

## §100 “Disabled” — A Term of Art

You cannot always rely on common sense to tell you who is and who is not disabled under Social Security law. Here are some examples:

### Example: Lawyer

- He is 35 years old with 10 years of trial experience.
- He is not working, but he is looking for a job.
- He lost his left foot in a car accident a year ago.

Because of stump complications, he is unable to use a prosthetic device to walk one block at a reasonable pace, though he uses it to walk shorter distances, e.g., around an office or around his apartment. When he goes longer distances, he rides a motorized scooter.

He is disabled. *See* C.F.R. Part 404, Subpart P, Appendix 1, § 1.05B.

### Example: Bookkeeper

- He has a college education.
- He is a quadriplegic with only limited use of his right hand and arm and no use whatsoever of his legs and left arm.
- He uses an arm brace to write.
- He works a few hours per day as a bookkeeper and earns, after deductions for expenses related to his impairment, about \$1,050 per month on average.

Because of his earnings he is not disabled. *See* 20 C.F.R. §§ 404.1520(b) and 404.1574(b)(2).

### Example: Construction worker

- He is 48 years old.
- He has done heavy unskilled construction work since age 16.
- He has a fourth grade education and is capable of reading only rudimentary things like inventory lists and simple instructions.
- He has a “low normal” I.Q.
- He is limited to sedentary work because of a heart condition.

He is not disabled unless he has some additional limitations. *See* 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 201.18.

### Example: Machine operator

- He is 38 years old.

- He has done medium exertion level unskilled factory work, operating a machine since he graduated from high school.

- A cardiovascular impairment limits him to sedentary work, and a permanent injury of the right hand limits him to such work not requiring bimanual dexterity.

He is probably disabled. *See* Social Security Rulings 83-10 and 96-9p.

### Example: Truck driver

- He is 61 years old.
- He worked as a truck driver all his life except that 10 years ago during a downturn in the trucking industry, he worked for 1-1/2 years at a sedentary office job which he got with the help of his brother-in-law.

- He is limited to sedentary work because of a pulmonary impairment.

He is not disabled because he is still capable of doing the office job. *See* 20 C.F.R. §§ 404.1520(f) and 404.1560(b).

### Example: Packer

- He is 50 years old.
- He has a high school education.
- He has done unskilled light exertion factory work as a packer for the past 30 years.
- He had a heart attack on January 1 and, after being off work for eight months, he recovered after an angioplasty. His cardiologist gave him a clean bill of health and was ready to send him back to work when he broke his leg in a fall unrelated to his heart condition. In a cast and unable to stand and walk as required by his job, he could not return to work until February. He was off work a total of 13 months.

He is not disabled for the time he was off work. 20 C.F.R. § 404.1522(a) provides that unrelated impairments may not be combined to meet the requirement that a claimant be unable to work for 12 months.

### Example: Housewife

- She is 55 years old.
- She has an eleventh grade education.
- She has not worked in the past 15 years. Before that she was a secretary.
- She has a back problem diagnosed as status post laminectomy.
- She is limited to maximum lifting of 50 lbs. with frequent lifting of 25 lbs., is capable of frequent

bending, stooping, etc., and has no limitation for standing or walking.

She is disabled for the SSI program as long as she meets the income and asset limitations for that program. *See* 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 203.10. *See also* 20 C.F.R. § 404.1562(b). (She is not eligible for Social Security disability benefits because she has not worked for so long.)

### §101 Regulations and Rulings

These examples are based on the Social Security regulations. A current copy of these regulations is essential to representing disability claimants. Although we will discuss some of the regulations, this book is not a substitute for having your own copy. You can purchase a copy of 20 C.F.R. Parts 400 to 499 from the Government Printing Office. For ordering information and where to find the regulations on the Internet, *see* Appendix 2.

This chapter will give you an overview of the regulations that describe how to determine if someone is disabled. (For the Social Security disability program, these appear at 20 C.F.R. §§ 404.1501 to 404.1599, plus two appendices located just after 20 C.F.R. § 404.1599.) It will provide enough information about these disability regulations and some of the nondisability and procedural matters covered in other parts of 20 C.F.R. Parts 400 to 499 for you to be able to conduct a reasonably thorough interview of most claimants. But each claimant's situation is unique. You may run into unusual issues for which it will be necessary to study the regulations themselves or other parts of this book.

Outside of the regulations, the most important body of law for determining disability is found in Social Security Rulings. These are published in the Federal Register by the Social Security Administration and are binding on all components of SSA. 20 C.F.R. § 402.35(b)(1). This book will give you citations to Social Security Rulings that elaborate on the meaning of the regulations. Because there are hundreds of rulings of varying usefulness and because these rulings are poorly indexed, Appendix 1 provides a list of the most important Social Security Rulings pertaining to determining disability. It is essential in representing Social Security disability claimants to have access to the rulings listed in Appendix 1. Rulings are available at SSA's website,

[www.ssa.gov](http://www.ssa.gov). *See also* Appendix 2 for more information about obtaining copies of rulings.

### Practice Tip

The Appendix 1 Guide to Important Social Security Rulings and Acquiescence Rulings is on the Internet at [http://www.tebush.com/teb/SSRs\\_files/SSRs.htm](http://www.tebush.com/teb/SSRs_files/SSRs.htm) with links to individual rulings on SSA's website. The best way to search rulings is to use the search engine at [www.google.com](http://www.google.com) and limit your search to rulings on the SSA website. For example, if you want to search for references to widow's benefits, enter your Google search this way: `site:www.ssa.gov/OP_Home/rulings widow`. Or if you want to include regulations, the statute and everything else on SSA's website, enter your Google search this way: `site:www.ssa.gov widow`.

The primary purpose of this book is to help you represent your clients in administrative proceedings. We are not going to spend much time talking about the Social Security Act itself because the regulations, along with the Social Security Rulings, constitute the official interpretation of the Act. Nearly everything in the Act appears in the regulations, though there are a few notable exceptions (*e.g.*, attorney fees authorized under the fee agreement process, *see* Chapter 7) where SSA has not yet promulgated regulations.

While you may wish to compare the regulations with the Act in certain unusual circumstances, you will never get a decision in your favor from any level of SSA based on a conflict between the Act and the regulations. If you want to challenge the regulations, you will have to make that challenge in federal court after making your record on the issue when the case is before the agency.

The regulations provide a lot of room to maneuver—a lot of possibilities for winning your client's case at the administrative hearing or maybe even at an earlier stage—so we are going to concentrate on these. But first, let us take a brief look at the definition of “disabled” in the Social Security Act.

### §102 Statutory Definition

Congress has defined the term “disability” for both the regular Social Security disability program (which appears in Title II of the Social Security Act)

and the SSI disability program (which appears in Title XVI of the Act) as an 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.” 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A).

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), “work which exists in the national economy” means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. §§ 423(d)(2)(A) and 1382c(a)(3)(B).

The Act defines “physical or mental impairment” as “an impairment that results from anatomical, physiological or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.” 42 U.S.C. §§ 423(d)(3) and 1382c(a)(3)(D). The definition of disability in the Act specifically provides that an individual is not “disabled” if drug addiction or alcoholism would “be a contributing factor material to the Commissioner’s determination that the individual is disabled.” 42 U.S.C. §§ 423(d)(2)(C) and 1382c(a)(3)(J).

The Act leaves it to the Commissioner of Social Security to prescribe regulations to determine when services performed or earnings demonstrate ability to engage in substantial gainful activity. 42 U.S.C. §§ 423(d)(4) and 1382c(a)(3)(E).

The Act provides somewhat different definitions of disability for those who are blind and, until 1991, for widow(er)s (including surviving divorced spouses), subjects which we will not address in detail in this book. See §§142 and 143. The part of

the Act dealing with SSI provides a significantly different definition of disability for children requiring “marked and severe functional limitations.” 42 U.S.C. § 1382c(a)(3)(C)(i). See §145.

For regular Social Security disability and SSI, the Act is much less specific than the regulations and rulings promulgated by the Commissioner. For example, although the Act requires consideration of age, education and work experience, it provides no guidance for weighing these factors to determine capacity for other work.

The Act sets a hypothetical tone for disability determination by excluding consideration of availability of work in the area where the claimant lives, job vacancies and whether the individual claimant would be hired. The Act does not define jobs existing “in significant numbers.”

The regulations and rulings provide the official, formal interpretation of the Social Security Act, answering many questions raised by the text of the Act and, as we shall see, leaving many questions unanswered. But this is the stuff of which good lawyering is made.

### **§103 Role of SSA's Informal Policy Statements**

The regulations and rulings that interpret the Social Security Act are in turn interpreted and supplemented by two huge agency manuals and memoranda from various components of SSA. These official but informal statements of SSA policy and procedures are useful tools for understanding the regulations and rulings and for understanding how SSA is supposed to handle various issues.

However, when SSA doesn’t follow procedures set forth in one of its manuals, courts are not fast to force SSA to follow the stated procedure. In *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981), the U.S. Supreme Court stated that SSA’s former claims manual was “not a regulation. It has no legal force, and it does not bind the SSA.” Nevertheless, a clear statement of SSA policy is likely to be followed at all levels of the Social Security Administration and an SSA interpretation of the Social Security Act or regulations is likely to be extremely influential in a federal court proceeding. See *Washington State Department of Social and Health Services et al. v. Guardianship Estate of Keffeler et al.*, 537 U.S. 371,

385 (2003), in which the U.S. Supreme Court, citing *Skidmore v Swift & Co.*, 323 U.S. 134, 139-140 (1944), used the POMS as evidence of the Commissioner's interpretation of the Social Security Act; but compare *Moore v Apfel*, 216 F.3d 864, 868-69 (9th Cir. 2000).

The largest and most important of SSA's manuals is the PROGRAM OPERATIONS MANUAL SYSTEM (POMS), a huge on-line handbook for internal use by SSA employees and by the employees of the state agencies who make administrative disability determinations below the hearing level. A section of the POMS deals with determining disability, interpreting the regulations and rulings with which we are concerned in this book. The disability section of the POMS, originally issued in loose-leaf format, filled a four-foot shelf of ring binders. The entire POMS, which deals with every aspect of the many programs operated by SSA, in loose-leaf format filled several bookcases. Because up-to-date filing of replacement pages was such a major project, SSA abandoned paper copies of the POMS. The complete POMS is available on-line to SSA employees through SSA's computer network.

A public version of the POMS may be accessed from SSA's website, [www.socialsecurity.gov](http://www.socialsecurity.gov), or from SSA's Program Policy Information Site, <http://policy.ssa.gov/>. According to SSA, "The public version of POMS is identical to the version used by Social Security employees except that it does not include internal data entry and sensitive content instructions." Thus, for example, although SSA computer printouts are often included as exhibits in a claimant's hearing exhibit file, the key to deciphering these printouts is not included in the public version of the POMS. For example, the Disability Determination Services Query (DDSQ), which sometimes appears as a hearing exhibit, is explained in a section of the POMS entitled "Parts of a Full Query Response," which appears at SM 06002.200 only in the SSA version of the POMS. This section of the POMS is labeled: "SENSITIVE—NOT TO BE SHARED WITH THE PUBLIC." Those who have compared the two versions of the POMS are able to find many examples of useful items left out of the public version, such as "Q and A's," many of which include detailed examples of medical impairments, that appear to be neither internal data entry matters nor "sensitive content instructions." It is not at all clear what SSA considers to be "sensitive content instructions."

We will make reference to the POMS to describe SSA policy. You may also have some occasion to cite the POMS to an ALJ for its educational value. However, the POMS is binding only at administrative proceedings below the ALJ hearing level. It is not binding on ALJs.

