date.

This indicator is set when the FO transfers the claim to the Disability Determination Services (DDS) and will appear in the eView and eCAT headers for all claim types.

- For claims filed before March 27, 2017, the indicator should say "MedEv: Prior Rules."

- For claims filed on or after March 27, 2017, the indicator should say "MedEv: Current Rules."

B. How To Determine The Filing Date Of A Claim

Electronic claim using eView and eCAT

Generally, the earliest filing date displayed in the eView Medical Evidence indicator and in eCAT is the correct filing date to use to determine which set of rules to use to evaluate evidence in a claim. Therefore, in most claims, the eView indicator will display the correct filing date information to use to determine which rules apply when evaluating evidence.

However, the indicator may display incorrect filing date information when:

- The claimant submits an application for a second claim after the FO transfers the first claim to the DDS, or
- We previously made a determination or decision on a claim filed by the claimant.

Follow the guidance in subsection DI 24503.050D in this section to determine which set of rules to follow.

NOTE: DDS adjudicators should check to see if the FO added a new claim after transfer of the first claim to the DDS. This information may be in the Update-After-Transfer Utility, Certified Electronic Folder Alerts, or a SSA-5002 (Report of Contact). For more information, see "Certified Electronic Folder (CEF) Alerts" in DI 81020.080.

2. Paper claim

Follow the guidance in the filing date scenarios in subsection DI 24503.050D in this section to determine which set of rules to follow.

NOTE: Look at the available SSA-831s to determine if there are prior filings.

C. Adjudicator Responsibilities Related To The Filing Date Of A Claim

1. Policy responsibility

An adjudicator must use the correct set of rules related to the filing date of a claim to evaluate evidence before issuing a determination or decision.

1.

- Adjudicate claim(s) with a filing date prior to March 27, 2017, using the "prior rules."

- Adjudicate claim(s) with a filing date on or after March 27, 2017, using the "current rules."

Follow the guidance in subsection DI 24503.050D in this section to determine which set of rules to follow.

2. Procedural responsibility for electronic claims

An adjudicator must ensure that the eView "MedEv" indicator shown displays the correct value based on the filing date of the claim before issuing the determination or decision.

If an adjudicator believes that the indicator's value may be incorrect, contact the FO to resolve any issues, as appropriate.

If the indicator displays an incorrect value, the adjudicator must manually correct the indicator's value in eView by clicking on the eView "MedEv" indicator hyperlink to change the value displayed. It is not possible to correct the "MedEv" indicator value shown in eCAT.

D. Filing Date Scenarios

The following instructions present the possible filing date scenarios with the corresponding rules that adjudicators must follow.

NOTE: We refer to the rules in place before March 27, 2017, as the "prior rules." We refer to the rules in place on or after March 27, 2017, as the "current rules."

1. Single claim

For the situations in DI 24503.050A.2, if the filing date of the claim is:

- Before March 27, 2017, use the prior rules; or

- On or after March 27, 2017, use the current rules.

2. Multiple claims

a. Concurrently-filed claims or when one claim is open when another new claim is filed

Except as stated in DI 24503.050D.2.b. in this section, use the earliest possible filing date of the claims to determine which set of rules to follow.

If the earliest filing date of the claims is:

- Before March 27, 2017, use the prior rules; or
- On or after March 27, 2017, use the current rules.

NOTE: If the first claim has been appealed when the second claim is filed, consolidate and escalate the second claim to the same level of appeal. For more information, see DI 12045.010.

b. When one claim is closed before another new claim is filed

If the earliest filing date of a new claim is after the earlier claim is closed and becomes final (i.e., the appeal period of the earlier claim(s) has ended), do not relate the claims. Use the filing date of the later claim.

REMINDER: Evidence from the new claim might constitute new and material evidence to justify reopening the earlier closed claim. See the instructions for reopening claims in DI 24503.050D.3. in this section.

REMINDER: Collateral estoppel may apply. For more information, see DI 24503.050D.4.

c. Example A: Title II claim is closed before a Title XVI claim is filed

Use the filing date of the Title II claim for the Title XVI claim if the Title XVI claim's earliest filing date is within 60 days after the Title II claim is decided or if the Title II claim is pending appeal. In contrast, use the filing date of the Title XVI claim if its earliest filing date is 61 days or more after a Title II claim is decided,

there is no appeal filed on the Title II claim, and collateral estoppel does not apply.

d. Example B: A claim under one social security number (SSN) is closed before a new claim(s) is filed under a different SSN

Although claims filed by the same individual under different SSNs can relate to each other, a new claim(s) involving a different SSN filed by the same individual will not relate to the earlier claim(s) if the earlier claim(s) is closed and collateral estoppel does not apply. This scenario can occur if an individual who is receiving childhood disability benefits (CDB) or disabled widow benefits (DWB) then files for disability or blindness benefits on his or her own earnings record. Decide the new claim(s) using the rules that apply to its filing date, not that of the claims in pay status. Ensure that the Medical Evidence indicator shows the correct filing date value for the new claim(s).

3. Reopening

If you reopen a claim, use the original filing date of the earlier claim as the filing date for the reopened claim.

Do not reopen a claim if all of the following apply:

- The claim uses the "prior rules," **and**
- New and material evidence is the reason that justifies reopening of the claim, **and**
- The new and material evidence is objective medical evidence from a medical source who is an acceptable medical source only for claims filed on or after March 27, 2017, **and**
- That objective medical evidence would be used to establish the existence of an impairment at step 2 of the sequential evaluation process.

NOTE: The "current rules" do not constitute a change of position or a change of criteria to justify reopening a claim. However, you may set an onset in the prior adjudicated period for the new claim without reopening the prior determination or

decision. The filing date of the new claim would determine the month payments could begin.

For more information about reopening, see:

- DI 27501.005 Reopening and Revising a Determination or Decision
- DI 27505.001 Conditions for Reopening a Final Determination or Decision

4. Collateral estoppel

If a claimant files a claim that meets the criteria for adoption of a prior medical determination or decision that has already been decided (i.e., collateral estoppel), use the filing date rules in effect for the earlier determination or decision. To determine the filing date for the earlier claim, see the Form SSA-831-U3, Items 3 and 34, (Disability Determination and Transmittal).

See:

- DI 11011.020 Completion of Form SSA-831-U3 In Adopted Decisions
- DI 27515.000 Collateral Estoppel

5. Res judicata

If a claimant submits a Title II claim on or after March 27, 2017, for the same period as a previous Title II claim filed prior to March 27, 2017, and there is no new and material evidence, res judicata applies. The medical evidence rules changes are not considered less restrictive and therefore do not affect the ability to apply res judicata. For more information, see Disability Determination Services (DDS) Medical Evaluation Criteria to Determine Applicability of Res Judicata in DI 27516.010.

6. Claims under the Office of Quality Review (OQR) jurisdiction

The OQR will return a claim(s) under its jurisdiction to the adjudicative component with cited deficiencies and corrective action when the claimant files a subsequent claim with a protective filing date that changes the set of evidence rules that the

adjudicative component should use for the claim(s).

The OQR will return the claim(s) to the adjudicative component to allow the adjudicative component to adjudicate the earlier claim(s) under the appropriate rules. For more information, see Adjudicating Component Actions on Deficient Cases in subchapter DI 30005.000.

7. Continuing disability review (CDR)

Use the current rules in all CDRs except for the situation listed below.

EXCEPTION: Use the prior rules at CDR only if **all** the following apply:

- This is the first CDR for the claim(s) after March 27, 2017, **and**
- There is no medical improvement related to the ability to work. Or if a SSI child, the CPD impairment(s) still meets or equals the severity of the listed impairment that it met or equaled before (or functionally equals the listing), **and**
- All full medical determination(s) made in the claim(s) under review were made using the prior rules.

NOTE: This first CDR will establish a new CPD after March 27, 2017. Decide the subsequent CDR(s) using the current rules.

REMINDER: When a claim was initially allowed because the claimant's impairment met a listing, and the listing is now obsolete, if you get to step 4 of the CDR sequential evaluation process, you will need to evaluate the claim under the obsolete listing. See DI 28005.015.

NOTE: The "MedEV" indicator in some CDRs will erroneously display "Prior Rules" when in fact the current rules apply. Be aware of this possibility and remember to change the indicator value when appropriate.

For more information, see The CDR Evaluation Process in subchapter DI 28005.000.

8. Age 18 redetermination

When determining which set of evidence rules to follow, we consider an age 18 redetermination to be a new claim (not a CDR) filed on the day a person attains age 18. Therefore, if the individual's date of birth is before March 28, 1999, use the prior rules for the age 18 redetermination. If the individual's date of birth is on or after March 28, 1999, use the current rules for the age 18 redetermination.

For more information, see DI 23570.000.

9. Expedited reinstatement (EXR)

When determining which set of evidence rules to follow, we consider a request for EXR to be a new claim filed on the day we receive the request. Therefore, if we receive the request for EXR on or after March 27, 2017, use the current rules.

For more information, see DI 13050.000.

E. References

- DI 11011.020 Completion of Form SSA-831-U3 In Adopted Decisions
- DI 12045.005 Claims Under Different Titles – Common Issue – General
- DI 13050.000 Expedited Reinstatements
- DI 23570.000 Title XVI Childhood and Age 18 Disability Redetermination Cases (Public Law (P.L.) 104-193 as Modified by P.L. 105-33) - DDS
- DI 24503.000 Evaluating Evidence to Conform With the New Medical Evidence Regulation
- DI 27501.005 Reopening and Revising a Determination or Decision
- DI 27505.001 Conditions for Reopening a Final Determination or Decision
- DI 27515.000 Collateral Estoppel

- DI 28005.000 The CDR Evaluation Process
- DI 51501.001 Procedural Change for Subsequent Disability Applications Effective July 28, 2011
- GN 00204.007 Application Filing Date
- GN 00204.010 Protective Filing
- SI 00601.035 Adjudicating Title II When a Title XVI Application Is Filed
- SI 00601.037 Closing Out Leads and Protective Filings

2-12-19

4191-02U

MARCH 15, 2019

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA-2019-0001]

Social Security Ruling 19-1p

TITLES II AND XVI: EFFECT OF THE DECISION IN *LUCIA V. SECURITIES AND EXCHANGE COMMISSION* (SEC) ON CASES PENDING AT THE APPEALS COUNCIL

AGENCY: Social Security Administration.

ACTION: Notice of Social Security Ruling (SSR).

SUMMARY: We are giving notice of SSR 19-1p. This ruling explains how we will adjudicate cases pending at the Appeals Council in which the claimant has raised a timely challenge to the appointment of an administrative law judge (ALJ) under the Appointments Clause of the United States Constitution in light of the Supreme Court's recent 2018 decision in *Lucia v. SEC*.

DATES: We will apply this notice on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Nancy Chung, Office of Appellate Operations, 5107 Leesburg Pike, Falls Church, Virginia (703) 605-7100. For information on eligibility or filing for benefits, call our national toll-free number 1-800-772-1213, or

TTY 1-800-325-0778, or visit our Internet site, Social Security online, at http://www.socialsecurity.gov.

SUPPLEMENTARY INFORMATION: Although 5 U.S.C. §§ 552(a)(1) and (a)(2) do not require us to publish this SSR, we are doing so under 20 CFR § 402.35(b)(1).

Through SSRs, we make available to the public precedential decisions relating to the Federal old-age, survivors, disability, supplemental security income, and special veterans benefits programs. We may base SSRs on determinations or decisions made at all levels of administrative adjudication, Federal court decisions, Commissioner's decisions, opinions of the Office of the General Counsel, or other interpretations of the law and regulations.

Although SSRs do not have the same force and effect as statutes or regulations, they are binding on all components of the Social Security Administration. 20 CFR § 402.35(b)(1).

This SSR will remain in effect until we publish a notice in the Federal Register that rescinds it, or we publish a new SSR that replaces or modifies it.

(Catalog of Federal Domestic Assistance, Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004—Social Security—Survivors Insurance; 96.006 Supplemental Security Income.)

Nancy Berryhill,
Acting Commissioner of Social Security.

POLICY INTERPRETATION RULING

SOCIAL SECURITY RULING (SSR) 19-1p

TITLES II AND XVI: EFFECT OF THE DECISION IN *LUCIA V. SECURITIES AND EXCHANGE COMMISSION* (SEC) ON CASES PENDING AT THE APPEALS COUNCIL

PURPOSE: This ruling explains how we will adjudicate cases pending at the Appeals Council in which the claimant has raised a timely challenge to the appointment of an administrative law judge (ALJ) under the Appointments Clause of the United States Constitution in light of the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

CITATIONS: 20 CFR §§ 404.970, 404.976(b), 416.1470, and 416.1476(b).

BACKGROUND: In *Lucia*, the Supreme Court considered a challenge to the manner in which the SEC appointed its ALJs. The Supreme Court held that the SEC's ALJs are "Officers of the United States" within the meaning of the Appointments Clause of the United States Constitution, Art. II, § 2, cl. 2.[1] As a result, the SEC's ALJs should have been (but were not) appointed to their positions by either the President, a court of law, or the Department head. The Supreme Court reversed the lower court's decision finding that the SEC's ALJs were not inferior officers. Having determined that Lucia had

[1] The Supreme Court explained in *Lucia* that "[t]he Appointments Clause prescribes the exclusive means of appointing 'Officers.' Only the President, a court of law, or a head of department can do so. *See* Art. II, § 2, cl. 2." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

raised a timely challenge to the ALJ's appointment, the Supreme Court remanded the case for a new hearing before a properly appointed ALJ who had not previously heard the case, or before the SEC itself.[2] The Supreme Court's decision in *Lucia* did not specifically address the constitutional status of ALJs who work in other Federal agencies, including the Social Security Administration (SSA). To address any Appointments Clause questions involving Social Security claims, and consistent with guidance from the Department of Justice, on July 16, 2018 the Acting Commissioner of Social Security ratified the appointments of our ALJs and approved those appointments as her own.[3] On the same day, the Acting Commissioner took the same actions with respect to the administrative appeals judges (AAJs) who work at the Appeals Council.[4] We are issuing this SSR to explain how the Appeals Council will adjudicate appeals in which the claimant timely raises an Appointments Clause challenge to the authority of the ALJ who decided or dismissed a claim.

POLICY INTERPRETATION:

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[2] *Lucia v. SEC*, 138 S. Ct. at 2055.
[3] See Social Security Emergency Message (EM) 18003 REV 2, § B (available at: https://secure.ssa.gov/apps10/reference.nsf/links/08062018021025PM).
[4] *Id.*

We receive millions of applications for benefits each year.[5] The essential requirement for any system of administrative review in a program as large and complex as ours is that it "must be fair--and it must work."[6] In adjudicating the millions of claims we receive each year, we strive to balance the two overriding concerns of fairness and efficiency, consistent with the law. The Social Security system must be fair and accurate and provide each claimant with appropriate due process protections. At the same time, the Supreme Court has recognized that we must make decisions efficiently in order to ensure that the system continues to work and serve the American people.[7] Because we employ more ALJs than all other Federal agencies combined, and our ALJs issue hundreds of thousands of decisions each year, *Lucia* has the potential to significantly affect our hearings and appeals process. To properly address the issues *Lucia* raises in the context of our hearings and appeals system, we have determined that some claimants are entitled to additional administrative review of their claims.

A claimant who is dissatisfied with an ALJ's decision, or the dismissal of a request for a hearing, may request that the Appeals Council review the decision or dismissal. Under our regulations, the Appeals Council will review a case if:

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[5] In fiscal year 2017, we completed 5.62 million retirement and survivors insurance claims and 2.485 million initial disability claims. We also received 620,000 hearing requests, and completed 686,000 hearings. *FY 2019 Congressional Justification*, at 6 (available at: https://www.ssa.gov/budget/FY19Files/2019CJ.pdf).

[6] *Richardson v. Perales*, 402 U.S. 389, 399 (1971).

[7] For example, in *Barnhart v. Thomas*, 540 U.S. 20, 28-29 (2003), the Supreme Court stated that, "As we have observed, '[t]he Social Security hearing system is probably the largest adjudicative system in the western world.'. . . The need for efficiency is self-evident.'" (quoting *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983)).

(1) there appears to be an abuse of discretion by the ALJ;

(2) there is an error of law;

(3) the ALJ's action, findings or conclusions are not supported by substantial evidence;

(4) there is a broad policy or procedural issue that may affect the general public interest; or

(5) the Appeals Council receives additional evidence that the claimant shows is new, material, and relates to the period on or before the date of the ALJ hearing decision, and there is a reasonable probability that the evidence would change the outcome of the decision.[8]

We interpret some challenges to the ALJ's authority to hear and decide a claim, based on the Supreme Court's decision in *Lucia,* as raising "a broad policy or procedural issue that may affect the general public interest" within the meaning of our regulations. Challenges to an ALJ's authority to decide a claim may raise a broadly applicable procedural issue independent of the merits of the individual claim for benefits—that is, whether the ALJ who presided over the claimant's hearing was properly appointed under the Appointments Clause of the Constitution. We will process requests for review that include a timely administrative challenge to the ALJ's authority based on the Appointments Clause in the manner described below.

[8] 20 CFR §§ 404.970(a) and (b), 416.1470(a) and (b).

The Appeals Council will grant the claimant's request for review in cases where the claimant: (1) timely requests Appeals Council review of an ALJ's decision or dismissal issued before July 16, 2018; and (2) raises before us (either at the Appeals Council level, or previously had raised at the ALJ level) a challenge under the Appointments Clause to the authority of the ALJ who issued the decision or dismissal in the case.

When the Appeals Council grants review based on a timely-raised Appointments Clause challenge, AAJs who have been appointed by the Acting Commissioner (or whose appointments the Acting Commissioner has ratified) will vacate the hearing decision or dismissal.[9] In cases in which the ALJ made a decision, the Appeals Council will conduct a new and independent review of the claims file and either remand the case to an ALJ other than the ALJ who issued the decision under review, or issue its own new decision about the claim covering the period before the date of the ALJ's decision. In its review, the Appeals Council will not presume that the prior hearing decision was correct.[10]

[9] Under our regulations, whenever the Appeals Council reviews a hearing decision under 20 CFR §§ 404.967, 404.969, 416.1467, or 416.1469, and the claimant does not appear personally or through representation before the Appeals Council to present oral argument, the Appeals Council's review will be conducted by a panel of not less than two members of the Appeals Council designated in the manner prescribed by the Chairman or Deputy Chairman of the Council. In the event of disagreement between a panel composed of only two members, the Chairman or Deputy Chairman, or his or her delegate, who must be a member of the Council, shall participate as a third member of the panel. When the claimant appears in person or through representation before the Appeals Council, the review will be conducted by a panel of not less than three members of the Council designated in the manner prescribed by the Chairman or Deputy Chairman. Concurrence of a majority of a panel shall constitute the decision of the Appeals Council unless the case is considered by the Appeals Council *en banc* or as a representative body, as provided in 20 CFR § 422.205. *See* 20 CFR § 422.205(b).

[10] 20 CFR §§ 404.979, 416.1479.

In cases in which the ALJ dismissed a request for a hearing, the Appeals Council will vacate the ALJ's dismissal order.[11] It will then either: (1) decide whether the request for a hearing should be dismissed, or (2) remand the case to another ALJ to determine that issue.

When the Appeals Council grants a claimant's request for review in cases that raise a timely Appointments Clause challenge, the claimant may request a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case.[12] Our regulations also allow a claimant to request to appear before the Appeals Council to present oral argument.[13] If the Appeals Council decides that the case raises an important question of law or policy, or that oral argument would help to reach the proper result, the Appeals Council will grant the request to appear. If the Appeals Council grants a request to appear and holds oral argument, it will notify the claimant and his or her representative about the time and place at least 10 days before the date scheduled for the appearance.[14] The Appeals Council will determine whether the appearance, or the appearance of any other person relevant to the proceeding, will be in person, by video teleconferencing, or by telephone.[15]

When the Appeals Council grants a request for review, it will mail a notice to all parties at their last known address stating the reasons for the review and the issues to be

[11] 20 CFR §§ 404.960(a), 416.1460(a).
[12] 20 CFR §§ 404.975, 416.1475.
[13] 20 CFR §§ 404.976(b), 416.1476(b).
[14] *Id.*
[15] *Id.*

considered.[16] Consistent with our regulations, the Appeals Council will consider all the evidence in the ALJ hearing record, as well as additional evidence subject to the limitations on Appeals Council consideration of additional evidence in 20 CFR §§ 404.970 and 416.1470. The Appeals Council will also consider any arguments the claimant or representative made in writing or at the hearing and will also consider any additional arguments submitted to it.

