

# Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) Benefits

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2011

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## § 1.1 INTRODUCTION

The Social Security Administration (SSA) administers two federal benefit programs that provide monthly disability benefits to those who qualify. The Old Age, Survivor and Disability Insurance program provides benefits based on retirement (Retirement Insurance Benefits (RIB), disability, and blindness (Social Security Disability Insurance (SSDI) to those who have worked and paid into the Social Security insurance system and to certain of their dependents/survivors. The Supplemental Security Income (SSI) program is a needs-based benefit available to low-income individuals who are 65 or older or who meet the disability or blindness standard.

**This outline will cover only benefits based on disability.** The standard for qualifying disability or blindness is the same in both the SSDI and the SSI programs. The disability must be severe enough to prevent most work and must be “permanent,” which means lasting for a year or more or resulting in death. Both programs also include work-incentive provisions that allow recipients to test their ability to work without immediate loss of benefits and related health insurance.

Although both programs share disability and blindness standards, applicants and recipients have different rights and responsibilities depending on whether the benefit is an SSDI or SSI benefit.

For ease of reference, this chapter will use the term Social Security Disability Insurance (SSDI) to refer to any Social Security insurance program benefit that is based on disability. Ordinarily, SSDI refers only to disability insurance benefits payable to a wage earner, and not to dependents’ or survivors’ benefits that are based on disability, e.g., disabled widow/er benefits, and child disability benefits (CDB), the benefit formerly known as disabled adult/child (DAC). The disability evaluation and work rules are the same for all Social Security insurance benefits based on disability.

## § 1.2 OVERVIEW OF SSI

### § 1.2.1 SSI (Title XVI)

**Supplemental Security Income (SSI) is a federally financed, needs-based benefit program, enacted under Title XVI of the Social Security Act and administered by the SSA.** SSI guarantees a national income level through the Federal Benefit Rate (FBR) for individuals with low income and resources on the basis of age, blindness, and disability. Each January, the SSI FBR receives the same cost-of-living increase applied to Social Security Insurance benefit recipients.

Many states, including Massachusetts, supplement the FBR with state money. When the program was enacted and implemented in the early 1970s, states were entitled to choose whether and how to supplement the FBR. Massachusetts chose to supplement based on categorical eligibility, i.e., age, disability, or

blindness, and living arrangement, i.e., full cost, shared living, or living in the household of another. An explanation of state supplementation and the maximum payment amounts can be found in the SSA's Programs Operational Manual System (POMS). See POMS at SI 01415.024. See also **Exhibit 1A** for the SSI benefits rates in Massachusetts for 2011. The FBR plus the applicable state supplement is the maximum monthly amount of SSI that an eligible individual can receive.

### **Practice Note**

The SSA's POMS are searchable free of charge on the SSA's website at <http://policy.ssa.gov/poms.nsf/aboutpoms>.

**In order to qualify for SSI, an individual must be eligible in each of the following five qualifying areas:**

- categorical, i.e., age, disability, or blindness;
- income;
- resources;
- residence; and
- alien status.

Generally, the individual bears the responsibility of providing evidence of eligibility in all five qualifying areas. **SSA must provide written notice and appeals rights for eligibility determinations in each qualifying area.** Each of these areas is governed by complex rules and will be discussed in detail later in this chapter.

### **§ 1.2.2 Medicaid**

**In Massachusetts, SSI recipients are automatically eligible for Medicaid.**

The Medicaid program is a federal state partnership; the federal Medicaid regulations describe mandatory procedures and services, as well as optional services. The federal government reimburses the states at least half of their Medicaid expenditures. Federal Medicaid law is at 42 U.S.C. §§ 1396 et seq. and 42 C.F.R. Parts 430-456.

The Massachusetts Medicaid program is called MassHealth and is run by the Office of Medicaid (formerly the Division of Medical Assistance). MassHealth includes several categories of Medicaid coverage and Medicaid buy-in programs. This overview is limited to the SSI connection with the Medicaid program. The MassHealth regulations are at 130 C.M.R. §§ 401 - 522. The Massachusetts Medicaid statute is at M.G.L. c. 118E.

The Medicaid program was created at about the same time as the SSI program, and states chose whether to provide Medicaid to SSI recipients or to make their own Medicaid eligibility determinations using different eligibility criteria. Most states, including Massachusetts, provide Medicaid to individuals who qualify for SSI. These states are known as "1634" states for the section of the Social Security Act governing the relationship of their Medicaid programs and the SSI program. They accept the SSA's eligibility determinations for SSI as eligibility

determinations for Medicaid. This means that SSI-eligible individuals do not need to file a separate Medicaid application with the state Medicaid agency. See 42 C.F.R. § 435.909.

In Massachusetts, when SSI eligibility is determined, the SSA shares this information electronically with the Office of Medicaid, which issues a MassHealth card to the recipient. **Medicaid eligibility is also retroactive with retroactive SSI eligibility. Although recipients do not receive good notice of this, they can have their providers submit bills for covered services for the retroactive period.**

**Practice Note**

Individuals who need Medicaid coverage before the SSI application has been decided can file an application for Medicaid with the state Medicaid agency. For application forms and other information, see [www.mass.gov/MassHealth](http://www.mass.gov/MassHealth). In Massachusetts, the Office of Medicaid will determine disability for Medicaid eligibility purposes and will often be faster than the SSA.

**It is important to note that automatic eligibility for Medicaid does not mean automatic ineligibility when SSI eligibility ends.** Instead, the state Medicaid agencies must make their own ineligibility determinations for Medicaid and are responsible for Medicaid due process notice procedures. See 42 C.F.R. § 435.930. In Massachusetts, the SSA shares SSI eligibility information electronically with the state Medicaid agency. When an individual loses SSI eligibility and, therefore, automatic Medicaid eligibility, the Office of Medicaid must redetermine Medicaid eligibility while Medicaid coverage continues. States must also provide due process, e.g., written notice of the eligibility determination, appeal rights, and the opportunity for hearing and benefits pending appeal. See, e.g., *Mass. Ass'n of Older Americans v. Sharp*, 700 F.2d 749, 753 (1st Cir. 1983), *appeal after remand* 803 F.2d 35 (1st Cir. 1986) (court required issuance of preliminary injunction until compliance with provisions requiring redetermination of eligibility prior to termination of benefits); see also HCFA, 45-3 *State Medicaid Manual*, § 3207 (Feb. 1997). For information about these issues from the SSA's point of view, see Medicaid and the SSI Program, POMS SI 01715.

**Practice Note**

See also state Medicaid director letter, dated April 22, 1997, available on the website of the Centers for Medicare & Medicaid Services (CMS) at <http://www.cms.hhs.gov/states/letters>.

**A few states, e.g., New Hampshire, continue to make their own Medicaid eligibility determinations using standards different from those contained in the SSI program.** See Medicaid and the SSI Program, POMS SI 01715.010(A)(1). These states, known as "209(b)" states, require a separate Medicaid application and will have independent administrative review mechanisms in the event of a denial of eligibility.

**In addition, certain SSI recipients whose earnings from work result in income ineligibility for SSI payments may be eligible for special Medicaid status.** See the SSI Work Incentives discussion in § 1.11, Posteligibility Issues, below.

**Practice Note**

Prescription drug coverage through MassHealth is no longer available for those dually eligible for MassHealth and Medicare. Medicare Part D replaces MassHealth prescription drug coverage for dual eligibles. MassHealth will continue to provide benzodiazepines and barbiturates, drugs Medicare does not cover, for dual eligibles, as well as the over the counter drugs it has long covered. Duals are eligible for the Low Income Subsidy (extra help) to assist with out of pocket costs. See § 1.3.4 Medicare, below.

## **§ 1.3 SOCIAL SECURITY INSURANCE BENEFITS (Title II)**

### **§ 1.3.1 Wage Earner Eligibility**

The Social Security Insurance programs were enacted under Title II of the Social Security Act. These “Title II” programs pay monthly cash benefits to insured workers who have reached retirement age or who meet the SSA’s disability or blindness standard. The SSDI benefit program is the Title II program available to workers under Full Retirement Age who meet the SSA’s disability or blindness standard. It provides cash benefits for disabled workers who have a recent employment history. See 20 C.F.R. §§ 404.130, 404.315-.317. The Retirement Insurance Benefit (RIB) program is the Title II program available to retired workers. 20 C.F.R. § 404.310.

**Title II benefits are not needs-based and have no income or asset test.**

Instead, a worker must have earned “insured status” in order to be eligible for an SSDI or RSI benefit. 20 C.F.R. § 404.110, 404.120. Insured status is earned by working in “covered” work and earning “quarters of coverage” (QCs). “Covered” work is work on which the social security taxes have been paid. Workers earn insured status by earning QCs in covered work. 20 C.F.R. § 404.146. E.g., in 2010, a worker had to earn \$1090 gross in covered work to earn one quarter of coverage. In 2011, that number is \$1120. See 20 C.F.R. § 404.146; Increment Amounts - Exhibit, POMS RS 00301.250 , for the QC amounts for prior years. No more than four QCs can be earned in any year. The monthly cash benefit paid by the SSDI program is essentially based on the amount of time worked and the amount of earnings in “covered” work. See 20 C.F.R. §§ 404.210 -.212. The worker’s base benefit is called the “primary insurance amount” (PIA). 20 C.F.R. § 404.201. Each January, the SSA determines whether a cost-of-living increase should be applied to current Title II benefits. 20 C.F.R. §§ 404.270 - .278.

**To qualify for SSDI, an individual must meet the SSA’s disability or blindness standard and must be “currently insured,” i.e., must have earned a certain number of quarters of coverage in proximity to the date of onset (generally within twenty out of the last forty calendar quarters). 20 C.F.R. §**

**404.130.** There are special provisions for younger workers for acquiring currently insured status for disability benefits. 20 C.F.R. § 404.130. For the insured status requirements for retirement benefits, see 20 C.F.R. § 404.115.

### **§ 1.3.2 Benefits for Dependents and Survivors of Wage Earners**

Certain family members may be eligible for dependents' or survivors' benefits on the wage record of an insured worker. The wage earner must be eligible for an SSDI or RIB benefit, or, the insured wage earner must be deceased for the dependent to receive a benefit. 20 C.F.R. §§ 404.330 - .384. The individual must file an application for the dependents' or survivors' benefit. Generally, dependents'/survivors' benefits based on disability can be paid retroactively for up to one year, while other dependents'/survivors' benefits vary in potential retroactivity from up to nine months to none. 20 C.F.R. § 404.621; Retroactivity - Title II, POMS GN 00204.030(B)(1).

Eligible dependents and survivors include the following:

- Mothers or fathers caring for dependent children of the wage earner. 20 C.F.R. §§ 404.339 - .349. The child must be under age 16 or disabled for the parent to qualify. 20 C.F.R. § 404.339(e).
- Certain spouses, divorced spouses, widows, or widowers. Generally, spouses and widows must meet certain duration of marriage requirements, and those who are not caring for minor dependent of the wage earner must meet age criteria, e.g., age sixty or sixty-two. Certain widows can be eligible on the basis of disability at age fifty. 20 C.F.R. §§ 404.330 - .338.
- Disabled adult children. Adult children of a wage earner who are age eighteen or older and who have met the adult disability standard since prior to age twenty-two qualify for the childhood disability benefit (CDB), also known as disabled adult child (DAC) benefit, as either a dependent or a survivor of an insured wage earner. 20 C.F.R. § 404.350(a)(5). To qualify, the individual must be unmarried, unless the individual marries another individual receiving a Title II benefit. 20 C.F.R. § 404.352(b)(2).
- Unmarried dependent minor children of the wage earner, 20 C.F.R. § 404.350-.369. These benefits end at age eighteen, unless the individual qualifies for CDB benefits, described above. Also, those who are full-time secondary education students can continue to receive the dependent minor child benefit until they graduate or attain age 19, whichever occurs first. 20 C.F.R. § 404.352(b)(1).
- Dependent parents of a deceased worker. 20 C.F.R. §§ 404.370 - .374.