At the ALJ hearing level, the manual used by ALJs and their staffs, the HALLEX (*Hearings, Appeals and Litigation Law Manual*), is much smaller than the POMS. The HALLEX is useful in understanding hearing office procedures, many of which have due process implications, and includes discussion of a number of substantive issues; however, unlike the POMS, the HALLEX has very little discussion of medical disability issues.

In addition to the HALLEX, substantive and procedural issues are also addressed in memoranda from various components of SSA, some of which end up as part of the HALLEX, often starting out as "temporary instructions" in HALLEX Volume I, Division 5, which tend to retain temporary status for years. Current temporary instructions deal with oral bench decisions, HALLEX I-5-1-16, hearings held by video teleconferencing, HALLEX I-5-1-17, and instruction for processing a subsequent claim while an earlier claim is pending at the Appeals Council, HALLEX I-5-3-17. A classic example of a substantive memorandum deals with fibromyalgia and chronic fatigue syndrome, which is reprinted at §231.5 (Deputy Commissioner for Disability and Income Security Programs, Susan M. Daniels). Although they never announce a new policy, periodic reminders from the Chief ALJ, which are designed to get ALJs to follow SSA policy, often provide useful summaries of SSA's position on various issues. As a rule, SSA forbids ALJs to cite memoranda, even though the ALJs are supposed to follow the policies or interpretations of the regulations contained in them.

Thus, there exists a hidden but very influential body of law interpreting SSA's regulations and rulings. A claimant's lawyer may not always be able to get an administrative law judge to follow a favorable interpretation contained in a memorandum; and the fact that the memorandum constitutes the SSA position on the subject is not always persuasive on further administrative appeal or in an appeal to federal court.

There is, in fact, a tension between SSA and many ALJs who take the position that although they are bound to follow SSA policy (and certainly will do so when there is a regulation or ruling on point),

it is often necessary to interpret *what* SSA policy is and *whether* that policy applies to the facts of an individual claimant's case. These ALJs find neither the POMS nor SSA memoranda to be dispositive. After all, they argue, the POMS and certain SSA memoranda may reflect only what one element within SSA *thinks* is the policy. Until that policy appears in a regulation or ruling, it may not be the final word. This position gives a claimant's attorney considerable leeway to present an interpretation of an issue that is favorable to a claimant's case, even when at first blush the interpretation may appear to contradict SSA policy.

The Social Security administrative system is not one built on precedent. Only limited attention is paid to court precedent (*see* §104), and ALJ decisions have no precedential value at all. Even an Appeals Council decision has no precedential value unless, as occasionally occurs, it is adopted as a Social Security ruling. In this system, one tends to fight the same battles over and over.

ALJs usually know and follow official interpretations such as those stated in the POMS, even though they are not technically bound to do so. For this reason, it is usually more important to know how SSA interprets the regulations and rulings than it is to know the position of the federal courts on an issue. Knowing SSA's position gives a fairly reliable basis for predicting how an issue will be decided at the administrative level.

### **§104 Role of Federal Court Decisions**

Most lawyers, when dealing with any new federal legal issue, reflexively look first to the Federal Reporter to see how circuit courts have dealt with the matter. But lawyers and administrative law judges within the Social Security Administration tend to look at circuit court case law last, if at all.

Although there used to be an official short list of circuit court cases, which were decided in SSA's favor, that were sometimes cited by ALJs (and even today a few ALJs have favorite circuit court cases that they cite in decisions), it is the rule within SSA that no significant decision-making weight is accorded a decision of a circuit court of appeals unless that decision has been adopted as an acquiescence ruling. *See* SSR 96-1p. Discussion of a cir-

cuit court opinion generally appears in an ALJ decision only in response to a citation by a claimant's attorney. An ALJ will follow circuit court precedent only if it suits the ALJ's purpose in the case.

At the same time, ALJs have been instructed not to cite federal *district* court opinions in their decisions except to distinguish them from the facts of the claimant's case. The decisions of the local United States District Court are thus accorded no precedential value whatsoever by SSA. SSR 96-1p.

When SSA finds a court decision to be an accurate statement of SSA policy, SSA may issue that decision as a Social Security Ruling, which will be identified with the suffix "c." But such rulings are rarely cited by ALJs.

SSA does apply precedential value to decisions of the United States Supreme Court. These also are published as Social Security rulings with the suffix "c." However, whenever a Supreme Court decision is cited, even within SSA, it is invariably cited in the usual manner and not as a Social Security ruling.

For the most part, SSA simply ignores circuit court decisions with which it disagrees, except for those few cases in which SSA issues "acquiescence rulings" by which it agrees to follow that appellate court decision in the circuit where it was decided. *See* §105. In the past, SSA issued "rulings of *nonacquiescence*" concerning such circuit court decisions.

SSA says that it must administer a national program. The agency argues that it cannot apply different rules in every federal district in the country, and, less convincingly, that it cannot apply different rules from circuit to circuit. *See* SSR 96-1p. SSA takes interpretation of the Social Security Act to be its mandate and, essentially, considers federal courts as not sufficiently deferential to agency interpretation.

Needless to say, the low regard with which SSA holds federal court decisions has caused tension between the federal courts and SSA. Federal district judges complain that they decide the same issues over and over. Frustrated by SSA's flagrant practice of ignoring appellate court decisions, a judge once threatened the official in charge of the agency with contempt proceedings "both in her official and individual capacities." *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983) (McMillan, J., concurring).

If you are new to the practice of representing Social Security disability claimants, you may initially find SSA's treatment of federal court precedent to

be bizarre and possibly illegal; but once you get used to it, you will find that it opens myriad possibilities for representing your clients. For one thing, if good, on-point claimant-oriented case law is ignored in the administrative phase of your client's case, you obviously have a great case for federal court review.

It often comes as a revelation to lawyers practicing Social Security disability law that at the administrative level you may treat unfavorable appellate court case law the same way SSA does: ignore it. This is especially true for those cases that are *both* anti-claimant *and* contrary to SSA policy. Although, in court, SSA lawyers often use arguments based on case law contrary to SSA policy, it is unlikely that you will ever see such arguments made in administrative proceedings.

### **§105 Acquiescence Rulings**

In addition to regular Social Security rulings, SSA has developed a species of rulings dealing with federal court decisions—"acquiescence rulings." In the 1980s, SSA was faced with more and more class action lawsuits attempting to enforce appellate court precedent. In response, SSA developed a procedure for issuing "acquiescence rulings" to deal with court of appeals decisions that were contrary to SSA policy but which SSA agreed to follow in the circuit from which the decision was issued. SSA policy on acquiescence rulings, including the circumstances under which SSA will relitigate an issue, appears at 20 C.F.R. § 404.985.

We have included acquiescence rulings pertaining to disability determination in our index of important Social Security rulings, Appendix 1. Acquiescence rulings are published in the Federal Register, as are regular Social Security Rulings; and they appear at SSA's website, [www.ssa.gov](http://www.ssa.gov). Acquiescence rulings are identified AR, are numbered consecutively in the year of issuance, and contain a number in parentheses that indicates the circuit in which the acquiescence ruling is applicable. For example, AR 03-1(7) indicates that this is the first acquiescence ruling issued in 2003 and is applicable in the seventh circuit.

You will find that acquiescence rulings are useful even if they do not apply to your clients' circuits. If an acquiescence ruling addresses an issue present in your client's case in an administrative proceeding, it may provide fodder for an argument to be

used later in federal court. Perhaps more important, acquiescence rulings always explain how a court decision differs from SSA policy. Many times, such statements operate to clarify just what SSA policy is.

### **§106 A Nonadversarial Administrative System**

Practice before SSA is nonadversarial. 20 C.F.R. §§ 404.900(b) and 404.1740(a)(2). You will never deal with an attorney adversary representing SSA's interest at any level of administrative review. Only if your client loses and you appeal to federal court will a lawyer adversary representing the government become involved.

The ALJ is a neutral factfinder. Although you may find an occasional ALJ who acts as if he or she were personally responsible for maintaining a surplus in the Social Security trust fund, ALJs are usually fair. Be careful not to treat an ALJ as an adversary. Such treatment of an ALJ may become self-fulfilling and a counterproductive adversarial relationship may develop.

As a factfinding system, the Social Security system works well at the ALJ level. This nonadversarial system is probably better at determining who is and is not disabled than any alternative adversarial system. The judges develop expertise in dealing with complicated medical and vocational issues that generally yields good results and accurate decisions.

You will also find that the regulations themselves have a certain logic and symmetry that aid accurate, dispassionate decision-making.

Despite the frustration of claimants by the time delays involved in this system at all levels, properly represented claimants tend to find the ALJ hearing to be non-threatening. They like having the opportunity to tell their stories to a judge. They like not having to deal with a lawyer adversary representing the government.

Attorneys representing claimants could abuse this nonadversarial system, but by and large they do not. Attorneys recognize that they have a heightened duty to this system: The attorney must not mislead the ALJ or allow a client to do so on any material fact. *See* 20 C.F.R. § 404.1740(c)(3). Attorneys have an affirmative duty to submit evidence "with reasonable promptness . . . that the claimant wants to submit in support of his or her claim." 20 C.F.R. §

404.1740(b)(1). Representatives should not “unreasonably delay” the processing of a claim. 20 C.F.R. § 404.1740(c)(4).

Based on § 1129 of the Social Security Act, 42 U.S.C. § 1320a-8, Social Security regulations provide for civil monetary penalties against persons who “[m]ake or cause to be made false statements or representations or omissions or otherwise withhold disclosure of a material fact for use in determining any right to or amount of benefits under title II or benefits or payments under title VIII or title XVI of the Social Security Act.” 20 C.F.R. § 498.100(b)(1).

Attorneys schooled in the adversarial system do not like having to submit adverse evidence in their clients’ cases. Yet this appears to be what the Social Security Act and regulations require. Various arguments that attorneys have made based on state bar ethics rules do not prevent a lawyer from following the fundamental rule of this non-adversarial system: Do not mislead the ALJ about any material fact.

An article by Professor Robert E. Rains, “Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance With Federal Rules on Production of Adverse Evidence,” 92 *Cornell Law Review* 363 (2007), which is reprinted at Appendix 9, addresses the ethical issues presented by disability cases: Do you have to submit a medical report that says your client is not disabled? What is the role of your state bar’s ethics rules when you are dealing with SSA? This article is required reading for all Social Security disability practitioners.

### §107 Informal Procedures

Despite a trend in recent years toward more formality in Social Security disability practice, a trend that is disturbing to many attorneys, the administrative system remains an informal one. Hearings before administrative law judges, held in small conference rooms, are much less formal than court proceedings. Some ALJs wear robes but other judicial trappings such as gavels, bailiffs, and court reporters are absent. The rules of evidence do not apply. Evidence may be submitted even though it would be “inadmissible under rules of evidence applicable to court proceedings.” 42 U.S.C. § 405(b)(1). Although witnesses at hearings testify under oath, one can sub-

mit an unsworn letter from a doctor as evidence. Medical records are not required to be certified.

There is no special form required for any submission to SSA. Most attorneys use letters for almost everything (briefs, motions, to submit evidence, to make requests, to give notice, etc.). Although not required, most attorneys use the official forms for appeals and to notify SSA of their involvement in a case. While the regulations allow appeal by sending a simple letter, it is best to use the official form. With a letter appeal, one runs the risk that an SSA employee will not recognize it for what it is. See the sample Request for Hearing, §178.2.2; and Request for Review of Hearing Decision, §512. The Appointment of Representative form, §178.2.1, is used by most attorneys so that SSA employees will note that there is attorney involvement in the case, despite the fact that the regulations require only that the claimant sign a statement appointing a representative. 20 C.F.R. § 404.1707(a).