The Appeals Council will either remand the case to a different ALJ; issue a new, independent decision; or, as appropriate, issue an order dismissing the request for a hearing. When the Appeals Council issues a decision, its decision may result in different findings from the ALJ hearing decision that the Appeals Council vacated.[17] When the Appeals Council grants review and issues its own decision, its decision will be based on the preponderance of the evidence.[18]

[16] 20 CFR §§ 404.973, 416.1473
[17] 20 CFR §§ 404.979, 416.1479.
[18] *Id.*

[FR Doc. 2019-04817 Filed: 3/14/2019 8:45 am; Publication Date: 3/15/2019]

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION AND REVIEW

ORDER OF APPEALS COUNCIL

REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

In the case of

[redacted]
(Claimant)

Claim for

Period of Disability and
Disability Insurance Benefits

(Wage Earner) (Leave Blank if same as above) [redacted] (Social Security Number)

The Administrative Law Judge issued a decision on August 2, 2017. The claimant has asked the Appeals Council to review this decision.

The Appeals Council grants the request for review under the substantial evidence and error of law provisions of the Social Security Administration regulations (20 CFR 404.970). Under the authority of 20 CFR 404.977, the Appeals Council vacates the hearing decision and remands this case to an Administrative Law Judge for resolution of the following issues:

- The Administrative Law Judge found the claimant has the residual functional capacity to perform a reduced range of light work, including a sit-stand option allowing the claimant to alternate between sitting and standing up to two times per hour (Finding 5). At step 5 of the sequential evaluation, the Administrative Law Judge relied on testimony from the vocational expert to find that there are jobs that exist in significant numbers in the national economy that the claimant is capable of performing (Decision, pages 13-14). When asked if her testimony was consistent with the Dictionary of Occupational Titles (DOT), the vocational expert testified that she relied on her education, training, and experience to address some limitations that were not addressed by the DOT but she did not explain that the DOT does not address the need for a sit-stand option (April 20, 2017 hearing testimony from 1:41:34 P.M. to 1:42:02 P.M.). Occupational evidence provided by a vocational expert generally should be consistent with the occupational information supplied by the DOT (Social Security Ruling 00-4p). When there is an apparent unresolved conflict between vocational expert evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the vocational expert evidence to support a decision about whether the claimant is disabled (Social Security Ruling 00-4p). The hearing decision does not address the apparent conflict regarding the sit-stand option.

See Next Page

- The Administrative Law Judge found the claimant has the severe impairments of left hip arthralgia, degenerative disc disease, degenerative joint disease, dermatitis, and anxiety (Finding 3). The record shows that the claimant is obese with a body mass index of 32 during the period at issue (Exhibit 10F, page 4). The record also shows that the claimant's treating doctor diagnosed the claimant with hypertension and prescribed medication to treat it during the period at issue (Exhibit 11F). The hearing decision does not contain an evaluation of the severity of the claimant's obesity or hypertension.

- The Administrative Law Judge found the claimant's date last insured is June 30, 2017 and found the claimant was not disabled from her alleged onset date through June 30, 2017 (Decision, pages 1, 3, 14). The claimant's earnings records show that her date last insured is June 30, 2019 (Exhibit 8D, page 1). The hearing decision leaves an unadjudicated period from July 1, 2017 through August 2, 2017, the date of the hearing decision.

Upon remand the Administrative Law Judge will:

- Give further consideration to the claim under Title II of the Social Security Act for the entire period at issue.

- Evaluate whether obesity and hypertension are severe medically determinable impairments (20 CFR 404.1521 and 404.1522 and Social Security Ruling 02-1p). If warranted, reevaluate the remaining steps in the sequential evaluation process.

- If warranted by the expanded record, obtain supplemental evidence from a vocational expert to clarify the effect of the assessed limitations on the claimant's occupational base (Social Security Ruling 83-14). The hypothetical questions should reflect the specific capacity/limitations established by the record as a whole. The Administrative Law Judge will ask the vocational expert to identify examples of appropriate jobs and to state the incidence of such jobs in the national economy (20 CFR 404.1566). Further, before relying on the vocational expert evidence the Administrative Law Judge will identify and resolve any conflicts between the occupational evidence provided by the vocational expert and information in the Dictionary of Occupational Titles (DOT) and its companion publication, the Selected Characteristics of Occupations (Social Security Ruling 00-4p).

See Next Page

The representative raised a challenge under the Appointments Clause of the Constitution, U.S. Const. Art. II, § 2, cl. 2, to the manner in which the Administrative Law Judge was appointed. This case is remanded to a different Administrative Law Judge. Any Appointments Clause defect is cured by this remand because, on July 16, 2018, the Acting Commissioner of Social Security ratified all Administrative Law Judge appointments and approved them as her own under the Constitution.

In compliance with the above, the Administrative Law Judge will offer the claimant an opportunity for a hearing, address the evidence which was submitted with the request for review, take any further action needed to complete the administrative record and issue a new decision.

APPEALS COUNCIL

/s/ Robert M. Wilson
Robert M. Wilson
Administrative Appeals Judge

/s/ Charlene P. Bellinger
Charlene P. Bellinger
Administrative Appeals Judge

Date: April 6, 2019

SSR 19-1p (2019) REMAND

TAB
G

David W. Kapor, Esq.

EDUCATION: Graduated Woodward High School 1973, B.A. Miami University 1977, J.D. John Marshall Law School, Chicago 1980

EMPLOYMENT: Sole practitioner with a practice limited to Personal Injury and Social Security Disability claims. Extensive trial practice.

LICENSES: Licensed in all state and federal courts in Ohio (1981) and Illinois (1980).

PROFESSIONAL ASSOCIATIONS

- 1997-Present, Chairperson of the Cincinnati Bar Association's Committee on Social Security
- Member of the Hamilton County Trial Lawyers Association
- Member of the Ohio State Bar Association
- Member of the Cincinnati Bar Association
- Member of the Chicago Bar Association
- Member of the Negligence Law Committee
- Member of the Conference with the Cincinnati Academy of Medicine Committee
- Member of The Ohio Academy of Trial Lawyers
- Member of the National Organization of Social Security Claimant's Representatives (NOSSCR)

ETHICS & PROFESSIONALISM

NEW ATTORNEY CONDUCT AND DISCIPLINARY REGULATIONS

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1

Rules of Conduct & Standards of Responsibility for Appointed Representatives

2

20 CFR 404.1740-1799

&

20 CFR 416.1505-1599

FEDERAL REGISTER/VOL. 83, NO. 127, JULY 2, 2018

3

BACKGROUND

". . . [w]e are concerned that some representatives use our processes in a way that undermines the integrity of our programs and harms claimants. Accordingly, we are clarifying that certain actions are prohibited, and we are providing additional means to address representative actions that do not serve the best interests of claimants."

4

404.1740(3)(iv) - WITHDRAWING LEGAL REPRESENTATION

Only withdraw representation at a time and in a manner that does not disrupt the processing or adjudication of a claim and that provides the claimant adequate time to find new representation, if desired. A representative should not withdraw after we set the time and place for the hearing unless the representative can show that a withdrawal is necessary due to extraordinary circumstances, as we determine on a case-by-case basis.

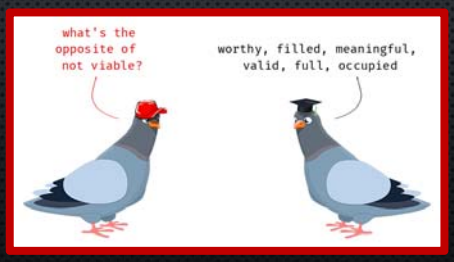
5

NOTICE & COMMENT

6

COMMENT:

Restricting the representative's right to withdraw after a hearing is scheduled, except under "extraordinary circumstances," is an overly broad restriction that inhibits a representative's right to withdraw in circumstances where the representative knows that the client no longer has a viable case.



7

RESPONSE:

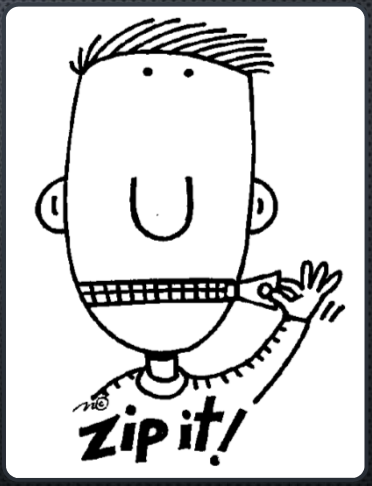
The American Bar Association Model Rules of Professional Conduct, Rule 1.16 includes requirements for withdrawal similar to this regulation. Some ***examples*** of "extraordinary circumstances" include:

1. Serious Illness
2. Death / Serious Illness – Rep's Immediate Family
3. Failure to Locate Claimant Despite Due Diligence

8

COMMENT:

Forcing representatives to divulge their reasons for withdrawal to justify extraordinary circumstances may violate attorney-client privilege.



9

RESPONSE:

We are not seeking privileged communications between an attorney and client. If the representative cannot describe why he or she must withdraw without revealing privileged or confidential communications (and no exception exists), the representative should state this fact, not disclose the privileged or confidential communication, and allow the ALJ to evaluate the request under these circumstances.

10

THE RULES OF PROFESSIONAL CONDUCT

OHIO
(AND OTHER STATES)

11

Ohio, Kentucky, Indiana, & Pennsylvania have all adopted the ABA Model Rules

Each State Code contains variances

KNOW YOUR STATE CODE!!!

12

AMERICAN BAR ASSOCIATION

Model Rules

13

RULE 1.16

DECLINING OR TERMINATING REPRESENTATION

14

(B) A LAWYER *MAY* WITHDRAW FROM REPRESENTING A CLIENT IF:

1. No material adverse effect on client interests
2. Reasonable belief of crime / fraud
3. Services used for crime / fraud
4. Client actions repugnant / rep disagrees
5. Client fails to fulfill obligations
6. Unreasonable financial burden
7. Other good cause

15

NO MATERIAL ADVERSE EFFECT ON CLIENT INTEREST

The (Third) Restatement of Law Governing Lawyers indicates that even where cause exists, a lawyer may still not withdraw if he believes that the harm to the client cause by the withdrawal will be disproportionately greater than the harm to the client or others if the representation continues

16

DUTY AFTER TERMINATION / WITHDRAWAL

1.16(d) A lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as:

- **Giving reasonable notice to the client**
- **Allowing time to obtain other counsel**
- **Surrendering papers and property**

17

RULE 1.6

CONFIDENTIALITY OF INFORMATION

18

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, OR . . .

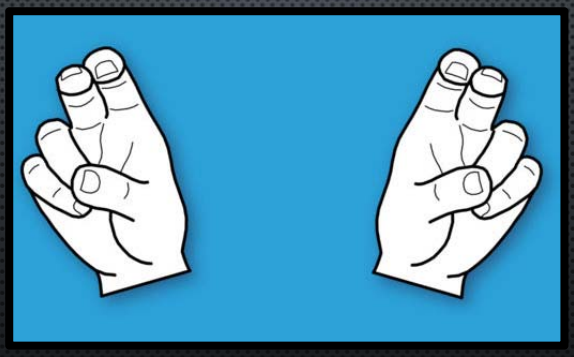
19

(b) A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary to:

1. Prevent Death
2. Prevent Crime / Fraud and Result
3. Prevent Injury and Result
4. Obtain Legal Advice
5. Establish Defense
6. Comply with Court Order
7. Detect / Resolve Conflicts of Interest

20

HYPOTHETICALS



21

HYPO #1

CLAIMANT ADVISES YOU THAT HE/SHE HAS A CLAIM PENDING AT OHO. YOU AND CLIENT EXECUTE REPRESENTATION DOCUMENTS. YOU EXPLAIN TO THE CLIENT THAT YOU WILL NEED TO REVIEW THE EXHIBIT FILE/UNEXHIBITED FILE BEFORE YOU CAN ASSESS THE MERITS OF THE CASE. CLIENT AGREES TO THIS.

22

(A) THE CLAIM IS SCHEDULED FOR HEARING. YOU REVIEW THE EXHIBITS AND DETERMINE THAT IT IS UNLIKELY THE CLAIM WITH PREVAIL, AND YOU THEREFORE WISH TO WITHDRAW.

23

(B) THE CLAIM IS NOT YET SCHEDULED FOR A HEARING. YOU REVIEW THE EXHIBITS AND DETERMINE ADDITIONAL DEVELOPMENT IS NEEDED. WHILE YOU ARE DEVELOPING THE RECORD, THE CLAIM IS SCHEDULED FOR HEARING. YOU OBTAIN ADDITIONAL TREATMENT RECORDS AND DETERMINE IT IS UNLIKELY THAT THE CLAIM WILL PREVAIL, AND YOU THEREFORE WISH TO WITHDRAW.

24

HYPO #2

YOU UNDERTAKE REPRESENTATION AT A LOWER ADMINISTRATIVE LEVEL, AND FILE A REQUEST FOR HEARING. UPON NOTICE THAT OHO HAS RECEIVED THE FILE, YOU REVIEW THE UNWORKED EXHIBITS AND THE CASE LOOKS STRONG. YOU ARE CONTACTED TO SCHEDULE A HEARING AND AGREE TO A HEARING DATE. YOU REQUEST AND RECEIVE UPDATED RECORDS AND DETERMINE THAT THE CLAIM IS UNLIKELY TO PREVAIL BECAUSE:

25

(A) RECORDS CONTAIN EVIDENCE THAT CLIENT UNFORTUNATELY RELAPSED AND WAS CONSISTENTLY USING/ABUSING ALCOHOL OR ILLICIT SUBSTANCES.

26

(B) RECORDS CONTAIN EVIDENCE OF ONGOING AND PERSISTENT NON-COMPLIANCE WITH TREATMENT AND/OR MEDICATION, WITHOUT GOOD CAUSE FOR NON-COMPLIANCE.

27

(C) THERE ARE INSUFFICIENT RECORDS/SIGNIFICANT GAPS IN TREATMENT.

28

(D) NO TREATING SOURCE IS WILLING TO PROVIDE A MEDICAL SOURCE STATEMENT AND THE OBJECTIVE MEDICAL EVIDENCE IS INCONSISTENT OR INSUFFICIENT ON ITS OWN.

29

(E) DAMAGING MEDICAL RECORDS ARE RECEIVED JUST PRIOR TO THE 5-DAY DEADLINE, DESPITE EXERCISING DUE DILIGENCE TO OBTAIN SAID RECORDS IN A TIMELY MANNER.

30

HYPO #3

THE CLAIM JUST GOT SCHEDULED FOR HEARING, AND:

31

(A) YOU FIND OUT THAT THE CLAIMANT HAS JUST BEEN MADE A "GUEST OF THE STATE" FOR 7-YEARS.

32

(B) YOUR CLIENT INFORMS YOU THAT THEY HAVE MEDICALLY IMPROVED, AND FORGOT TO TELL YOU (DESPITE YOUR EFFORTS TO OBTAIN UPDATES) THAT THEY HAVE BEEN WORKING FULL-TIME FOR SEVERAL MONTHS.

33

HYPO #4

THE CLAIM IS SCHEDULED FOR HEARING, BUT:

34

(A) THE CLAIMANT DOES NOT RESPOND TO YOUR WRITTEN CORRESPONDENCES OR PHONE CALLS. AS SUCH, YOU ARE UNABLE TO WORK UP THE FILE OR PREPARE TO REPRESENT THE CLAIMANT.

35

(B) THE CLAIMANT DOES RESPOND UP UNTIL THE HEARING IS SCHEDULED (OR LATER).

36

QUESTIONS / DISCUSSION

37

ETHICS AND PROFESSIONALISM: NEW ATTORNEY CONDUCT AND DISCIPLINARY REGULATIONS

David W. Kapor & Associates, LLC

Rules of Conduct and Standards of Responsibility for Appointed Representatives

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- 20 CFR 404.1740-1799
- 20 CFR 416.1505-1599
- Federal Register/Vol. 83, No. 127, Monday, July 2, 2018

(with Notice & Comment)

LEGAL STATUS

LEGAL STATUS

Rules of Conduct and Standards of Responsibility for Appointed Representatives

A Rule by the Social Security Administration on 07/02/2018

DOCUMENT DETAILS

Printed version:
PDF (https://www.govinfo.gov/content/pkg/FR-2018-07-02/pdf/2018-13989.pdf)

Publication Date:
07/02/2018 (/documents/2018/07/02)

Agency:
Social Security Administration (https://www.federalregister.gov/agencies/social-security-administration)

Dates:
These final rules will be effective August 1, 2018.

Effective Date:
08/01/2018

Document Type:
Rule

Document Citation:
83 FR 30849

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30849-30860 (12 pages)

CFR:
20 CFR 404
20 CFR 416

Agency/Docket Number:
Docket No. SSA-2013-0044

RIN:
0960-AH63 (https://www.federalregister.gov/regulations/0960-AH63/revisions-to-rules-of-conduct-and-standards-of-responsibility-for-appointed-representatives)

Document Number:
2018-13989

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as of 04/25/2019 at 12:15 pm EDT

DOCUMENT STATISTICS

ENHANCED CONTENT

regulations.gov

Docket Number:
SSA-2013-0044 (https://www.regulations.gov/docket?D=SSA-2013-0044)

Docket Name:
Rules of Conduct and Standards of Responsibility for Appointed Representatives

Docket RIN

0960-AH63 (https://www.federalregister.gov/regulations/0960-AH63/revisions-to-rules-of-conduct-and-standards-of-responsibility-for-appointed-representatives)

Supporting/Related Materials:

E O 12866 Meeting on Revisions to Rules of Conduct - Listening... (https://www.regulations.gov/document?D=SSA-2013-0044-0156)

ENHANCED CONTENT

PUBLISHED DOCUMENT

AGENCY:

Social Security Administration.

ACTION:

Final rules.

SUMMARY:

We are revising our rules of conduct and standards of responsibility for representatives. We are also updating and clarifying the procedures we use when we bring charges against a representative for violating these rules and standards. These changes are necessary to better protect the integrity of our administrative process and to further clarify representatives' existing responsibilities in their conduct with us. The revisions should not be interpreted to suggest that any specific conduct was permissible under our rules prior to these changes; instead, we seek to ensure that our rules of conduct and standards of responsibility are clearer as a whole and directly address a broader range of inappropriate conduct.

DATES:

These final rules will be effective August 1, 2018.

FOR FURTHER INFORMATION CONTACT:

Sarah Taheri, Office of Appellate Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605-7100. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778, or visit our internet site, Social Security Online, at *http://www.socialsecurity.gov (http://www.socialsecurity.gov).*

SUPPLEMENTARY INFORMATION:

Background

Although the vast majority of representatives conducting business before us on behalf of Social Security beneficiaries and claimants ethically and conscientiously assist their clients, we are concerned that some representatives are using our processes in a way that undermines the integrity of our programs and harms claimants. Accordingly, we are clarifying that certain actions are prohibited, and we are providing additional means to address representative actions that do not serve the best interests of claimants.

On August 16, 2016,[1] we published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** in which we proposed clarifications and revisions to our rules of conduct for representatives. To the extent that we adopt a proposed change as final without revision, and we already discussed at length the reason for and details of the proposal, we will not repeat that information here.

In response to the NPRM, we received 154 timely submitted comments that addressed issues within the scope of our proposed rules. Based on those comments, we are modifying some of our proposed changes to address concerns that commenters raised. We have also made editorial changes consistent with plain language writing requirements. We made conforming changes in other sections not originally edited in the NPRM. Finally, we made changes to ensure correct paragraph punctuation in §§ 404.1740 and 416.1540; a

nomenclature change to reflect the organization of our agency in §§ 404.1765(b)(1) and 416.1565(b)(1); and updated a cross-reference in §§ 404.1755 and 416.1555 that refers to §§ 404.1745 and 416.1545, sections reorganized and rewritten in the NPRM and codified in the final rule.

Public Comments and Discussion

Comment: Some commenters suggested that our proposed rules would deter potential representatives from representing claimants in Social Security matters.

Response: These rules reflect our interest in protecting claimants and ensuring the integrity of our administrative process, and they do not impose unreasonable standards of conduct. These additional rules of conduct should not deter competent, knowledgeable, and principled representatives.

Comment: Some commenters objected to the provision in proposed § 404.1705(b)(4) and 416.1505(b)(4), which includes "persons convicted of a felony (as defined by § 404.1506(c)), or any crime involving moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft" as examples of persons who lack "good character and reputation." The commenters sometimes referred to this provision as involving a "lifetime ban" on representation. Commenters noted that a "lifetime ban" fails to consider multiple situations, such as overturned convictions. Some commenters suggested that we place the ban only on representatives with prior felony convictions but exempt those with past misdemeanor convictions, because claimants may have family members with misdemeanor convictions who are otherwise well-qualified to be representatives. Commenters opined that there is nothing inherent about a felony conviction that would prohibit a person from providing competent representation. Finally, commenters suggested that this proposed regulation would decrease the pool of representatives, particularly for minorities, because, according to these commenters, some statistics show higher conviction rates in minority populations.