**Receipt of dependents' benefits does not affect the benefit amount of the wage earner.** SSA determines a "family maximum" benefit to cap the total benefit amount payable to a wage earner and the wage earner's dependents. 20 C.F.R. §§ 404.403. If the amount remaining in the family maximum after

payment of the wage earner's monthly benefit is not sufficient to pay all dependents their full benefits, the SSA will reduce each dependent's benefit *pro rata*.

### **§ 1.3.3 Immigration Eligibility Criteria for Social Security Insurance Benefits**

Prior to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2170, there were no citizenship or alien status requirements for Social Security insurance benefits. Noncitizens with work authorization could obtain a valid social security number and earn quarters of coverage. Noncitizens who earned enough quarters of coverage to have insured status could receive Social Security disability or retirement benefits if they met the eligibility criteria.

**Section 401(b)(2) of the act provides that noncitizens must show that they are "lawfully present" in order to be eligible for Social Security Insurance program benefits.** This provision applies only to benefits payable to wage earners and dependents/survivors on applications filed on or after December 1, 1996. It does not apply to those receiving benefits on applications filed prior to that date. It also does not apply to benefits paid to noncitizens who reside outside the U.S. See U.S. Lawful Presence Provisions, POMS RS 00204.010(B).

SSA accepts the definition of "lawfully present" contained in regulations published by the Department of Justice, which were effective as of September 6, 1996. 8 C.F.R. § 103.12; Evidence Requirements for Lawful Presence, POMS RS 00204.025(B). The overall definition of "lawfully present" is an alien who has been inspected and admitted to the United States and who has not violated the terms of the status. Specifically included are

- legal permanent resident aliens,
- refugees,
- asylees,
- certain parolees,
- certain conditional entrants,
- withholding of deportation status,
- Temporary Protected Status (TPS),
- Cuban/Haitian entrants,
- Family Unity beneficiaries,
- Deferred Enforced Departure (DED) status,
- applicants for asylum, and
- others.

See 61 Fed. Reg. 47.039 - .041 (1996); Evidence Requirements for Lawful Presence, POMS RS 00204.025(B).

### **§ 1.3.4 Medicare**

**Individuals who receive an SSDI or dependents' or survivors' benefit based on disability are eligible for Medicare.** However, eligibility does not begin until the individual has received the benefit for 24 months. Retroactive periods of

eligibility count toward the 24-month period. 42 U.S.C. § 426; 42 C.F.R. § 4061. No application is necessary because eligibility occurs automatically in month 25 of eligibility. The SSA provides written notice of Medicare eligibility just prior to month 25. The notice explains that Medicare Part A is available without a premium. The notice also explains that the premium for Medicare Part B will be deducted from the individual's Social Security Insurance benefit and that the individual may choose to opt out of Medicare Part B. In 2011, the Medicare Part B premium is \$96.40 per month for those eligible for and paying the premium in November and December 2009. For those newly eligible for Medicare 2010 who were paying the Part B premium, the 2011 premium remains \$110.50. For all others, the Part B premium is \$115.40, unless they have income of \$85,000 or higher (then a higher premium applies. See [www.Medicare.gov](http://www.Medicare.gov). Some individuals are eligible for state assistance with these premiums, e.g., those eligible for MassHealth Standard or those who eligible for the Medicare buy-in (generally, up to 135% federal poverty guidelines and who meet the buy-in asset limit).

Medicare, like private health insurance, has many coverage limitations, copays, and deductibles. Because the Massachusetts Medicaid program uses the same disability standard as the SSA, individuals with incomes below 133 % of the federal poverty guidelines will be eligible for MassHealth Standard if they apply through the Office of Medicaid. Those with higher incomes may be eligible for MassHealth CommonHealth. Contact the MassHealth Enrollment Center at 1-888-665-9993 for voice or at 1-888-665-9997 for TTY. Or download an application from the MassHealth website at [www.mass.gov/MassHealth](http://www.mass.gov/MassHealth)

**Starting in 2006, Medicare includes a new Medicare prescription drug benefit, Medicare Part D.** The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) added Medicare Part D. **This benefit replaces Medicaid drug coverage for those dually eligible for Medicaid and Medicare. To keep up with developments, see the following websites:** [www.medicare.gov/prescriptions](http://www.medicare.gov/prescriptions); [www.cms.hhs.gov/medicarereform](http://www.cms.hhs.gov/medicarereform); [www.kff.org/medicare/rxdrugdebate](http://www.kff.org/medicare/rxdrugdebate).

## § 1.4 ADMINISTRATION OF THE SSDI AND SSI PROGRAMS

### § 1.4.1 Offices and Responsibilities

Both the SSI and the SSDI programs are administered by the SSA. District or field offices are the point of public entry to the Social Security programs for most persons. District office personnel

- take applications and appeals,
- receive and develop evidence,
- make preliminary decisions on non-disability claims, and
- offer public information.

#### **Practice Note**

There are ten Regional offices that oversee the district offices. Massachusetts is in Region I. The Region I office is located at JFK

Federal Building, Room 1900, Boston, MA 02203 and can be reached at (617) 565-2881.

State Disability Determination Service (DDS) agencies contract with the SSA to develop evidence of disability and make the disability determination. A team of doctors and lay disability examiners develop and review the medical and other evidence to make the disability decision. The agency in Massachusetts is Disability Determination Services, Inc., with offices in Boston and Worcester. The SSA district offices refer disability cases to the appropriate Disability Determination Services, Inc. office to make disability determinations.

#### **§ 1.4.2 Sources of Law and Policy (See Exhibit 1C)**

The Social Security programs were created by statute, at 42 U.S.C. §§ 402 *et seq.* The SSI program was also created by statute, at 42 U.S.C. §§ 1381 *et seq.*

**Implementing regulations** for the SSI program are found at 20 C.F.R. § 416 app. to subpt. K. Those for the SSDI program are found at 20 C.F.R. §§ 404.170 - .290. The regulations are online on SSA's website at [http://www.socialsecurity.gov/OP\\_Home/cfr20/cfrdoc.htm](http://www.socialsecurity.gov/OP_Home/cfr20/cfrdoc.htm)

**The Program Operations Manual System (POMS)** provides guidelines for day-to-day operations in the district offices and at DDS, although it does not have the force of law. The SSA often relies on the POMS to implement statutory changes until it goes through the formal rule making procedure for promulgating regulations. It is often helpful to request a copy of the POMS on which a decision is based. The POMS is available on the SSA's website at <http://policy.ssa.gov/poms.nsf/aboutpoms>. Additional operating instructions in the form of **Emergency Messages (EMs)** and **Chief ALJ Bulletins** are available online at <https://secure.ssa.gov/apps10/>

**Social Security Rulings** are based on federal court and administrative decisions, policy statements, and opinions of the Office of General Counsel. They are published in the Federal Register and are binding on all components of the SSA but are primarily used by Administrative Law Judges (ALJs). The SSA publishes its rulings in the Federal Register but is not required to do so. The Rulings do not have the force of law. These Rulings are available on the SSA's website at [http://www.socialsecurity.gov/OP\\_Home/rulings/rulings.html](http://www.socialsecurity.gov/OP_Home/rulings/rulings.html)

**Hearings, Appeals and Litigation Law Manual.** Instructions used by employees of SSAs Office of Disability Adjudication and Review in processing and adjudicating claims at the hearing, Appeals Council review, and civil actions levels of appeal. The HALLEX is available on SSAs website at [http://www.socialsecurity.gov/OP\\_Home/hallex/hallex.html](http://www.socialsecurity.gov/OP_Home/hallex/hallex.html)

**Program Circulars** distributed by the SSA national and regional offices discuss district office and DDS policies. They are generally not available to the public but can be requested under the Freedom of Information Act.

**Federal case law** - 42 U.S.C. § 405(g) provides for a right of review in the

federal courts for “final” administrative decisions. There are a great many federal court decisions interpreting the Social Security Act and regulations. Many are very fact specific and have little precedential value. Decisions interpreting the statute and regulations are often of value in federal court appeals but are generally of lesser value in the administrative appeals process. The SSA considers federal district court cases as not binding in the administrative appeals process. However, the SSA must apply U.S. Circuit Court of Appeals decisions, unless the government appeals or relitigates the issue. When the SSA disagrees with the interpretation of a court of appeals, the SSA must issue an acquiescence ruling that explains how the SSA will apply the decision. See 20 C.F.R. §§ 404.985(b), 416.1485(b). [SSR 96-1p—Policy Interpretation Ruling—Application by the SSA Of Federal Circuit Court and District Court Decisions](#). See **Exhibit 1C** for further sources of law and information.

## **§ 1.5 SSI ELIGIBILITY**

**SSI applicants and recipients must meet SSI eligibility criteria in five areas:**

- categorical;
- residence;
- citizenship or alien status;
- resources; and
- income.

Failure to meet the eligibility criteria in any one area will result in ineligibility. See 20 C.F.R. § 416.202.

### **§ 1.5.1 Categorical Eligibility (20 C.F.R. § 416.202)**

SSI applicants and recipients must fit into one of the following eligibility categories:

- age, defined as age sixty-five or over;
- blind, defined as central visual acuity no better than 20/200 in the better eye with corrective lenses, or limited to a visual field of 20 degrees in the better eye. 20 C.F.R. §416.981;
- disabled adult, defined as a person age eighteen or older who is unable to engage in substantial gainful activity due to a medically determinable mental or physical impairment, which has lasted or is expected to last at least twelve months or result in death. 20 C.F.R. § 416.905; or
- disabled child, defined as a person under age eighteen who has a medically determinable mental or physical impairment that has medical criteria or functional limits resulting in marked and severe functional limits and which has lasted or is expected to last at least twelve months or result in death. 20 C.F.R. § 416.906.

### **§ 1.5.2 Residence (20 C.F.R. §§ 416.1603, 416.1327)**

To be eligible for SSI, an applicant must have resided in the United States or Northern Marianas Islands for at least thirty days. A recipient who remains outside the United States for a full calendar month loses SSI eligibility and is not eligible for SSI until he or she has returned to the United States and has remained in the United States for thirty consecutive days. Regaining eligibility in these circumstances does not require a new application, because SSI eligibility is suspended, rather than terminated, unless the suspense status continues for twelve consecutive months. See § 1.11, Posteligibility Issues, below, for more information on suspense status.

### **§ 1.5.3 Citizenship and Alien Status**

An SSI applicant or recipient must either be a citizen of the United States or have qualifying alien status. Recent federal legislation has drastically changed noncitizen eligibility for SSI. The changes have not yet been codified in regulations, but the SSA has developed detailed subregulatory instructions in the POMS. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-93, 110 Stat. 2170 (1996), made the changes effective regardless of whether regulations had been published. Citations are to the PRWORA and the POMS.

### **§ 1.5.4 Citizenship**

For SSI purposes, a citizen of the United States is a person born in the United States, Puerto Rico, Guam, or the Virgin Islands. Individuals born in American Samoa, Swains Island, and the Northern Marianas Islands are United States Nationals and are treated as United States citizens for SSI purposes. 20 C.F.R. § 416.1610(d). Citizenship may also be obtained through the naturalization process.

#### **Practice Note**

Immigrants who naturalize have the same rights to receive public benefits as other citizens. Many immigrants with disabilities have avoided the naturalization process for fear that they will be unable to complete certain parts. Others have tried and have not received reasonable accommodation. The Department of Homeland Security (DHS) is subject to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which requires programmatic access for individuals with disabilities. In recent years, the DHS has developed better procedures for identifying immigrants in need of reasonable accommodations and providing them. For example, an immigrant who cannot learn sufficient English to pass the interview portion of the process due to a cognitive limitation may be able to have an interpreter at the interview. The procedure requires medical documentation of a condition causing the alleged limitation. For more information contact the Massachusetts Immigrant and Refugee Coalition (MIRA), at (617) 350-5480.

### **§ 1.5.5 SSI Eligibility for Noncitizens Prior to 8/22/96**

Prior to enactment of the PRWORA on August 22, 1996, a noncitizen could be eligible for SSI as

- an alien lawfully admitted in the United States for permanent residence, 20 C.F.R. § 416.1615; or
- an alien permanently residing in the United States under color of law (PRUCOL). 20 C.F.R. § 416.1618. Permanent residence in the United States under color of law (PRUCOL) is not a DHS status. PRUCOL means that the individual is residing in the United States with the “knowledge and permission” of the DHS, and that the DHS does not contemplate enforcing the departure of the individual.