### §108 SSA: A Bureaucracy

For the most part, attorneys deal with SSA’s Office of Disability Adjudication and Review (ODAR), which includes about 150 hearing offices scattered around the country, and the next level of appeal, the Appeals Council, which is located in a suburb of Washington, D.C. (Those in the northeast deal with the Disability Review Board under the DSI program—see §150.1.) In all, ODAR has about 8,000 employees, including about 1,300 administrative law judges and 34 administrative appeals judges. Dealing with hearing offices is generally a pleasant experience. Although dealing with the Appeals Council can be frustrating for attorneys, it is nothing compared to dealing with SSA outside of ODAR.

There is a rigidity of rule-following, whether or not application of the rule makes any sense, which characterizes the approach of low-level bureaucrats. This problem exists in all bureaucracies and is present at SSA, for the most part outside of ODAR. It is something that has been known to cause both claimants and lawyers to tear out their hair. To deal with this, you will find that it is best to be firm and persistent but never obnoxious.

A fundamental problem in dealing with SSA outside of ODAR is, of course, the sheer size of the agency, which has more than 57,000 employees in

addition to those employed by ODAR. Also, there are more than 14,000 state agency employees nationwide involved in making determinations of disability below the ALJ hearing level. It is difficult for a lawyer first to figure out whom to contact about a claimant's particular problem and then to determine how to contact them, whether by phone, fax, mail or, in some limited circumstances, e-mail. Once you figure it out in a particular case, be sure to keep good notes for that particular case; and also start keeping a master list of telephone and fax numbers and addresses for use in future cases. You will discover that there are knowledgeable and helpful people at all levels of SSA. You will do well to cultivate a relationship with them. Treasure their phone numbers.

The problem of SSA's size is compounded by the complexity of its programs, the most complicated of which are the two disability programs, Social Security disability and SSI. When there are program changes, it is a huge task to ensure that everyone within SSA who needs to know gets the information, and often they do not. Sometimes it will be up to you to tell SSA employees about policy changes.

To take just one example of problems created by complexity, consider the Social Security Administration's nationwide toll-free telephone number, 1-800-772-1213 (which SSA likes to write as 1-800-SSA-1213). In theory, the toll-free number is staffed by knowledgeable SSA employees capable of answering a wide variety of questions, including questions about entitlement to disability benefits. However, this is not the reality. One test showed 25 percent wrong answers to questions involving SSI, by far the most complicated of SSA's programs. The toll-free number, if you can get past the busy signals and the recorded messages, is most useful for information about the retirement program, not for questions that a lawyer might have about disability benefit entitlement.

SSA, like all bureaucracies, attempts to routinize complex decisions; however, the more complicated the decision, the less effective this is. It does not work well at all for disability determinations below the administrative law judge hearing level because the medical-vocational issues tend to be complicated and because state agencies are not equipped to assess the actual impact of a medical impairment on a particular claimant, which often involves a credibility determination. State agency disability deter-

minations tend to be inadequate, and many people within SSA remain almost blissfully unaware of state agency decision shortcomings. For example, studies using SSA's own peculiar methodology repeatedly conclude that state agency determinations are correct more than 93% of the time. Such studies are unable to explain why ALJs have always found disabled more than half the claimants who come before them. These studies have led many state agency employees to believe that ALJs issue mostly wrong decisions, and there is a component within SSA (outside of the Office of Disability Adjudication & Review) that thinks so, too.

It is a mistake to view SSA as being of one mind. For example, there are those within SSA who think that disability determination would be improved by getting rid of lawyers, administrative law judges, due process hearings, and appeals. Thus, there is a component of SSA that is opposed to the very existence of the Office of Disability Adjudication and Review. This tension between different components of SSA tends to produce turf wars and, whenever restructuring of SSA is going on as it has been for the past several years, a search for hidden agendas is made to see if this or that bureaucratic change will ultimately be a benefit or detriment to the future of a particular component of SSA.

### §109 Citations

The primary focus of this book is on Social Security disability regulations, with an emphasis on the regulations for determining disability beginning at 20 C.F.R. § 404.1501. For the sake of simplicity, citations to the *identical* disability regulations for the SSI program will not be provided. The SSI regulations for determining disability begin at 20 C.F.R. § 416.901. It is easy to find the parallel SSI regulation. The formula is: 20 C.F.R. § 416.900 plus the last two digits of the Social Security disability regulation. For example, the parallel SSI regulation for the important Social Security disability regulation that describes the sequential evaluation process, 20 C.F.R. § 404.1520, appears at 20 C.F.R. § 416.920. The same sort of conversion works for the regulations dealing with the administrative review process appearing at 20 C.F.R. §§ 404.900 to 404.999 for the Social Security disability program. The parallel SSI regulations, which

contain some differences, begin at 20 C.F.R. § 416.1400.

To be technically correct according to the Bluebook system of citation, whenever one cites the Code of Federal Regulations, one is supposed to reference the year of the latest bound volume, e.g., 20 C.F.R. § 404.1520 (2000). If a new regulation was issued after the publication date of the latest bound volume, a Federal Register cite should be provided. We have included some important Federal Register citations; but we have chosen not to state the year of the latest C.F.R. because to do so would require annual changes in virtually every citation in this book and would significantly increase subscriber costs for supplements. When you are writing a federal court brief and you want to use correct citation form, be sure to determine the year of the latest C.F.R. and include this in your citation.

This book will cite the Social Security Act using the U.S. Code system, the system usually used by lawyers. The Social Security Administration, on the other hand, usually cites to a section number of the Social Security Act itself. It is easy to convert to the U. S. Code system references to the Social Security Act for Title II, the title pertaining to the Social Security retirement, survivors and disability programs. Simply add 200. For example, a reference to § 223 of the Social Security Act, the section that contains the definition of disability, is a reference to 42 U.S.C. § 423.

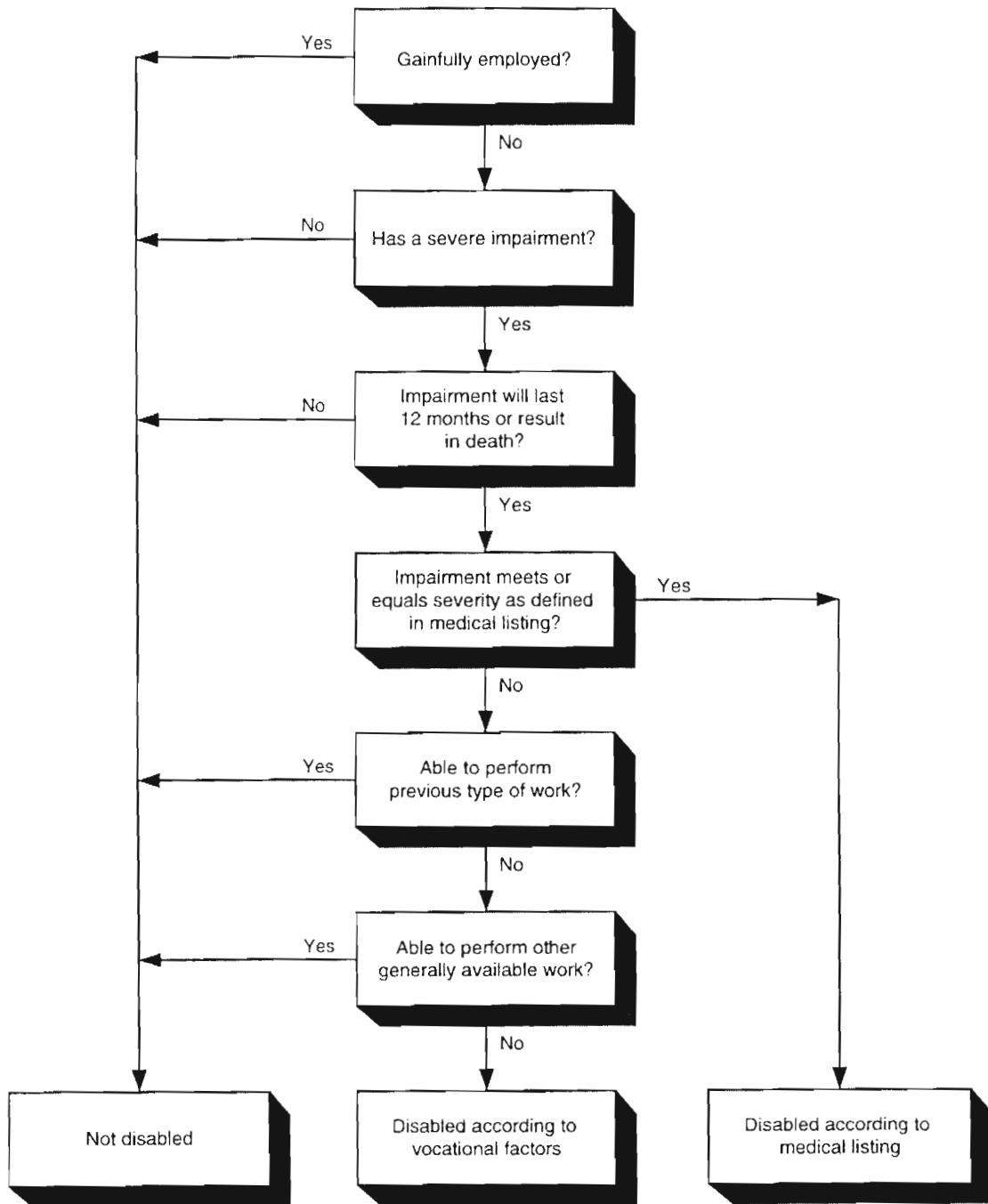
Converting references to Title XVI of the Social Security Act, that part of the Act dealing with SSI, to the U.S. Code System is more complicated. Title XVI appears in the Social Security Act at §§ 1601 through 1635; but these sections are crammed into the U.S. Code system from 42 U.S.C. §§ 1381 through 1383d. You may need to use a conversion table, such as one published by West's Social Security Reporting Service, to find a reference to Title XVI in the U.S. Code system.

### **§110 *Determining Disability Under the Regulations and Rulings***

Social Security regulations provide a five-step sequential evaluation process for determining disability. In addition, the claimant's impairment must be expected to result in death or have lasted or be expected to last at least 12 months. This is called the duration requirement. It is a requirement that, although not part of the sequential evaluation process, logically could be inserted into this process following step 2, the severity step. Thus, it is included in the following outline of the disability determination process.

(Text continued on page I-14.)

**§111 Diagram: Disability Decision and Sequential Evaluation Process**



### **§112 Sequential Evaluation Process — Overview**

Under the five-step sequential disability evaluation process described in 20 C.F.R. § 404.1520 the following must be proved by a claimant in order to be found disabled:

1. The claimant is not engaging in “substantial gainful activity” (SGA); *and*
2. The claimant has a “severe” impairment; *and*
3. The impairment meets or “equals” one of the impairments described in the Social Security regulations known as the “Listing of Impairments”; *or*
4. Considering the claimant’s “residual functional capacity” (RFC), that is, what the claimant can still do even with his or her impairments, the claimant is unable to do “past relevant work” (PRW); *and*
5. Other work within the claimant’s RFC, considering age, education and work experience, does not exist in the national economy in significant numbers.

Watch out for the terms identified by quotation marks above and the initials that go with some of them. They have precise meanings in the regulations and rulings that are not necessarily the meanings one would expect. It will be necessary for you to learn these terms if you want to make sense out of Social Security regulations.

### **§113 Step 1: Substantial Gainful Activity**

Because it is a sequential process, if the proof fails at any step other than step 3, the process is terminated and the claimant is found not disabled. Thus, if a claimant is working, that is, performing “substantial gainful activity” (SGA), no matter how impaired that claimant is, the claimant cannot be found disabled. This is the reason that our hypothetical bookkeeper in §100 is not disabled.