Start Printed Page 30850

Response: We have broad rulemaking authority to decide who can serve as a non-attorney representative. We believe we can achieve our goal of protecting claimants from potentially fraudulent representatives by limiting the prohibition to individuals convicted of certain offenses that are more severe in nature or involve behavior that reflects poorly on an individual's ability to represent claimants. There is no evidence that this approach will decrease the pool of available, high quality representatives for any particular population. Accordingly, we determined that individuals are not qualified to practice before us if they have a felony conviction (as defined in our rules) or a conviction involving moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft. These criminal convictions reflect crimes that, by their nature, are more serious based on their categorization as felonies, or involve behavior that reflects poorly on an individual's honesty and moral judgment and, therefore, also reflects poorly on the individual's ability to represent claimants. This disqualification would not apply to convictions that have been overturned or other similar situations, which we have clarified in the final rules. The regulation does not specifically bar individuals with misdemeanor convictions from serving as representatives, unless the misdemeanor involved moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft, which are the misdemeanors that we believe reflect a lack of honesty and moral judgment, characteristics that we consider necessary in representatives. Further, even if individuals are unable to serve as appointed representatives due to these rules, they may still assist their family members with claims in an unofficial capacity.

Comment: Some commenters stated that claimants should be held harmless if they appoint a representative whom they later learn was not qualified (proposed §§ 404.1705(b)(4) and 416.1505(b)(4)).

Response: These rules do not suggest that we would impose any penalty on a claimant who appoints or attempts to appoint an unqualified representative. This regulatory section only identifies whom we will recognize as a representative.

Comment: Some commenters stated that proposed §§ 404.1740(b)(3)(iii) and 416.1540(b)(3)(iii) should clarify that a list of potential dates and times that a representative will be available for a hearing is only required to be accurate at the time it is submitted. The comments explained that many representatives

schedule hearings in multiple locations, and availability may change once they have other obligations scheduled.

Response: We understand that schedules change, and we do not expect representatives to hold open their schedules for all of the dates and times that they identify. We did not change the proposed regulatory text.

Comment: Commenters stated that the term "scheduled" is too vague (proposed §§ 404.1740(b)(3)(iv) and 416.1540(b)(3)(iv)).

Response: A hearing has been "scheduled" when a date and time have been set and we have notified all parties. We clarified the language in these sections.

Comment: Some commenters asserted that restricting a representative's right to withdraw after a hearing is scheduled, except under "extraordinary circumstances," is an overly broad restriction that inhibits a representative's right to withdraw in circumstances where the representative knows that the client no longer has a viable case. Many commenters also argued that forcing representatives to divulge their reasons for withdrawal to justify extraordinary circumstances may violate the attorney-client privilege, if the withdrawal is based on the representative's knowledge that a client may be engaging in fraud. Other commenters stated that if a claimant does not want to attend a hearing but will not release the representative, and the representative cannot withdraw, the administrative law judge (ALJ) will not be able to dismiss the case and will have to hold a hearing, which wastes administrative time and resources. Finally, commenters noted that hearings are sometimes already scheduled by the time representatives are hired. Because representatives cannot view claimants' files until they are appointed, representatives may have to withdraw after reviewing the file even though a hearing has already been scheduled.

Response: The American Bar Association (ABA) Model Rules of Professional Conduct Rule (Model Rule) 1.16 includes requirements for withdrawal similar to this regulation. Some examples of "extraordinary circumstances" under which we may allow a withdrawal include (1) serious illness; (2) death or serious illness in the representative's immediate family; or (3) failure to locate a claimant despite active and diligent attempts to contact the claimant.

We are not seeking privileged communications between an attorney and client. If the representative cannot describe why he or she must withdraw without revealing privileged or confidential communications (and if no exceptions to the attorney-client privilege exist, such as the crime-fraud exception), the representative should state this fact, not disclose the privileged or confidential communication, and allow the ALJ to evaluate the request under these circumstances.

Comment: Commenters raised the issue of providing "prompt and timely communication" with claimants, stating that this is often difficult with homeless or indigent claimants (proposed §§ 404.1740(b)(3)(v) and 416.1540(b)(3)(v)). Some commenters suggested changing this language to "keep the client reasonably informed of the status of the case" in accordance with Model Rule 1.4. One commenter requested that we define "incompetent representation" and "reasonable and adequate representation."

Response: Representatives are responsible for maintaining timely contact with their clients. We expect representatives to have working contact information for all of their clients, but we recognize that it may be difficult to locate homeless or indigent clients in some circumstances. We have changed the language of §§ 404.1740(b)(3)(v) and 416.1540(b)(3)(v) to take into account the difficulty in locating certain claimants despite a representative's best efforts. We did not provide any definition of "incompetent representation" or "reasonable and adequate representation," because these terms do not appear in the rule.

Start Printed Page 30851

Comment: A number of commenters were concerned with proposed §§ 404.1740(b)(5) and 416.1540(b)(5), which require a representative to disclose certain things in writing when the representative submits a medical or vocational opinion to us. The commenters specifically raised concerns about the disclosure of physician referrals and the disclosure requirement when the medical or vocational opinion was "drafted, prepared, or issued" by an employee of the representative or an individual contracting with the

representative for services. Commenters also stated that the term "prepared" is vague, and it is unclear whether disclosure would be required if a representative discusses the sequential evaluation process with a provider of an opinion or supplies a questionnaire for a provider to complete. Some commenters further maintained that requiring disclosure of physician referrals would violate the attorney-client privilege and that such referrals are irrelevant to the representation of the case. Commenters also requested that the regulation clarify that opinions are entitled to the same weight regardless of whether the representative requested them. Finally, commenters argued that requiring disclosure will "chill" referrals for those claimants who need them most.

Response: When a representative submits a medical or vocational opinion to us, he or she has an affirmative duty to disclose to us in writing if the representative or one of the representative's employees or contractors participated in drafting, preparing, or issuing the opinion. For clarity, we consider providing guidance or providing a questionnaire, template or format to fall within the parameters of this rule when the guidance, questionnaire, template or format is used to draft a medical or vocational opinion submitted to us. In response to the concern that the term "prepared" is vague, unless the context indicates otherwise, we intend the ordinary meaning of words used in our regulations. We intend the word "prepared" here to have its ordinary meaning. Representatives also have an affirmative duty to disclose to us in writing if the representative referred or suggested that the claimant be examined, treated, or assisted by the individual who provided the opinion evidence. However, we are not seeking privileged or confidential communications concerning legal advice between an attorney and client, nor are we requiring disclosure of detailed communications. We are only requiring that representatives disclose the fact that they made a referral or participated in drafting, preparing, or issuing an opinion. *See* Fed. R. of Civ. P. 26(b)(5)(A) ("When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must . . . describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.") We explain what we mean by the attorney-client and attorney work product privileges more fully in §§ 404.1513(b)(2) and 416.913(b)(2) of our rules. We will interpret the affirmative duty in final §§ 404.1740(b)(5) and 416.1540(b)(5) in light of our interpretation of those privileges in §§ 404.1513(b)(2) and 416.913(b)(2). In response to the request that the regulation clarify that opinions are entitled to the same weight regardless of whether the representative requested them, we have other regulations that govern how we evaluate medical opinion evidence. *See* 20 CFR 404.1520 (/select-citation/2018/07/02/20-CFR-404.1520)c, 404.1527, 416.920c, and 416.927.

Comment: Some commenters stated that notifying us if a claimant is committing fraud (proposed §§ 404.1740(b)(6) and 416.1540(b)(6)) violates the attorney-client privilege and Model Rule 1.6. Commenters also suggested a more direct adoption of the provisions of Model Rule 3.3, Candor Toward the Tribunal.

Response: We do not believe that our final rule violates either the attorney-client privilege or Model Rule 1.6. Our final rule requires a representative to "[d]isclose to us immediately if the representative discovers that his or her services are or were used by the claimant to commit fraud against us." Model Rule 1.6(b)(2) [2] includes an exception to confidentiality "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." Furthermore, the crime-fraud exception to the attorney-client privilege allows a lawyer to disclose otherwise privileged communications when they are in furtherance of a crime or fraudulent act. When a claimant uses a representative's services in furtherance of the claimant's fraud, there is a reasonable certainty that the fraud will cause substantial injury to the Social Security trust funds. Such fraud also undermines public confidence in our programs. Our proposed and final rules are fully consistent with the exception to confidentiality found in Model Rule 1.6(b)(2). The final rules also address the aim of Model Rule 3.3 to limit false or misleading statements, but within the unique context of the legal and procedural structure of the Social Security programs. Therefore, we are not changing the originally proposed language.

Comment: A few commenters asked us to clarify whether disbarment or disqualification will be an automatic bar to representation, or whether we will address each situation individually (proposed §§ 404.1740(b)(7)-(9) and 416.1540(b)(7)-(9)).

Response: We will address any disclosure made pursuant to §§ 404.1740(b)(7)-(9) and 416.1540(b)(7)-(9) on an individual basis.

Comment: Some commenters stated that proposed § 416.1540(b)(10) is too broad, because representatives often refer Supplemental Security Income (SSI) claimants to special needs trust attorneys, and the proposed language suggests that the representatives would be responsible for the conduct of the trust attorneys. Other commenters recommend that the regulation encompass only those people over whom representatives have supervisory authority.

Response: In response to these comments, we have revised the language in final §§ 404.1740(b)(10) and 416.1540(b)(10) to clarify that the affirmative duty applies "when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work." Further, because this requirement is an affirmative duty, we moved language from proposed §§ 404.1740(c)(14) and 416.1540(c)(14) to §§ 404.1740(b)(10) and 416.1540(b)(10), which outlines the affirmative duty to take remedial action when: (i) The representative's employees, assistants, partners, contractors, or other individuals' conduct violates these rules of conduct and standards of responsibility, and (ii) the representative has reason to believe a violation of these rules of conduct and standards of responsibility will occur. We revised the language of final §§ 404.1740(c)(14) and 415.1540(c)(14) to prohibit representatives from failing to oversee other individuals working on the claims on which the representative is appointed when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

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Comment: Some commenters objected to proposed §§ 404.1740(c)(1) and 416.1540(c)(1), which prohibit "misleading a claimant, or prospective claimant or beneficiary, about the representative's services and qualifications." Commenters asked whether it would be misleading if a claimant refers to a non-attorney representative as an attorney, and the representative does not correct them.

Response: Not correcting a known misconception about the representative's status as a non-attorney is "misleading a claimant," as contemplated under this prohibition.

Comment: A few commenters objected to the language of proposed § 404.1740(c)(7)(ii)(B), which prohibits "[p]roviding misleading information or misrepresenting facts . . . where the representative has or should have reason to believe the information was misleading and the facts would constitute a misrepresentation." These commenters stated that many claimants are mentally ill, and it is difficult to ascertain whether a client is providing accurate facts. The commenters also objected to the term "should," stating that it is overly vague. A few commenters believe the standard "knowingly" should be added. Commenters also stated that this regulation conflicted with our rule on the submission of evidence, which requires representatives to submit all available evidence.

Response: Based on the comments, we have changed the "has or should have reason to believe" language of the proposed rule to "knows or should have known" in the final rule. Whether or not a claimant is mentally ill, a representative will violate the standard in the final rule if he or she presents information that he or she knows to be false or circumstances demonstrate that the representative should have known it to be false. This rule does not conflict with our rule requiring representatives to submit all evidence, because a false document is not evidence as contemplated under §§ 404.1513 and 416.913. Further, "should" is not an overly broad standard and is a commonly used term in Federal laws and regulations. *See, e.g.,* 42 U.S.C. 1320 (https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent&section=1320&type=usc&link-type=html)a-8a(a)(1).

Comment: A few commenters stated that proposed §§ 404.1740(c)(7)(ii)(C) and 416.1540(c)(7)(ii)(C) should clarify that representatives may contact SSA staff regarding matters such as case status, requests for critical case flags, Congressional inquiries, or when SSA staff ask the representative to contact them.

Response: We did not make any changes in response to these comments. The proposed and final rules specifically states that representatives should not communicate with agency staff "outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s)." Matters such as case status inquiries, requests for critical case flags, and Congressional inquiries are not outside the normal course of business, nor would they be attempts to inappropriately influence the processing or outcome of a claim.

Comment: Some commenters asked whether a representative would be guilty of misleading an ALJ if an ALJ finds that a claimant's statements are "not fully credible." These commenters also recommend adding "knowingly" to proposed §§ 404.1740(c)(3) and 416.1540(c)(3). Other commenters stated that requiring representatives to disclose matters of which they do not have actual knowledge would "chill" advocacy.

Response: On March 16, 2016, we published Social Security Ruling (SSR) 16-3p, "Titles II and XVI: Evaluation of Symptoms in Disability Claims" in the **Federal Register**.[3] In this SSR, we eliminated the use of the term "credibility" from our sub-regulatory policy, because our regulations do not use this term. In doing so, we clarified that subjective symptom evaluation is not an examination of an individual's character. Instead, we will more closely follow our regulatory language regarding symptom evaluation. With respect to the commenters' concerns, the regulations include a number of factors that must be considered when evaluating symptoms, but a representative will not be found to be misleading an ALJ based solely on the results of this evaluation. Acknowledging the concern about the standard we will use in evaluating this type of situation, we are changing the "has or should have reason to believe" language in the proposed rule to "knows or should have known" in the final rule. This provision addresses only situations where the representative knows or should have known that specific statements, evidence, assertions, or representations are false or misleading.

Comment: Commenters objected to the 14-day limit to respond to charges and proposed that the 30-day limit in the current rules should be maintained (proposed §§ 404.1750 and 416.1550).

Response: We did not adopt this suggestion, because we believe that 14 days allows for a more timely resolution of misconduct matters. The 14-day timeframe provides the representative with sufficient time to respond to charges, which typically consists only of affirming or denying various factual allegations. However, in response to the commenters' concerns that the proposed rule did not give representatives adequate time to respond to the charges, we added the term "business" to clarify that the time limit is 14 business days.

Comment: One commenter suggested that representatives be suspended from representing clients until the sanction process is complete.

Response: The Social Security Act requires that we give a representative notice and opportunity for a hearing before we suspend or disqualify him or her from practicing before us. We have long allowed representatives to continue to practice before us until there is a final decision on the case. We will continue to impose sanctions only after the administrative sanctions process is completed.

Comment: Some commenters suggested that a representative should not have to show good cause for objecting to the manner of hearing (proposed §§ 404.1765(d) and 416.1565(d)). One commenter stated that a hearing should always be in person unless a party can demonstrate that there is no genuine dispute as to any material fact.

Response: The hearing officer is in the best position to decide how to conduct a particular hearing in the most effective and efficient manner. A "good cause" standard for objecting to the manner of the hearing ensures that any objection to this issue is well-founded.

Comment: A few commenters stated that 14 days is insufficient time to request review of a hearing officer's decision (proposed §§ 404.1775 and 416.1575). The commenters requested that the rule clarify whether it refers to business or calendar days.

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Response: In response to these and other related comments, we adopted this suggestion and added the word "business" to clarify that the 14-day period means 14 business days.

Comment: Some commenters stated that proposed §§ 404.1785 and 416.1585 shift the burden from the Appeals Council to representatives to obtain evidence. They stated that by changing the language from the Appeals Council "shall require that the evidence be obtained" to "the Appeals Council will allow the party with the information to submit the additional evidence," the regulation relieves the Appeals Council of the responsibility for obtaining evidence and allows the Appeals Council to ignore evidence submitted by another party.

Response: We changed the language in §§ 404.1785 and 416.1585 for clarity. In the adversarial proceedings to sanction representatives, the obligation to provide evidence to the Appeals Council is, and has always been, on the party with the information. Accordingly, we are not changing the language proposed in the NPRM.

Comment: Some commenters asked that we clarify which decisions we will publish and when we will publish them (proposed §§ 404.1790(f) and 416.1590(f)). They also inquired as to whether the public will have access to the published decisions, and they expressed concern that the decisions might contain personally identifiable information.

Response: On June 16, 2017, the Administrative Conference of the United States (ACUS) adopted Recommendation 2017-1, "Adjudication Materials on Agency Websites." [4] ACUS recommended that "[a]gencies should consider providing access on their websites to decisions and supporting materials (*e.g.*, pleadings, motions, briefs) issued and filed in adjudicative proceedings." ACUS also recommended that "[a]gencies that adjudicate large volumes of cases that do not vary considerably in terms of their factual contexts or the legal analyses employed in their dispositions should consider disclosing on their websites a representative sampling of actual cases and associated adjudication materials." We will work with ACUS with respect to this recommendation, and we will provide details in sub-regulatory guidance of how we will publish decisions after these final rules become effective. In response to the commenters' concerns about privacy, we take concerns regarding personally identifiable information seriously, and the final rule makes clear that we will remove or redact any personally identifiable information from the decisions.

Comment: One commenter stated that proposed § 404.1790 should use a "preponderance of the evidence" standard rather than the "substantial evidence standard."

Response: The Appeals Council is an appellate body that generally reviews decisions using the substantial evidence standard.[5] Therefore, we are not changing this language.

Comment: Some commenters stated that the word "may" should be changed to "will" in proposed §§ 404.1790(f) and 416.1590(f), which state, "Prior to making a decision public, we may remove or redact information from the decision."

Response: We adopted this comment and changed "may" to "will." We will redact any personally identifiable information from the decisions.

Comment: One commenter stated that the 3-year ban on reinstatement after suspension is too harsh.

Response: The 3-year prohibition is actually a 3-year wait to reapply for reinstatement and we believe it is appropriate, because our experience shows that when the Appeals Council denies a request for reinstatement, the representative typically has not taken appropriate action to remedy the violation or does

not understand its severity. We are implementing this change to ensure more thoroughly supported requests for reinstatement.

Regulatory Procedures

Executive Order 12866 as Supplemented by Executive Order 13563 (/executive-order/13563)

We consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563 (/executive-order/13563) and are subject to OMB review.

Executive Order 13771 (/executive-order/13771)

This rule is not subject to the requirements of Executive Order 13771 (/executive-order/13771) because it is administrative in nature and results in no more than de minimis costs.

Regulatory Flexibility Act

We certify that these final rules will not have a significant economic impact on a substantial number of small entities because they affect individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

These final rules contain information collection burdens in §§ 404.1740(b)(5) through (9) and 416.1540(b)(5) through (b)(9) that require OMB clearance under the Paperwork Reduction Act of 1995 (PRA). As the PRA requires, we submitted a clearance request to OMB for approval of these sections. We will publish the OMB number and expiration date upon approval.

Further, these final rules contain information collection activities at 20 CFR 404.1750 (/select-citation/2018/07/02/20-CFR-404.1750)(c) and (e)(2), 404.1765(g)(1), 404.1775(b), 404.1799(d)(2), 416.1550(c) and (e)(2), 416.1565(g)(1), 416.1575(b), and 416.1599(d)(2). However, 44 U.S.C. 3518 (https://api.fdsys.gov/link?collection=uscode&title=44&year=mostrecent&section=3518&type=usc&link-type=html)(c)(1)(B)(ii) exempts these activities from the OMB clearance requirements under the Paperwork Reduction Act of 1995.

We published an NPRM on August 16, 2016 at 81 FR 54520 (/citation/81-FR-54520). In that NPRM, we solicited comments under the PRA on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. We received no public comments relating to any of these issues. We will not collect the information referenced in these burden sections until we receive OMB approval.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404 (/select-citation/2018/07/02/20-CFR-404)

- Administrative practice and procedure
- Blind
- Disability benefits
- Old-age, survivors, and disability insurance
- Reporting and recordkeeping requirements
- Social Security

20 CFR Part 416 (/select-citation/2018/07/02/20-CFR-416)

- Administrative practice and procedure
- Aged
- Blind
- Disability benefits
- Public assistance programs
- Reporting and recordkeeping requirements
- Supplemental Security Income (SSI)

Nancy A. Berryhill,

Acting Commissioner of Social Security.

For the reasons set out in the preamble, we amend 20 CFR chapter III, parts 404 and part 416, as set forth below:

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PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)

Subpart R—[Amended]

1. The authority citation for subpart R of part 404 continues to read as follows:

Authority: Secs. 205(a), 206, 702(a)(5), and 1127 of the Social Security Act (42 U.S.C. 405 (https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent&section=405&type=usc&link-type=html)(a), 406, 902(a)(5), and 1320a-6).

2. Revise § 404.1705(b) to read as follows:

§ 404.1705 Who may be your representative.

* * * * *

(b) You may appoint any person who is not an attorney to be your representative in dealings with us if the person—

(1) Is capable of giving valuable help to you in connection with your claim;

(2) Is not disqualified or suspended from acting as a representative in dealings with us;

(3) Is not prohibited by any law from acting as a representative; and

(4) Is generally known to have a good character and reputation. Persons lacking good character and reputation, include, but are not limited to, persons who have a final conviction of a felony (as defined by § 404.1506(c)) or any crime involving moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft.