This is a broad standard that allowed most noncitizens with immigration status, and even some applicants for status, to qualify for SSI. However, undocumented noncitizens, e.g., those who entered the U.S. uninspected and with no contact with immigration officials, were not eligible under PRUCOL.

### **§ 1.5.6 SSI Eligibility for Noncitizens On and After 8/22/96.**

Section 402 of the PRWORA made most noncitizens ineligible for SSI benefits. “Current recipients,” i.e., recipients as of August 22, 1996, were facing benefits termination in August and September 1997. The Balanced Budget Act (BBA) of 1997, Pub. L. No. 105-33, 111 Stat. 678 (1997) stopped the scheduled terminations and also reinstated eligibility for some noncitizens. After the PRWORA and the 1997 BBA, one must know both the noncitizen’s alien status and the date of entry in order to determine whether the noncitizen meets the SSI alien status eligibility criteria. **The following terms and definitions are crucial to understanding which noncitizens are still SSI eligible and to applying the current eligibility criteria** in § 1.5.7, SSI Alien Status Eligibility Criteria Now in Effect, below.

#### **(a) PRWORA Alien Status Eligibility Criteria**

Under the provisions of the PRWORA, **only** the following noncitizens qualify for SSI:

- **refugees, asylees, and persons granted withholding of deportation**, but only for **seven years** (increased from five to seven years by Balanced Budget Act) after obtaining these statuses. Basic SSI Eligibility and Development Requirements, POMS SI 00502.100 , Documentary Evidence of Qualified Alien Status, POMS SI 00502.130 . (Note that those who adjust to legal permanent resident status before the seven years runs remain eligible for the remainder of the period, and that Amerasians and Cuban/Haitian entrants are treated as refugees for the purpose of determining eligibility for time-limited benefits.) A two year extension of the 7 year period was available to some in this category, but it ended on September 30, 2011. POMS SI 00502.301 (Legislative efforts to extend were stalled as of 10.14.11);
- **“qualified aliens” who are honorably discharged veterans or active**

**duty armed services personnel**, their spouses, and unmarried dependent children. Veteran or Active Duty Member of the Armed Forces, a Spouse or Dependent Child, POMS SI 00502.140;

- **legal permanent resident aliens who have earned forty qualifying quarters** as defined by Title II of the Social Security Act (as of January 1, 1997, no quarter qualified in which the wage earner was also receiving a Federal means-tested benefit). LAPR with 40 Qualifying Quarters of Earnings, POMS SI 00502.135; and
- **legal permanent resident aliens who may be credited with forty qualifying quarters** from one or both parents, if the quarters were earned before the individual turned age eighteen, or from their current spouse (the federal mean-tested benefit exception described above applies for quarters earned after January 1, 1997). LAPR with 40 Qualifying Quarters of Earnings, POMS SI 00502.135(B).

**Note that** most legal permanent residents who enter the United States on or after August 22, 1996, also face a **five-year bar on SSI eligibility**. LAPR with 40 Qualifying Quarters of Earnings, POMS SI 00502.135(B)(1). **The five-year bar does not apply to those eligible for time-limited benefits or to the veterans and armed service personnel described above**, even if their “qualified alien” status is that of legal permanent resident.

**(b) Definition of “Qualified Alien”**

The term “qualified alien” was first created and defined in Section 431 of the PRWORA. It was expanded by subsequent laws, including the 1997 Balanced Budget Act. With some exceptions, a noncitizen must have a status within the definition of “qualified alien” to qualify for SSI. The definition of “qualified alien” now includes:

- legal permanent residents,
- asylees,
- refugees,
- persons granted withholding of deportation,
- Cuban /Haitian entrants,
- persons paroled into the United States for a period of at least one year, &
- certain spouses and children affected by domestic violence.

Basic SSI Alien Eligibility Requirements, POMS SI 00502.100 ; *see also* Qualified Alien Status Based on Battery or Extreme Cruelty by a Family Member, POMS SI 00502.116, for the domestic violence criteria.

**(c) Definition of “Current Recipient” (Grandfathered)**

A “current recipient” is a noncitizen who was receiving SSI on August 22, 1996, the date of enactment of the PRWORA, or who was in a non-pay status, like suspense status, on that date, or who had received at least a partially favorable disability decision prior to August 21, 1996. Qualified Aliens Receiving Benefits

on 8/22/96 (Balanced Budget Act of 1997, P.L. 105-33), POMS SI 00502.150(B)(2)(6) . The importance of being a “current recipient” is that most “current recipients” are “grandfathered” into the SSI program.

**(d) Definition of “Lawfully Residing”**

An alien is “lawfully residing” in the U.S. if he/she is a resident of the U.S. **and** is “lawfully present” as defined by the U.S. Attorney General in regulations published on 9/6/96. “Lawfully present” is a fairly broad term defined by the Department of Justice and includes more types of alien status than the definition of “qualified alien.” See § 1.3.3, Immigration Eligibility Criteria for Social Security Insurance Benefits, above.

**§ 1.5.7 SSI Alien Status Eligibility Criteria Now in Effect**

The following are the SSI eligibility categories for noncitizens now in effect. See § 1.3.3, Immigration Eligibility Criteria for Social Security Benefits, above.

**(a) “Current Recipients” (Grandfatherees)**

Current recipients, as defined above, who are “qualified aliens”, as defined above, are SSI eligible, if otherwise eligible. Qualified Aliens Receiving Benefits on 8/22/96 (Balanced Budget Act of 1997, P.L. 105-33), POMS SI 00502.150(A) .

Those who are not “qualified aliens” will also continue, as a result of the Noncitizen Benefit Clarification Act of 1998, Pub. L. No. 105-368, 112 Stat. 338 (1998). These recipients had been scheduled to lose SSI eligibility effective October 1998. **The effect of the new law is to grandfather all “current recipients” into the SSI program, as long as they are at least PRUCOL.** SSI Eligibility of Nonqualified Aliens Who Were Receiving SSI on 8/22/96. 1998 “Grandfathering” Legislation, POMS SI 00502.153(B)(1) .

Note that the SSA decided to apply the prior eligibility rules to the pre-August 22, 1996 portion of applications pending on that date. Individuals found eligible under those rules who were eligible on August 22, 1996, were then eligible for grandfathering. See Basic SSI Alien Eligibility Requirements, POMS SI 00502.100(A)(4) .

**“Current recipients” retain their “grandfathered” status, even if they lose eligibility for another reason and later become eligible again.** For example, “current recipient” on 8/22/96 who later loses disability eligibility and even later applies for age-based benefits at age 65 retains his or her “grandfathered” status as to alien status eligibility. Basic SSI Alien Eligibility Requirements, POMS SI 00502.100(B). Without grandfathered status, as an applicant based on age, he or she would have to meet the restrictive PRWORA alien status to be eligible, or, if he or she has status meeting the definition of “qualified alien,” he or she could try, as an alien “lawfully present” on August 22, 1996, try to prove disability eligibility.

In addition, individuals who are long-term SSI recipients (since prior to January 1, 1979) will continue to be eligible in the absence of “clear and convincing evidence” of ineligibility on the basis of alien status. Eligibility on the Basis of Receiving SSI Benefits on an Application Filed Before January 1, 1979, POMS SI 00502.120(B).

**(b) “Qualified Aliens” Who Were “Lawfully Residing” in the United States on August 22, 1996**

“Qualified aliens” who were “lawfully residing” in the United States on August 22, 1996 are SSI eligible if they meet the SSI disability standard. SSA will perform disability determinations for those 65 to determine SSI noncitizen eligibility under these criteria. This means that legal permanent residents who were lawfully residing in the U.S. on August 22, 1996, and who meet the disability standard are SSI eligible without having earned forty quarters of coverage. It also means that asylees and refugees lawfully present on August 22, 1996, who are disabled are SSI eligible without the seven-year eligibility limit. The SSA will perform disability determinations for elders (age sixty-five and over) who are “qualified aliens” and who were “lawfully residing” on August 22, 1996. Qualified Aliens Who Are Blind or Disabled and Lawfully Residing in the U.S. on 8/22/96, POMS SI 00502.142(E).

**Practice Note: Social Security Ruling 03-03p: Titles II and XVI: Evaluation of Disability and Blindness in Initial Claims for Individuals Aged 65 or Older**, describes the disability review process for noncitizens aged sixty-five and older. Note that conditions often found in older individuals, i.e., arthritis, can be the basis of a disability finding if medically determinable, i.e., diagnosed by a doctor. Evidence from many other sources can then be used to show the severity of resulting functional limitations. The Social Security Administration will use the rules for individuals aged sixty to sixty-five, which generally require less severe functional limitations than those for younger individuals to meet the severity standard. In addition, the Social Security Ruling includes two special rules for older noncitizens:

- individuals aged seventy-two and older who have a medical determinable impairment will be deemed to have a severe impairment as defined in Step 2 of sequential analysis of disability and the evaluation will proceed to Step 3; and
- for individuals aged sixty-five or older who retain the capacity to perform medium work and who are further limited by illiteracy in English or the inability to communicate in English, a finding of disabled is warranted, unless the individual’s past relevant work was skilled or semiskilled and resulted in transferable skills.

**(c) All Other Noncitizens**

Noncitizens who do not meet the criteria in §§ 1.5.7(a) or (b) must meet the restrictive PRWORA SSI alien status eligibility criteria described above in §1.5.6(a) to be SSI eligible.

#### **(d) Exceptions**

Two groups of American Indians are exempt from all SSI noncitizen provisions, as follows:

- individuals born in Canada who establish one-half American Indian blood; and
- foreign-born members of federally recognized United States Indian tribes.

See Exemption from Alien Provisions for Certain Noncitizen Indians, POMS SI 00502.105.

#### **§ 1.5.8 Verification**

Generally, SSA will verify alien status with the Department of Homeland Security (DHS, formerly the Immigration and Naturalization Service) if there is any reason to question the authenticity of the documents presented or if the information on the documents presented is insufficient to determine alien status eligibility. Basic SSI Alien Eligibility Requirements, POMS SI 00502.100 ; Verification of Alien Eligibility With the Department of Homeland Security (DHS), POMS SI 00502.115. Many SSA offices now have the capacity to verify status for noncitizens with “A” numbers through SAVE, a computerized systems link with DHS.

#### **§ 1.5.9 Reporting Requirement**

Section 404 of the PRWORA requires certain federal agencies, including the SSA, to furnish the DHS with identifying information on persons whom the commissioner knows to be unlawfully present in the United States. The extent of this reporting requirement was unknown until publication of notice in the *Federal Register*, 65 Fed. Reg. 58,301 (Sept. 28, 2000). The notice explains that the reporting requirement applies to the SSA with respect to the SSI program only. The notice provides that affected agencies are not required to file reports unless they have something to report. The trigger for filing a report, “knowing” that a noncitizen is not lawfully present, is narrowly defined. An agency “knows” that an individual is not lawfully present only when the unlawful presence is a finding of fact or conclusion of law made by the agency as part of a formal determination that is subject to the administrative appeal process. A finding of fact or conclusion of law must be supported by a determination by DHS or the Executive Office of Immigration Review, such as a Final Order of Deportation. A SAVE response showing no DHS record on an individual or an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that the individual is unlawfully present.

#### **Practice Note**

It is important to consider whether the need for a public benefit like SSI outweighs any risk that receipt of the public benefits will harm the immigrant's ability to better his or her status. As the "public charge" issue requires consideration of all the circumstances, the immigrant should consult an immigration specialist for advice.