Work is evaluated “without regard to legality.” 20 C.F.R. § 404.1572, 42 U.S.C. §§ 423(d)(4)(B) and 1382c(a)(3)(E). Thus, illegal activity may be substantial gainful activity. *See also* SSR 94-1c, which adopted *Dotson v. Shalala*, 1 F.3d 571 (7th Cir. 1993), as a Social Security ruling.

Work, however, must be both “substantial” and “gainful.” “Substantial work activity . . . involves doing significant physical or mental activities.” 20 C.F.R. § 404.1572(a). Work may not be substantial

when a claimant is unable “to do ordinary or simple tasks satisfactorily without more supervision or assistance than is usually given other people doing similar work” or when a claimant is doing work “that involves minimal duties that make little or no demands” on the claimant and that are of “little or no use” to the employer or to the operation of a self-employed business. 20 C.F.R. § 404.1573(b). But even sheltered work may be substantial. 20 C.F.R. § 404.1573(c).

SSA defines gainful activity broadly: “Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.” 20 C.F.R. § 404.1572(b). Nevertheless, when a claimant is an employee of someone else, whether work is “gainful” is *usually* determined by looking only at the claimant’s earnings. But, because SSA does not want to let employed claimants slip past this step if they are in a position to control the timing or amount of their income (*e.g.*, when claimants are working for relatives), SSA will look at factors in addition to the amount of income to make sure such claimants are not cheating. 20 C.F.R. § 404.1574(b)(3)(ii).

This problem is always presented for self-employed claimants, who SSA views very suspiciously. SSA looks carefully at a self-employed person’s work activity and its value to the business, even if the person is working at a loss (as so many unimpaired self-employed people do from time to time). *See* 20 C.F.R. § 404.1575(a)(2) and SSR 83-34, which provide evaluation guides for the self-employed. *See also* §176.3 of this book.

Whether the claimant is employed by someone else or is self-employed, to arrive at countable income, SSA allows deduction from earnings for what it calls “impairment-related work expenses,” which are usually payments made by the claimant for drugs or medical treatment for the disabling impairment but may also include payments for some transportation costs, vehicle modification, attendant care services, residential modification, *etc.* SSA’s impairment-related work expense rules must be reviewed carefully before making a deduction because some expenses you wouldn’t expect are included (such as payment for treatment for the disabling impairment that the claimant has to pay whether the claimant works or not) and some expenses that you might expect to

qualify are excluded (such as payment for health insurance). See 20 C.F.R. § 404.1576, SSR 84-26, and §274 of this book.

In determining if work is substantial gainful activity, SSA averages income according to rules that consider the nature of the work, the period of time worked, and whether the SGA level changed during the time the claimant worked. See 20 C.F.R. §§ 404.1574a and SSR 83-35.

The SGA level, which was \$300 per month during all of the 1980s and \$500 per month from 1990 until July 1999, when it was raised to \$700, is becoming considerably more generous than it used to be because of cost-of-living increases that have been applied beginning with the year 2001. 20 C.F.R. § 404.1574(b)(2)(ii). For example, for the year 2009, average countable earnings of more than \$980 per month show that work was substantial gainful activity. 20 C.F.R. § 404.1574(b)(2).

You can find the SGA amount for the current year on the Internet at [www.ssa.gov/cola/](http://www.ssa.gov/cola/). Because the regulations contain SGA dollar amounts only for years through 2000 (and only a formula for years after that), Appendix 11 of this book provides the SGA amounts (and several other amounts that are based on annual cost-of-living increases) for years beginning with the year 2000. Historical SGA amounts can also be found at POMS DI 10501.015.

### §114 Step 2: The Severity Step

At step two of the sequential evaluation process, it is necessary to determine if a claimant's impairments are "severe," a misleading word that encouraged erroneous decisions and spawned much litigation in the past. This step, which incorporates two different concepts, was intended to weed out frivolous cases involving either 1) no medically determinable impairments or 2) *slight* medically determinable impairments that impose only *minor* limitations on ability to work. Virtually any reduction in residual functional capacity (what the claimant can still do even with his or her impairments) satisfies the requirement that there be a severe medically determinable impairment. See 20 C.F.R. § 404.1520(c), § 404.1521, SSR 85-28 and SSR 96-3p. As such, medically determinable impairments are divided into two categories:

(1) slight impairments that are referred to in SSA's peculiar lingo as "nonsevere" impairments and

(2) all other impairments that are, therefore, "severe."

As a practical matter, when you prove a reduction of the claimant's residual functional capacity at step 4, you have effectively proven that the claimant has a severe medically determinable impairment. No separate proof is required to show a significant limitation of ability to do "basic work activities." See 20 C.F.R. § 404.1521. SSA is supposed to consider the combined effect of all impairments, including multiple non-severe impairments, in determining if a claimant's overall condition meets the requirement of being "severe." 20 C.F.R. § 404.1523. Note that even subjective symptoms, as long as they arise from a medically determinable impairment, must be considered in assessing whether an impairment, or group of impairments, reduces a claimant's ability to do basic work activity. SSR 96-3p. If an adjudicator is "unable to determine clearly" the effect of an impairment on a claimant's ability to do basic work activities, the adjudicator is directed by SSR 96-3p to proceed with the next steps of the sequential evaluation process. Thus, close cases are to be decided in favor of finding an impairment to be severe.

On the other hand, "[n]o symptom or combination of symptoms can be the basis for a finding of disability, no matter how genuine the individual's complaints may appear to be, unless there are medical signs and laboratory findings demonstrating the existence of a medically determinable physical or mental impairment." SSR 96-4p. When there is no "medically determinable impairment," an individual may be found not disabled at step 2 of the sequential evaluation process. Nevertheless, as a rule, if a doctor has enough information to make a legitimate diagnosis, a claimant has a medically determinable impairment. When there is a controversy over which diagnosis is correct, if medical signs or laboratory findings show any abnormality, the claimant has a medically determinable impairment even if the doctors do not agree on which diagnosis is best.

Step 2 denials are usually hogwash. Do not be intimidated by a step 2 denial if your own eyes tell you that the claimant is significantly impaired and you believe the claimant. Indeed, you should not be intimidated by step 2 denials even after a hearing in a non-frivolous case. Even though the U.S. Supreme Court upheld the facial validity of the step 2 regulation in *Bowen v. Yuckert*, 482 U.S. 137 (1987), federal courts have not treated SSA kindly in step 2 cases.

Federal courts usually send step 2 cases back to SSA for completion of the sequential evaluation process. Indeed, after the Supreme Court upheld the facial validity of step 2 in *Bowen v. Yuckert*, it remanded the case to the Ninth Circuit which, in turn, remanded *Yuckert v. Bowen*, 841 F.2d 303 (9th Cir. 1988), refusing to affirm a step 2 denial in that case.

### §115 Duration Requirement

Unless an impairment is expected to result in death, it must have lasted or be expected to last for a continuous period of 12 months. 20 C.F.R. § 404.1505(a). *See also* 20 C.F.R. § 404.1522(b).

The regulation implies that the impairment must be continuously "severe." This interpretation is a concern for those impairments that wax and wane or have short periods of remission but have active periods sufficient to preclude engaging in substantial gainful activity on a sustained basis. The regulation, properly interpreted, does not require a denial of disability benefits for failure to meet the duration requirement under such circumstances. *Cf. Moore v. Sullivan*, 895 F.2d 1065, 1069 (5th Cir. 1990).

The regulation specifically prohibits tacking together unrelated severe impairments to meet the duration requirement. 20 C.F.R. § 404.1522(a). This is the reason that our hypothetical packer in §100 is not disabled. This regulation appears to be the unintended consequence of the wording of the definition of disability. 42 U.S.C. § 423(d)(2)(A). It is hard to find a public policy reason for this harsh result.

Denials based on the duration requirement usually occur in those cases where, at the time of the decision, the duration requirement is not met and the impairment is the sort that is likely to improve within 12 months. For those impairments that may or may not improve before the duration requirement is met, sometimes a state agency decision maker will delay a case just to see if the claimant continues to be disabled. Because of the slow progress of the administrative process, the 12 months usually have passed by the time a claimant actually attends a hearing, thus permitting an accurate retrospective evaluation.

Once the twelve-month duration requirement is met, you may ask for a finding of a closed period of disability in the situation where a claimant's condition has improved to the degree that he or she is able to return to work.

### §116 Step 3: Listing of Impairments

In order to be found disabled at step 3 of the sequential evaluation process, a claimant's medical signs, findings, and symptoms must meet or "medically equal" one of the set of medical signs, findings and symptoms found in the Listing of Impairments. The Listing of Impairments is a set of medical criteria for disability found at Appendix 1 of the Social Security disability regulations, officially cited as 20 C.F.R. Part 404, Subpart P, Appendix 1.

If a claimant can be found disabled at step 3, there is no inquiry into ability to do past work or other work. This is the reason that our hypothetical lawyer in §100 is disabled despite the fact that he retains the ability to practice law. His impairment meets § 1.05B of the Listings, which deals with amputation of one or both feet.

Although you should look at the issue in every case, you will want to take an especially hard look at the Listings when your client can still perform past relevant work. If your client's impairment meets or equals one of the impairments in the Listings, the ability to perform past work is irrelevant.

It is possible to argue that your client's impairments are medically equivalent to an impairment in the Listing of Impairments. 20 C.F.R. § 404.1526(a). This comes up in four situations: (1) your client does not have one of the essential findings stated in the Listings for your client's particular impairment but your client has other findings; (2) your client has all the essential findings but one or more of the findings is not quite severe enough and your client has other findings; (3) your client's impairment is not described in the Listings but it may be as severe as an analogous impairment that appears in the Listings; or (4) your client has a combination of impairments, none of which meet the Listings but the cumulative total of your client's impairments could still equal the Listings. 20 C.F.R. § 404.1526(b). It is possible to compare medical findings, symptoms and limitations in functioning to see if one claimant, whose impairment does not appear in the Listings, is as disabled as another claimant whose impairment meets a particular Listing. *See* §336. However, before an ALJ or the Appeals Council can find that a claimant's impairment medically equals a Listed Impairment, the decision maker must receive the opinion of a medical expert hired by SSA. *See* SSR 96-6p.

In regular Social Security disability and SSI cases involving adults, if a claimant cannot be found disabled at step 3, the inquiry proceeds to step 4. For a discussion of widow(er)'s disability under pre-1991 standards and disabled children's eligibility for SSI, *see* §§142 and 145.

### **§117 Step 4: Past Relevant Work**

In the usual case, attention will focus on steps 4 and 5 of the sequential evaluation process. At step 4 the claimant has the burden of proving that he or she is incapable of doing any "past relevant work." To qualify as past relevant work:

1. The job must have been performed within:
  - a. 15 years prior to adjudication; or
  - b. if insured status has lapsed, 15 years prior to the date last insured, 20 C.F.R. § 404.1565(a). *See* §131 on insured status.
2. The job must have been "substantial gainful activity," 20 C.F.R. § 404.1565(a). That is,
  - a. the job must have involved doing significant physical or mental activities, 20 C.F.R. § 404.1572(a); and
  - b. it must have been done at the SGA level. *See* 20 C.F.R. §§ 404.1574-1575.
3. The job must have lasted long enough for the claimant to develop the facility needed for average performance. *See* 20 C.F.R. § 404.1565(a) and SSR 82-62.

Note that a job qualifies as past relevant work even if the job was done only part-time, as long as it was substantial gainful activity. SSR 96-8p, footnote 2. Thus, you have to identify the claimant's easiest full or part time past relevant job and then figure out why the claimant cannot still do it. If the claimant had an easy job in the past 15 years that he or she can still do, the claimant will be found not disabled like our hypothetical truck driver in §100, unless you can put together an argument that the impairments meet or medically equal one of the impairments in the Listing of Impairments.