* * * * *

3. Amend § 404.1740 as follows:

a. Revise paragraphs (b)(2)(vii) and (b)(3);

b. Add paragraphs (b)(5) through (10);

c. Revise paragraphs (c)(1) through (6) and (c)(7)(ii);

d. Remove paragraph (c)(7)(iii);

e. Revise paragraphs (c)(8) through (13); and

f. Add paragraph (c)(14).

The revisions and additions read as follows:

§ 404.1740 Rules of conduct and standards of responsibility for representatives.

* * * * *

(b) * * *

(2) * * *

(vii) Any other factors showing how the claimant's impairment(s) affects his or her ability to work. In §§ 404.1560 through 404.1569a, we discuss in more detail the evidence we need when we consider vocational factors.

(3) Conduct his or her dealings in a manner that furthers the efficient, fair, and orderly conduct of the administrative decision-making process, including duties to:

(i) Provide competent representation to a claimant. Competent representation requires the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A representative must know the significant issue(s) in a claim, have reasonable and adequate familiarity with the evidence in the case, and have a working knowledge of the applicable provisions of the Social Security Act, as amended, the regulations, the Social Security Rulings, and any other applicable provisions of law.

(ii) Act with reasonable diligence and promptness in representing a claimant. This includes providing prompt and responsive answers to our requests for information pertinent to processing of the claim.

(iii) When requested, provide us, in a manner we specify, potential dates and times that the representative will be available for a hearing. We will inform the representative how many potential dates and times we require to coordinate the hearing schedule.

(iv) Only withdraw representation at a time and in a manner that does not disrupt the processing or adjudication of a claim and that provides the claimant adequate time to find new representation, if desired. A representative should not withdraw after we set the time and place for the hearing (see § 404.936) unless the representative can show that a withdrawal is necessary due to extraordinary circumstances, as we determine on a case-by-case basis.

(v) Maintain prompt and timely communication with the claimant, which includes, but is not limited to, reasonably informing the claimant of all matters concerning the representation, consulting with the claimant on an ongoing basis during the entire representational period, and promptly responding to a claimant's reasonable requests for information. When we evaluate whether a representative has maintained prompt and timely communication with the claimant, we will consider the difficulty the representative has in locating a particular claimant (*e.g.*, because the claimant is homeless) and the representative's efforts to keep that claimant informed.

* * * * *

(5) Disclose in writing, at the time a medical or vocational opinion is submitted to us or as soon as the representative is aware of the submission to us, if:

(i) The representative's employee or any individual contracting with the representative drafted, prepared, or issued the medical or vocational opinion; or

(ii) The representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence.

(6) Disclose to us immediately if the representative discovers that his or her services are or were used by the claimant to commit fraud against us.

(7) Disclose to us whether the representative is or has been disbarred or suspended from any bar or court to which he or she was previously admitted to practice, including instances in which a bar or court took administrative action to disbar or suspend the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disbarment or suspension occurs after the appointment of the representative, the representative will immediately disclose the disbarment or suspension to us.

(8) Disclose to us whether the representative is or has been disqualified from participating in or appearing before any Federal program or agency, including instances in which a Federal program or agency took administrative action to disqualify the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disqualification occurs after the appointment of the representative, the representative will immediately disclose the disqualification to us.

(9) Disclose to us whether the representative has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary. If the removal or suspension occurs after the appointment of the representative, the representative will immediately disclose the removal or suspension to us.

(10) Ensure that all of the representative's employees, assistants, partners, contractors, or any person assisting the representative on claims for which the representative has been appointed, comply with these rules of conduct and standards of responsibility for representatives, when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work. This includes a duty to take remedial action when:

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(i) The representative's employees, assistants, partners, contractors or other individuals' conduct violates these rules of conduct and standards of responsibility; and

(ii) The representative has reason to believe a violation of these rules of conduct and standards of responsibility occurred or will occur.

(c) * * *

(1) In any manner or by any means threaten, coerce, intimidate, deceive or knowingly mislead a claimant, or prospective claimant or beneficiary, regarding benefits or other rights under the Act. This prohibition includes misleading a claimant, or prospective claimant or beneficiary, about the representative's services and qualifications.

(2) Knowingly charge, collect or retain, or make any arrangement to charge, collect or retain, from any source, directly or indirectly, any fee for representational services in violation of applicable law or regulation. This prohibition includes soliciting any gift or any other item of value, other than what is authorized by law.

(3) Make or present, or participate in the making or presentation of, false or misleading oral or written statements, evidence, assertions, or representations about a material fact or law concerning a matter within our jurisdiction, in matters where the representative knows or should have known that those statements, evidence, assertions, or representations are false or misleading.

(4) Through his or her own actions or omissions, unreasonably delay or cause to be delayed, without good cause (see § 404.911(b)), the processing of a claim at any stage of the administrative decision-making process.

(5) Divulge, without the claimant's consent, except as may be authorized by regulations prescribed by us or as otherwise provided by Federal law, any information we furnish or disclose about a claim or prospective claim.

(6) Attempt to influence, directly or indirectly, the outcome of a decision, determination, or other administrative action by any means prohibited by law, or by offering or granting a loan, gift, entertainment, or anything of value to a presiding official, agency employee, or witness who is or may reasonably be expected to be involved in the administrative decision-making process, except as reimbursement for legitimately incurred expenses or lawful compensation for the services of an expert witness retained on a non-contingency basis to provide evidence.

(7) * * *

(ii) Behavior that has the effect of improperly disrupting proceedings or obstructing the adjudicative process, including but not limited to:

(A) Directing threatening or intimidating language, gestures, or actions at a presiding official, witness, contractor, or agency employee;

(B) Providing misleading information or misrepresenting facts that affect how we process a claim, including, but not limited to, information relating to the claimant's work activity or the claimant's place of residence or mailing address in matters where the representative knows or should have known that the information was misleading and the facts would constitute a misrepresentation; and

(C) Communicating with agency staff or adjudicators outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s).

(8) Violate any section of the Act for which a criminal or civil monetary penalty is prescribed.

(9) Refuse to comply with any of our rules or regulations.

(10) Suggest, assist, or direct another person to violate our rules or regulations.

(11) Advise any claimant or beneficiary not to comply with any of our rules or regulations.

(12) Knowingly assist a person whom we suspended or disqualified to provide representational services in a proceeding under title II of the Act, or to exercise the authority of a representative described in § 404.1710.

(13) Fail to comply with our sanction(s) decision.

(14) Fail to oversee the representative's employees, assistants, partners, contractors, or any other person assisting the representative on claims for which the representative has been appointed when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

4. Amend § 404.1745 by revising paragraphs (d) and (e) and adding paragraph (f) to read as follows:

§ 404.1745 Violations of our requirements, rules, or standards.

★* ★* ★* ★* ★*

(d) Has been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice (see § 404.1770(a));

(e) Has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency (see § 404.1770(a)); or

(f) Who, as a non-attorney, has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary.

5. Amend § 404.1750 by revising paragraphs (c), (d), (e)(2), and (f) to read as follows:

§ 404.1750 Notice of charges against a representative.

★* ★* ★* ★* ★*

(c) We will advise the representative to file an answer, within 14 business days from the date of the notice, or from the date the notice was delivered personally, stating why he or she should not be suspended or disqualified from acting as a representative in dealings with us.

(d) The General Counsel or other delegated official may extend the 14-day period specified in paragraph (c) of this section for good cause, in accordance with § 404.911.

(e) * * *

(2) File the answer with the Social Security Administration, at the address specified on the notice, within the 14-day time period specified in paragraph (c) of this section.

(f) If the representative does not file an answer within the 14-day time period specified in paragraph (c) of this section (or the period extended in accordance with paragraph (d) of this section), he or she does not have the right to present evidence, except as may be provided in § 404.1765(g).

6. Revise § 404.1755 to read as follows:

§ 404.1755 Withdrawing charges against a representative.

The General Counsel or other delegated official may withdraw charges against a representative. We will withdraw charges if the representative files an answer, or we obtain evidence, that satisfies us that we should not suspend or disqualify the representative from acting as a representative. When we consider withdrawing charges brought under § 404.1745(d) through (f) based on the representative's assertion that, before or after our filing of charges, the representative has been reinstated to practice by the court, bar, or Federal program or Federal agency that suspended, disbarred, or disqualified the representative, the General Counsel or other delegated official will determine whether such reinstatement occurred, whether it remains in effect, and whether he or she is reasonably satisfied that the representative will in the future act in accordance with the provisions of section 206(a) of the Act and our rules and regulations. If the representative proves that reinstatement occurred and remains in effect and the General Counsel or other delegated official is so satisfied, the General Counsel or other delegated official will withdraw those charges. The action of the General Counsel or other delegated official regarding withdrawal of charges is solely that of the General Counsel or other delegated official and is not reviewable, or subject to consideration in decisions made under §§ 404.1770 and 404.1790. If we withdraw the charges, we will notify the representative by mail at the representative's last known address.

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7. Amend § 404.1765 by revising paragraphs (b)(1), (c), (d)(1) and (3), and (g)(1) and (3) to read as follows:

§ 404.1765 Hearing on charges.

★* ★* ★* ★* ★*

(b) *Hearing officer.* (1) The Deputy Commissioner for the Office of Hearings Operations or other delegated official will assign an administrative law judge, designated to act as a hearing officer, to hold a hearing on the charges.

* * * * *

(c) *Time and place of hearing.* The hearing officer will mail the parties a written notice of the hearing at their last known addresses, at least 14 calendar days before the date set for the hearing. The notice will inform the parties whether the appearance of the parties or any witnesses will be in person, by video teleconferencing, or by telephone. The notice will also include requirements and instructions for filing motions, requesting witnesses, and entering exhibits.

(d) *Change of time and place for hearing.* (1) The hearing officer may change the time and place for the hearing, either on his or her own initiative, or at the request of the representative or the other party to the hearing. The hearing officer will not consider objections to the manner of appearance of parties or witnesses, unless the party shows good cause not to appear in the prescribed manner. To determine whether good cause exists for extending the deadline, we use the standards explained in § 404.911.

* * * * *

(3) Subject to the limitations in paragraph (g)(2) of this section, the hearing officer may reopen the hearing for the receipt of additional evidence at any time before mailing notice of the decision.

* * * * *

(g) *Conduct of the hearing.* (1) The representative or the other party may file a motion for decision on the basis of the record prior to the hearing. The hearing officer will give the representative and the other party a reasonable amount of time to submit any evidence and to file briefs or other written statements as to fact and law prior to deciding the motion. If the hearing officer concludes that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law, the hearing officer may grant the motion and issue a decision in accordance with the provisions of § 404.1770.

* * * * *

(3) The hearing officer will make the hearing open to the representative, to the other party, and to any persons the hearing officer or the parties consider necessary or proper. The hearing officer will inquire fully into the matters being considered, hear the testimony of witnesses, and accept any documents that are material.

* * * * *

8. Revise § 404.1775(b) to read as follows:

§ 404.1775 Requesting review of the hearing officer's decision.

* * * * *

(b) *Time and place of filing request for review.* The party requesting review will file the request for review in writing with the Appeals Council within 14 business days from the date the hearing officer mailed the notice. The party requesting review will certify that a copy of the request for review and of any documents that are submitted have been mailed to the opposing party.

9. Revise § 404.1780(a) to read as follows:

§ 404.1780 Appeals Council's review of hearing officer's decision.

(a) Upon request, the Appeals Council will give the parties a reasonable time to file briefs or other written statements as to fact and law, and to request to appear before the Appeals Council to present oral argument. When oral argument is requested within the time designated by the Appeals Council, the Appeals Council will grant the request for oral argument and determine whether the parties will

appear at the oral argument in person, by video teleconferencing, or by telephone. If oral argument is not requested within the time designated by the Appeals Council, the Appeals Council may deny the request.

* * * * *

10. Revise § 404.1785 to read as follows:

§ 404.1785 Evidence permitted on review.

(a) *General.* Generally, the Appeals Council will not consider evidence in addition to that introduced at the hearing. However, if the Appeals Council finds the evidence offered is material to an issue it is considering, it may consider that evidence, as described in paragraph (b) of this section.

(b) *Individual charged filed an answer.* (1) When the Appeals Council finds that additional evidence material to the charges is available, and the individual charged filed an answer to the charges, the Appeals Council will allow the party with the information to submit the additional evidence.

(2) Before the Appeals Council admits additional evidence into the record, it will mail a notice to the parties, informing them that evidence about certain issues was submitted. The Appeals Council will give each party a reasonable opportunity to comment on the evidence and to present other evidence that is material to an issue it is considering.

(3) The Appeals Council will determine whether the additional evidence warrants a new review by a hearing officer or whether the Appeals Council will consider the additional evidence as part of its review of the case.

(c) *Individual charged did not file an answer.* If the representative did not file an answer to the charges, the representative may not introduce evidence that was not considered at the hearing.

11. Amend § 404.1790 by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 404.1790 Appeals Council's decision.

(a) The Appeals Council will base its decision upon the evidence in the hearing record and any other evidence it may permit on review. The Appeals Council will affirm the hearing officer's decision if the action, findings, and conclusions are supported by substantial evidence. If the hearing officer's decision is not supported by substantial evidence, the Appeals Council will either:

(1) Reverse or modify the hearing officer's decision; or

(2) Return the case to the hearing officer for further proceedings.

* * * * *

(f) The Appeals Council may designate and publish certain final decisions as precedent for other actions brought under its representative conduct provisions. Prior to making a decision public, we will remove or redact personally identifiable information from the decision.

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12. Amend § 404.1799 by revising paragraphs (a), (d)(2), and (f) to read as follows:

§ 404.1799 Reinstatement after suspension or disqualification—period of suspension not expired.

(a) After more than one year has passed, a person who has been suspended or disqualified may ask the Appeals Council for permission to serve as a representative again. The Appeals Council will assign and process a request for reinstatement using the same general procedures described in § 404.1776.

* * * * *

(d) * * *

(2) If a person was disqualified because he or she had been disbarred, suspended, or removed from practice for the reasons described in § 404.1745(d) through (f), the Appeals Council will grant a request for reinstatement as a representative only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that he or she has been admitted (or readmitted) to and is in good standing with the court, bar, Federal program or agency, or other governmental or professional licensing authority from which he or she had been disbarred, suspended, or removed from practice.

* * * * *

(f) If the Appeals Council decides not to grant the request, it will not consider another request before the end of 3 years from the date of the notice of the previous denial.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart O—[Amended]

13. The authority citation for subpart O of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1127, and 1631(d) of the Social Security Act (42 U.S.C. 902 (https://api.fdsys.gov/link?collection=uscode&title=42&year=mostrecent&section=902&type=usc&link-type=html)(a)(5), 1320a-6, and 1383(d)).

14. Revise § 416.1505(b) to read as follows:

§ 416.1505 Who may be your representative.

* * * * *

(b) You may appoint any person who is not an attorney to be your representative in dealings with us if the person—

(1) Is capable of giving valuable help to you in connection with your claim;

(2) Is not disqualified or suspended from acting as a representative in dealings with us;

(3) Is not prohibited by any law from acting as a representative; and

(4) Is generally known to have a good character and reputation. Persons lacking good character and reputation, include, but are not limited to, persons who have a final conviction of a felony (as defined by § 404.1506(c) of this chapter), or any crime involving moral turpitude, dishonesty, false statement, misrepresentations, deceit, or theft.

* * * * *

15. Amend § 416.1540 follows:

a. Revise paragraphs (b)(2)(vii) and (b)(3);

b. Add paragraphs (b)(5) through (10);

c. Revise paragraphs (c)(1) through (6) and (c)(7)(ii);

d. Remove paragraph (c)(7)(iii);

e. Revise paragraphs (c)(8) through (13); and

f. Add paragraph (c)(14).

The revisions and additions read as follows:

§ 416.1540 Rules of conduct and standards of responsibility for representatives.

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(b) * * *

(2) * * *

(vii) Any other factors showing how the claimant's impairment(s) affects his or her ability to work. In §§ 416.960 through 416.969a, we discuss in more detail the evidence we need when we consider vocational factors.

(3) Conduct his or her dealings in a manner that furthers the efficient, fair, and orderly conduct of the administrative decision-making process, including duties to:

(i) Provide competent representation to a claimant. Competent representation requires the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A representative must know the significant issue(s) in a claim, have reasonable and adequate familiarity with the evidence in the case, and have a working knowledge of the applicable provisions of the Social Security Act, as amended, the regulations, the Social Security Rulings, and any other applicable provisions of law.

(ii) Act with reasonable diligence and promptness in representing a claimant. This includes providing prompt and responsive answers to our requests for information pertinent to processing of the claim.

(iii) When requested, provide us, in a manner we specify, potential dates and times that the representative will be available for a hearing. We will inform the representative how many potential dates and times we require to coordinate the hearing schedule.

(iv) Only withdraw representation at a time and in a manner that does not disrupt the processing or adjudication of a claim and that provides the claimant adequate time to find new representation, if desired. A representative should not withdraw after we set the time and place for the hearing (see § 416.1436) unless the representative can show that a withdrawal is necessary due to extraordinary circumstances, as we determine on a case-by-case basis.

(v) Maintain prompt and timely communication with the claimant, which includes, but is not limited to, reasonably informing the claimant of all matters concerning the representation, consulting with the claimant on an ongoing basis during the entire representational period, and promptly responding to a claimant's reasonable requests for information. When we evaluate whether a representative has maintained prompt and timely communication with the claimant, we will consider the difficulty the representative has in locating a particular claimant (*e.g.*, because the claimant is homeless) and the representative's efforts to keep that claimant informed.

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(5) Disclose in writing, at the time a medical or vocational opinion is submitted to us or as soon as the representative is aware of the submission to us, if:

(i) The representative's employee or any individual contracting with the representative drafted, prepared, or issued the medical or vocational opinion; or

(ii) The representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence.

(6) Disclose to us immediately if the representative discovers that his or her services are or were used by the claimant to commit fraud against us.

(7) Disclose to us whether the representative is or has been disbarred or suspended from any bar or court to which he or she was previously admitted to practice, including instances in which a bar or court took administrative action to disbar or suspend the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disbarment or suspension occurs after the appointment of the representative, the representative will immediately disclose the disbarment or suspension to us.

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(8) Disclose to us whether the representative is or has been disqualified from participating in or appearing before any Federal program or agency, including instances in which a Federal program or agency took administrative action to disqualify the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disqualification occurs after the appointment of the representative, the representative will immediately disclose the disqualification to us.

(9) Disclose to us whether the representative has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary. If the removal or suspension occurs after the appointment of the representative, the representative will immediately disclose the removal or suspension to us.

(10) Ensure that all of the representative's employees, assistants, partners, contractors, or any person assisting the representative on claims for which the representative has been appointed, comply with these rules of conduct and standards of responsibility for representatives, when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work. This includes a duty to take remedial action when:

(i) The representative's employees, assistants, partners, contractors or other individuals' conduct violates these rules of conduct and standards of responsibility; and

(ii) The representative has reason to believe a violation of these rules of conduct and standards of responsibility occurred or will occur.

(c) * * *

(1) In any manner or by any means threaten, coerce, intimidate, deceive or knowingly mislead a claimant, or prospective claimant or beneficiary, regarding benefits or other rights under the Act. This prohibition includes misleading a claimant, or prospective claimant or beneficiary, about the representative's services and qualifications.

(2) Knowingly charge, collect or retain, or make any arrangement to charge, collect or retain, from any source, directly or indirectly, any fee for representational services in violation of applicable law or regulation. This prohibition includes soliciting any gift or any other item of value, other than what is authorized by law.

(3) Make or present, or participate in the making or presentation of, false or misleading oral or written statements, evidence, assertions, or representations about a material fact or law concerning a matter within our jurisdiction, in matters where the representative knows or should have known that those statements, evidence, assertions or representations are false or misleading.

(4) Through his or her own actions or omissions, unreasonably delay or cause to be delayed, without good cause (see § 416.1411(b)), the processing of a claim at any stage of the administrative decision-making process.

(5) Divulge, without the claimant's consent, except as may be authorized by regulations prescribed by us or as otherwise provided by Federal law, any information we furnish or disclose about a claim or prospective claim.

(6) Attempt to influence, directly or indirectly, the outcome of a decision, determination, or other administrative action by any means prohibited by law, or offering or granting a loan, gift, entertainment, or anything of value to a presiding official, agency employee, or witness who is or may reasonably be expected to be involved in the administrative decision-making process, except as reimbursement for legitimately incurred expenses or lawful compensation for the services of an expert witness retained on a non-contingency basis to provide evidence.

(7) * * *

(ii) Behavior that has the effect of improperly disrupting proceedings or obstructing the adjudicative process, including but not limited to:

(A) Directing threatening or intimidating language, gestures, or actions at a presiding official, witness, contractor, or agency employee;

(B) Providing misleading information or misrepresenting facts that affect how we process a claim, including, but not limited to, information relating to the claimant's work activity or the claimant's place of residence or mailing address in matters where the representative knows or should have known that the information was misleading and the facts would constitute a misrepresentation; and

(C) Communicating with agency staff or adjudicators outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s).