### **§ 1.5.10 Public Charge**

By law, most noncitizens who want to get a green card or visa to the United States must show that they are not likely to become dependent upon government benefits for support, i.e., a "public charge." DHS's implementation of the public charge policy had been confusing and inconsistent. As a result, many immigrants have avoided seeking basic benefits and services for fear that use of such government programs would lead to denial of a green card or deportation. In May 1999, the Department of Justice (DOJ) published proposed regulations at 64 Fed. Reg. 28,676. The DOJ also published a Field Guidance at 64 Fed. Reg. 28,689, which was immediately effective, pending publication of final regulations. The new guidance provides much needed standardization and clarification of the DHS public charge policy. See Alien Requests for Information About Possible Deportation for Receiving SSI, POMS SI 00501.450 for the SSA's policy statement on the Field Guidance. Highlights of the public charge clarification include the following:

- Use of cash welfare benefits, including SSI, does not require but might result in a public charge finding, depending on the situation. 64 Fed. Reg. 28,676, 28,683. The DHS adjudicator must consider the totality of the circumstances, including whether receipt of the benefit is temporary. 64 Fed. Reg. 28,676, 28,683. Also, published as an appendix to the proposed regulations is a letter from former SSA deputy commissioner, Susan Daniels, which sets out limitations on application of the "public charge" policy to SSI recipients. For example, aged, blind, and disabled refugees and asylees, Amerasian immigrants, and certain Cuban/Haitian entrants are exempt from the public charge provisions by law or under the proposed regulations. 64 Fed. Reg. 28,687. In addition, the circumstances under which a permanent resident can be deported on public charge grounds is very limited. See 64 Fed. Reg. 28,685, 28,687.
- Benefits that are "earned," such as Title II Social Security benefits, unemployment compensation benefits, and veterans' benefits, will not be considered for "public charge" purposes. 64 Fed. Reg. 28,682, 28,684.
- Receipt of cash welfare benefits, including SSI, by an immigrant's children or other family members will not make the immigrant a public charge, unless these benefits are the family's only income. 64 Fed. Reg. 28,683, 28,685–28,686.
- Use of food stamps, Women, Infants, and Children (WIC), public housing, or other noncash programs by immigrants and their families will not make the immigrants public charges. 64 Fed. Reg. 28,682, 28,684, 28,685.

- Use of MassHealth or other public health services by immigrants or their family members will not make the immigrants public charges, unless these or other government funds are used to pay for long-term care. 64 Fed. Reg. 28,682, 28,684, 28,685. This clarification is not expected to significantly change the number of noncitizens who will be found inadmissible or deportable on public charge grounds. It is expected to result in less confusion on the public charge issue and more confident use of basic public services by noncitizens.

### **§ 1.5.11 Notes About Social Security Numbers**

The SSA may issue social security numbers (SSNs) to “lawfully present” noncitizens who have work authorization. “Nonwork” SSNs may be issued in limited circumstances to noncitizens who do not meet this standard but who need a SSN for a valid nonwork reason. Valid nonwork reasons include a federal statute requiring a SSN to receive a benefit or a state statute requiring a SSN to receive a public assistance benefit. As of October 2003, SSNs are no longer assigned for the sole purpose of getting a driver’s license.

#### **Practice Note**

A child who does not have an SSN must apply for one when he or she applies for SSI. If the child meets the citizenship or immigrant status standards for SSI, the child will be eligible for an SSN. As of February 9, 1998, the SSN application for a child requires the SSA to request the parents’ SSNs, unless the parents cannot be assigned SSNs.

Regulations issued in 1996 provide that, based on a persons immigration status, a restrictive legend may appear on the face on an SSN card to indicate that work is either not authorized or that work may be performed only with DHS authorization. 20 C.F.R. §422.103.

In addition, SSA has setting a limit on the number of replacement SSN cards. Unless the individual provides evidence establishing significant hardship if a replacement card is not issued, SSA will limit individuals to 3 replacement cards per year and 10 per lifetime. 20 C.F.R. §422.103.

### **§ 1.5.12 Financial Eligibility - Resources**

Eligibility for SSI is dependent upon the financial position of the applicant and, in some cases, on that of other members of the applicant’s household. One consideration of financial eligibility is the resource eligibility of the applicant or recipient. The SSI resource limit is \$2,000 in countable resources for an individual, and \$3,000 for a couple. Certain resources are excluded. The following information can be used to determine if an applicant/recipient is eligible to receive SSI benefits. 20 C.F.R. § 416.1200 et seq.

#### **(a) Definition of a Resource**

A resource is cash on hand, other personal property, or real property that an individual

- owns or in which an individual has an ownership interest;
- has the legal right, authority, or power to dispose of the resource or to liquidate it and convert it to cash; and
- is not legally restricted from using for support and maintenance.

20 C.F.R. § 416.1201.

### **(b) Valuation of Resources**

The value of a resource is generally the amount of the individual's equity in the property. Equity value is defined as the price at which the item can be reasonably be expected to sell on the open market in the particular geographic area, minus any encumbrances (e.g., loans, liens). 20 C.F.R. § 416.1201(c)(2).

### **(c) Resource Limit**

The SSI resource limit is \$2,000 in countable resources for an individual and \$3,000 for an eligible couple. 20 C.F.R. § 416.1205. If countable resources exceed the SSI resource limit, the SSI applicant or recipient is financially ineligible for SSI. SSI eligibility may be reestablished once the excess resources have been spent down below the resource limit. See 1.5.11(f), Excluded (Noncountable) Resources, below, for resources that are not countable.

### **(d) Timing**

Money received by an individual is income in the month received and a resource in the first moment of the following month, if retained by the individual. **20 C.F.R. § 416.1100, 416.1207(d).**

#### **Example**

Maria, an SSI recipient, receives \$800 in wages in January 2010. These funds will be counted under the SSI income rules for January. Any remaining funds retained as of the first moment of February 1, 2010, count toward her countable resource limit for February 2010.

Resource determinations for SSI eligibility purposes are based on the resources an individual has at the first moment of the first of the month for which the eligibility determination is made. 20 C.F.R. 416.1207(d).

#### **Example**

Joe, an SSI recipient, has \$2,500 in countable resources on June 1 2010. He is not eligible for SSI for the month of June, even if he reduces his countable resources below \$2,000 before the end of the month.

### **(e) Countable Resources**

Countable resources are those that are considered toward the SSI resource limitation. Examples of countable resources include the following:

- cash on hand that is not current month's income;
- money in savings, checking, or credit union accounts that is not current month's income;
- stocks and bonds;
- certificates of deposit;
- U.S. savings bonds;
- land or property on which the person does not reside;
- life insurance policies with a face value of over \$1,500; and
- certain trusts created to benefit the recipient.

20 C.F.R. 416.1205

- **Note that a resource may be countable even if there is a financial penalty for accessing it**, e.g., early cashing of a certificate of deposit. The amount that is countable is the amount that can be accessed at the time under consideration, less any penalty imposed for early withdrawal or access. See, e.g., Retirement Funds, POMS SI 01120.210(A)(3).

**(f) SSA Access to Financial Institutions**

On October 14, 2003, new regulations went into effect requiring SSI applicants and recipients, as a condition of eligibility, to authorize SSA to contact any financial institution and request any financial records that financial institution may have. The new provision also requires such authorization from anyone whose income and resources are considered as being available to the applicant or recipient, unless there is good cause why the permission cannot be obtained. Failure to give permission to contact financial institutions may result in suspension of SSI benefits.

There is a "limited good cause exception..... consistent with our current policy regarding a third party's failure to cooperate." Under the regulations:

- Good cause exists if permission cannot be obtained from the individual and there is evidence that the individual is harassing you, abusing you, or endangering your life.
- Good cause may exist if an individual other than one listed in paragraph (h)(3) of this section refuses to provide permission and: you acted in good faith to obtain permission from the individual but were unable to do so through no fault of your own, or you cooperated with us in our efforts to obtain permission.
- Good cause does not apply if the individual is your representative payee and your legal guardian, if you are a minor child and the individual is your representative payee and your custodial parent, or if you are an alien and the individual is your sponsor or the sponsors living-with spouse.

20 C.F.R. 416.207 and 416.1321.

### **(g) Excluded (Noncountable) Resources**

Examples of excluded resources include the following:

- The home in which the person lives and the contiguous land on which it stands. 20 C.F.R. 416.1212.
- One car, regardless of value, if used for transportation for the SSI recipient or a member of the recipient's household. This rule is effective as of 3/9/05. (The prior rule excluded one car, regardless of value, if necessary for work or to get to medical services and appointments, or if specially modified to transport a person with disabilities.) If a car cannot be excluded for these reasons, SSA will exclude the current market value of one car up to \$4,500, and any excess will count toward the applicable resource limit. Only one car per SSI recipient may receive the benefit of the full exclusion or the \$4500 exclusion. The equity value of all additional vehicles is countable. 20 C.F.R. 416.1218.
- Prior to 3/9/05, personal or household goods were excluded if total equity value was under \$2,000. Effective 3/9/05, personal effects are considered separately from household goods. Amended rule 20 C.F.R. 416.1216, excludes household goods if found in or near the home and used on a regular basis or if needed for maintenance, use and occupancy. Personal effects are excluded if ordinarily worn or carried by the individual or otherwise intimately related to the individual.
- Life insurance policies with a face value under \$1,500. 20 C.F.R. 416.1230.
- Burial funds of \$1,500, or less, if the person owns any excluded life insurance (see above). These funds must be specifically identified as burial funds and set aside in a separate account. See 20 C.F.R. 416.1231(b)(1). The value of this exemption must be reduced by certain other burial funds excluded from countable resources. 20 C.F.R. 416.1231(b)(5).
- Burial plots or spaces. An individual may exclude both burial spaces and burial funds. 20 C.F.R. 416.1231(b)(1).
- Property used for self-support. Effective May 1990, all property used in a trade or business or property used by an employee for work is excluded regardless of its value. Property Essential to Self-Support - Overview, POMS SI 01130.500(B)(1)(a) (1994). This includes up to \$6,000 equity in non-business property used to produce "goods or services essential to daily activities." See Property Essential to Self-Support - Overview, POMS SI 01130.500(B)(1)(b) (1994); Essential Property Excluded Regardless of Value or Rate of Return, POMS SI 01130.501 (1990); and the examples included therein.

- The proceeds from the sale of a home, if the proceeds are used within three months to purchase another primary residence. 20 C.F.R. 416.1212(d).
- Effective for payments received on or after 3/2/04, underpayments of SSI and Social Security benefits for nine months from the date of receipt. 20 C.F.R. 416.1233, as amended by Section 431, Pub.L.No.108-203 (3/2/04). The exclusion period prior to 3/2/04 was six months. See 1.12, Eligibility Redeterminations, below, for the rules on certain retroactive awards of SSI for children.
- Resources identified as necessary to fulfill a Plan to Achieve Self-Support (PASS). 20 C.F.R. 416.1210(f). See 1.14.3, Plans to Achieve Self-Support (PASS), below.
- Real property, for up to nine months, pending efforts to sell. Conditional benefits are paid during this time and are recoverable as overpayments upon sale of the property. 20 C.F.R. 416.1245.
- Real property, the sale of which would cause undue hardship, for example, if upon sale a co-owner of the property would be rendered homeless. 20 C.F.R. 416.1245.
- Effective with benefits payable in July 2004, any grant scholarship, fellowship, or gift for the cost of tuition or fees, for nine months. 20 C.F.R. 416.1210 (u). POMS SI 01320.115.
- All federal student financial assistance received under Title IV of the Higher Education Act, including federal work study, or under BIA student assistance programs, is excluded from income and resources, regardless of use. POMS SI 00830.455B.

SSA may determine that other resources are noncountable (excluded) if the resource is “**inaccessible**.” 20 C.F.R. 416.1201; Factors That Make Property a Resource, POMS SI 01120.010 . e.g., real estate owned by four siblings, one of whom is the SSI applicant, cannot be sold without the approval of all co-owners. Should one sibling refuse permission to sell, the SSA should determine that the real estate is a “noncountable” resource to the SSI applicant. The SSA will not force the applicant to bring legal action to have the property partitioned. See 20 C.F.R. 416.1210.

#### **(h) *Jointly Held Accounts at Financial Institutions***

Joint bank accounts cause problems for SSI recipients and should be avoided (except for SSI couples). Nor should SSI recipients hold money for someone else. In addition to the problems indicated below, an SSI recipient who has been holding money for someone else may face transfer of asset penalty problems if he or she cannot prove the money is not his/hers. 20 C.F.R. 416.1208(b), (c).