You must prove that your client cannot do a past relevant job even if that job no longer exists in the economy, an SSA position that was upheld by the

U.S. Supreme Court in *Barnhart v. Thomas*, 540 U.S. 20 (2003).

In addition, if a claimant retains the capacity to do a past relevant job as it is ordinarily done, the claimant will be found not disabled even though the claimant's actual past job required greater exertion and the claimant is unable to do that particular job. The "job as it is ordinarily done" rule will not be applied to a claimant's benefit, however. If a claimant's own past work was easier than the way the job is ordinarily done, SSA will examine the actual job requirements as the claimant performed them in determining whether the claimant can perform past relevant work. *See* Social Security Ruling 82-61.

Determining whether a claimant can do past relevant work is accomplished by comparing the claimant's current residual functional capacity with the physical and mental demands of past relevant work. 20 C.F.R. § 404.1520(f).

For more about past relevant work, *see* §347.

### **§118 Step 5: Other Work**

Once you have proven that the claimant cannot perform past relevant work, you move on to the most complicated step—determining whether the claimant can make an adjustment to other work that exists in significant numbers in the national economy, considering the claimant's remaining work capacity, age, education and work experience. SSA has provided an important tool for determining whether a claimant is or is not disabled because of medical impairments and vocational factors: the Medical-Vocational Guidelines, discussed in detail beginning at §120. The Medical-Vocational Guidelines, popularly known as the "grids," provide that the older a claimant is, the easier it is to be found disabled. Thus, our hypothetical housewife in §100, is found disabled despite the remaining physical capacity to do most jobs in the economy (sedentary, light and medium work) because of the adversity of age (55), education (less than a high school graduate), and work experience (none in the past 15 years). *See* Rule 203.10 of the Medical-Vocational Guidelines. Indeed, this rule may still be applied if "the work activity performed within this 15-year period does not (on the basis of job content, recency, or duration) enhance present work capability." SSR 82-63.

### §119 Summary and Exceptions

As you can see, determining disability involves a multi-step reasoning process. The one-step “he can’t work” sort of argument won’t get you very far. Common sense can be applied only where there isn’t a regulation or Social Security Ruling to the contrary.

#### Two Main Routes to Disability Finding

The sequential evaluation process provides two main routes for a finding of disability. One route involves a purely medical determination that the claimant’s impairment meets or medically equals an impairment described in the Listing of Impairments. The other route to a disability finding involves assessing a combination of medical and vocational factors that culminates at step 5 of the sequential evaluation process and, to one degree or another, uses the Medical-Vocational Guidelines.

#### Three Special Medical-Vocational Profiles

In addition, there are three other ways to be found disabled without completing the standard five-step sequential evaluation process. If a claimant fits one of three special medical-vocational profiles, the claimant is found disabled without proceeding to step five and without consulting the Medical-Vocational Guidelines. Indeed, for one of the three profiles, it is not even necessary to assess residual functional capacity. A claimant who fits this profile is found disabled by simply showing that he or she has a severe impairment. This profile, which is described at 20 C.F.R. § 404.1562(b), provides that a claimant is disabled who:

- Has a severe, medically determinable impairment;
- Is age 55 or older;
- Has an 11th grade education or less; and
- Has no past relevant work experience.

Another profile, known as the “worn-out worker,” describes a claimant who:

- Has no more than a sixth grade education;
- Worked 35 years at arduous unskilled labor; and

- Is unable to do the arduous unskilled labor done in the past.

20 C.F.R. §§ 404.1520(g)(2) and 404.1562(a). See also SSR 82-63 and *Walston v. Sullivan*, 956 F.2d 768 (8th Cir. 1992). In effect, the worn-out worker is found disabled at step four with proof that he or she is incapable of performing past relevant work. An article by ALJ Peter J. Lemoine, “The Worn-Out Worker Rule Revisited,” 49 West’s Social Security Reporting Service 883, presents a well-reasoned analysis that demonstrates that the worn-out worker rule may be more useful than it may appear at first glance.

A claimant may have more formal education than sixth grade and still be considered to have marginal education if he or she functions at the marginal educational level. 20 C.F.R. § 404.1564(b). Even light work “if it demands a great deal of stamina or activity such as repetitive bending and lifting at a very fast pace” (SSR 82-63), may qualify as arduous. The 35 years of qualified work activity need not be continuous and may be interspersed with work activity that does not satisfy the “arduous unskilled labor” requirement. Not all prior work need be unskilled if work at higher skill level is isolated, brief, or remote, or if skills are not transferable. ALJ Lemoine points out that as long as there are 35 years of qualified employment that the claimant can no longer perform, the existence of an unskilled job in the past which the claimant retains the capacity to perform will not make the worn-out worker rule inapplicable.

The third medical-vocational profile, known as the “lifetime commitment” profile, does not appear in 20 C.F.R. § 404.1562. Instead, it appears only in the POMS (along with the other two profiles discussed above), but it is consistent with the principles stated in SSRs 82-63 and 85-15. Like the worn-out worker, this claimant is found disabled at step four with proof of inability to do past relevant work. POMS DI 25010.001B.3 provides:

A finding of “disabled” will be made for persons who:

- Are not working at SGA level, and
- Have a lifetime commitment (30 years or more) to a field of work that is unskilled, or is skilled or semi-skilled but with no transferable skills, and

- Can no longer perform this past work because of a severe impairment(s), and
- Are closely approaching retirement age (age 60 or older), and
- Have no more than a limited education.

(See DI 25001.001 for the definitions of “limited education” and DI 24505.000 for a discussion of severe impairment.)

**NOTE:** To satisfy the requirement for this profile, the 30 years of lifetime commitment work does not have to be at one job or for one employer but rather work in one field of a very similar nature. If the person has a history of working 30 years or more in one field of work, the use of this profile will not be precluded by the fact that the person also has work experience in other fields, so long as that work experience in other fields is not past relevant work which the person is still able to perform.

### **Six Ways to Be Found Not Disabled**

The regulations provide six possibilities for a finding of not disabled. A claimant is not disabled who:

- Is working at the SGA level;
- Has no medically determinable impairment;
- Has an impairment that does not significantly limit the physical or mental ability to do basic work activities;
- Fails to meet the duration requirement;
- Is capable of past relevant work;
- Is capable of other work.

### **Two Ways to Be Found Disabled But Not Eligible**

There are two ways for a claimant to be found *not* disabled *after* the sequential disability evaluation process has been completed and SSA has concluded that the claimant is, in fact, disabled. This can happen when a claimant fails to follow prescribed treatment or when alcoholism or other drug abuse is a contributing factor material to the determination of disability. Although SSA itself never refers to these issues precisely this way, where they apply, you can view these issues as involving additional steps in the sequential evaluation process.

The regulations provide that SSA will not find a claimant disabled if the claimant, without good reason, does not follow prescribed treatment. 20 C.F.R. § 404.1530. Although the regulation doesn’t say so, SSR 82-59 makes it clear that a determination finding a claimant not disabled on this basis is made only after SSA finds that the claimant is otherwise disabled. The treatment must be prescribed by the claimant’s own physician and, according to SSR 82-59, this treatment must be “clearly expected to restore” the claimant’s ability to work. See §278 of this book for additional information.

If drug addiction or alcoholism is “a contributing factor material to the determination of disability,” a claimant will be found not disabled. 42 U.S.C. §§ 423(d)(2)(C) and 1382c(a)(3)(J). This issue is addressed only after it is determined that the claimant is disabled when considering all impairments, including any impairments involving drug addiction or alcoholism. 20 C.F.R. § 404.1535(a). Then SSA looks at the claimant’s impairments again to consider whether the claimant would still be disabled if the claimant stopped using drugs or alcohol. 20 C.F.R. § 404.1535(b)(1). See §249 of this book for additional discussion. (Note that SSA has not amended its regulations after Congress provided that a claimant was not disabled if drug addiction or alcoholism is a contributing factor material to the determination of disability. Thus, regulations that deal with treatment requirements for claimants with drug addiction or alcoholism, 20 C.F.R. §§ 404.1536 to 404.1541, are not applicable.)

### **Non-Disability Requirements**

As we shall see, there are other requirements, which have nothing to do with whether a claimant is disabled—SSA calls these “non-disability requirements”—that may be used by SSA to deny benefits. These issues, “insured status” for Social Security disability claims, and alien status and income/asset limitations for SSI claims, are supposed to be evaluated before SSA looks at medical issues (and they usually are), but sometimes a problem is caught when SSA is getting ready to pay benefits after SSA has already concluded that a claimant meets the disability requirements. See §§131, 132, and 136.

## **§120 Medical-Vocational Guidelines**

In determining whether a claimant is capable of performing other work that exists in significant numbers, SSA decision makers are faced with the difficult task of weighing the relative importance of the factors for consideration identified by the Social Security Act: the claimant's remaining work capacity, known as residual functional capacity or RFC; age; education; and work experience, including whether or not the claimant has developed work skills transferable to other work within his or her RFC. Before 1979 SSA relied on vocational expert (VE) testimony to analyze these factors and determine how many jobs existed in the economy for a particular claimant. It was then up to the ALJ to determine whether the number of jobs identified by the vocational expert was "significant." As one might imagine, this procedure yielded disparate results, varying from VE to VE and ALJ to ALJ.

To achieve more consistency in decision-making, SSA promulgated regulations, effective in 1979, known as the Medical-Vocational Guidelines. These appear as Appendix 2 to the Social Security disability regulations cited as 20 C.F.R. Part 404, Subpart P, Appendix 2. The Medical-Vocational Guidelines contain three charts, called grids, which answer the question whether a claimant is or is not disabled for different combinations of maximum physical residual functional capacity, age, education and work experience. If a claimant's profile matches one of the rules in the Medical-Vocational Guidelines, the rules, which are binding on decision-makers, direct the outcome of the case. See §121.1 for a chart that shows the maximum residual functional capacity a claimant can have and still be found disabled. You may use this

chart to determine to what degree your client must be exertionally limited if he or she is to be found disabled. But do not neglect a careful analysis of age, education and work experience. Your analysis might make a different rule applicable.

If a claimant's profile differs from that described in the grids, the rules do not directly answer the question of whether the claimant is or is not disabled—but they must be used as a "framework" for decision-making. This happens where a claimant's exertional limitations fall between those described by the three grids for sedentary, light and medium work; where a claimant cannot do a full range of sedentary work; and where there are nonexertional limitations such as in cases involving mental, sensory or skin impairments, postural or manipulative limitations or environmental limitations. As a rule, ALJs call vocational experts to testify when the Medical-Vocational Guidelines must be used as a framework.

## **§121 Maximum Residual Functional Capacity**

The following chart is a composite of information from the three grids in the Medical-Vocational Guidelines. The chart focuses on those rules that result in a claimant being found disabled. It shows different combinations of age, education and work experience with the maximum exertional residual functional capacity that a claimant may have and still be found disabled. Thus, the chart shows what you have to prove when, for example, a 55-year-old high school graduate with an unskilled work background comes to your office to discuss a heart impairment: the claimant must have an RFC for light work or less in order to win the case.

(Text continued on page 1-22.)