(8) Violate any section of the Act for which a criminal or civil monetary penalty is prescribed.

(9) Refuse to comply with any of our rules or regulations.

(10) Suggest, assist, or direct another person to violate our rules or regulations.

(11) Advise any claimant or beneficiary not to comply with any of our rules or regulations.

(12) Knowingly assist a person whom we suspended or disqualified to provide representational services in a proceeding under title XVI of the Act, or to exercise the authority of a representative described in § 416.1510.

(13) Fail to comply with our sanction(s) decision.

(14) Fail to oversee the representative's employees, assistants, partners, contractors, or any other person assisting the representative on claims for which the representative has been appointed when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

16. Amend § 416.1545 by revising paragraphs (d) and (e) and adding paragraph (f) to read as follows:

§ 416.1545 Violations of our requirements, rules, or standards.

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(d) Has been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice (see § 416.1570(a));

(e) Has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency (see § 416.1570(a)); or

(f) Who, as a non-attorney, has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary.

17. Amend § 416.1550 by revising paragraphs (c), (d), (e)(2), and (f) to read as follows:

§ 416.1550 Notice of charges against a representative.

* * * * *

(c) We will advise the representative to file an answer, within 14 business days from the date of the notice, or from the date the notice was delivered personally, stating why he or she should not be suspended or disqualified from acting as a representative in dealings with us.

(d) The General Counsel or other delegated official may extend the 14-day period specified in paragraph (c) of this section for good cause in accordance with § 416.1411.

(e) * * *

(2) File the answer with the Social Security Administration, at the address specified on the notice, within the 14-day time period specified in paragraph (c) of this section.

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(f) If the representative does not file an answer within the 14-day time period specified in paragraph (c) of this section (or the period extended in accordance with paragraph (d) of this section), he or she does not have the right to present evidence, except as may be provided in § 416.1565(g).

18. Revise § 416.1555 to read as follows:

§ 416.1555 Withdrawing charges against a representative.

The General Counsel or other delegated official may withdraw charges against a representative. We will withdraw charges if the representative files an answer, or we obtain evidence, that satisfies us that we should not suspend or disqualify the representative from acting as a representative. When we consider withdrawing charges brought under § 416.1545(d) through (f) based on the representative's assertion that, before or after our filing of charges, the representative has been reinstated to practice by the court, bar, or Federal program or Federal agency that suspended, disbarred, or disqualified the representative, the General Counsel or other delegated official will determine whether such reinstatement occurred, whether it remains in effect, and whether he or she is reasonably satisfied that the representative will in the future act in accordance with the provisions of section 206(a) of the Act and our rules and regulations. If the representative proves that reinstatement occurred and remains in effect and the General Counsel or other delegated official is so satisfied, the General Counsel or other delegated official will withdraw those charges. The action of the General Counsel or other delegated official regarding withdrawal of charges is solely that of the General Counsel or other delegated official and is not reviewable, or subject to consideration in decisions made under §§ 416.1570 and 416.1590. If we withdraw the charges, we will notify the representative by mail at the representative's last known address.

19. Amend § 416.1565 by revising paragraphs (b)(1), (c), (d)(1) and (3), and (g)(1) and (3) as follows:

§ 416.1565 Hearing on charges.

* * * * *

(b) *Hearing officer.* (1) The Deputy Commissioner for the Office of Hearings Operations or other delegated official will assign an administrative law judge, designated to act as a hearing officer, to hold a hearing on the charges.

* * * * *

(c) *Time and place of hearing.* The hearing officer shall mail the parties a written notice of the hearing at their last known addresses, at least 14 calendar days before the date set for the hearing. The notice will inform the parties whether the appearance of the parties or any witnesses will be in person, by video teleconferencing, or by telephone. The notice will also include requirements and instructions for filing motions, requesting witnesses, and entering exhibits.

(d) *Change of time and place for hearing.* (1) The hearing officer may change the time and place for the hearing, either on his or her own initiative, or at the request of the representative or the other party to the hearing. The hearing officer will not consider objections to the manner of appearance of parties or witnesses, unless the party shows good cause not to appear in the prescribed manner. To determine whether good cause exists for extending the deadline, we use the standards explained in § 416.1411.

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(3) Subject to the limitations in paragraph (g)(2) of this section, the hearing officer may reopen the hearing for the receipt of additional evidence at any time before mailing notice of the decision.

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(g) *Conduct of the hearing.* (1) The representative or the other party may file a motion for decision on the basis of the record prior to the hearing. The hearing officer will give the representative and the other party a reasonable amount of time to submit any evidence and to file briefs or other written statements as to fact and law prior to deciding the motion. If the hearing officer concludes that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law, the hearing officer may grant the motion and issue a decision in accordance with the provisions of § 416.1570.

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(3) The hearing officer will make the hearing open to the representative, to the other party, and to any persons the hearing officer or the parties consider necessary or proper. The hearing officer will inquire fully into the matters being considered, hear the testimony of witnesses, and accept any documents that are material.

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20. Revise § 416.1575(b) to read as follows:

§ 416.1575 Requesting review of the hearing officer's decision.

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(b) *Time and place of filing request for review.* The party requesting review will file the request for review in writing with the Appeals Council within 14 business days from the date the hearing officer mailed the notice. The party requesting review will certify that a copy of the request for review and of any documents that are submitted have been mailed to the opposing party.

21. Revise § 416.1580(a) to read as follows:

§ 416.1580 Appeals Council's review of hearing officer's decision.

(a) Upon request, the Appeals Council will give the parties a reasonable time to file briefs or other written statements as to fact and law, and to request to appear before the Appeals Council to present oral argument. When oral argument is requested within the time designated by the Appeals Council, the Appeals Council will grant the request for oral argument and determine whether the parties will appear at the oral argument in person, by video teleconferencing, or by telephone. If oral argument is not requested within the time designated by the Appeals Council, the Appeals Council may deny the request.

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22. Revise § 416.1585 to read as follows:

§ 416.1585 Evidence permitted on review.

(a) *General.* Generally, the Appeals Council will not consider evidence in addition to that introduced at the hearing. However, if the Appeals Council finds the evidence offered is material to an issue it is considering, it may consider that evidence, as described in paragraph (b) of this section.

(b) *Individual charged filed an answer.* (1) When the Appeals Council finds that additional evidence material to the charges is available, and the individual charged filed an answer to the charges, the Appeals Council will allow the party with the information to submit the additional evidence.

(2) Before the Appeals Council admits additional evidence into the record, it will mail a notice to the parties, informing them that evidence about certain issues was submitted. The Appeals Council will give each party a reasonable opportunity to comment on the evidence and to present other evidence that is material to an issue it is considering.

(3) The Appeals Council will determine whether the additional evidence warrants a new review by a hearing officer or whether the Appeals Council will consider the additional evidence as part of its review of the case.

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(c) *Individual charged did not file an answer.* If the representative did not file an answer to the charges, the representative may not introduce evidence that was not considered at the hearing.

23. Amend § 416.1590 by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 416.1590 Appeals Council's decision.

(a) The Appeals Council will base its decision upon the evidence in the hearing record and any other evidence it may permit on review. The Appeals Council will affirm the hearing officer's decision if the action, findings, and conclusions are supported by substantial evidence. If the hearing officer's decision is not supported by substantial evidence, the Appeals Council will either:

(1) Reverse or modify the hearing officer's decision; or

(2) Return a case to the hearing officer for further proceedings.

* * * * * * * * * *

(f) The Appeals Council may designate and publish certain final decisions as precedent for other actions brought under its representative conduct provisions. Prior to making a decision public, we will remove or redact personally identifiable information from the decision.

24. Amend § 416.1599 by revising paragraphs (a), (d)(2), and (f) to read as follows:

§ 416.1599 Reinstatement after suspension or disqualification—period of suspension not expired.

(a) After more than one year has passed, a person who has been suspended or disqualified may ask the Appeals Council for permission to serve as a representative again. The Appeals Council will assign and process a request for reinstatement using the same general procedures described in § 416.1576.

* * * * * * * * * *

(d) * * *

(2) If a person was disqualified because he or she had been disbarred, suspended, or removed from practice for the reasons described in § 416.1545(d) through (f), the Appeals Council will grant a request for reinstatement as a representative only if the criterion in paragraph (d)(1) of this section is met and

the disqualified person shows that he or she has been admitted (or readmitted) to and is in good standing with the court, bar, Federal program or agency, or other governmental or professional licensing authority from which he or she had been disbarred, suspended, or removed from practice.

* * * * *

(f) If the Appeals Council decides not to grant the request, it will not consider another request before the end of 3 years from the date of the notice of the previous denial.

Footnotes

1. 81 FR 54520 (/citation/81-FR-54520). https://www.federalregister.gov/documents/2016/08/16/2016-19384/revisions-to-rules-of-conduct-and-standards-of-responsibility-for-appointed-representatives (https://www.federalregister.gov/documents/2016/08/16/2016-19384/revisions-to-rules-of-conduct-and-standards-of-responsibility-for-appointed-representatives).
Back to Citation

2. Rule 1.6, Confidentiality of information. (2013). In American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct. Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html (https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confide
Back to Citation

3. 81 FR 14166 (/citation/81-FR-14166) (March 16, 2016). https://www.federalregister.gov/documents/2016/03/16/2016-05916/social-security-ruling-16-3p-titles-ii-and-xvi-evaluation-of-symptoms-in-disability-claims (https://www.federalregister.gov/documents/2016/03/16/2016-05916/social-security-ruling-16-3p-titles-ii-and-xvi-evaluation-of-symptoms-in-disability-claims). Corrected at 81 FR 15776 (/citation/81-FR-15776) (March 24, 2016). https://www.federalregister.gov/documents/2016/03/24/2016-06598/social-security-ruling-16-3p-titles-ii-and-xvi-evaluation-of-symptoms-in-disability-claims (https://www.federalregister.gov/documents/2016/03/24/2016-06598/social-security-ruling-16-3p-titles-ii-and-xvi-evaluation-of-symptoms-in-disability-claims).
Back to Citation

4. Administrative Conference of the United States, Recommendation 2017-1, Adjudication Materials on Agency Websites, 82 FR 31039 (/citation/82-FR-31039) (July 5, 2017).
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5. 20 CFR 404.970 (/select-citation/2018/07/02/20-CFR-404.970)(a)(3), 416.1470(a)(3).
Back to Citation

[FR Doc. 2018-13989 (/a/2018-13989) Filed 6-29-18; 8:45 am]

BILLING CODE 4191-02-P

PUBLISHED DOCUMENT

List of Subjects

16 CFR Part 1112

Administrative practice and procedure, Audit, Consumer protection, Reporting and recordkeeping requirements, Third party conformity assessment body.

16 CFR Part 1237

Consumer protection, Imports, Incorporation by reference, Infants and children, Labeling, Law enforcement, and Toys.

For the reasons discussed in the preamble, the Commission amends 16 CFR parts 1112 and 1237 as follows:

PART 1112—REQUIREMENTS PERTAINING TO THIRD PARTY CONFORMITY ASSESSMENT BODIES

■ 1. The authority citation for part 1112 continues to read as follows:

Authority: 15 U.S.C. 2063; Pub. L. 110–314, section 3, 122 Stat. 3016, 3017 (2008).

■ 2. Amend § 1112.15 by adding paragraph (b)(47) to read as follows:

§ 1112.15 When can a third party conformity assessment body apply for CPSC acceptance for a particular CPSC rule and/or test method?

* * * * *

(b) * * *

(47) 16 CFR part 1237, Safety Standard for Booster Seats.

* * * * *

■ 3. Add part 1237 to read as follows:

PART 1237—SAFETY STANDARD FOR BOOSTER SEATS

Sec.

1237.1 Scope.

1237.2 Requirements for booster seats.

Authority: Sec. 104, Pub. L. 110–314, 122 Stat. 3016 (August 14, 2008); Sec. 3, Pub. L. 112–28, 125 Stat. 273 (August 12, 2011).

§ 1237.1 Scope.

This part establishes a consumer product safety standard for booster seats.

§ 1237.2 Requirements for booster seats.

Each booster seat must comply with all applicable provisions of ASTM F2640–18, Standard Consumer Safety Specification for Booster Seats (approved on April 1, 2018). The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from ASTM International, 100 Bar Harbor Drive, P.O. Box 0700, West Conshohocken, PA 19428; *http://www.astm.org.* You may inspect a copy at the Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East-West Highway, Bethesda, MD 20814, telephone: 301–504–7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2018–14133 Filed 6–29–18; 8:45 am]

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2013–0044]

RIN 0960–AH63

Rules of Conduct and Standards of Responsibility for Appointed Representatives

AGENCY: Social Security Administration.

ACTION: Final rules.

SUMMARY: We are revising our rules of conduct and standards of responsibility for representatives. We are also updating and clarifying the procedures we use when we bring charges against a representative for violating these rules and standards. These changes are necessary to better protect the integrity of our administrative process and to further clarify representatives' existing responsibilities in their conduct with us. The revisions should not be interpreted to suggest that any specific conduct was permissible under our rules prior to these changes; instead, we seek to ensure that our rules of conduct and standards of responsibility are clearer as a whole and directly address a broader range of inappropriate conduct.

DATES: These final rules will be effective August 1, 2018.

FOR FURTHER INFORMATION CONTACT: Sarah Taheri, Office of Appellate Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605–7100. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Background

Although the vast majority of representatives conducting business before us on behalf of Social Security beneficiaries and claimants ethically and conscientiously assist their clients, we are concerned that some representatives are using our processes in a way that undermines the integrity of our programs and harms claimants. Accordingly, we are clarifying that certain actions are prohibited, and we are providing additional means to address representative actions that do not serve the best interests of claimants.

On August 16, 2016,[1] we published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** in which we proposed clarifications and revisions to our rules of conduct for representatives. To the extent that we adopt a proposed change as final without revision, and we already discussed at length the reason for and details of the proposal, we will not repeat that information here.

In response to the NPRM, we received 154 timely submitted comments that addressed issues within the scope of our proposed rules. Based on those comments, we are modifying some of our proposed changes to address concerns that commenters raised. We have also made editorial changes consistent with plain language writing requirements. We made conforming changes in other sections not originally edited in the NPRM. Finally, we made changes to ensure correct paragraph punctuation in §§ 404.1740 and 416.1540; a nomenclature change to reflect the organization of our agency in §§ 404.1765(b)(1) and 416.1565(b)(1); and updated a cross-reference in §§ 404.1755 and 416.1555 that refers to §§ 404.1745 and 416.1545, sections reorganized and rewritten in the NPRM and codified in the final rule.

Public Comments and Discussion

Comment: Some commenters suggested that our proposed rules would deter potential representatives from representing claimants in Social Security matters.

Response: These rules reflect our interest in protecting claimants and ensuring the integrity of our administrative process, and they do not impose unreasonable standards of conduct. These additional rules of conduct should not deter competent, knowledgeable, and principled representatives.

Comment: Some commenters objected to the provision in proposed § 404.1705(b)(4) and 416.1505(b)(4), which includes "persons convicted of a

[1] 81 FR 54520. *https://www.federalregister.gov/documents/2016/08/16/2016-19384/revisions-to-rules-of-conduct-and-standards-of-responsibility-for-appointed-representatives.*

felony (as defined by § 404.1506(c)), or any crime involving moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft" as examples of persons who lack "good character and reputation." The commenters sometimes referred to this provision as involving a "lifetime ban" on representation. Commenters noted that a "lifetime ban" fails to consider multiple situations, such as overturned convictions. Some commenters suggested that we place the ban only on representatives with prior felony convictions but exempt those with past misdemeanor convictions, because claimants may have family members with misdemeanor convictions who are otherwise well-qualified to be representatives. Commenters opined that there is nothing inherent about a felony conviction that would prohibit a person from providing competent representation. Finally, commenters suggested that this proposed regulation would decrease the pool of representatives, particularly for minorities, because, according to these commenters, some statistics show higher conviction rates in minority populations.

Response: We have broad rulemaking authority to decide who can serve as a non-attorney representative. We believe we can achieve our goal of protecting claimants from potentially fraudulent representatives by limiting the prohibition to individuals convicted of certain offenses that are more severe in nature or involve behavior that reflects poorly on an individual's ability to represent claimants. There is no evidence that this approach will decrease the pool of available, high quality representatives for any particular population. Accordingly, we determined that individuals are not qualified to practice before us if they have a felony conviction (as defined in our rules) or a conviction involving moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft. These criminal convictions reflect crimes that, by their nature, are more serious based on their categorization as felonies, or involve behavior that reflects poorly on an individual's honesty and moral judgment and, therefore, also reflects poorly on the individual's ability to represent claimants. This disqualification would not apply to convictions that have been overturned or other similar situations, which we have clarified in the final rules. The regulation does not specifically bar individuals with misdemeanor convictions from serving as representatives, unless the misdemeanor involved moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft, which are the misdemeanors that we believe reflect a lack of honesty and moral judgment, characteristics that we consider necessary in representatives. Further, even if individuals are unable to serve as appointed representatives due to these rules, they may still assist their family members with claims in an unofficial capacity.

Comment: Some commenters stated that claimants should be held harmless if they appoint a representative whom they later learn was not qualified (proposed §§ 404.1705(b)(4) and 416.1505(b)(4)).

Response: These rules do not suggest that we would impose any penalty on a claimant who appoints or attempts to appoint an unqualified representative. This regulatory section only identifies whom we will recognize as a representative.

Comment: Some commenters stated that proposed §§ 404.1740(b)(3)(iii) and 416.1540(b)(3)(iii) should clarify that a list of potential dates and times that a representative will be available for a hearing is only required to be accurate at the time it is submitted. The comments explained that many representatives schedule hearings in multiple locations, and availability may change once they have other obligations scheduled.

Response: We understand that schedules change, and we do not expect representatives to hold open their schedules for all of the dates and times that they identify. We did not change the proposed regulatory text.

Comment: Commenters stated that the term "scheduled" is too vague (proposed §§ 404.1740(b)(3)(iv) and 416.1540(b)(3)(iv)).

Response: A hearing has been "scheduled" when a date and time have been set and we have notified all parties. We clarified the language in these sections.

Comment: Some commenters asserted that restricting a representative's right to withdraw after a hearing is scheduled, except under "extraordinary circumstances," is an overly broad restriction that inhibits a representative's right to withdraw in circumstances where the representative knows that the client no longer has a viable case. Many commenters also argued that forcing representatives to divulge their reasons for withdrawal to justify extraordinary circumstances may violate the attorney-client privilege, if the withdrawal is based on the representative's knowledge that a client may be engaging in fraud. Other commenters stated that if a claimant does not want to attend a hearing but will not release the representative, and the representative cannot withdraw, the administrative law judge (ALJ) will not be able to dismiss the case and will have to hold a hearing, which wastes administrative time and resources. Finally, commenters noted that hearings are sometimes already scheduled by the time representatives are hired. Because representatives cannot view claimants' files until they are appointed, representatives may have to withdraw after reviewing the file even though a hearing has already been scheduled.

Response: The American Bar Association (ABA) Model Rules of Professional Conduct Rule (Model Rule) 1.16 includes requirements for withdrawal similar to this regulation. Some examples of "extraordinary circumstances" under which we may allow a withdrawal include (1) serious illness; (2) death or serious illness in the representative's immediate family; or (3) failure to locate a claimant despite active and diligent attempts to contact the claimant.

We are not seeking privileged communications between an attorney and client. If the representative cannot describe why he or she must withdraw without revealing privileged or confidential communications (and if no exceptions to the attorney-client privilege exist, such as the crime-fraud exception), the representative should state this fact, not disclose the privileged or confidential communication, and allow the ALJ to evaluate the request under these circumstances.

Comment: Commenters raised the issue of providing "prompt and timely communication" with claimants, stating that this is often difficult with homeless or indigent claimants (proposed §§ 404.1740(b)(3)(v) and 416.1540(b)(3)(v)). Some commenters suggested changing this language to "keep the client reasonably informed of the status of the case" in accordance with Model Rule 1.4. One commenter requested that we define "incompetent representation" and "reasonable and adequate representation."

Response: Representatives are responsible for maintaining timely contact with their clients. We expect representatives to have working contact information for all of their clients, but we recognize that it may be difficult to locate homeless or indigent clients in some circumstances. We have changed the language of §§ 404.1740(b)(3)(v) and 416.1540(b)(3)(v) to take into account the difficulty in locating certain claimants despite a representative's best

efforts. We did not provide any definition of "incompetent representation" or "reasonable and adequate representation," because these terms do not appear in the rule.