- If an SSI applicant or recipient is the only named holder, SSA presumes sole ownership in the holder and does not allow the holder to rebut the presumption. (Note that this rule may be amenable to challenge in the appropriate circumstances.)
- If there are joint holders and only one holder is an SSI applicant or recipient, SSA presumes sole ownership in the SSI applicant or recipient. If more than one joint holder is an SSI applicant or recipient, SSA presumes equal shares ownership in the SSI applicants or recipients. However, SSA allows rebuttal of both of these presumptions. See Checking and Savings Accounts, POMS SI 01140.200.

### **(i) Resource Deeming**

In resource deeming, the SSA “deems” or treats the countable resources of SSI ineligible parents, spouses, or alien sponsors, whether or not the sponsor lives with the alien SSI recipient, as if they were available to the SSI recipient, even if they are not actually available. For specific spouse-to-spouse resource deeming rules, see 20 C.F.R. 416.1202(a). For specific sponsor-to-alien resource deeming rules, see 20 C.F.R. 416.1204.

### **Resource Exclusions**

All the usual resource exclusions noted above apply in determining countable resources for deeming purposes. Additionally, **funds in an IRA or other work-related pension plan of an SSI ineligible parent or spouse are excluded from countable resources for parent-to-child and spouse-to-spouse deeming purposes.** 20 C.F.R. 416.1202(b)(1).

### **Parent-to-Child Resource Deeming Mechanics**

Remember that both the ineligible parents and the SSI recipient child have separate resource limits, although only one set of resource exclusions applies. For example, the child’s countable resource limit is \$2,000. In a two-parent family, the parents’ countable resource limit is \$3,000. In a one-parent family, the parent’s countable resource limit is \$2,000. Thus, the countable resource limit is actually \$5,000 in a two-parent family and \$4,000 in a one-parent family. The countable resources of the parents will be applied to the appropriate resource limit, i.e., \$3,000 or \$2,000. Any excess resources will then be added to any countable resources owned by the disabled child and applied to the child’s countable resource limit, i.e., \$2,000.

#### **Example**

Johnny, an SSI child recipient, lives with his mother Pat. Pat, as a single parent, has a \$2,000 resource limit. Johnny, as an SSI recipient, also has a \$2,000 resource limit. Pat’s countable resources are deemed available to Johnny. Pat owns the home they live in and one car used to transport Johnny to medical appointments. She has an IRA worth \$22,000 and a checking account holding a balance of \$2,700.

The home and the car are noncountable resources. The IRA would be a countable resource if Pat were seeking SSI, but it is excluded from deeming to her child. The checking account is countable (to the extent it holds other than current month's income). Assuming it does not include current month's income, the \$700 in excess of Pats \$2000 asset limit is "deemed" available to Johnny. Johnny has \$500 in a bank account that was a gift from his grandmother. The "deemed" \$700 from his mother is added to Johnny's \$500 bank account resource and applied to his \$2,000 asset limit. Since his total assets (\$1,200) are less than \$2,000, Johnny is resource eligible for SSI.

### **Sponsor-to-Alien Deeming Changes**

The PRWORA, Pub. L. No. 104-193 (Aug. 22, 1996) required the DHS to design a new legally enforceable affidavit of support to be used by immigrants who enter with sponsors. The form is effective for use after December 19, 1997. For immigrants whose sponsors have signed the new affidavit, deeming will apply until the immigrant attains United States citizenship or earns forty quarters of coverage. Remember that after December 31, 1996, no quarter of coverage will count for SSI eligibility purposes if the noncitizen received a federal means-tested benefit during that quarter. See 1.5.6, SSI Eligibility for Noncitizens After the PRWORA, above. This deeming change applies only to immigrants with sponsors who have signed the new affidavits of support. Note that the old deeming rules in the SSI program continue to apply to immigrants whose sponsors signed the old affidavit of support. Sponsor-to-Alien Deeming, POMS SI 00502.200(A)(2) .

Under the old sponsor-to-alien deeming rules, deeming of both income and resources applies for only three years after the immigrant enters the United States. Deeming does not apply at all if the sponsored alien became disabled after entering the United States. 20 C.F.R. 416.1166a. The old rules will continue to apply to recipients who entered with sponsors who signed the old affidavit of support, unless a new affidavit of support is required for some reason. Sponsor-to-Alien Deeming, POMS SI 00502.200(A)(2), (3) .

Remember, the deeming of resources from sponsor to noncitizen occurs whether or not the applicant/ recipient noncitizen resides with the sponsor.

### **§ 1.5.13 Transfer of Asset Penalty**

Federal legislation reestablished the transfer of asset penalty in the SSI program as of December 14, 1999. The transfer of asset penalty is triggered by a transfer of countable assets for less than fair market value. The purpose of the penalty is to prevent people from giving away assets to make themselves eligible for SSI. The transfer of asset penalty does not prevent SSI recipients from spending down excess assets, and, of course, it does not apply to any individual receiving only SSDI benefits.

Prior to July 1, 1988, a 24-month transfer of asset penalty existed. This penalty provision was eliminated on July 1, 1988, by the Medicare Catastrophic Care Act.

Between July 1, 1988 and December 14, 1999, SSI recipients could transfer, or give away, countable resources without affecting their SSI eligibility. The SSA was required to report any transfers made during this period of time to the state Medicaid administering agency in order to assist the implementation of Medicaid transfer laws.

The new transfer of asset penalty, effective for transfers made on or after December 14, 1999, was contained in the Foster Care Improvements Act of 1999, Pub. L. No. 106-169, 206 (Dec. 14, 1999) (amending 42 U.S.C. 1382b(c)). The new transfer penalty will penalize an individual who disposes of assets for less than fair market value within a 36-month “look back” period. The penalty for such a transfer is SSI ineligibility for the number of months equal to the amount of the uncompensated value of the transferred asset, divided by the maximum monthly SSI benefit payable to that individual after considering the individual’s living arrangement and eligibility category (aged, blind, or disabled).

### **Example**

Tom is a Massachusetts recipient of SSI and SSDI benefits who inherited \$5,000 from his deceased uncle. In 2011, he receives \$458 in SSDI and \$350.39 in SSI. Knowing he could keep up to \$2,000 and maintain his SSI eligibility, he disposed of \$3,500. He purchased new furniture, paid some overdue debts, and gave his brother \$2,000 to help pay his college tuition. When he reported to the SSA, Tom was informed that the \$2,000 gift to his brother was subject to the transfer of asset penalty because Tom received no value for the gift of \$2,000. Tom will face a transfer penalty for a period of two months as a result of the penalized transfer, unless an exception to the penalty application applies. The penalty period is calculated by dividing \$2,000 by \$788.39 (the Massachusetts SSI payment rate for which Tom was eligible in 2011) and rounding down to the nearest whole number. See Computing the Period of Ineligibility for Resources Transferred on or After 12/14/99, POMS SI 01150.111

There are important exceptions to the application of the penalty. These exceptions are similar to those that apply to the Medicaid transfer of asset penalty rule. The penalty period does not apply in the following circumstances:

- the individual (or spouse) disposed of the resource exclusively for a purpose other than qualifying for benefits;
- the individual (or spouse) intended to dispose of the asset for fair market value;
- the transferred assets have all been returned to the individual; or
- denial of SSI eligibility would result in “undue hardship” to the individual, according to the rules to be established by the commissioner of the SSA.

See 20 C.F.R. 416.1246.

### **§ 1.5.14 Transfers and Trusts**

The transfer of asset issue is raised when an SSI recipient (or spouse) uses resources to create a trust. Between July 1, 1988 and December 14, 1999, SSI

recipients could transfer assets (retroactive awards, personal injury settlements, etc.) to a trust without incurring a transfer penalty. As long as the trust satisfied the SSI resource rules for noncountability, SSI eligibility was not affected. Only Medicaid eligibility for long-term care or other institutional coverage was affected by such a transfer during that period of time.

As of December 14, 1999, SSI recipients face transfer of asset penalties when they (or their spouses) transfer assets to a trust. There are exceptions to the rule, which are similar to the exceptions in the Medicaid program. These include transfers to a “pooled” trust or to a “Medicaid payback” trust for the benefit of a disabled individual under age sixty-five. See 42 U.S.C. 1382b(c)(1)(B). A hardship waiver will also be available. As of this writing, the SSA had issued only subregulatory instructions to implement these changes. See Other Resources Provisions, POMS SI 01150.001 - .210.

In addition to the transfer of asset provision, the Foster Care Improvements Act of 1999, Section 205, also contained a trust restricting provision effective for any trust created on or after January 1, 2000. See 42 U.S.C. 1382b. The new trust provisions adopt resource-counting rules for trusts that mirror those currently existing in the Medicaid program and make most trusts countable resources, without regard to whether they are revocable or irrevocable. The exceptions to countability are similar to those in the Medicaid program. Trusts established as described in the Medicaid statute at 42 U.S.C. 1396p(d) will not be counted as a resource in the SSI program, e.g., certain special-needs trusts established for disabled persons under age sixty-five, “pooled” trusts, and trusts established with assets transferred by will. Other irrevocable trusts established with the assets of an individual (or spouse) will be considered as a resource available to the individual to the extent of the portion of the corpus of the trust from which payment can be made to or for the benefit of the individual (or spouse). If the trust contains assets of an individual (or spouse) and the assets of another person, the portion of the trust attributable to the assets of the SSI eligible individual (or spouse) will be countable to the individual, regardless of the purpose of the trust and whether the trustee has discretion under the trust. Trusts Established Prior To 1/1/00, Trusts Established by Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act, POMS SI 01120.200 .

**Note:** Creating a trust must be done very carefully and, preferably, with the assistance of an expert in estate planning and needs-based benefits. Improper creation of a trust can cause a loss of both cash and healthcare benefits to the person funding the trust.

## **§ 1.5.15 SSI Eligibility - Income**

### **(a) *Definition of Income***

Income is anything an individual receives in cash or in kind that could be used either directly, or by conversion, to meet one’s basic needs for food, clothing, or shelter. 20 C.F.R. 416.1102. Almost all income is countable, although there are certain income deductions and exclusions. Countable income reduces the maximum monthly benefit amount to which an SSI recipient would otherwise be

entitled. If large enough, countable income can reduce the benefit amount to \$0, making the individual financially ineligible for SSI. 20 C.F.R. 416.1100 et seq.

### **(b) Types of Income**

#### **Unearned Income**

Unearned income consists of income from non-work sources, including

- alimony,
- child support,
- pensions,
- annuities,
- rents,
- interest from bank accounts,
- Social Security benefits,
- VA benefits,
- worker's compensation benefits,
- unemployment benefits, prizes,
- awards,
- gifts, and
- inheritances.

20 C.F.R. 416.1121.

#### **Earned Income**

Earned income is income from work, including

- wages,
- salary,
- tips,
- commissions, and
- bonuses paid through employment or self-employment.

20 C.F.R. 416.1110.

#### **In-Kind Income**

When an SSI recipient receives food or shelter-related items for free or at a reduced charge, SSA counts the value of the item received as in-kind income. 20 C.F.R. 416.1130. SSA does not count the value of free or low-cost goods or services that are not food or shelter-related, e.g., entertainment, car maintenance, medical supplies, etc. For the items that count as shelter-related, see POMS SI 00835.465. **Note: effective 3/5/05, gifts of clothing to SSI recipients are no longer count as in-kind income.**

#### **Garnished Income**

Garnished income is counted as available to an SSI recipient, even though it is not. 20 C.F.R. 416.1123(b)(2).

#### **Overpayment Recovery**

Money withheld as a result of recovery of an overpayment from other benefits (Social Security, VA, Railroad Retirement, Workers' Compensation, etc.) is counted as if the individual actually received it. 20 C.F.R. 416.1123(b)(1).

### **(c) Basic Income Rules**

Income is counted on a monthly basis, and is income in the month received. If retained, it is counted as a resource in the following month. 20 C.F.R. 416.1100, 416.1207(d); Relationship of Income Sources, POMS SI 00810.010.

### **(d) Income Exclusions**

Certain types of income received by an SSI applicant or recipient are excluded in determining financial eligibility for SSI benefits. 20 C.F.R. 416.1112, 416.1124.