**§121.1 Chart: Maximum RFC Possible for Disability Finding**

Age	Education	Previous work experience	Max. RFC	Rule
60-64	6th grade or less	Unskilled	Medium	203.01
	7th to 11th grade	Unskilled	Light	202.01
	11th grade or less	None	Medium	203.02
	11th grade or less	Skilled or semiskilled— skills not transferable	Light	202.02
	High school graduate or more— does not provide for direct entry into skilled work	Unskilled or none	Light	202.04
	High school graduate or more— does not provide for direct entry into skilled work	Skilled or semiskilled— skills not transferable	Light	202.06
55-59	11th grade or less	None	Medium	203.10
	11th grade or less	Unskilled	Light	202.01
	11th grade or less	Skilled or semiskilled— skills not transferable	Light	202.02
	High school graduate or more— does not provide for direct entry into skilled work	Unskilled or none	Light	202.04
	High school graduate or more— does not provide for direct entry into skilled work	Skilled or semiskilled— skills not transferable	Light	202.06
50-54	Illiterate or unable to communicate in English	Unskilled or none	Light	202.09
	11th grade or less—at least literate and able to communicate in English	Unskilled or none	Sedentary	201.09
	High school graduate or more— does not provide for direct entry into skilled work	Unskilled or none	Sedentary	201.12
	High school graduate or more— does not provide for direct entry into skilled work	Skilled or semiskilled— skills not transferable	Sedentary	201.14
45-49	Illiterate or unable to communicate in English	Unskilled or none	Sedentary	201.17
	All educational levels—at least literate and able to communicate in English	Unskilled, none, or skilled or semiskilled— skills not transferable	Sedentary occupational base must be significantly compromised	201.00(h)
18-44	All educational levels including illiterate or unable to communicate in English	Unskilled, none, or skilled or semiskilled— skills not transferable	Sedentary occupational base must be significantly compromised	201.00(h)

## §122 Age

Age is second only to residual functional capacity as a determinant of whether or not someone is found disabled by the Medical-Vocational Guidelines. The regulations provide that in determining whether a claimant is disabled, SSA will consider the claimant's chronological age in combination with the claimant's residual functional capacity, education, and work experience. SSA will not consider a claimant's ability to adjust to other work on the basis of the claimant's age alone. "In determining the extent to which age affects a person's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the person's ability to make such an adjustment." 20 C.F.R. § 404.1563(a).

SSA groups claimants who are under age 45, those ages 45 through 49, 50 through 54, 55 through 59, and 60 through 64. Those within each age category are treated alike. Thus, a 50-year-old claimant will be treated the same as a 54-year-old claimant. However, according to the regulations, these age categories will not be applied "mechanically in a borderline situation." 20 C.F.R. § 404.1563(b) and SSR 86-8. Therefore, a claimant who is within a few months of a birthday that puts him or her into a disabled category in the Medical-Vocational Guidelines is supposed to get the benefit of the doubt.

Normally where a rule directs a conclusion that a claimant is disabled because of reaching a specified age, SSA will find the claimant disabled as of the day before his or her birthday. POMS DI 25015.005 A.1. and GN 00302.400. But where the alleged onset date is a few months prior to an age at which a rule directs a finding of disabled, the Appeals Council has stated that it will take a "sliding scale" approach by looking at whether a claimant has additional vocational adversities that support use of the higher age category. HALLEX II-5-3-2.

For example, where poor education or limited work experience operates against a claimant, one may argue that the age category ought to be stretched. According to POMS DI 25015.005A.1, the borderline age rule applies only when a claimant is within "a few days or a few months" of the next higher age category. "Determining how much time can separate an individual's actual age from the next higher age category is a matter for adjudicative judgment. Such judgments must be supported by the evidence in file and be carefully

explained. However, finding a borderline situation as much as one year before the next higher age is difficult to justify and, therefore, will be rare." POMS DI 25015.005A.

According to POMS DI 25015.005B.1:

Once it has been decided that a borderline age situation exists ..., the adjudicator then considers whether the specific facts of the individual case support the use of the next higher age category. If they do not, the individual's chronological age is used in adjudication—even when he or she is only a few days from attaining a critical age.

- The medical-vocational rules fully consider the relative adversities of a claimant's exertional capabilities, age, education and work experience (including skill level).
- Therefore, additional vocational adversities in residual functional capacity (RFC), education, or work experience (beyond those already considered in the rules) are needed to support a determination to use the next higher age.
- Additional vocational adversity is found when some adjudicative factor(s) is relatively more adverse when considered in terms of that factor's stated criteria, or when there is an additional element(s) which has adverse vocational implications.
- The longer the period of time between an individual's actual age and attainment of the next higher age category, the progressively greater the additional adversity that must be present to support the use of the next higher age.
- Conversely, the shorter the period between an individual's actual age and the next higher age category, the less adversity and justification that are needed.
- If there are no additional vocational adversities justifying use of the higher age category, the adjudicator will use the claimant's chronological age.

The examples given in POMS DI 25015.005B.2 of additional vocational adversities are quite generous:

- "The presence of an additional impairment(s) which infringes upon—without substantially narrowing—a claimant's remaining occupational base (e.g., a nonse-

vere allergy to printing ink or other unique substance used in an isolated industry”);

- “A limitation that does not significantly erode an individual’s remaining unskilled occupational base (e.g., a limitation to no overhead reaching or to no frequent stooping for an individual with a sedentary exertional level, or any mental limitation that at least permits the performance of unskilled work)”;
- “A claimant who may be barely literate in English or have only a marginal ability to communicate in English”;
- “A history of work experience in an unskilled job(s) in one isolated industry or work setting (e.g., a family business or oyster bed worker or forest worker).”

Thus, it appears that virtually any vocational adversity may justify use of a higher age category in a borderline age situation.

How age affects a claimant’s ability to work is not explained anywhere in the regulations. Instead, it appears in the commentary that was published when the Medical-Vocational Guidelines were first promulgated. “[W]here age is critical to a decision, recognition is taken of increasing physiological deterioration in the senses, joints, eye-hand coordination, reflexes, thinking processes, *etc.*, which diminish a severely impaired person’s aptitude for new learning and adaptation to new jobs.” 43 Fed. Reg. 55,359 (1978). At another point this commentary refers to age “in terms of how the progressive deteriorative changes which occur as individuals get older affect their vocational capacities to perform jobs.” 43 Fed. Reg. 55,353 (1978).

### §123 Education

As a rule, SSA uses the highest grade completed in school in evaluating educational level. However, the regulation itself recognizes that a person’s actual educational abilities may be higher or lower. SSA will accept evidence that a claimant’s actual educational level is lower than the numerical grade completed in school. 20 C.F.R. § 404.1564(b). Achievement testing, such as with the Wide Range Achievement Test (WRAT), may show a low educational level.

### §124 Work Experience

SSA classifies work as unskilled, semiskilled and skilled. Unskilled work is work that may be

learned in 30 days or less. 20 C.F.R. § 404.1568(a). Everything else is either semiskilled or skilled. For the purposes of the Medical-Vocational Guidelines, semiskilled and skilled work is treated as one category. This treatment has spawned the issue of transferability of work skills. *See*, §349 *et seq.*

### §125 Full or Wide Range of Work

Under certain circumstances, a claimant can somewhat exceed the maximum residual functional capacity stated in the Medical-Vocational Guidelines (see chart at §121.1) and still be found disabled under the rule for the lower RFC. To give an example: a claimant’s doctor says the claimant may not lift more than 50 pounds but fails to explain that the claimant may not engage in repetitive lifting of weights of more than about 10 pounds and may not bend or stoop frequently. Based on the 50-pound lifting limitation, SSA may leap to the conclusion that the grid for medium work should be applied and issue a denial decision.

However, to apply a rule from one of the grids in the Medical-Vocational Guidelines to the facts of a particular claimant’s case, that claimant must be capable of doing a “full or wide range” of work at the exertional level applicable to that grid. That is, the claimant must be capable of substantially all of the activities at that exertional level. SSRs 83-10 and 83-11.

Medium work requires frequent lifting of 25 pounds and frequent bending or stooping, both of which are beyond the capacity of our hypothetical claimant. Thus, our claimant has the RFC for only slightly more than light work. Therefore, the light grid may be applied, which may require a decision that this claimant is disabled. For more information about how to evaluate an RFC that falls between ranges of work, *see* Social Security Ruling 83-12.

As you can see, understanding the definitions of the exertional levels that appear in 20 C.F.R. § 404.1567 is extremely important to application of the proper grid to your client’s case. Social Security Ruling 83-10 provides the most detailed explanation of medium, light and sedentary work. These explanations are set forth below.

#### §125.1 Definition of Medium Work From SSR 83-10

“The regulations define medium work as lifting no more than 50 pounds at a time with frequent lift-

ing or carrying of objects weighing up to 25 pounds. A full range of medium work requires standing or walking, off and on, for a total of approximately 6 hours in an 8-hour workday in order to meet the requirements of frequent lifting or carrying objects weighing up to 25 pounds. As in light work, sitting may occur intermittently during the remaining time. Use of the arms and hands is necessary to grasp, hold, and turn objects, as opposed to the finer activities in much sedentary work, which require precision use of the fingers as well as use of the hands and arms.

“The considerable lifting required for the full range of medium work usually requires frequent bending-stooping. (Stooping is a type of bending in which a person bends his body downward and forward by bending the spine at the waist.) Flexibility of the knees as well as the torso is important for this activity. (Crouching is bending both the legs and spine in order to bend the body downward and forward.) However, there are relatively few occupations in the national economy which require exertion in terms of weights that must be lifted at times (or involve equivalent exertion in pushing or pulling), but are performed primarily in a sitting position, *e.g.*, taxi driver, bus driver, and tank-truck driver (semiskilled jobs). In most medium jobs, being on one’s feet for most of the workday is critical. Being able to do frequent lifting or carrying of objects weighing up to 25 pounds is often more critical than being able to lift up to 50 pounds at a time.”

### **§125.2 Definition of Light Work From SSR 83-10**

“The regulations define light work as 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 in a particular light job may be very little, a job is in this category when it requires a good deal of walking or standing—the primary difference between sedentary and most light jobs. A job also is in this category when it involves sitting most of the time but with some pushing and pulling of arm-hand or leg-foot controls, which require greater exertion than in sedentary work; *e.g.*, mattress sewing machine operator, motor-grader operator, and road-roller operator (skilled and semiskilled jobs in these particular instances). Relatively few unskilled light jobs are performed in a seated position.

“‘Frequent’ means occurring from one-third to two-thirds of the time. Since frequent lifting or carrying requires being on one’s 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. The lifting requirement for the majority of light jobs can be accomplished with occasional, rather than frequent, stooping. Many unskilled light jobs are performed primarily in one location, with the ability to stand being more critical than the ability to walk. They require use of arms and hands to grasp and to hold and turn objects, and they generally do not require use of the fingers for fine activities to the extent required in much sedentary work.”

### **§125.3 Definition of Sedentary Work From SSR 83-10**

“The regulations define sedentary work as involving lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers and small tools. Although sitting is involved, a certain amount of walking and standing often is necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. By its very nature, work performed primarily in a seated position entails no significant stooping. Most unskilled sedentary jobs require good use of the hands and fingers for repetitive hand-finger actions.

“‘Occasionally’ means occurring from very little up to one-third of the time. Since being on one’s feet is required ‘occasionally’ at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday. Work processes in specific jobs will dictate how often and how long a person will need to be on his or her feet to obtain or return small articles.”

### **§126 RFC for Less Than Full Range of Sedentary Work**

Go back and look at the chart, §121.1, for the age categories under 50. At first glance, proof of disability for almost everyone under age 50 looks like an impossible task. Disability for such individuals

requires proof that they can do much less than a full or wide range of sedentary work, described by SSR 83-12 as a “significance compromise” of the sedentary occupational base. This means, according to SSR 96-9p, that jobs for them do not exist in significant numbers. Although this is frequently difficult, it is not impossible.

For example, our hypothetical machine operator in §100 has an RFC for much less than a wide range of sedentary work. He may be found disabled despite his young age and high school education because of a limitation to sedentary work *plus* an impairment that affects bimanual dexterity. This result is based on SSRs 83-10 and 96-9p, which point out that “most sedentary jobs require good use of both hands.” However, a note of caution is appropriate here. SSA’s position, in effect, is that although a person limited to sedentary work with limited bimanual dexterity will *usually* be found disabled, this conclusion can be rebutted by vocational expert testimony in an individual case.