Comment: A number of commenters were concerned with proposed §§ 404.1740(b)(5) and 416.1540(b)(5), which require a representative to disclose certain things in writing when the representative submits a medical or vocational opinion to us. The commenters specifically raised concerns about the disclosure of physician referrals and the disclosure requirement when the medical or vocational opinion was "drafted, prepared, or issued" by an employee of the representative or an individual contracting with the representative for services. Commenters also stated that the term "prepared" is vague, and it is unclear whether disclosure would be required if a representative discusses the sequential evaluation process with a provider of an opinion or supplies a questionnaire for a provider to complete. Some commenters further maintained that requiring disclosure of physician referrals would violate the attorney-client privilege and that such referrals are irrelevant to the representation of the case. Commenters also requested that the regulation clarify that opinions are entitled to the same weight regardless of whether the representative requested them. Finally, commenters argued that requiring disclosure will "chill" referrals for those claimants who need them most.

Response: When a representative submits a medical or vocational opinion to us, he or she has an affirmative duty to disclose to us in writing if the representative or one of the representative's employees or contractors participated in drafting, preparing, or issuing the opinion. For clarity, we consider providing guidance or providing a questionnaire, template or format to fall within the parameters of this rule when the guidance, questionnaire, template or format is used to draft a medical or vocational opinion submitted to us. In response to the concern that the term "prepared" is vague, unless the context indicates otherwise, we intend the ordinary meaning of words used in our regulations. We intend the word "prepared" here to have its ordinary meaning. Representatives also have an affirmative duty to disclose to us in writing if the representative referred or suggested that the claimant be examined, treated, or assisted by the individual who provided the opinion evidence. However, we are not seeking privileged or confidential communications concerning legal advice between an attorney and client, nor are we requiring disclosure of detailed communications. We are only requiring that representatives disclose the fact that they made a referral or participated in drafting, preparing, or issuing an opinion. *See* Fed. R. of Civ. P. 26(b)(5)(A) ("When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must . . . describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.") We explain what we mean by the attorney-client and attorney work product privileges more fully in §§ 404.1513(b)(2) and 416.913(b)(2) of our rules. We will interpret the affirmative duty in final §§ 404.1740(b)(5) and 416.1540(b)(5) in light of our interpretation of those privileges in §§ 404.1513(b)(2) and 416.913(b)(2). In response to the request that the regulation clarify that opinions are entitled to the same weight regardless of whether the representative requested them, we have other regulations that govern how we evaluate medical opinion evidence. *See* 20 CFR 404.1520c, 404.1527, 416.920c, and 416.927.

Comment: Some commenters stated that notifying us if a claimant is committing fraud (proposed §§ 404.1740(b)(6) and 416.1540(b)(6)) violates the attorney-client privilege and Model Rule 1.6. Commenters also suggested a more direct adoption of the provisions of Model Rule 3.3, Candor Toward the Tribunal.

Response: We do not believe that our final rule violates either the attorney-client privilege or Model Rule 1.6. Our final rule requires a representative to "[d]isclose to us immediately if the representative discovers that his or her services are or were used by the claimant to commit fraud against us." Model Rule 1.6(b)(2)[2] includes an exception to confidentiality "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." Furthermore, the crime-fraud exception to the attorney-client privilege allows a lawyer to disclose otherwise privileged communications when they are in furtherance of a crime or fraudulent act. When a claimant uses a representative's services in furtherance of the claimant's fraud, there is a reasonable certainty that the fraud will cause substantial injury to the Social Security trust funds. Such fraud also undermines public confidence in our programs. Our proposed and final rules are fully consistent with the exception to confidentiality found in Model Rule 1.6(b)(2). The final rules also address the aim of Model Rule 3.3 to limit false or misleading statements, but within the unique context of the legal and procedural structure of the Social Security programs. Therefore, we are not changing the originally proposed language.

Comment: A few commenters asked us to clarify whether disbarment or disqualification will be an automatic bar to representation, or whether we will address each situation individually (proposed §§ 404.1740(b)(7)–(9) and 416.1540(b)(7)–(9)).

Response: We will address any disclosure made pursuant to §§ 404.1740(b)(7)–(9) and 416.1540(b)(7)–(9) on an individual basis.

Comment: Some commenters stated that proposed § 416.1540(b)(10) is too broad, because representatives often refer Supplemental Security Income (SSI) claimants to special needs trust attorneys, and the proposed language suggests that the representatives would be responsible for the conduct of the trust attorneys. Other commenters recommend that the regulation encompass only those people over whom representatives have supervisory authority.

Response: In response to these comments, we have revised the language in final §§ 404.1740(b)(10) and 416.1540(b)(10) to clarify that the affirmative duty applies "when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work." Further, because this requirement is an affirmative duty, we moved language from proposed §§ 404.1740(c)(14) and 416.1540(c)(14) to §§ 404.1740(b)(10) and 416.1540(b)(10), which outlines the affirmative duty to take remedial action when: (i) The representative's employees, assistants, partners, contractors, or other individuals' conduct violates these rules of conduct

[2] Rule 1.6, Confidentiality of information, (2013). In American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct.* Retrieved from *https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html.*

and standards of responsibility, and (ii) the representative has reason to believe a violation of these rules of conduct and standards of responsibility will occur. We revised the language of final §§ 404.1740(c)(14) and 415.1540(c)(14) to prohibit representatives from failing to oversee other individuals working on the claims on which the representative is appointed when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

Comment: Some commenters objected to proposed §§ 404.1740(c)(1) and 416.1540(c)(1), which prohibit "misleading a claimant, or prospective claimant or beneficiary, about the representative's services and qualifications." Commenters asked whether it would be misleading if a claimant refers to a non-attorney representative as an attorney, and the representative does not correct them.

Response: Not correcting a known misconception about the representative's status as a non-attorney is "misleading a claimant," as contemplated under this prohibition.

Comment: A few commenters objected to the language of proposed § 404.1740(c)(7)(ii)(B), which prohibits "[p]roviding misleading information or misrepresenting facts . . . where the representative has or should have reason to believe the information was misleading and the facts would constitute a misrepresentation." These commenters stated that many claimants are mentally ill, and it is difficult to ascertain whether a client is providing accurate facts. The commenters also objected to the term "should," stating that it is overly vague. A few commenters believe the standard "knowingly" should be added. Commenters also stated that this regulation conflicted with our rule on the submission of evidence, which requires representatives to submit all available evidence.

Response: Based on the comments, we have changed the "has or should have reason to believe" language of the proposed rule to "knows or should have known" in the final rule. Whether or not a claimant is mentally ill, a representative will violate the standard in the final rule if he or she presents information that he or she knows to be false or circumstances demonstrate that the representative should have known it to be false. This rule does not conflict with our rule requiring representatives to submit all evidence, because a false document is not evidence as contemplated under §§ 404.1513 and 416.913. Further, "should" is not an overly broad standard and is a commonly used term in Federal laws and regulations. *See, e.g.*, 42 U.S.C. 1320a–8a(a)(1).

Comment: A few commenters stated that proposed §§ 404.1740(c)(7)(ii)(C) and 416.1540(c)(7)(ii)(C) should clarify that representatives may contact SSA staff regarding matters such as case status, requests for critical case flags, Congressional inquiries, or when SSA staff ask the representative to contact them.

Response: We did not make any changes in response to these comments. The proposed and final rules specifically states that representatives should not communicate with agency staff "outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s)." Matters such as case status inquiries, requests for critical case flags, and Congressional inquiries are not outside the normal course of business, nor would they be attempts to inappropriately influence the processing or outcome of a claim.

Comment: Some commenters asked whether a representative would be guilty of misleading an ALJ if an ALJ finds that a claimant's statements are "not fully credible." These commenters also recommend adding "knowingly" to proposed §§ 404.1740(c)(3) and 416.1540(c)(3). Other commenters stated that requiring representatives to disclose matters of which they do not have actual knowledge would "chill" advocacy.

Response: On March 16, 2016, we published Social Security Ruling (SSR) 16–3p, "Titles II and XVI: Evaluation of Symptoms in Disability Claims" in the **Federal Register.**[3] In this SSR, we eliminated the use of the term "credibility" from our sub-regulatory policy, because our regulations do not use this term. In doing so, we clarified that subjective symptom evaluation is not an examination of an individual's character. Instead, we will more closely follow our regulatory language regarding symptom evaluation. With respect to the commenters' concerns, the regulations include a number of factors that must be considered when evaluating symptoms, but a representative will not be found to be misleading an ALJ based solely on the results of this evaluation. Acknowledging the concern about the standard we will use in evaluating this type of situation, we are changing the "has or should have reason to believe" language in the proposed rule to "knows or should have known" in the final rule. This provision addresses only situations where the representative knows or should have known that specific statements, evidence, assertions, or representations are false or misleading.

Comment: Commenters objected to the 14-day limit to respond to charges and proposed that the 30-day limit in the current rules should be maintained (proposed §§ 404.1750 and 416.1550).

Response: We did not adopt this suggestion, because we believe that 14 days allows for a more timely resolution of misconduct matters. The 14-day timeframe provides the representative with sufficient time to respond to charges, which typically consists only of affirming or denying various factual allegations. However, in response to the commenters' concerns that the proposed rule did not give representatives adequate time to respond to the charges, we added the term "business" to clarify that the time limit is 14 business days.

Comment: One commenter suggested that representatives be suspended from representing clients until the sanction process is complete.

Response: The Social Security Act requires that we give a representative notice and opportunity for a hearing before we suspend or disqualify him or her from practicing before us. We have long allowed representatives to continue to practice before us until there is a final decision on the case. We will continue to impose sanctions only after the administrative sanctions process is completed.

Comment: Some commenters suggested that a representative should not have to show good cause for objecting to the manner of hearing (proposed §§ 404.1765(d) and 416.1565(d)). One commenter stated that a hearing should always be in person unless a party can demonstrate that there is no genuine dispute as to any material fact.

Response: The hearing officer is in the best position to decide how to conduct a particular hearing in the most effective and efficient manner. A "good cause" standard for objecting to the manner of the hearing ensures that any objection to this issue is well-founded.

Comment: A few commenters stated that 14 days is insufficient time to request review of a hearing officer's decision (proposed §§ 404.1775 and 416.1575). The commenters requested that the rule clarify whether it refers to business or calendar days.

[3] 81 FR 14166 (March 16, 2016). *https://www.federalregister.gov/documents/2016/03/16/2016-05916/social-security-ruling-16-3p-titles-ii-and-xvi-evaluation-of-symptoms-in-disability-claims.* Corrected at 81 FR 15776 (March 24, 2016). *https://www.federalregister.gov/documents/2016/03/24/2016-06598/social-security-ruling-16-3p-titles-ii-and-xvi-evaluation-of-symptoms-in-disability-claims.*

Response: In response to these and other related comments, we adopted this suggestion and added the word "business" to clarify that the 14-day period means 14 business days.

Comment: Some commenters stated that proposed §§ 404.1785 and 416.1585 shift the burden from the Appeals Council to representatives to obtain evidence. They stated that by changing the language from the Appeals Council "shall require that the evidence be obtained" to "the Appeals Council will allow the party with the information to submit the additional evidence," the regulation relieves the Appeals Council of the responsibility for obtaining evidence and allows the Appeals Council to ignore evidence submitted by another party.

Response: We changed the language in §§ 404.1785 and 416.1585 for clarity. In the adversarial proceedings to sanction representatives, the obligation to provide evidence to the Appeals Council is, and has always been, on the party with the information. Accordingly, we are not changing the language proposed in the NPRM.

Comment: Some commenters asked that we clarify which decisions we will publish and when we will publish them (proposed §§ 404.1790(f) and 416.1590(f)). They also inquired as to whether the public will have access to the published decisions, and they expressed concern that the decisions might contain personally identifiable information.

Response: On June 16, 2017, the Administrative Conference of the United States (ACUS) adopted Recommendation 2017–1, "Adjudication Materials on Agency Websites." [4] ACUS recommended that "[a]gencies should consider providing access on their websites to decisions and supporting materials (*e.g.*, pleadings, motions, briefs) issued and filed in adjudicative proceedings." ACUS also recommended that "[a]gencies that adjudicate large volumes of cases that do not vary considerably in terms of their factual contexts or the legal analyses employed in their dispositions should consider disclosing on their websites a representative sampling of actual cases and associated adjudication materials." We will work with ACUS with respect to this recommendation, and we will provide details in sub-regulatory guidance of how we will publish decisions after these final rules become effective. In response to the commenters' concerns about privacy, we take concerns regarding personally identifiable information seriously, and the final rule makes clear that we will remove or redact any personally identifiable information from the decisions.

Comment: One commenter stated that proposed § 404.1790 should use a "preponderance of the evidence" standard rather than the "substantial evidence standard."

Response: The Appeals Council is an appellate body that generally reviews decisions using the substantial evidence standard.[5] Therefore, we are not changing this language.

Comment: Some commenters stated that the word "may" should be changed to "will" in proposed §§ 404.1790(f) and 416.1590(f), which state, "Prior to making a decision public, we may remove or redact information from the decision."

Response: We adopted this comment and changed "may" to "will." We will redact any personally identifiable information from the decisions.

Comment: One commenter stated that the 3-year ban on reinstatement after suspension is too harsh.

Response: The 3-year prohibition is actually a 3-year wait to reapply for reinstatement and we believe it is appropriate, because our experience shows that when the Appeals Council denies a request for reinstatement, the representative typically has not taken appropriate action to remedy the violation or does not understand its severity. We are implementing this change to ensure more thoroughly supported requests for reinstatement.

Regulatory Procedures

Executive Order 12866 as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563 and are subject to OMB review.

Executive Order 13771

This rule is not subject to the requirements of Executive Order 13771 because it is administrative in nature and results in no more than de minimis costs.

Regulatory Flexibility Act

We certify that these final rules will not have a significant economic impact on a substantial number of small entities because they affect individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

These final rules contain information collection burdens in §§ 404.1740(b)(5) through (9) and 416.1540(b)(5) through (b)(9) that require OMB clearance under the Paperwork Reduction Act of 1995 (PRA). As the PRA requires, we submitted a clearance request to OMB for approval of these sections. We will publish the OMB number and expiration date upon approval.

Further, these final rules contain information collection activities at 20 CFR 404.1750(c) and (e)(2), 404.1765(g)(1), 404.1775(b), 404.1799(d)(2), 416.1550(c) and (e)(2), 416.1565(g)(1), 416.1575(b), and 416.1599(d)(2). However, 44 U.S.C. 3518(c)(1)(B)(ii) exempts these activities from the OMB clearance requirements under the Paperwork Reduction Act of 1995.

We published an NPRM on August 16, 2016 at 81 FR 54520. In that NPRM, we solicited comments under the PRA on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. We received no public comments relating to any of these issues. We will not collect the information referenced in these burden sections until we receive OMB approval.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-age, survivors, and disability insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Nancy A. Berryhill,

Acting Commissioner of Social Security.

For the reasons set out in the preamble, we amend 20 CFR chapter III,

[4] Administrative Conference of the United States, Recommendation 2017–1, *Adjudication Materials on Agency Websites,* 82 FR 31039 (July 5, 2017).

[5] 20 CFR 404.970(a)(3), 416.1470(a)(3).

parts 404 and part 416, as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart R—[Amended]

■ 1. The authority citation for subpart R of part 404 continues to read as follows:

Authority: Secs. 205(a), 206, 702(a)(5), and 1127 of the Social Security Act (42 U.S.C. 405(a), 406, 902(a)(5), and 1320a–6).

■ 2. Revise § 404.1705(b) to read as follows:

§ 404.1705 Who may be your representative.

* * * * *

(b) You may appoint any person who is not an attorney to be your representative in dealings with us if the person—

(1) Is capable of giving valuable help to you in connection with your claim;

(2) Is not disqualified or suspended from acting as a representative in dealings with us;

(3) Is not prohibited by any law from acting as a representative; and

(4) Is generally known to have a good character and reputation. Persons lacking good character and reputation, include, but are not limited to, persons who have a final conviction of a felony (as defined by § 404.1506(c)) or any crime involving moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft.

* * * * *

■ 3. Amend § 404.1740 as follows:

■ a. Revise paragraphs (b)(2)(vii) and (b)(3);

■ b. Add paragraphs (b)(5) through (10);

■ c. Revise paragraphs (c)(1) through (6) and (c)(7)(ii);

■ d. Remove paragraph (c)(7)(iii);

■ e. Revise paragraphs (c)(8) through (13); and

■ f. Add paragraph (c)(14).

The revisions and additions read as follows:

§ 404.1740 Rules of conduct and standards of responsibility for representatives.

* * * * *

(b) * * *

(2) * * *

(vii) Any other factors showing how the claimant's impairment(s) affects his or her ability to work. In §§ 404.1560 through 404.1569a, we discuss in more detail the evidence we need when we consider vocational factors.

(3) Conduct his or her dealings in a manner that furthers the efficient, fair, and orderly conduct of the administrative decision-making process, including duties to:

(i) Provide competent representation to a claimant. Competent representation requires the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A representative must know the significant issue(s) in a claim, have reasonable and adequate familiarity with the evidence in the case, and have a working knowledge of the applicable provisions of the Social Security Act, as amended, the regulations, the Social Security Rulings, and any other applicable provisions of law.

(ii) Act with reasonable diligence and promptness in representing a claimant. This includes providing prompt and responsive answers to our requests for information pertinent to processing of the claim.

(iii) When requested, provide us, in a manner we specify, potential dates and times that the representative will be available for a hearing. We will inform the representative how many potential dates and times we require to coordinate the hearing schedule.

(iv) Only withdraw representation at a time and in a manner that does not disrupt the processing or adjudication of a claim and that provides the claimant adequate time to find new representation, if desired. A representative should not withdraw after we set the time and place for the hearing (see § 404.936) unless the representative can show that a withdrawal is necessary due to extraordinary circumstances, as we determine on a case-by-case basis.

(v) Maintain prompt and timely communication with the claimant, which includes, but is not limited to, reasonably informing the claimant of all matters concerning the representation, consulting with the claimant on an ongoing basis during the entire representational period, and promptly responding to a claimant's reasonable requests for information. When we evaluate whether a representative has maintained prompt and timely communication with the claimant, we will consider the difficulty the representative has in locating a particular claimant (*e.g.*, because the claimant is homeless) and the representative's efforts to keep that claimant informed.

* * * * *

(5) Disclose in writing, at the time a medical or vocational opinion is submitted to us or as soon as the representative is aware of the submission to us, if:

(i) The representative's employee or any individual contracting with the representative drafted, prepared, or issued the medical or vocational opinion; or

(ii) The representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence.

(6) Disclose to us immediately if the representative discovers that his or her services are or were used by the claimant to commit fraud against us.

(7) Disclose to us whether the representative is or has been disbarred or suspended from any bar or court to which he or she was previously admitted to practice, including instances in which a bar or court took administrative action to disbar or suspend the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disbarment or suspension occurs after the appointment of the representative, the representative will immediately disclose the disbarment or suspension to us.

(8) Disclose to us whether the representative is or has been disqualified from participating in or appearing before any Federal program or agency, including instances in which a Federal program or agency took administrative action to disqualify the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disqualification occurs after the appointment of the representative, the representative will immediately disclose the disqualification to us.

(9) Disclose to us whether the representative has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary. If the removal or suspension occurs after the appointment of the representative, the representative will immediately disclose the removal or suspension to us.

(10) Ensure that all of the representative's employees, assistants, partners, contractors, or any person assisting the representative on claims for which the representative has been appointed, comply with these rules of conduct and standards of responsibility for representatives, when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

This includes a duty to take remedial action when:

(i) The representative's employees, assistants, partners, contractors or other individuals' conduct violates these rules of conduct and standards of responsibility; and

(ii) The representative has reason to believe a violation of these rules of conduct and standards of responsibility occurred or will occur.

(c) * * *

(1) In any manner or by any means threaten, coerce, intimidate, deceive or knowingly mislead a claimant, or prospective claimant or beneficiary, regarding benefits or other rights under the Act. This prohibition includes misleading a claimant, or prospective claimant or beneficiary, about the representative's services and qualifications.

(2) Knowingly charge, collect or retain, or make any arrangement to charge, collect or retain, from any source, directly or indirectly, any fee for representational services in violation of applicable law or regulation. This prohibition includes soliciting any gift or any other item of value, other than what is authorized by law.

(3) Make or present, or participate in the making or presentation of, false or misleading oral or written statements, evidence, assertions, or representations about a material fact or law concerning a matter within our jurisdiction, in matters where the representative knows or should have known that those statements, evidence, assertions, or representations are false or misleading.

(4) Through his or her own actions or omissions, unreasonably delay or cause to be delayed, without good cause (see § 404.911(b)), the processing of a claim at any stage of the administrative decision-making process.

(5) Divulge, without the claimant's consent, except as may be authorized by regulations prescribed by us or as otherwise provided by Federal law, any information we furnish or disclose about a claim or prospective claim.

(6) Attempt to influence, directly or indirectly, the outcome of a decision, determination, or other administrative action by any means prohibited by law, or by offering or granting a loan, gift, entertainment, or anything of value to a presiding official, agency employee, or witness who is or may reasonably be expected to be involved in the administrative decision-making process, except as reimbursement for legitimately incurred expenses or lawful compensation for the services of an expert witness retained on a non-contingency basis to provide evidence.