Examples of excluded income include:

- income tax refunds;
- proceeds of a loan (however, if the proceeds are not spent in the month received, they will be counted as a resource in the following month);
- **bills paid by others for goods or services that are not food, clothing, or shelter** (Note: effective 3/5/05 clothing paid for by others will not as income to the SSI recipient;
- weatherization assistance;
- any portion of a grant, scholarship, or fellowship used for paying tuition, fees, or other necessary education expenses (Note that all student financial assistance received under Title IV of the Higher Education Act of 1965, or under BIA Student Assistance Programs, is excluded from income and resources, regardless of use. Title IV programs include: Pell Grants; federal work study programs; Upward Bound, and others specified in POMS SI 00830.455.);
- one-third of child support paid by an absent parent for a minor child;
- assistance based on need from a state or local government, including rent subsidies;
- in-kind income based on need provided by nonprofit organizations;
- impairment-related work expenses;
- domestic commercial airline tickets received as gifts, as long as not cashed in;
- income earned by a blind or disabled student under age 22 regularly attending school, consisting of \$1640 per month up to \$6600 per calendar in 2011.
- Food stamps;
- effective July 2004, all interest and dividend income earned on countable resources, see 430, Pub.L.No.108-203(3/2/04);
- effective 7/04, the amount excluded for infrequent or irregular earned income increased to \$30 per quarter, pursuant to 430, Pub.L.No. 108-203 (3/2/04), POMS SI 00810.410; and
- effective 7/04, the amount excluded for infrequent or irregular unearned income increased to \$60 per quarter, pursuant to 430, Pub.L.No. 108-203 (3/2/04), POMS SI 00810.410.

### **(e) Income Deductions**

After the application of all appropriate income exclusions, the SSA will apply the relevant income deductions to determine the individual's countable monthly income for SSI financial eligibility purposes. Countable monthly income is then deducted from the maximum benefit amount to which the individual is entitled. This result is the monthly SSI benefit payable to the individual. The available income deductions follow.

#### **General/Unearned Income Deduction**

Twenty dollars of unearned income is deducted per month. If this deduction is not used fully on unearned income, any remaining exclusion may be deducted from earned income. 20 C.F.R. 416.1124(12).

#### **Earned Income Deduction**

Exclude \$65 plus one-half the remainder of gross monthly earned income. For example, earned income in the amount of \$585 results in \$250 in countable monthly income.

\$585.00
- <u>20.00</u> (if unused on unearned income)
\$565.00
- <u>65.00</u>
\$500.00
divided by 2 = \$250.00 (countable income)

See 20 C.F.R. 416.1112(c)(5),(7).

### **(f) Income Deeming**

Income deeming is the process of considering a portion of another person's income as the unearned income of an SSI recipient. The deemed income is considered available to the SSI recipient, whether or not it is actually available. The deemed income will be deducted from the maximum SSI benefit to which the recipient is entitled, along with the recipient's own countable income, if any. 20 C.F.R. 416.1160.

#### **Deeming Circumstances**

Deeming applies only in the following situations:

- from SSI-ineligible spouse to SSI-eligible spouse in the same household;
- from SSI-ineligible parent to SSI-eligible child in the same household;
- from sponsor to SSI-eligible alien (see 1.5.11, Financial Eligibility - Resources, above, for PRWORA changes); and
- from SSI-ineligible essential person. (See 20 C.F.R. 416.1160(d) for the definition of "essential person." Since essential persons had to be

identified prior to 1974, there are few left.)

### **Deeming Process—Parent-to-Child Income Deeming**

The deeming rules vary according to each of the deeming relationships noted above. The following is a general description of the deeming steps for parent-to-child deeming. See 20 C.F.R. 416.1165.

- Determine the parent's monthly earned and unearned income.
- Apply all income exclusions appropriate under the SSI rules.
- Apply the deduction for each ineligible child in the household (one-half the federal benefit rate).
- Apply all appropriate income deductions to the parent's monthly income.
- Apply the deduction for the parent and the parent's spouse, if any (the usual deduction for a parent with no spouse is the FBR for a disabled individual). The result is the amount of the parent's monthly income deemed to the SSI child applicant or recipient.
- If the beneficiary does not use up the \$20 unearned income deduction on his or her own unearned income, apply the remaining deduction to the deemable income from the child's parents.
- Combine the remaining deemable income with the remaining income of the child, if any, and deduct from the benefit rate for a disabled individual to determine the benefit payable. See parent-to-child deeming worksheet at **Exhibit 1D**.

### **Deeming Process—Spouse-to-Spouse Income Deeming**

Spousal deeming causes a portion of the ineligible spouse's income to be considered available to the SSI spouse, whether or not such income is actually available. Spousal deeming will occur only if the ineligible spouse lives in the same household as the SSI spouse. 20 C.F.R. 416.1160(a)(1). The term "ineligible spouse" is defined for SSI purposes as someone who lives with an SSI recipient as husband or wife and is not eligible for SSI. 20 C.F.R. 416.1160(d). The regulations give several specific rules for couples who face a "change in circumstances." Some of these circumstances include the following:

- when the ineligible spouse becomes eligible, 20 C.F.R. 416.1163(d)(1);
- when spouses separate or divorce, 20 C.F.R. 416.1163(d)(2);
- when an eligible individual begins living with an ineligible spouse, 20 C.F.R. 416.1163(d)(3);
- when an ineligible spouse dies, 20 C.F.R. 416.1163(d)(4); and
- when an eligible spouse becomes subject to the \$30 federal benefit rate (FBR), 20 C.F.R. 416.1163(d)(5).

In general, deeming will cease, or begin, beginning with the month after the event-changing circumstances occur. See **Exhibit 1E** for a spousal deeming worksheet. See also 1.5.11(h), Resource Deeming, above.

### **Deeming Process—Sponsor-to-Alien Income Deeming**

The general deeming formula and calculations have not changed. These include the following:

- If the sponsor sponsors only one alien, all income determined to be “deemable” is deemed to the SSI alien.
- If the sponsor sponsors more than one alien, all income determined to be “deemable” is deemed to each sponsored alien as if that alien were the only alien being sponsored.
- In other words, the same dollar amount is deemed to each alien being sponsored.
- Deeming from a sponsor to an alien ends with the month during which the alien’s third anniversary of entrance into the United States occurs. See 20 C.F.R. 416.1102 for a discussion concerning what is countable as income. In this type of deeming situation, there is no distinction between earned and unearned income.
- The sponsor’s allocation equals the FBR for a disabled individual. The sponsor’s spouse’s allocation equals one-half the disabled FBR and is allowed if the spouses live together in the month considered. A sponsor’s spouse serving as a cosponsor will receive a full sponsor’s allowance. The sponsor’s dependents’ allocation equals one-half the disabled FBR per dependent without regard to the income of each dependent.
- Total income deemed to an alien becomes the alien’s unearned income for purposes of calculating the SSI payment level. See **Exhibit 1F** for a sponsor-to-alien deeming worksheet.

### **(g) Counting In-Kind Income**

In-kind income is considered by the SSA when determining monthly SSI awards. In-kind income may come in the form of gifts or allowances that are used by the individual to meet basic needs for food and shelter-related items (Note that effective 3/5/05, clothing is no longer included in in-kind income.). For example, if an SSI recipient lives in an in-law’s apartment and pays less than market value for rent, the difference between the market rental rate and the actual rent will be considered in-kind income to the SSI recipient. For the full range of shelter-related items see POMS SI 00835.465.

Two rules are used to determine the amount of in-kind support and maintenance that must be counted:

- **One-third reduction rule** - When an SSI applicant or recipient lives in the household of a person who supplies both food and shelter, the SSI benefit amount will be reduced by one-third of the FBR. 20 C.F.R. 416.1131. In Massachusetts, this puts the SSI recipient in the lowest SSI payment category, Living in the Household of Another.

- **Presumed maximum value rule** - This rule applies when the One-third reduction rule does not apply, i.e., only shelter is provided or the SSI recipient makes partial payment for food or shelter. Under this rule, the SSA reduces the SSI recipient's benefit by the actual value of the in-kind income or one-third the FBR plus \$20 (the presumed maximum value), whichever is less. 20 C.F.R. 416.1140. This rule does not apply if every member of the household receives public income-maintenance payments.

#### **Practice Note**

*Loans of in-kind income.* Legal obligations to repay loans of food and shelter are not income for SSI purposes, e.g., when an SSI applicant receives food and shelter from relatives while waiting for benefits. See Introduction to Living Arrangements and In-kind Support and Maintenance, POMS SI 00835.001(b) (1995) and Social Security Ruling 92-8p for the documentation requirements of a legal obligation to repay.

#### **(h) Retrospective Monthly Accounting (20 C.F.R. 416.410)**

The SSA uses a monthly system of calculating both the eligibility of SSI recipients and the amount of benefit due. Determinations of eligibility are based on the current month's income. Payment amount determinations are based on the monthly income received two months prior to the payment month. During the first two months of entitlement, special rules apply.

Effective with benefits payable beginning April 1, 2005, one-time, nonrecurring income for new SSI recipients will not be subject to RMA. See 433, Social Security Protection Act of 2004, P.L. No. 108-203. This change will eliminate the triple counting of one-time income for new SSI recipients by counting that nonrecurring income only for the month of receipt.

## **§ 1.6 APPLICATIONS AND APPEALS**

### **§ 1.6.1 Applications**

The first step in the SSI eligibility determination process is to complete and file an application.

#### **(a) Who Can Apply?**

An application may be filed by any aged, blind, or disabled person or by an authorized representative acting on his or her behalf. 20 C.F.R. 404.612, 416.315.

#### **(b) How to Apply**

The application must be in writing using an SSA form and can be filed at any convenient district office. If the applicant is unable to appear in person, the SSA will mail an application and make a home visit if necessary. It may be also be possible to complete some of the application by telephone. The telephonic application will be forwarded to the applicant's home for completion and

signature. See 20 C.F.R. 404.610, 416.310. Applications for Title II benefits (not SSI) and the Adult Disability Report form (SSA 3368) for both SSI and SSDI applications may be completed online through SSA's website, [www.socialsecurity.gov](http://www.socialsecurity.gov). Individuals who need help completing the forms online may call SSA to schedule an appointment and SSA will provide help in person or by phone. Also note that helpful application starter kits are available on SSA's website.

**(c) *When to Apply***

Prior to the PRWORA, Pub. L. No. 104-193 (Aug. 22, 1996), SSI payments could be retroactive to the date of application or the date all eligibility requirements were met, whichever was later, benefit payments were prorated for a partial month of eligibility. 20 C.F.R. 404.620, 416.330. Section 204 of the PRWORA changed the effective date of an SSI application to the first day of the month after the month in which the application is filed and the individual becomes eligible. For example, the first possible payment month for an SSI application filed on September 9, 1996, would be October 1996.

**(d) *Social Security Application as Application for SSI***

The SSA will treat the filing of an application for a Social Security benefit as an oral inquiry about SSI and will utilize that date if an SSI application is filed within sixty days. 20 C.F.R. 416.350.

**(e) *Oral or Letter Application (20 C.F.R. 404.630, 416.325)***

If an applicant writes or inquires orally about SSI, the SSA will mail a notice explaining the right to apply, and, if an application is completed within sixty days, the date of the initial inquiry is considered the application date. This is known as a "protective filing date."

**(f) *Failure to Cooperate***

If an applicant refuses permission to verify the contents of the application, the SSA can withhold further action for "failure to cooperate. See Failure to Cooperate, POMS DI 40105.040 .

**(g) *Misinformation by the SSA (20 C.F.R. 404.633, 416.325(b)(3))***

If a claimant can show that misinformation from the SSA resulted in late filing, the claimant may be considered to have applied on the date of the misinformation or the date all eligibility criteria are met, whichever is later. It is important that the claimant have the name of the SSA worker and the date of contact with the SSA in order to prove a misinformation allegation. In fact, it is always good practice to keep a log of with whom and when the applicant spoke during an SSA contact.

**(h) *Necessary Documents***

The SSA will request various documents to verify evidence of eligibility. These documents include the following:

- an SSN;
- proof of age;
- proof of citizenship or alien status;
- wage stubs or other evidence of the source and amount of earned income;
- proof of resources, such as bank statements or car registration; and
- names and addresses of doctors, hospitals, or clinics where treatments were received.

However, it is important to apply as soon as possible to protect the filing date. Any missing documentation can be supplied later.