For most claimants under age 50, as a preliminary matter, it is necessary to show that they can do neither a wide range of sedentary work nor a wide range of light work. It is essential, then, to have a thorough understanding of SSA’s definitions of sedentary and light work. See §§125.2 and 125.3, from Social Security Ruling 83-10.

In order to prove that the sedentary occupational base is significantly compromised, you will usually look for a combination of exertional and nonexertional impairments. Each additional impairment whittles away the range of sedentary work that a claimant is capable of doing to arrive at the point where jobs do not exist in significant numbers. See §§260 *et seq.*, on designing a case for a claimant under age 50. See §348.8, on dealing with vocational experts regarding whether significant numbers of jobs exist within the claimant’s RFC.

Often, you will find individuals who, for one reason or another, cannot sit for the six hours out of an eight-hour day required to do sedentary work, nor can they stand for six hours out of an eight-hour day required to do light work. A common residual functional capacity describes claimants who must alternate between sitting and standing. Although Social Security Ruling 83-12 analyzes this RFC, this RFC does present several challenges to lawyers representing claimants, a subject dealt with in detail at §§348.4 and 348.9. The SSR 83-12 statement on the subject is reproduced below.

### §126.1 **Alternate Sitting and Standing From SSRs 83-12 and 96-9p**

SSR 83-12 provides:

In some disability claims, the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. The individual may be able to sit for a time, but must then get up and stand or walk for a while before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work. (Persons who can adjust sitting and standing by doing so at breaks, lunch periods, etc., would still be able to perform a defined range of work.)

There are some jobs in the national economy—typically professional and managerial ones—in which a person can sit or stand with a degree of choice. If an individual had such a job and is still capable of performing it, or is capable of transferring work skills to such jobs, he or she would not be found disabled. However, most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a V[ocational] S[pecialist] should be consulted to clarify the implications for the occupational base.

SSR 96-9p added the following to the discussion of alternate sitting and standing jobs:

**“Alternate sitting and standing:** An individual may need to alternate the required sitting of sedentary work by standing (and, possibly, walking) periodically. Where this need cannot be accommodated by scheduled breaks and a lunch period, the occupational base for a full range of unskilled sedentary work will be eroded. The extent of the erosion will

depend on the facts in the case record, such as the frequency of the need to alternate sitting and standing and the length of time needed to stand. The RFC assessment must be specific as to the frequency of the individual's need to alternate sitting and standing. It may be especially useful in these situations to consult a vocational resource in order to determine whether the individual is able to make an adjustment to other work."

### **§127 Nonexertional Limitations**

Exertional abilities involve sitting, standing, walking, lifting, carrying, pushing and pulling. 20 C.F.R. § 404.1569a. A limitation of any other work-related ability is a nonexertional limitation. A list of categories and examples follows:

<b>Category</b>	<b>Example</b>
<b>Postural:</b>	<b>Need to alternate sitting and standing; Need to elevate leg; Difficulty turning head; Balance problems; Difficulty bending, stooping or squatting.</b>
<b>Manipulative:</b>	<b>Difficulties with reaching, grasping, handling, fingering.</b>
<b>Environmental:</b>	<b>Difficulties working around fumes, dust, etc.; Difficulties tolerating noise, heights, humidity or temperature extremes; Inability to be around dangerous machinery.</b>
<b>Mental:</b>	<b>Difficulties relating with others; Difficulty understanding, remembering or carrying out simple instructions; Inability to maintain attention or concentration; Poor stress tolerance.</b>
<b>Sensory:</b>	<b>Difficulties speaking, hearing, feeling or seeing.</b>

This list is by no means exhaustive. Note that a nonexertional *impairment* may impose more than one type of nonexertional *limitation*. For example, a skin impairment may impose both environmental and manipulative limitations and may affect work in other ways, also. Some impairments, such as certain gastro-intestinal impairments, impose nonexertional limitations by forcing a worker to be absent from the work area to lie down or go to the restroom, *etc.*

Many impairments have both exertional and nonexertional implications. For example, amputation of an arm will limit the weight a claimant can lift, an exertional impairment, and will limit bimanual dexterity, a nonexertional manipulative impairment.

Nonexertional impairments need to be carefully examined. They are discussed in Social Security Rulings 83-12, 83-14, 85-15, 96-4p, 96-8p and 96-9p. You may need to consult your own vocational expert for help evaluating the impact of such limitations on your client's ability to work.

### **§128 Transferable Work Skills**

You also may need a vocational expert to help you manage the complex problem of transferability of work skills. If you examine the three grids from the Medical-Vocational Guidelines, you will discover that a claimant is never disabled if the claimant has skills transferable to jobs within his or her RFC that exist in significant numbers. On the other hand a finding of no transferable work skills may lead to a finding of disability in certain cases. But note that in only two age categories does the issue of transferability of skills determine the outcome of the case. If a claimant is age 50 or older and is limited to sedentary work, the claimant wins or loses the case based upon whether or not the claimant has skills transferable to sedentary work. If a claimant is age 55 or older, this rule extends to light work—a claimant wins or loses based on whether or not the claimant has skills transferable to a significant range of semiskilled or skilled light work.

Since an unskilled work background produces no transferable skills, the rules about transferability apply only to claimants with histories of semi-skilled or skilled work.

The standards for determining transferability differ for age categories beginning with ages 50, 55 and 60, making it easier as a claimant gets older to

show that skills are not transferable to a significant range of work within the claimant's RFC. At age 50, garden-variety transferability of skills to sedentary work is all that is required to turn down a case based on the presence of transferable skills. To find that skills of a 55-year-old claimant are transferable to sedentary work, SSA must meet a higher burden. It must show that there is "very little, if any, vocational adjustment required in terms of tools, work settings, or the industry." Rule 201.00(f) of the Medical-Vocational Guidelines. A 55-year-old claimant limited to light work needs only garden-variety transferable work skills in order to be turned down. But at age 60 for claimants limited to light work, SSA must meet a higher burden—the same higher burden that applies to 55-year-olds limited to sedentary work. *See* Rules 202.00(c) and (e) of the Medical-Vocational Guidelines. *See* §349.6 for a chart showing the transferability standards for different ages; *and see* §349 for an extensive discussion of the transferability issue.

In that rare situation where recently completed education provides for direct entry into skilled work, the Guidelines always require a finding of not disabled. *See* Rules 201.05, 201.08, 201.13, 201.16, 202.05, 202.08, 203.09, 203.17 and 203.24.

### **§129 Medical-Vocational Guidelines as Framework for Decision-Making**

The grids govern the outcome of cases where they exactly describe a claimant. But the characteristics of many claimants do not fall squarely within the Guidelines. For example, a claimant's residual functional capacity may fall between ranges of work, a claimant may have only nonexertional impairments, or a claimant may have a combination of exertional and nonexertional impairments. In these cases, the Medical-Vocational Guidelines, by their own terms, are to be used as "an overall structure for evaluation" and a "framework for consideration" of disability. *See* Rules 200.00(d) and (e).

The most important principle of the Medical-Vocational Guidelines may be stated as follows: the more adverse a claimant's vocational factors (age, education and work experience), the more remaining residual functional capacity the claimant may have and still be found disabled. Consider our

hypothetical housewife in §100. She is age 55, has a limited education and no relevant work experience. The grids find her disabled despite her residual functional capacity for medium work, a capacity which means that she is physically capable of performing about 2,500 out of the approximately 3,100 unskilled occupations identified in the *Dictionary of Occupational Titles*.

This fundamental principle of the Guidelines is based on the concept of vocational adaptability. Younger, better-educated people with work experience are more adaptable to job changes despite a decline in RFC caused by a medical impairment. Such younger claimants must demonstrate a more restricted RFC in order to be found disabled. Indeed, according to the Medical-Vocational Guidelines, English-speaking claimants with exertional impairments who are under age 50 must have such restricted RFCs that they are limited to much less than a wide range of sedentary work—to the point that jobs do not exist in significant numbers, according to SSR 96-9p. Using the Guidelines as a framework, an English-speaking claimant under age 50 with nonexertional impairments must have a similarly restricted occupational base.

Using the Medical-Vocational Guidelines as a framework for analysis is a slippery concept that is not well understood by claimants' attorneys or even by ALJs. It is the subject of three Social Security Rulings, SSRs 83-12, 83-14 and 85-15. SSR 96-9p, with its emphasis on whether jobs exist in significant numbers, departs somewhat from the earlier rulings. *See* §348, for a detailed discussion.

### **§130 Social Security Disability and SSI: Nondisability Requirements and Other Differences**

#### **§131 Social Security Disability — Worker's Insured Status**

The Social Security program for workers functions like an insurance plan. There are requirements that a claimant for disability insurance must have:

- Contributed to the program (paid Social Security taxes) over a sufficiently long period to be “fully insured” and
- Contributed to the program recently enough to have “disability insured status”

In short, a worker must have paid Social Security taxes in order to be “insured,” just like paying the premiums for a private insurance policy. After stopping work (and stopping paying Social Security taxes), there will come a time when insured status will lapse, just like with a private insurance policy.

Contributions are counted in “quarters of coverage,” abbreviated QC by SSA, with minimum earnings requirements that, since 1978, go up every year. Before 1978 a nonagricultural worker generally could earn only one QC if he or she worked in only one calendar quarter of the year, no matter how great the earnings. (A calendar quarter is one of the following three-month periods: January through March, April through June, July through September, or October through December.) Before 1978 a worker need earn only \$50 in wages in a calendar quarter to count as a “quarter of coverage.” Thus, to evaluate how many QCs a worker earned prior to 1978, you need to know how much a worker earned and during what months of the year the money was earned. 20 C.F.R. §§ 404.140 through 404.146.

Beginning in 1978, an individual with sufficient earnings in one calendar quarter could earn QCs for the entire year, up to a total of four QCs for a calendar year. Thus, beginning in 1978 you need only consider total annual earnings and compare to the minimum earnings for a quarter of coverage. To take an example, in 2000 minimum earnings for a QC was \$780. Therefore, a claimant who earned \$3120 or more in wages in 2000 was credited with four QCs, no matter when the money was earned during 2000. 20 C.F.R. §§ 404.143 through 404.146.

Occasionally, you will encounter a case where, in order to meet the insured status rules, a claimant needs those extra quarters of coverage credited during the year he or she stopped working. For example, let’s say that a claimant who earned \$3120 in 2000 actually stopped working because of disability on March 31, 2000. Because the worker needs all four quarters of coverage in order to meet the insured status rules, the worker does not become insured until October 1, 2000. This is the “date first insured.” This worker cannot be found disabled for

Social Security disability before this date. Note that a quarter of coverage is acquired on the first day of the quarter in which it is assigned. 20 C.F.R. §§ 404.110(e) and 404.145.

To be *fully insured*, as a rule, a claimant must have one QC for every calendar year after the year in which he or she turned 21, up to the calendar year before becoming disabled, though more than 40 QCs are never required. 20 C.F.R. §§ 404.110 and 404.132.

The rule for *disability insured status* for those over 31 years old is that they must have 20 quarters of coverage out of the 40 calendar quarters before they become disabled. 20 C.F.R. § 404.130. This is referred to as the 20/40 rule. Significant work in five years out of the last 10 years usually satisfies this requirement. For a claimant with a steady work record, insured status will lapse about five years after stopping work. To receive any Social Security disability benefits, such a claimant will have to prove that he or she was disabled before the “date last insured.” Our hypothetical housewife described in §100 does not have current insured status because she has not worked for over 15 years. Thus, she is not eligible for Social Security disability benefits even though she is disabled for SSI purposes.