(7) * * *

(ii) Behavior that has the effect of improperly disrupting proceedings or obstructing the adjudicative process, including but not limited to:

(A) Directing threatening or intimidating language, gestures, or actions at a presiding official, witness, contractor, or agency employee;

(B) Providing misleading information or misrepresenting facts that affect how we process a claim, including, but not limited to, information relating to the claimant's work activity or the claimant's place of residence or mailing address in matters where the representative knows or should have known that the information was misleading and the facts would constitute a misrepresentation; and

(C) Communicating with agency staff or adjudicators outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s).

(8) Violate any section of the Act for which a criminal or civil monetary penalty is prescribed.

(9) Refuse to comply with any of our rules or regulations.

(10) Suggest, assist, or direct another person to violate our rules or regulations.

(11) Advise any claimant or beneficiary not to comply with any of our rules or regulations.

(12) Knowingly assist a person whom we suspended or disqualified to provide representational services in a proceeding under title II of the Act, or to exercise the authority of a representative described in § 404.1710.

(13) Fail to comply with our sanction(s) decision.

(14) Fail to oversee the representative's employees, assistants, partners, contractors, or any other person assisting the representative on claims for which the representative has been appointed when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

■ 4. Amend § 404.1745 by revising paragraphs (d) and (e) and adding paragraph (f) to read as follows:

§ 404.1745 Violations of our requirements, rules, or standards.

* * * * *

(d) Has been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice (see § 404.1770(a));

(e) Has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency (see § 404.1770(a)); or

(f) Who, as a non-attorney, has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary.

■ 5. Amend § 404.1750 by revising paragraphs (c), (d), (e)(2), and (f) to read as follows:

§ 404.1750 Notice of charges against a representative.

* * * * *

(c) We will advise the representative to file an answer, within 14 business days from the date of the notice, or from the date the notice was delivered personally, stating why he or she should not be suspended or disqualified from acting as a representative in dealings with us.

(d) The General Counsel or other delegated official may extend the 14-day period specified in paragraph (c) of this section for good cause, in accordance with § 404.911.

(e) * * *

(2) File the answer with the Social Security Administration, at the address specified on the notice, within the 14-day time period specified in paragraph (c) of this section.

(f) If the representative does not file an answer within the 14-day time period specified in paragraph (c) of this section (or the period extended in accordance with paragraph (d) of this section), he or she does not have the right to present evidence, except as may be provided in § 404.1765(g).

■ 6. Revise § 404.1755 to read as follows:

§ 404.1755 Withdrawing charges against a representative.

The General Counsel or other delegated official may withdraw charges against a representative. We will withdraw charges if the representative files an answer, or we obtain evidence, that satisfies us that we should not suspend or disqualify the representative from acting as a representative. When we consider withdrawing charges brought under § 404.1745(d) through (f) based on the representative's assertion that, before or after our filing of charges, the representative has been reinstated to practice by the court, bar, or Federal program or Federal agency that suspended, disbarred, or disqualified the representative, the General Counsel or other delegated official will determine whether such reinstatement occurred, whether it remains in effect, and whether he or she is reasonably satisfied that the representative will in the future act in accordance with the

provisions of section 206(a) of the Act and our rules and regulations. If the representative proves that reinstatement occurred and remains in effect and the General Counsel or other delegated official is so satisfied, the General Counsel or other delegated official will withdraw those charges. The action of the General Counsel or other delegated official regarding withdrawal of charges is solely that of the General Counsel or other delegated official and is not reviewable, or subject to consideration in decisions made under §§ 404.1770 and 404.1790. If we withdraw the charges, we will notify the representative by mail at the representative's last known address.

■ 7. Amend § 404.1765 by revising paragraphs (b)(1), (c), (d)(1) and (3), and (g)(1) and (3) to read as follows:

§ 404.1765 Hearing on charges.

* * * * *

(b) *Hearing officer.* (1) The Deputy Commissioner for the Office of Hearings Operations or other delegated official will assign an administrative law judge, designated to act as a hearing officer, to hold a hearing on the charges.

* * * * *

(c) *Time and place of hearing.* The hearing officer will mail the parties a written notice of the hearing at their last known addresses, at least 14 calendar days before the date set for the hearing. The notice will inform the parties whether the appearance of the parties or any witnesses will be in person, by video teleconferencing, or by telephone. The notice will also include requirements and instructions for filing motions, requesting witnesses, and entering exhibits.

(d) *Change of time and place for hearing.* (1) The hearing officer may change the time and place for the hearing, either on his or her own initiative, or at the request of the representative or the other party to the hearing. The hearing officer will not consider objections to the manner of appearance of parties or witnesses, unless the party shows good cause not to appear in the prescribed manner. To determine whether good cause exists for extending the deadline, we use the standards explained in § 404.911.

* * * * *

(3) Subject to the limitations in paragraph (g)(2) of this section, the hearing officer may reopen the hearing for the receipt of additional evidence at any time before mailing notice of the decision.

* * * * *

(g) *Conduct of the hearing.* (1) The representative or the other party may file a motion for decision on the basis of the record prior to the hearing. The hearing officer will give the representative and the other party a reasonable amount of time to submit any evidence and to file briefs or other written statements as to fact and law prior to deciding the motion. If the hearing officer concludes that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law, the hearing officer may grant the motion and issue a decision in accordance with the provisions of § 404.1770.

* * * * *

(3) The hearing officer will make the hearing open to the representative, to the other party, and to any persons the hearing officer or the parties consider necessary or proper. The hearing officer will inquire fully into the matters being considered, hear the testimony of witnesses, and accept any documents that are material.

* * * * *

■ 8. Revise § 404.1775(b) to read as follows:

§ 404.1775 Requesting review of the hearing officer's decision.

* * * * *

(b) *Time and place of filing request for review.* The party requesting review will file the request for review in writing with the Appeals Council within 14 business days from the date the hearing officer mailed the notice. The party requesting review will certify that a copy of the request for review and of any documents that are submitted have been mailed to the opposing party.

■ 9. Revise § 404.1780(a) to read as follows:

§ 404.1780 Appeals Council's review of hearing officer's decision.

(a) Upon request, the Appeals Council will give the parties a reasonable time to file briefs or other written statements as to fact and law, and to request to appear before the Appeals Council to present oral argument. When oral argument is requested within the time designated by the Appeals Council, the Appeals Council will grant the request for oral argument and determine whether the parties will appear at the oral argument in person, by video teleconferencing, or by telephone. If oral argument is not requested within the time designated by the Appeals Council, the Appeals Council may deny the request.

* * * * *

■ 10. Revise § 404.1785 to read as follows:

§ 404.1785 Evidence permitted on review.

(a) *General.* Generally, the Appeals Council will not consider evidence in addition to that introduced at the hearing. However, if the Appeals Council finds the evidence offered is material to an issue it is considering, it may consider that evidence, as described in paragraph (b) of this section.

(b) *Individual charged filed an answer.* (1) When the Appeals Council finds that additional evidence material to the charges is available, and the individual charged filed an answer to the charges, the Appeals Council will allow the party with the information to submit the additional evidence.

(2) Before the Appeals Council admits additional evidence into the record, it will mail a notice to the parties, informing them that evidence about certain issues was submitted. The Appeals Council will give each party a reasonable opportunity to comment on the evidence and to present other evidence that is material to an issue it is considering.

(3) The Appeals Council will determine whether the additional evidence warrants a new review by a hearing officer or whether the Appeals Council will consider the additional evidence as part of its review of the case.

(c) *Individual charged did not file an answer.* If the representative did not file an answer to the charges, the representative may not introduce evidence that was not considered at the hearing.

■ 11. Amend § 404.1790 by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 404.1790 Appeals Council's decision.

(a) The Appeals Council will base its decision upon the evidence in the hearing record and any other evidence it may permit on review. The Appeals Council will affirm the hearing officer's decision if the action, findings, and conclusions are supported by substantial evidence. If the hearing officer's decision is not supported by substantial evidence, the Appeals Council will either:

(1) Reverse or modify the hearing officer's decision; or

(2) Return the case to the hearing officer for further proceedings.

* * * * *

(f) The Appeals Council may designate and publish certain final decisions as precedent for other actions brought under its representative conduct provisions. Prior to making a decision public, we will remove or

redact personally identifiable information from the decision.

■ 12. Amend § 404.1799 by revising paragraphs (a), (d)(2), and (f) to read as follows:

§ 404.1799 Reinstatement after suspension or disqualification—period of suspension not expired.

(a) After more than one year has passed, a person who has been suspended or disqualified may ask the Appeals Council for permission to serve as a representative again. The Appeals Council will assign and process a request for reinstatement using the same general procedures described in § 404.1776.

* * * * *

(d) * * *

(2) If a person was disqualified because he or she had been disbarred, suspended, or removed from practice for the reasons described in § 404.1745(d) through (f), the Appeals Council will grant a request for reinstatement as a representative only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that he or she has been admitted (or readmitted) to and is in good standing with the court, bar, Federal program or agency, or other governmental or professional licensing authority from which he or she had been disbarred, suspended, or removed from practice.

* * * * *

(f) If the Appeals Council decides not to grant the request, it will not consider another request before the end of 3 years from the date of the notice of the previous denial.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart O—[Amended]

■ 13. The authority citation for subpart O of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1127, and 1631(d) of the Social Security Act (42 U.S.C. 902(a)(5), 1320a–6, and 1383(d)).

■ 14. Revise § 416.1505(b) to read as follows:

§ 416.1505 Who may be your representative.

* * * * *

(b) You may appoint any person who is not an attorney to be your representative in dealings with us if the person—

(1) Is capable of giving valuable help to you in connection with your claim;

(2) Is not disqualified or suspended from acting as a representative in dealings with us;

(3) Is not prohibited by any law from acting as a representative; and

(4) Is generally known to have a good character and reputation. Persons lacking good character and reputation, include, but are not limited to, persons who have a final conviction of a felony (as defined by § 404.1506(c) of this chapter), or any crime involving moral turpitude, dishonesty, false statement, misrepresentations, deceit, or theft.

* * * * *

■ 15. Amend § 416.1540 follows:

■ a. Revise paragraphs (b)(2)(vii) and (b)(3);

■ b. Add paragraphs (b)(5) through (10);

■ c. Revise paragraphs (c)(1) through (6) and (c)(7)(ii);

■ d. Remove paragraph (c)(7)(iii);

■ e. Revise paragraphs (c)(8) through (13); and

■ f. Add paragraph (c)(14).

The revisions and additions read as follows:

§ 416.1540 Rules of conduct and standards of responsibility for representatives.

* * * * *

(b) * * *

(2) * * *

(vii) Any other factors showing how the claimant's impairment(s) affects his or her ability to work. In §§ 416.960 through 416.969a, we discuss in more detail the evidence we need when we consider vocational factors.

(3) Conduct his or her dealings in a manner that furthers the efficient, fair, and orderly conduct of the administrative decision-making process, including duties to:

(i) Provide competent representation to a claimant. Competent representation requires the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A representative must know the significant issue(s) in a claim, have reasonable and adequate familiarity with the evidence in the case, and have a working knowledge of the applicable provisions of the Social Security Act, as amended, the regulations, the Social Security Rulings, and any other applicable provisions of law.

(ii) Act with reasonable diligence and promptness in representing a claimant. This includes providing prompt and responsive answers to our requests for information pertinent to processing of the claim.

(iii) When requested, provide us, in a manner we specify, potential dates and times that the representative will be available for a hearing. We will inform the representative how many potential dates and times we require to coordinate the hearing schedule.

(iv) Only withdraw representation at a time and in a manner that does not disrupt the processing or adjudication of a claim and that provides the claimant adequate time to find new representation, if desired. A representative should not withdraw after we set the time and place for the hearing (see § 416.1436) unless the representative can show that a withdrawal is necessary due to extraordinary circumstances, as we determine on a case-by-case basis.

(v) Maintain prompt and timely communication with the claimant, which includes, but is not limited to, reasonably informing the claimant of all matters concerning the representation, consulting with the claimant on an ongoing basis during the entire representational period, and promptly responding to a claimant's reasonable requests for information. When we evaluate whether a representative has maintained prompt and timely communication with the claimant, we will consider the difficulty the representative has in locating a particular claimant (*e.g.*, because the claimant is homeless) and the representative's efforts to keep that claimant informed.

* * * * *

(5) Disclose in writing, at the time a medical or vocational opinion is submitted to us or as soon as the representative is aware of the submission to us, if:

(i) The representative's employee or any individual contracting with the representative drafted, prepared, or issued the medical or vocational opinion; or

(ii) The representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence.

(6) Disclose to us immediately if the representative discovers that his or her services are or were used by the claimant to commit fraud against us.

(7) Disclose to us whether the representative is or has been disbarred or suspended from any bar or court to which he or she was previously admitted to practice, including instances in which a bar or court took administrative action to disbar or suspend the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disbarment or suspension occurs after the appointment of the representative, the representative will immediately disclose the disbarment or suspension to us.

(8) Disclose to us whether the representative is or has been disqualified from participating in or appearing before any Federal program or agency, including instances in which a Federal program or agency took administrative action to disqualify the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disqualification occurs after the appointment of the representative, the representative will immediately disclose the disqualification to us.

(9) Disclose to us whether the representative has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary. If the removal or suspension occurs after the appointment of the representative, the representative will immediately disclose the removal or suspension to us.

(10) Ensure that all of the representative's employees, assistants, partners, contractors, or any person assisting the representative on claims for which the representative has been appointed, comply with these rules of conduct and standards of responsibility for representatives, when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work. This includes a duty to take remedial action when:

(i) The representative's employees, assistants, partners, contractors or other individuals' conduct violates these rules of conduct and standards of responsibility; and

(ii) The representative has reason to believe a violation of these rules of conduct and standards of responsibility occurred or will occur.

(c) * * *

(1) In any manner or by any means threaten, coerce, intimidate, deceive or knowingly mislead a claimant, or prospective claimant or beneficiary, regarding benefits or other rights under the Act. This prohibition includes misleading a claimant, or prospective claimant or beneficiary, about the representative's services and qualifications.

(2) Knowingly charge, collect or retain, or make any arrangement to charge, collect or retain, from any source, directly or indirectly, any fee for representational services in violation of applicable law or regulation. This prohibition includes soliciting any gift or any other item of value, other than what is authorized by law.

(3) Make or present, or participate in the making or presentation of, false or misleading oral or written statements, evidence, assertions, or representations about a material fact or law concerning a matter within our jurisdiction, in matters where the representative knows or should have known that those statements, evidence, assertions or representations are false or misleading.

(4) Through his or her own actions or omissions, unreasonably delay or cause to be delayed, without good cause (see § 416.1411(b)), the processing of a claim at any stage of the administrative decision-making process.

(5) Divulge, without the claimant's consent, except as may be authorized by regulations prescribed by us or as otherwise provided by Federal law, any information we furnish or disclose about a claim or prospective claim.

(6) Attempt to influence, directly or indirectly, the outcome of a decision, determination, or other administrative action by any means prohibited by law, or offering or granting a loan, gift, entertainment, or anything of value to a presiding official, agency employee, or witness who is or may reasonably be expected to be involved in the administrative decision-making process, except as reimbursement for legitimately incurred expenses or lawful compensation for the services of an expert witness retained on a non-contingency basis to provide evidence.

(7) * * *

(ii) Behavior that has the effect of improperly disrupting proceedings or obstructing the adjudicative process, including but not limited to:

(A) Directing threatening or intimidating language, gestures, or actions at a presiding official, witness, contractor, or agency employee;

(B) Providing misleading information or misrepresenting facts that affect how we process a claim, including, but not limited to, information relating to the claimant's work activity or the claimant's place of residence or mailing address in matters where the representative knows or should have known that the information was misleading and the facts would constitute a misrepresentation; and

(C) Communicating with agency staff or adjudicators outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s).

(8) Violate any section of the Act for which a criminal or civil monetary penalty is prescribed.

(9) Refuse to comply with any of our rules or regulations.

(10) Suggest, assist, or direct another person to violate our rules or regulations.

(11) Advise any claimant or beneficiary not to comply with any of our rules or regulations.

(12) Knowingly assist a person whom we suspended or disqualified to provide representational services in a proceeding under title XVI of the Act, or to exercise the authority of a representative described in § 416.1510.

(13) Fail to comply with our sanction(s) decision.

(14) Fail to oversee the representative's employees, assistants, partners, contractors, or any other person assisting the representative on claims for which the representative has been appointed when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

■ 16. Amend § 416.1545 by revising paragraphs (d) and (e) and adding paragraph (f) to read as follows:

§ 416.1545 Violations of our requirements, rules, or standards.

* * * * *

(d) Has been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice (see § 416.1570(a));

(e) Has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency (see § 416.1570(a)); or

(f) Who, as a non-attorney, has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary.

■ 17. Amend § 416.1550 by revising paragraphs (c), (d), (e)(2), and (f) to read as follows:

§ 416.1550 Notice of charges against a representative.

* * * * *

(c) We will advise the representative to file an answer, within 14 business days from the date of the notice, or from the date the notice was delivered personally, stating why he or she should not be suspended or disqualified from acting as a representative in dealings with us.

(d) The General Counsel or other delegated official may extend the 14-day period specified in paragraph (c) of this section for good cause in accordance with § 416.1411.

(e) * * *

(2) File the answer with the Social Security Administration, at the address

specified on the notice, within the 14-day time period specified in paragraph (c) of this section.

(f) If the representative does not file an answer within the 14-day time period specified in paragraph (c) of this section (or the period extended in accordance with paragraph (d) of this section), he or she does not have the right to present evidence, except as may be provided in § 416.1565(g).

■ 18. Revise § 416.1555 to read as follows:

§ 416.1555 Withdrawing charges against a representative.

The General Counsel or other delegated official may withdraw charges against a representative. We will withdraw charges if the representative files an answer, or we obtain evidence, that satisfies us that we should not suspend or disqualify the representative from acting as a representative. When we consider withdrawing charges brought under § 416.1545(d) through (f) based on the representative's assertion that, before or after our filing of charges, the representative has been reinstated to practice by the court, bar, or Federal program or Federal agency that suspended, disbarred, or disqualified the representative, the General Counsel or other delegated official will determine whether such reinstatement occurred, whether it remains in effect, and whether he or she is reasonably satisfied that the representative will in the future act in accordance with the provisions of section 206(a) of the Act and our rules and regulations. If the representative proves that reinstatement occurred and remains in effect and the General Counsel or other delegated official is so satisfied, the General Counsel or other delegated official will withdraw those charges. The action of the General Counsel or other delegated official regarding withdrawal of charges is solely that of the General Counsel or other delegated official and is not reviewable, or subject to consideration in decisions made under §§ 416.1570 and 416.1590. If we withdraw the charges, we will notify the representative by mail at the representative's last known address.

■ 19. Amend § 416.1565 by revising paragraphs (b)(1), (c), (d)(1) and (3), and (g)(1) and (3) as follows:

§ 416.1565 Hearing on charges.

* * * * *

(b) *Hearing officer.* (1) The Deputy Commissioner for the Office of Hearings Operations or other delegated official will assign an administrative law judge, designated to act as a hearing officer, to hold a hearing on the charges.

* * * * *

(c) *Time and place of hearing.* The hearing officer shall mail the parties a written notice of the hearing at their last known addresses, at least 14 calendar days before the date set for the hearing. The notice will inform the parties whether the appearance of the parties or any witnesses will be in person, by video teleconferencing, or by telephone. The notice will also include requirements and instructions for filing motions, requesting witnesses, and entering exhibits.

(d) *Change of time and place for hearing.* (1) The hearing officer may change the time and place for the hearing, either on his or her own initiative, or at the request of the representative or the other party to the hearing. The hearing officer will not consider objections to the manner of appearance of parties or witnesses, unless the party shows good cause not to appear in the prescribed manner. To determine whether good cause exists for extending the deadline, we use the standards explained in § 416.1411.

* * * * *

(3) Subject to the limitations in paragraph (g)(2) of this section, the hearing officer may reopen the hearing for the receipt of additional evidence at any time before mailing notice of the decision.

* * * * *

(g) *Conduct of the hearing.* (1) The representative or the other party may file a motion for decision on the basis of the record prior to the hearing. The hearing officer will give the representative and the other party a reasonable amount of time to submit any evidence and to file briefs or other written statements as to fact and law prior to deciding the motion. If the hearing officer concludes that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law, the hearing officer may grant the motion and issue a decision in accordance with the provisions of § 416.1570.

* * * * *

(3) The hearing officer will make the hearing open to the representative, to the other party, and to any persons the hearing officer or the parties consider necessary or proper. The hearing officer will inquire fully into the matters being considered, hear the testimony of witnesses, and accept any documents that are material.