### **(i) Applicant's Rights**

SSI applicants have the right to apply for SSI benefits regardless of whether the SSA believes they will be found eligible. See 20 C.F.R. 416.305, 404.603. They also have the right to be informed of all SSA-administered benefits they might be eligible for and to be assisted in developing evidence to meet the eligibility criteria.

### **(j) Communication Access**

If the applicant is unable to effectively communicate in English, SSA is required to provide an interpreter at no expense to the applicant in order to assist the applicant in completing business transactions with the SSA. Special Interviewing Situations (Non-English Speaking or Limited English Proficiency), POMS GN 00203.011 ; Special Interviewing Situations (Deaf and Hard-of-Hearing Individuals), POMS GN 00203.012 . Interpreters can be provided for all SSA interactions and at all levels of administrative appeal upon request by the applicant.

As a result of a federal court decision in *American Council of the Blind v. Astrue*, blind and visually impaired beneficiaries and representative payees have additional choices in how they receive notices from SSA including large print, Braille, and Microsoft Word CD. See <http://www.socialsecurity.gov/notices/index.htm>

See SSA's Multilanguage Gateway website page for more information on language access. <http://www.socialsecurity.gov/multilanguage/langlist1.htm>

Also note that SSA has publications in many languages other than English available on its website.

### **(k) Other Benefits (20 C.F.R. 416.210)**

As noted above, SSI is a needs-based federal welfare program. As such, an applicant or recipient must seek assistance from any other program for which the applicant may be eligible before seeking assistance from the SSI program. For instance, a disabled worker must seek worker's compensation benefits, SSDI

benefits, or any other non-needs-based benefit, if potential eligibility exists, prior to applying for SSI. The SSA will inform the SSI applicant of all other benefits that could potentially assist the applicant. Applicants (or recipients) who fail, without good cause, to apply for any and all other benefits for which they may be eligible will be denied SSI.

### **(I) Quick Disability Determination (QDD)**

The Quick Disability Determination process began as part of the Disability Service Improvement (DSI) initiative in the Boston region (SSA's Region 1) but has been expanded nationwide. See 72 Fed. Reg. 51173 (9/6/07). The purpose of QDD is to make a quick decision in obvious cases. SSA states that it uses criteria highly predictive of disability to determine which cases are selected for QDD consideration. Criteria may include medical history, treatment, and the availability of medical evidence - not necessarily specific impairments. Selection for QDD processing is done by SSA, based on the information in the application. SSA will not entertain requests from advocates and claimants to have claims designated as QDD.

**Note** that QDD does not replace other mechanisms for expedited claim processing such as presumptive disability (see §1.10 in this outline) and the provisions for terminal illness (TERI) cases (see POMS DI 23020.045).

### **§ 1.6.2 Appeals Process Overview**

The SSA has developed a three-step administrative determination and appeal process. 20 C.F.R. 404.900, 416.1400. This process applies to most determinations, e.g., decisions about eligibility, benefit amounts, overpayments, disability determinations, etc. There must be an application before appeal rights attach. In other cases, there must be an "initial determination" before appeals rights attach. 20 C.F.R. 404.902 - .903, 416.1402 - .1403.

**NOTE: A slightly different appeals process is still effect for disability cases at the ALJ and Appeals Council levels of appeal, based on applications filed in an SSA Region 1 states (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont) on or after 8/1/06. The new process, known as Disability Service Improvements (DSI), applies only to initial disability cases. It does NOT apply to CDRs or age-18 reviews. It also does not apply to any type of non-disability case.**

#### **(a) Time**

All appeals must be filed within sixty days from the date of receipt of the notice of the decision. The SSA presumes that notices are received within five days of the date of the notice. 20 C.F.R. 404.901, 416.1401. This means that appeals must be filed with sixty-five days of the date of the notice. However, the five-day mailing presumption can be overcome by proof that the notice was received later

(this only works if the appeal is filed within sixty days of the actual receipt of the notice).

Otherwise, failure to file an appeal within sixty-five days of the date of the notice prohibits further review of the case, unless the SSA determines that there is “good cause” for failing to appeal on time. Good cause is generally a reason that would prevent a person from attending to important business, e.g., serious illness or death in the family. 20 C.F.R. 404.911, 416.1411. The SSA must also consider the effect of any mental, physical, educational, or linguistic limitations on the individual’s ability to timely file and find “good cause” in situations where an individual’s ability to comply with the appeal process has been compromised by any of these, or similar, factors. 20 C.F.R. 404.911(a)(4), 416.1411(a)(4). **SSR 91-5p—Policy Interpretation Ruling—Titles II and XVI—Mental Incapacity and Good Cause for Missing the Deadline to Request Review, SSR 95-1p—Policy Interpretation Ruling—Titles II and XVI—Finding Good Cause for Missing the Deadline to Request Administrative Review Due to Statements in the Notice of Initial or Reconsideration Determination Concerning the Right to Request Administrative Review and the Option to File a New Application.**

### **(b) Appeal Form**

The SSA provides specific forms for each level of appeal. These forms are available at the SSA’s district offices. The forms are:

- *Request for Reconsideration* - Used to appeal an initial determination.
- *Federal Reviewing Official* – Used until 3/23/08 to appeal an initial disability determination in SSA Region 1 states (Mass, Maine, N.H., R.I., Conn. VT) for applications filed on or after 8/1/2006. After 3/23/08, the SSA Region 1 states reverted to Reconsideration, except in New Hampshire, where initial disability denials go to the ALJ level of appeal.
- *Request for Hearing* - Used to appeal a reconsidered determination and bring the issue before an administrative law judge (ALJ). **Note that, in the SSA Region 1 states, there are restrictive evidence submission rules in place for disability cases for applications filed on or after 8/1/2006.** See 20 CFR 405.331.
- *Request for Review of the Hearing Decision (Appeals Council)* - Used to appeal an ALJ’s decision and bring the issue before the appeals council. See DSI Appeals Council rules at 20 CFR 405.401 *et seq.*

#### **Practice Note**

These, and many other SSA forms, are available on the SSA’s website at [www.ssa.gov/online/forms.html](http://www.ssa.gov/online/forms.html).

Each form is a one-page, multicopy document that is very simple to complete. However, a timely appeal can be made with any clear written request before the appeal time runs. A letter indicating that a claimant wishes to appeal the denial of benefits received by the SSA during the appeal period will suffice to protect the

claimant's appeal rights. The Social Security Act requires the claimant to complete the appropriate form. However, appeal rights will already have been preserved.

### **§ 1.6.3 Initial Determinations**

#### **(a) Disability Determinations**

Disability determinations are made by the state Disability Determination Services (DDS). Once the application is complete, the district office mails the entire file to the DDS for evidence development, evidence review, and a decision. The DDS may contact the applicant and the applicant's doctors or lay sources of evidence for more information. The applicant may also be scheduled for consultative examinations to provide missing medical evidence or to resolve conflicts in the evidence. It is in the best interest of the claimant to attempt to provide all available medical and lay evidence as early in the determination process as possible. Advocates and claimants should make efforts to collect existing medical evidence from treating sources, emergency rooms, clinics, etc., and to provide this information to the DDS claims examiner for consideration.

**Massachusetts law requires that existing medical evidence be provided to a claimant or claimant's advocate free of charge when requested in conjunction with an application for SSDI, SSI, or other needs-based benefit. See G.L. c. 111, 70 (hospitals, clinics); G.L. c. 112, 12CC (physicians).**

"Existing medical evidence" includes doctor's notes, nurse's notes, hospital charts, and anything else that was in existence at the time of the request for medical information and was not prepared specifically in response to that request. The law does not require medical providers to write letters or fill out forms for no charge, although many will do so.

Once a decision has been made, DDS mails the entire file back to the district office. The applicant receives a notice explaining the decision and appeal rights. If the applicant is not satisfied with the decision, he or she may file an appeal called a "Request for Reconsideration." This form asks for a reason for the claimant's appeal. A simple statement indicating that the claimant is disabled or that he or she disagrees with the decision will be sufficient for purposes of completing the form.

#### **(b) Other SSI Eligibility Determinations**

Nondisability determinations (e.g., financial, residence, citizenship, overpayments) are made at the district office. District office staff develop the evidence, make the decision, and send the notice explaining the decision and the applicant's right to file a request for reconsideration.

#### **(c) The 10 Day Aid Pending Appeal Rules**

**If the initial decision concerns the termination, reduction, or suspension of SSI benefits, the recipient shall receive continuing benefits pending the**

reconsideration decision if he or she files the appeal within ten days of receipt of the notice. 20 C.F.R. 416.1336(b).

**If the initial decision concerns the termination of SSI or SSDI for medical reasons after a continuing disability review**, the recipient may elect continuing benefits pending the reconsideration decision if he or she files the appeal within ten days of receipt of the termination notice. 20 C.F.R. 404.1597a, 416.996.

The five-day mailing rule and the good cause for late filing rules apply to both of these ten-day rules. See Due Process Requirements - Title XVI, POMS DI 40515.010 (1992); Time Limit for Electing Benefit Continuation - Title II/Title XVI, POMS DI 12027.010 (1995).

#### **§ 1.6.4 Reconsideration and Federal Reviewing Official \*\***

Reconsideration is the first step in the administrative appeal process. The format of the appeal varies with the type of decision.

##### **(a) Disability Determination for applications filed prior to 8/1/06**

If the decision concerns whether or not the applicant meets the disability or blindness criteria, the applicant will be asked to file new information about his or her disability along with the appeal. The entire file will then be sent back to DDS, where different staff will take another look at the case and develop and evaluate any new information supplied by the applicant. It is likely that a consultative examination will be scheduled at this stage of the appeal process should the file evidence be lacking or contradictory. Once new evidence has been gathered and developed DDS will make a new decision and return the file to the district office. A new notice will be sent to the applicant explaining the decision and the appeal rights. If the applicant is not satisfied with decision, he or she may file a *Request for Hearing*.

##### **(b) Disability Determinations for applications filed on or after 8/1/06. \*\*Note that this section is no longer relevant because the SSA Commissioner suspended use of the FedRO after 3/08 in favor of reinstating Reconsideration.**

For SSI disability and SSDI benefit applications filed on or after 8/1/06, the appeal after an initial denial is to the Federal Reviewing Officer. The appeal period is 60 days from the date of receipt of the initial denial notice. The appeal form is SSA-61, available on SSAs website in Forms or at district offices. Federal Reviewing Officers are attorneys and are located in Falls Church Virginia. Their role is to review the DDS determination, ensure that the record is developed for decision, and make a new decision. If the Federal Reviewing Officer denies the claim, the individual can file an appeal for de novo review by an Administrative Law Judge.

##### **(c) Other SSI Eligibility Determinations**

When the decision involves SSI nondisability eligibility criteria, the appeal stays in the district office. The applicant may supply new evidence and may request a formal or informal conference at the district office. 20 C.F.R. 416.1413. The conferences are an opportunity to have the SSA explain the decision in person and to present opposing views. The difference between formal and informal conferences is basically that subpoenas may be used in formal conferences. If a conference is not requested, the district office staff will review the decision and all the evidence, including any new evidence. After the district office makes a decision, a new notice will be sent to the applicant explaining the decision and the right to file a *Request for Hearing*.

#### **(d) Special Appeals Process for Disability Terminations**

If the initial decision concerns a termination of disability or blindness benefits for medical reasons (i.e., a decision finding the recipient no longer disabled because the medical evidence shows that he or she has medically improved to the point where he or she can work), the recipient has a right to a face-to-face hearing at the reconsideration level. 20 C.F.R. 404.914, 416.1414. The hearing will be automatically scheduled if the case cannot be allowed on file review only. It is important to attend these hearings because testimony from the individual is important to many types of cases and many recipients win at these hearings.

These hearings are conducted by DDS hearing officers. The DDS will issue a reconsidered decision explaining the decision and the recipient's right to request a further appeal. If the DDS hearing decision upholds the termination, the recipient is still entitled to a de novo hearing before an ALJ. The recipients may also request continuing benefits pending appeal if they file the next appeal with ten days of the date of receipt of the DSS hearing notice and request continuing benefits. 20 C.F.R. 404.1597a, 416,996.