For those who become disabled before age 31 there is a reduced quarter of coverage requirement. Such a younger claimant must have earned QCs in one-half the calendar quarters beginning with the quarter after the quarter in which he or she attained age 21 and ending with the quarter in which he or she became disabled. If the number of elapsing calendar quarters is an odd number, the next lower even number is used. A minimum of 6 QCs is required. If a claimant becomes disabled before age 24, an alternative rule applies. He or she must simply have 6 QCs in the 12-quarter period ending with the quarter in which disability began. Under the alternative rule, there is no requirement that the QCs be earned after attaining age 21. 20 C.F.R. § 404.130(c). See also POMS RS 00301.140, which contains a good discussion filled with examples.

As a rule those who have “disability insured status” are also “fully insured.” But there are circumstances where this is not so. Evaluating denials based on insured status requires careful reading of the regulations and the claimant’s earnings record. See 20 C.F.R. §§ 404.101 to 404.146 and §205.4 of this book.

### §132 SSI

The Supplemental Security Income (SSI) program is a federal welfare program for the disabled, blind and those over 65. In contrast to Social Security disability, benefits are paid out of general revenues, not out of the Social Security trust fund. Many states supplement the federal SSI benefit. Thus, the SSI benefit amount varies from state to state.

To meet all the requirements to receive SSI a claimant must:

- Be “disabled” using the same definition as is used for the Social Security disability program
- Meet the income and asset requirements of the SSI program
- Be a U.S. citizen or fall into the group of limited exceptions to the citizenship rule (*see* §136); and
- File an application

There are both income and asset limitations for eligibility. *See* 20 C.F.R. §§ 416.1100 to 416.1266. The income limit is based upon the SSI benefit amount after several different kinds and amounts of unearned income are “disregarded”; and part of earned income is disregarded under a formula designed to encourage SSI recipients to work. There is also a formula for counting part of the income of parents of minors or spouses who live with the claimant. Application of this formula is called “deeming.”

Claimants may receive both Social Security disability and SSI benefits if the Social Security disability benefits are low enough. When both kinds of benefits are received, the recipient’s total income from the two programs equals the SSI benefit amount plus \$20. However, even where high Social Security disability benefits disqualify a claimant from receiving SSI, he or she still may get SSI during the five-month waiting period when no Social Security disability benefits are paid, assuming assets and any other income are small enough.

The asset limitation beginning in 1989 is \$2,000 for an individual and \$3,000 for a couple. Several assets are excluded, the most significant of which are the home of any value and one car of any value if it is used for work or to obtain medical care. *See* 20 C.F.R. §§ 416.1210 *et seq.*

### §133 Retroactivity of Applications and Waiting Period

During the history of the SSI program, SSI benefits have never been paid for any time before the date of the application; in other words, there is no retroactive effect of an SSI application. Social Security disability, on the other hand, may pay benefits for the 12 months preceding the date of application if all requirements are met. Claimants who are not currently eligible for Social Security disability benefits must be found entitled to at least one month of benefits during this 12-month period in order for a “period of disability” to be established. For example, if a claimant alleges a disability that ended more than about 14 months before the date of application, SSA will not even bother to investigate if the claimant really was disabled during this time because no benefits are payable.

An exception to this rule allows filing up to 36 months after the period of disability ended if a physical or mental condition prevented a claimant from applying. *See* 20 C.F.R. §§ 404.621(d) and 404.320(b)(3). Since it is hard to see how an impairment could be so severe as to prevent application for benefits but not severe enough to make the person unable to work, this exception must be applicable primarily to those whose disabilities begin just before full retirement age, after which there can be no period of disability. They would have until three years after full retirement age to apply under this exception.

There used to be no waiting period for SSI. For applications before August 22, 1996, SSI was paid from the date of application if all requirements were met. For SSI applications filed on or after August 22, 1996, there is an effective waiting period until the first of the next month after all requirements are met. 20 C.F.R. §§ 416.330 and 416.335. For Social Security disability there is a five-month waiting period after the “onset date,” the date disability began, during which no Social Security disability benefits are payable. Because only *full* months are counted, the actual waiting period is nearly always more than five months. Only when a person becomes disabled on the first day of the month is the waiting period exactly five months.

### §134 Other Differences

A significant procedural difference between the Social Security disability and SSI programs appears in the time limit for requesting reopening of earlier applications based on good cause, such as where there is new evidence or where the earlier decision was wrong on its face. For Social Security disability, that time limit is four years from the date of the notice of the initial determination. 20 C.F.R. § 404.988(b). For SSI, that time limit is two years. 20 C.F.R. § 416.1488(b). *See also* §§370 *et seq.*

Payment processing within the Social Security Administration differs for the two programs, knowledge of which is useful when you are trying to track down and correct a payment delay. SSI payment is processed at the local Social Security office. Social Security disability payment is processed in Baltimore for those under age 55. Payment for those over 55 is processed at regional payment centers. *See also* §§440 *et seq.*

Social Security disability benefits applicable to one month are paid during the next month. For example, a Social Security disability payment for January is paid in February. For SSI, the check received in January is for January.

There also are some differences in the way benefits are paid. These differences are helpful when you're talking to a recipient of disability benefits and trying to figure out whether he or she is receiving Social Security disability or SSI payments, a distinction that many recipients of benefits do not make. SSI benefits arrive in the mail or by direct deposit on the first of the month. An SSI check says SSI on it. A Social Security disability check is very similar to an SSI check but it includes the reference: SOC SEC FOR INS.

In a concurrent claim in which a beneficiary receives both Social Security disability and SSI payments, the Social Security disability portion is paid on the third of the month. If a beneficiary receives only Social Security disability benefits, those benefits are paid on the second, third or fourth Wednesday of the month depending on the beneficiary's birthday. Those born on the 1st through the 10th of the month are paid on the second Wednesday. Those born on the 11th through the 20th are paid on the third Wednesday. The rest are paid on the fourth Wednesday.

(Text continued on page 1-32.)

**§135 Chart: Social Security Disability and SSI Compared**

<b>Issue</b>	<b>SS Disability</b>	<b>SSI</b>
Disability standard:	Same for both programs.	
Source of payment:	Social Security trust fund.	General revenue.
Amount of payment:	Based on worker's earnings record.	Federal amount set by Congress plus state supplement, if any, set by state. State supplement amount may vary according to living arrangement.
Payment to children:	Yes, additional payment based on earnings record to children under age 18 or under age 19 and still in high school.	No increased federal payment for child; but some state SSI supplements add money for children. Otherwise, children may receive welfare, which is not counted as income; i.e., welfare does not reduce SSI benefit amount.
Payment to spouse:	Yes, if child in spouse's care is under age 16 or is disabled. There is an income limit for spouse's payment.	No increased federal payment but some state SSI supplements add money for spouse.
Earnings requirement:	Fully insured (1 QC for each year after age 21); and disability insured status (20/40 rule).	None.
Asset limitation:	None.	\$2,000 individual; \$3,000 couple.
Unearned income limit:	None.	A small amount is disregarded; the rest is deducted from SSI benefit.
Earned income limit:	Same for both programs for claimants; SGA results in step one denial.	After individual is receiving benefits, SSI has more liberal rules designed to encourage work.
Waiting period:	Five full months from date of onset of disability.	For applications on or after August 22, 1996, payment begins with first of month after all requirements are met. For earlier applications, payment begins with date of application if all requirements are met.
Retroactivity of application:	12 months if all requirements are met.	No retroactivity.

Time limit for reopening for good cause:	4 years.	2 years.
Payment processing office:	Baltimore or regional payment center.	Local office.
Payment applies to:	Previous month.	Current month.
Payment date:	Varies by birthday except concurrent cases paid on 3rd of month.	1st day of month.
Check says:	SOC SEC FOR INS.	SSI.
Attorney's fees:	25 percent of past due benefits withheld for direct payment.	25 percent of back benefits withheld for direct payment.
Medical coverage:	Medicare begins after receipt of 24 months of benefits.	Medicaid coverage in most states begins with entitlement to SSI (sometimes 3 months before).
Eligibility of legal aliens:	Eligible.	Aliens who were lawfully residing in the U.S. on August 22, 1996 are, for the most part, eligible for SSI disability benefits; but those who arrived later are ineligible with limited exceptions.

### §136 Eligibility of Aliens

The welfare reform legislation signed into law on August 22, 1996, made legal aliens ineligible for SSI benefits with some limited (and complicated) exceptions. A year later, this law was amended to make most legal aliens who were residing in the United States on August 22, 1996 eligible for SSI disability benefits and to grandfather in those aliens who were eligible to receive benefits on August 22, 1996. Thus, the original law applies only to those aliens who arrive in the United States after August 22, 1996. Public Law 110-328, enacted October 1, 2008, granted a two or three year extension to certain categories of aliens. The result is an odd patchwork that requires careful analysis. A threshold issue is the definition of U.S. "resident" and the acceptable types of evidence for proving status as a U.S. citizen or national. These are provided in 20 C.F.R. §§ 416.1603 and 416.1610.

A good description of which aliens were eligible for SSI appeared in an attachment to a memorandum from the Chief Administrative Law Judge dated August 29, 1997. This is an updated and edited version of that document:

The following is a list of the only categories of people who may be eligible for SSI:

1. Citizens or nationals of the U.S.
2. Aliens who are lawfully admitted for permanent residence under the Immigration and Nationality Act (INA) and who have worked long enough to have at least a total of 40 qualifying quarters of work. An alien may get the 40 quarters of work himself or herself. Also, work done by a spouse or parent may count toward the 40 quarters of work for getting SSI only. We cannot count any quarter of work acquired after December 31, 1996 if the alien or the worker received certain types of federally funded assistance during that quarter.
3. Certain aliens who are blind or disabled and were lawfully residing in the U.S. on August 22, 1996. Note that this provision creates a new category of claimants who attorneys may be asked to prove disabled: Aliens over age 65. See SSR 99-3p about proving disability for claimants over age 65.
4. Certain aliens who are lawfully residing in the U.S. and who were "receiving" SSI benefits on August 22, 1996. SSA has

interpreted this provision to apply to those whose claims were filed before August 22, 1996 and who were eligible to receive benefits for periods prior to August 22, 1996 even if their claims were not finally adjudicated and they were not actually being paid prior to August 22, 1996.

5. American Indians born outside the U.S. who are under section 289 of the INA or who are members of federally recognized Indian tribes under section 4(e) of the Indian Self-Determination and Educational Assistance Act.
6. Aliens admitted as refugees under section 207 of the INA. SSI eligibility is limited to the first 7 years after being admitted as a refugee. The 7-year limit applies even if the alien's status changes to lawfully admitted for permanent residence. Public Law 110-328 granted a two-year extension to most refugees, three years if the refugee has shown good faith in pursuing U.S. citizenship as determined by the Department of Homeland Security. However, the time limit does not apply at all if the alien meets the requirements in category 2, 3, 4, or 11.
7. Aliens granted asylum under section 208 of the INA. SSI eligibility is limited to the first 7 years after asylum is granted. The 7-year limit applies even if the alien's status changes to lawfully admitted for permanent residence. However, this time limit was extended by two or three years by Public Law 110-328, the same as for refugees described in category 6 above. The time limit does not apply at all if the alien meets the requirements in category 2, 3, 4, or 11.
8. Aliens whose deportation has been withheld under section 243(h) of the INA as in effect prior to April 1, 1997, or whose removal has been withheld under section 241(b)(3) of the INA. SSI eligibility is limited to the first 7 years after deportation or removal is withheld. The 7-year limit applies even if the alien's status changes to lawfully admitted for permanent residence. However, no time limit applies if the alien meets the requirements in category 2, 3, 4, or 11. Public Law 110-328 also extended the time limit by two or three years for this