* * * * *

■ 20. Revise § 416.1575(b) to read as follows:

§ 416.1575 Requesting review of the hearing officer's decision.

* * * * *

(b) *Time and place of filing request for review.* The party requesting review will file the request for review in writing with the Appeals Council within 14 business days from the date the hearing officer mailed the notice. The party requesting review will certify that a copy of the request for review and of any documents that are submitted have been mailed to the opposing party.

■ 21. Revise § 416.1580(a) to read as follows:

§ 416.1580 Appeals Council's review of hearing officer's decision.

(a) Upon request, the Appeals Council will give the parties a reasonable time to file briefs or other written statements as to fact and law, and to request to appear before the Appeals Council to present oral argument. When oral argument is requested within the time designated by the Appeals Council, the Appeals Council will grant the request for oral argument and determine whether the parties will appear at the oral argument in person, by video teleconferencing, or by telephone. If oral argument is not requested within the time designated by the Appeals Council, the Appeals Council may deny the request.

* * * * *

■ 22. Revise § 416.1585 to read as follows:

§ 416.1585 Evidence permitted on review.

(a) *General.* Generally, the Appeals Council will not consider evidence in addition to that introduced at the hearing. However, if the Appeals Council finds the evidence offered is material to an issue it is considering, it may consider that evidence, as described in paragraph (b) of this section.

(b) *Individual charged filed an answer.* (1) When the Appeals Council finds that additional evidence material to the charges is available, and the individual charged filed an answer to the charges, the Appeals Council will allow the party with the information to submit the additional evidence.

(2) Before the Appeals Council admits additional evidence into the record, it will mail a notice to the parties, informing them that evidence about certain issues was submitted. The Appeals Council will give each party a reasonable opportunity to comment on the evidence and to present other evidence that is material to an issue it is considering.

(3) The Appeals Council will determine whether the additional

evidence warrants a new review by a hearing officer or whether the Appeals Council will consider the additional evidence as part of its review of the case.

(c) *Individual charged did not file an answer.* If the representative did not file an answer to the charges, the representative may not introduce evidence that was not considered at the hearing.

■ 23. Amend § 416.1590 by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 416.1590 Appeals Council's decision.

(a) The Appeals Council will base its decision upon the evidence in the hearing record and any other evidence it may permit on review. The Appeals Council will affirm the hearing officer's decision if the action, findings, and conclusions are supported by substantial evidence. If the hearing officer's decision is not supported by substantial evidence, the Appeals Council will either:

(1) Reverse or modify the hearing officer's decision; or

(2) Return a case to the hearing officer for further proceedings.

* * * * *

(f) The Appeals Council may designate and publish certain final decisions as precedent for other actions brought under its representative conduct provisions. Prior to making a decision public, we will remove or redact personally identifiable information from the decision.

■ 24. Amend § 416.1599 by revising paragraphs (a), (d)(2), and (f) to read as follows:

§ 416.1599 Reinstatement after suspension or disqualification—period of suspension not expired.

(a) After more than one year has passed, a person who has been suspended or disqualified may ask the Appeals Council for permission to serve as a representative again. The Appeals Council will assign and process a request for reinstatement using the same general procedures described in § 416.1576.

* * * * *

(d) * * *

(2) If a person was disqualified because he or she had been disbarred, suspended, or removed from practice for the reasons described in § 416.1545(d) through (f), the Appeals Council will grant a request for reinstatement as a representative only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that he or she has been admitted (or readmitted) to and is in good standing with the court, bar, Federal program or agency, or other governmental or professional licensing authority from which he or she had been disbarred, suspended, or removed from practice.

* * * * *

(f) If the Appeals Council decides not to grant the request, it will not consider another request before the end of 3 years from the date of the notice of the previous denial.

[FR Doc. 2018–13989 Filed 6–29–18; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2018–0626]

RIN 1625–AA08

Special Local Regulation; Wyandotte Invites, Detroit River, Trenton Channel, Wyandotte, MI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a special local regulation for certain navigable waters of the Detroit River, Trenton Channel, Wyandotte, MI. This action is necessary and is intended to ensure safety of life on navigable waters immediately prior to, during, and immediately after the Wyandotte Invites event.

DATES: This temporary final rule is effective from 8 a.m. until 12:30 p.m. on July 15, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–0626 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or email Tracy Girard, Prevention Department, Sector Detroit, Coast Guard; telephone 313–568–9564, or email *Tracy.M.Girard@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking
§ Section
COTP Captain of the Port
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The Coast Guard just recently received the final details of this rowing event, Wyandotte Invites, which does not provide sufficient time to publish an NPRM prior to the event. Thus, delaying the effective date of this rule to wait for a comment period to run would be contrary to public interest because it would inhibit the Coast Guard's ability to protect participants, mariners and vessels from the hazards associated with this event. It is impracticable to publish an NPRM because we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing this rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would inhibit the Coast Guard's ability to protect participants, mariners and vessels from the hazards associated with this event.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1233. The Captain of the Port Detroit (COTP) has determined that the likely combination of recreation vessels, commercial vessels, and an unknown number of spectators in close proximity to a youth rowing regatta along the water pose extra and unusual hazards to public safety and property. Therefore, the COTP is establishing a special local regulation around the event location to help minimize risks to safety of life and property during this event.

IV. Discussion of the Rule

This rule establishes a temporary special local regulation from 8 a.m. until 12:30 p.m. on July 15, 2018. In light of the aforementioned hazards, the COTP has determined that a special local regulation is necessary to protect

List of Jurisdictions Adopting the Model Rules

Alphabetical List of Jurisdictions Adopting Model Rules

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Jurisdictions That Have Adopted the ABA Model Rules of Professional Conduct

(previously the Model Code of Professional Responsibility)

Dates of initial adoption

Alphabetical Order

Jurisdiction	Date of Adoption
Alabama	5/2/90
Alaska	4/14/93
Arizona	9/7/84
Arkansas	12/16/85
Colorado	5/7/92
Connecticut	6/23/86
Delaware	9/12/85
District of Columbia	3/1/90

Florida	7/17/86
Georgia	6/12/00
Guam	9/29/03
Hawaii	12/6/93
Idaho	9/3/86
Illinois	2/8/90
Indiana	11/25/86
Iowa	4/20/05
Kansas	1/29/88
Kentucky	6/12/89
Louisiana	12/18/86
Maine	2/26/09
Maryland	4/15/86
Massachusetts	6/9/97

Michigan	3/11/88
Minnesota	6/13/85
Mississippi	2/18/87
Missouri	8/7/85
Montana	6/6/85
Nebraska	6/8/05
Nevada	1/26/86
New Hampshire	1/16/86
New Jersey	7/12/84
New Mexico	6/26/86
New York	12/16/08
North Carolina	10/7/85
North Dakota	5/6/87
Northern Mariana Islands	8/29/07

Ohio	8/1/06
Oklahoma	3/10/88
Oregon	1/1/05
Pennsylvania	10/16/87
Puerto Rico	Has not adopted MRPC
Rhode Island	11/1/88
South Carolina	1/9/90
South Dakota	12/15/87
Tennessee	8/27/02
Texas	6/20/89
Utah	3/20/87
Vermont	3/9/99
Virgin Islands	3/30/92
Virginia	1/25/99

Washington	7/25/85
West Virginia	6/30/88
Wisconsin	6/10/87
Wyoming	11/7/86

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Updated 03/28/2018

ABA Model Rules:

Rule 1.16 – Declining or Terminating Representation

December 03, 2018

Rule 1.16: Declining or Terminating Representation

Client-Lawyer Relationship

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

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ABA Model Rules:

Rule 1.6 – Confidentiality of Information

Rule 1.6: Confidentiality of Information

Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed

information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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Ohio Rules of Professional Conduct: Rules 1.16 & 1.6

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if any of the following applies:

(1) the representation will result in violation of the Ohio Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged.

(b) Subject to divisions (c), (d), and (e) of this rule, a lawyer may withdraw from the representation of a client if any of the following applies:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is *illegal* or *fraudulent*;

(3) the client has used the lawyer's services to perpetrate a crime or *fraud*;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails *substantially* to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given *reasonable* warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;

(7) the client gives *informed consent* to termination of the representation;

(8) the lawyer sells the law practice in accordance with Rule 1.17;

(9) other good cause for withdrawal exists.

(c) If permission for withdrawal from employment is required by the rules of a *tribunal*, a lawyer shall not withdraw from employment in a proceeding before that *tribunal* without its permission.

(d) As part of the termination of representation, a lawyer shall take steps, to the extent *reasonably* practicable, to protect a client's interest. The steps include giving due notice to the client, allowing *reasonable* time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. "Client papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items *reasonably* necessary to the client's representation.

(e) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned, except when withdrawal is pursuant to Rule 1.17.

Comment

[1] A lawyer shall not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Ohio Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the discharge may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[8A] A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of the client and the possibility of prejudice to the client as a result of the withdrawal. Even when the lawyer justifiably withdraws, a lawyer should protect the welfare of the client by giving due notice of the withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Clients receive no benefit from a lawyer keeping a copy of the file and therefore can not be charged for any copying costs. Further, the lawyer should refund to the client any compensation not earned during the employment.

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.16 governs withdrawal from representation and replaces DR 2-110.

Rule 1.16(a)(1) corresponds to DR 2-110(B)(1) and (2), Rule 1.16(a)(2) corresponds to DR 2-110(B)(3), and Rule 1.16(a)(3) corresponds to DR 2-110(B)(4).

Rule 1.16(b)(1) generally corresponds to DR 2-110(A)(2).

Rule 1.16(b)(2) corresponds to DR 2-110(C)(1)(b).

Rule 1.16(b)(3) corresponds to DR 2-110 (C)(1)(c).

Rule 1.16(b)(4) corresponds to DR 2-110(C)(1)(c) and (d).

Rule 1.16(b)(5) corresponds to DR 2-110(C)(1)(f).

Rule 1.16(b)(6) corresponds to DR 2-110(C)(1)(d).

Rule 1.16(b)(7) corresponds to DR 2-110(C)(5).

Rule 1.16(b)(8) corresponds to DR 2-110(C)(7).

Rule 1.16(b)(9) corresponds to DR 2-110(C)(6).

Rule 1.16(c) is identical to DR 2-110(A)(1).

Rule 1.16(d) corresponds to DR 2-110(A)(2) and also requires the withdrawing lawyer to promptly return client papers and property to the client. "Client papers and property" are defined as including correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation.

Rule 1.16(e) is identical to DR 2-110(A)(3) except that the reference to the sale of a law practice rule is appropriately designated as Rule 1.17.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.16(b)(2) is revised to change "criminal" to "illegal." This allows the lawyer to withdraw when the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal. This would include violations of statutes or administrative regulations for which there are no criminal penalties.

Rules 1.16(b)(7) and (8) are added to recognize additional circumstances in which withdrawal may be permitted.

Rule 1.16(d) is revised to include a list of items typically included in "client papers and property." This provision is further modified to require that a withdrawing lawyer must afford the client a reasonable time to secure new counsel. Comment [8A] is added to elaborate on the duties of a lawyer who is contemplating or effectuating withdrawal from representation.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (d) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the commission of a crime by the client or other person;

(3) to mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal* or *fraudulent* act, in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;

(6) to comply with other law or a court order;

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a *firm*, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make *reasonable* efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to information related to the representation of a client.

(d) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary to comply with Rule 3.3 or 4.1.

Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Ohio Rules of Professional Conduct or other law. See also Scope.

[4] Division (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Permitting lawyers to reveal information relating to the representation of clients may create a chilling effect on the client-lawyer relationship, and discourage clients from revealing confidential information to their lawyers at a time when the clients should be making a full disclosure. Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Division (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Division (b)(2) recognizes the traditional "future crime" exception, which permits lawyers to reveal the information necessary to prevent the commission of the crime by a client or a third party.

[8] Division (b)(3) addresses the situation in which the lawyer does not learn of the illegal or fraudulent act of a client until after the client has used the lawyer's services to further it. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct [see Rule 4.1], there will be situations in which the loss suffered by the affected person can be mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to mitigate or recoup their losses. Division (b)(3) does not apply when a person is accused of or has committed an illegal or fraudulent act and thereafter employs a lawyer for representation concerning that conduct. In addition, division (b)(3) does not apply to a lawyer who has been engaged by an organizational client to investigate an alleged violation of law by the client or a constituent of the client.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, division (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Ohio Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in the conduct of a client or a former client or other misconduct of the lawyer involving representation of the client or a former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have

been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Division (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by division (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, division (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Division (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (*e.g.*, the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of a divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, division (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules.

[14] Any information disclosed pursuant to division (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Division (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to division (b)(7). Division (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See Comment [5].

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, division (b)(6) permits the lawyer to comply with the court's order.

[16] Division (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. A disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. Before making a disclosure under division (b)(1), (2), or (3), a lawyer for an organization should ordinarily bring the issue of taking suitable action to higher authority within the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

[17] Division (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in divisions (b)(1) through (b)(6). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by division (b) does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by division (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule.

Acting Competently to Preserve Confidentiality

[18] Division (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to or the inadvertent or unauthorized disclosure of information related to the representation of a client does not constitute a violation of division (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the

safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forego security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state or federal laws that govern data privacy or that impose specific notification requirements upon the loss of or unauthorized access to electronic information is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm see Rule 5.3, Comments [3] and [4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws governing data privacy, is beyond the scope of these rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.6 replaces Canon 4 (A Lawyer Should Preserve the Confidences and Secrets of a Client), including DR 4-101 (Preservation of Confidences and Secrets of a Client) and ECs 4-1 to 4-6 of the Ohio Code of Professional Responsibility.

Rule 1.6(a) generally corresponds to DR 4-101(A) by protecting the confidences and secrets of a client under the rubric of "information relating to the representation." To clarify that this includes privileged information, the rule is amended to add the phrase, "including information protected by the attorney-client privilege under applicable law." Rule 1.6(a) also corresponds to DR 4-101(B) by prohibiting the lawyer from revealing such information. Use of client information is governed by Rule 1.8(b).

Rule 1.6(a) further corresponds to DR 4-101(C)(1) by exempting disclosures where the client gives "informed consent," including situations where disclosure is "impliedly authorized" by the client's informed consent.

Rule 1.6(b) addresses the exceptions to confidentiality and generally corresponds to DR 4-101(C)(2) to (4). Rule 1.6(b)(1) is new and has no comparable Code provision. Rule 1.6(b)(2) is the future crime exception and corresponds to DR 4-101(C)(3), with the addition of "or other person" from the Model Rule. Rule 1.6(b)(3) expands on the provisions of DR 7-102(B)(1) by permitting disclosure of information related to the representation of a client, including privileged information, to mitigate substantial injury to the financial interests or property of another that has been caused by the client's illegal or fraudulent act and the client has used the lawyer's services to further the commission of the illegal or fraudulent act.

Rule 1.6(b)(4) is new, and codifies the common practice of lawyers to consult with other lawyers about compliance with these rules. Rule 1.6(b)(5) tracks DR 4-101(C)(4), adding "any disciplinary matter" to clarify the rule's application in that situation. Rule 1.6(b)(6) is the same as DR 4-101(C)(2).

Rule 1.6(c) makes explicit that other rules create mandatory rather than discretionary disclosure duties. For example, Rules 3.3 and 4.1 correspond to DR 7-102(B), which requires disclosure of client fraud in certain circumstances.

Comparison to ABA Model Rules of Professional Conduct

The additions to Rule 1.6(a) are intended to clarify that "information relating to the representation" includes information protected by the attorney-client privilege.

The exceptions to confidentiality in Rule 1.6(b) generally track those found in the Model Rule, although two of Ohio's exceptions [Rules 1.6(b)(2) and (3)] permit more disclosure than the Model Rule allows.

Rule 1.6(b)(1) is the same as the Model Rule and reflects the policy that threatened death or serious bodily harm, regardless of criminality, create the occasion for a lawyer's discretionary disclosure. Nineteen jurisdictions have such a provision.

Rule 1.6(b)(2) differs from the Model Rule by maintaining the traditional formulation of the future crime exception currently found in DR 4-101(C)(3), rather than the future crime/fraud provision in Model Rule 1.6(b)(2) that is tied to "substantial injury to the financial interests of another." Twenty-two jurisdictions, including Ohio, opt for this stand-alone future crime exception. This exception is retained because it mirrors the public policy embodied in the criminal law.

Rule 1.6(b)(3) differs from Model Rule 1.6(b)(3) in two ways: it deletes the words "prevent" and "rectify;" and it allows for disclosure to mitigate the effects of the client's commission of an illegal (as opposed to criminal) or fraudulent act. The prevention of fraud is deleted from Rule 1.6(b)(3) because it is addressed in Rule 4.1(b). The extension of "criminal" to "illegal" is consistent with the use of the term "illegal" in Rules 1.2(d), 1.16(b), 4.1(b), and 8.4(b), but it is not found in either the Model Rule or Ohio disciplinary rules as an exception to confidentiality. Only two jurisdictions have included illegal conduct as justification for disclosure in Rule 1.6.

Rule 1.6(b)(4) is similar to the Model Rule.

Rule 1.6(b)(5) adds "disciplinary matter" to clarify the application of the exception.

Rule 1.6(c) is substantially the same as Model Rule 1.6(b)(6), except that it clarifies the mandatory disclosure required by other rules.

Southern District of Ohio:
Federal Rules of Disciplinary Enforcement

LOCAL CIVIL AND CRIMINAL RULES

United States District Court
Southern District of Ohio

January 1, 2016

www.ohsd.uscourts.gov

INTRODUCTORY STATEMENT ON CIVILITY

LOCAL CIVIL RULES

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(4) that the misconduct established is deemed by this Court to warrant substantially different discipline.

Where this Court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

(E) In all other respects, a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this Court.

(F) This Court may at any stage appoint counsel to prosecute the disciplinary proceedings.

Rule III. Disbarment on Consent or Resignation in Other Courts

(A) Any attorney admitted to practice before this Court who shall be disbarred on consent or resign from the bar of any other Court of the United States or the District of Columbia, or from the bar of any State, territory, commonwealth or possession of the United States while an investigation into allegations of misconduct is pending, shall, upon the filing with this Court of a certified or exemplified copy of the judgment or order accepting such disbarment on consent or resignation, cease to be permitted to practice before this Court and be stricken from the roll of attorneys admitted to practice before this Court.

(B) Any attorney admitted to practice before this Court shall, upon being disbarred on consent or resigning from the bar of any other Court of the United States or the District of Columbia, or from the bar of any State, territory, commonwealth or possession of the United States while an investigation of misconduct is pending, promptly inform the Clerk of this Court of such disbarment on consent or resignation.

Rule IV. Standards for Professional Conduct

(A) For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this Court may be disbarred, suspended from practice before this Court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.

(B) Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Rules of Professional Conduct adopted by this Court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives or bar associations within the state.

Web Links to State Rules of Ethics

OHIO

http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf

KENTUCKY

https://www.kybar.org/page/scr3

INDIANA

https://www.in.gov/judiciary/rules/prof_conduct/

PENNSYLVANIA

https://www.pacode.com/secure/data/204/chapter81/s81.4.html

Hypotheticals

HYPOTHETICALS

1) **Claimant advises you that he/she has a claim pending at OHO. You and client execute representation documents. You explain to the client that you will need to review the exhibit file/unexhibited file before you can assess the merits of the case. Client agrees to this.**

   a. The claim is scheduled for hearing. You review the exhibits and determine that it is unlikely the claim with prevail, and you therefore wish to withdraw.

   b. The claim is not yet scheduled for a hearing. You review the exhibits and determine additional development is needed. While you are developing the record, the claim is scheduled for hearing. You obtain additional treatment records and determine it is unlikely that the claim will prevail, and you therefore wish to withdraw.

2) **You undertake representation at a lower administrative level, and file a Request for Hearing. Upon notice that OHO has received the file, you review the unworked exhibits and the case looks strong. You are contacted to schedule a hearing and agree to a hearing date. You request and receive updated records and determine that the claim is unlikely to prevail because:**

   a. Records contain evidence that client unfortunately relapsed and was consistently using/abusing alcohol or illicit substances.

   b. Records contain evidence of ongoing and persistent non-compliance with treatment and/or medication, without good cause for non-compliance.

   c. There are insufficient records/significant gaps in treatment.

d. No treating source is willing to provide a Medical Source Statement and the objective medical evidence is inconsistent or insufficient on its own.

e. Damaging medical records are received just prior to the 5-day deadline, despite exercising due diligence to obtain said records in a timely manner.

3) The claim just got scheduled for hearing:

a. You find out that the claimant has just been made a "guest of the state" for 7-years.

b. Your client informs you that they have medically improved, and forgot to tell you (despite your efforts to obtain updates) that they have been working full-time for several months.

4) The claim is scheduled for hearing, but:

a. The claimant does not respond to your written correspondences or phone calls. As such, you are unable to work up the file or prepare to represent the claimant.

b. The claimant does respond up until the hearing is scheduled (or later).