#### **§ 1.6.5 Administrative Law Judge Hearing (20 C.F.R. 404.929 -.961, 416.1429-.1442).**

**Note: The Administrative Law Judge appeal step is the same for DSI and non-DSI cases, although there are different time frames for hearing notices and restrictive time limits for submission of evidence as described below in this section.**

The ALJ hearing step of the administrative appeal process is probably the most important appeal stage in that the highest reversal of unfavorable decisions occurs here. This is the only step in the administrative review process where the decision maker sees and speaks with the applicant. Well over 50 percent of the cases appealed to this stage will be reversed. The hearings are de novo and are conducted by independent ALJs at the Office Disability Adjudication and Review (ODAR). The ALJ will review all the evidence, including any new evidence submitted, and take testimony from the applicant or recipient and any witnesses called by the applicant or recipient. 20 C.F.R. 404.929, 416.1429.

The ALJ may schedule a medical expert or vocational expert to provide opinions on medical or vocational issues. If present at the hearing, they will review the

record, listen to testimony, and respond to the ALJ's questions. The ALJ will pose hypothetical questions to the vocational expert concerning the claimant's capacity for work. The claimant's advocate has the right to cross-examine the medical expert and the vocational expert. When the record is closed, the ALJ will then make a new decision and issue a notice explaining the decision and the right to appeal to the appeals council.

Depending upon the location, it can take from nine to twelve months to get an ALJ hearing date (from the date a request is filed). The SSI applicant or recipient will be notified at least twenty days prior to hearing of the date of the time and location of the scheduled hearing. 20 C.F.R. 404.938, 416.1438. The notice will also indicate whether experts will be in attendance and will include a general statement of the issue to be decided. If additional evidence is to be submitted, it is best to submit it as far in advance of the hearing as possible. As always, it is wise to keep copies of everything submitted to the SSA.

Memoranda outlining a claimant's case and providing relevant regulations and SSA policies may assist in explaining a claim to the ALJ. Memos should be submitted at, or prior to, the hearing. However, when experts are involved, it may be impossible to address all issues prior to the hearing. In this event, a request for time to provide a memo, or supplemental memo, will generally be granted.

Remember that the SSA must provide interpreters at hearings for individuals who do not speak English or who have limited English proficiency.

### ***Video Teleconferencing of Hearings Video Teleconferencing of Hearings***

On March 5, 2003, regulations went into effect authorizing SSA to conduct hearings before ALJs at which a party or parties to the hearing and/or a witness or witnesses may appear before the ALJ by video teleconferencing (VTC). Under the new rules, claimants may veto the use of VTC for their own testimony. See 20 CDR 404.938(b), 416.1436(c), and 405.315(c)(for DSI cases). Claimants may object to, but not veto, the use of VTC for the testimony of vocational experts or medical experts. SSA notes that 40% of hearings are held at remote sites. SSA expects these revisions to permit greater flexibility in scheduling and holding hearings, improve hearing process efficiency, and extend another service delivery option to individuals requesting a hearing.

### **DSI Case Issues at the ALJ Level**

Where DSI applies, the following are among the differences at the ALJ level.

\* The *DSI advance notice requirement* is 75 days. 20 C.F.R §§ 405.315(a), 405.316.

\* *DSI Objections as to time and place of hearing* must be made within 30 days after receipt of the hearing notice. 20 C.F.R. § 405.317(a).

\* *DSI Objections to issues in the hearing notice* must be made at least 5 business days in advance of the hearing. - 20 C.F.R. § 405.317(b). Note that

the issues before the ALJ include all issues raised by the claim, regardless of whether the issues have already been decided in the claimants favor. ALJs may consider new issues at any time after sending out the notice of hearing and before sending out the notice of decision - as long as the ALJ provides the claimant with an opportunity to address it. 20 C.F.R. § 405.325.

\* *DSI ALJ Evidence submission* - 20 C.F.R. § 405.331.

- a. Evidence must be filed at least 5 business days prior to the hearing.
- b. ALJs may accept and consider new evidence filed less than 5 days prior to the hearing or at the hearing if:
  - i. SSAs action mislead the claimant, or
  - ii. Claimant has physical, mental, educational or linguistic limitations, or
  - iii. Some other unusual, unexpected or unavoidable circumstance beyond the claimants control prevented earlier filing.
- c. The ALJ will accept and consider new evidence after the hearing but before the hearing decision if:
  - i. One of the three exceptions in 5.b. above applies, and
  - ii. There is a reasonable probability that the evidence, when considered alone or with the other evidence would affect the outcome.
- d. The ALJ will consider new evidence after the ALJ decision if:
  - i. One of the three exceptions in 5.b. above applies, and
  - ii. There is a reasonable probability that the evidence, when considered alone or with the other evidence of record would change the outcome, and
  - iii. If submitted within 30 days of receiving the ALJ decision.
- e. The claimant may ask the ALJ to hold the record open at the hearing. The ALJ may hold the record open if
  - i. the claimant is aware of additional evidence which she has been unable to obtain prior to the hearing, or
  - ii. the claimant is scheduled to undergo medical evaluation.
- f. Adverse Evidence - 20 C.F.R. §§ 405.1512(2), 416.912(c)

The final regulations did not include the requirement that appeared in the proposed regulations requiring submission of adverse evidence. The final regulations require the claimant to produce evidence, without redaction, showing the affect of their impairments. Note, however, other regulations that provide for penalties for failure to disclose material evidence.

\* *DSI Pre and post Hearing conferences* - 20 C.F.R. §§ 405.330, .366.

ALJs may hold, at the claimants request or on the ALJs own initiative, pre or post hearing conferences. Such conferences will usually be held by telephone and a record will be made.

\* *DSI Reopening*. 20 C.F.R. §405.601.

-Prior to the ALJ decision, these rules apply - 20 C.F.R. §§ 404.988,

416.1488.

-After the ALJ decision, reopening is limited to 6 months from the date of the final decision. SSA will not use new and material evidence as a good cause reason after the ALJ decision has been made.

### ***Representation***

While there is no requirement that a claimant be represented before the SSA, it is most beneficial to seek the assistance of an advocate or attorney when a case reaches the administrative hearing level. The assistance of a knowledgeable advocate can greatly enhance the chances of success.

Representation is regulated by the SSA. Attorneys are allowed to charge a fee for services; however, all fees must first be approved by the SSA. 20 C.F.R. 404.1728, 416.1520. Fees are generally limited to 25 percent of the retroactive benefit. There is no provision for withholding attorney fees from retroactive SSI awards for direct payment to the attorney. It is the responsibility of the represented individual to then pay the fee. Fees for nonattorney representation also can be approved by the SSA.

Any award of fees to an attorney or advocate will come with notice to the representative and claimant. Both parties can appeal awards using the SSA administrative process. 20 C.F.R. 404.1720(d), 416.1520(d).

#### **Practice Note**

The SSA's website at [www.ssa.gov/representation](http://www.ssa.gov/representation) includes a gateway page called "Representing Clients," which includes information about the attorney fee rules.

### **§ 1.6.6 Appeals Council and Disability Review Board.**

#### **(a) Appeals Council**

**NOTE: Until June 13, 2011, the Appeals Council level of appeal did not apply to disability applications filed on or after 8/1/06 in the SSA Region 1 states (MA, RI, CT, VT, ME, NH). Final regulations published at 76 Fed. Reg. 24802 (5/3/11), eliminated the DRB effective with 6.13.11. Claims pending at the DRB on 6.12.11 were transferred to the Appeals Council. For information on the processing of the transferred claims, see subpart (b) below.**

The SSI applicant or recipient may request that the appeals council review an ALJ's decision, and new evidence related to the period considered by the ALJ may be submitted. This is last step in the administrative appeal process. Most requests for review are denied. If review is granted, the appeals council may uphold the decision, reverse the decision, or remand the case to the ALJ for further proceedings. 20 C.F.R. 404.969, 416.1467. To make these decisions, the appeals council will review the ALJ decision and the evidence of record. After

making a decision, the appeals council will issue a notice explaining the decision and the right to appeal to federal court.

It is also possible for the appeals council to take its “own motion” review of an ALJ decision within sixty days of the date of the decision. 20 C.F.R. 404.969, 416.1469. Should this occur, the applicant will be provided with notice and an opportunity to submit further information for the appeals council’s consideration. Interim benefits are available to the claimant, if the appeals council takes its “own motion” review and if a final decision has not been made within 110 days of the date of the decision that is being reviewed. 20 C.F.R. 404.969(d), 416.1469(d).

The appeals council takes the position that a claimant’s request for review opens the entire ALJ decision to review and not only those issues challenged by the claimant. For example, should an ALJ award benefits but with an unfavorable onset date, the appeal filed by the claimant will be viewed by the appeals council as giving that body the ability to review the entire decision.

Further, the appeals council also takes the position that it can access the reopening regulations to the same extent as can a claimant. This means that if the appeals council disagrees with an ALJ decision but fails to take “own motion review” within the required number of days, it will try to apply the reopening rules at 20 C.F.R. 404.987 - .989 and 416.1487 - .1489 to reopen and revise the decision. This may conflict with First Circuit law and remains something of an open question. See *McCuin v. Secretary*, 817F.2d 161 (1st Cir. 1987).

#### **(b) Disability Review Board Eliminated**

Until 6/13/11, Appeals Council review was not available for disability benefit applications filed on or after 8/1/06. Claimants did not have the right to appeal to the DRB (except on an ALJ dismissal); instead, the DRB reviewed selected favorable and unfavorable ALJ decisions. If the DRB decided to review a decision, it sent notice of the review along with the ALJ decision. A favorable ALJ decision could not be implemented until this review was complete. If the DRB did not make a decision within 90 days, the individual had the right to file an appeal in Federal District court. SSA deemed cases pending at the DRB on 6/12/2011 as Appeals Council Appeals. SSA published HALLEX Rule I-5-3-18 to provide instructions on claimant rights regarding these deemed appeals – including withdrawing the appeal, and providing additional evidence and argument.

#### **(c) New Evidence Submissions at the Appeals Council**

For non-DSI cases, the Appeals Council will consider new and material evidence which related to the period on or before the date of the ALJ decision. 20 C.F.R. 416.1476(b), 404.976(b).

The procedural differences for DSI cases (see subsection (a) above for which claims are DSI claims) at the Appeals Council, are as follows:

- The evidentiary record is essentially closed after the date of the ALJ decision. New evidence submitted to the Appeals Council will be considered only if it relates to the period considered by the ALJ, and only if the claimant shows there is a reasonable probability that the evidence would change the outcome, and either: that SSA misled the claimant; or that the claimant had a physical, mental, educational, or linguistic limitation that prevented earlier submission of the evidence; or that some other unusual, unexpected or unavoidable circumstance prevented the claimant from submitting the evidence earlier. 20 C.F.R. 405.401, 405.402.
- After the ALJ decision, the time frame for reopening is six months from the date of the final decision. New and material evidence will not provide a good cause basis for reopening. 20 C.F.R. 405.601.

**(d) Rescission of SSA Subsequent Application Policy**

Effective July 28, 2011, SSA has rescinded its longstanding (since December 1999) policy of allowing claimants to both reapply and file an Appeals Council appeal for the same Title and the same disability. This is not a DSI issue nor is it a regional issue. The details of this policy change can be seen in Social Security 11-1p and EM-11052 REV2 (9.26.11).

**§ 1.6.7 Federal Court Review**

The appeals council decision is the final administrative decision of the SSA. Claimants may file a complaint for judicial review with the United States District Court within sixty days of the receipt of the denial notice from the appeals council. 42 U.S.C. 405(g); 20 C.F.R. 404.981, 416.1481.

The federal court's jurisdiction is limited to reviewing the decision and the record developed in the administrative appeals process to determine whether the decision is based on errors of law or is contrary to substantial evidence of record. The court will not take testimony and will consider new evidence only in very limited circumstances. See *Evangelista v. Secretary HHS*, 826 F.2d 136 (1st Cir. 1987).

The court may, but rarely does, hear oral argument on the parties' motions for judgment. The court may uphold the decision of the SSA or reverse it, with or without remanding the case to the SSA for further administrative proceedings.

The Equal Access to Justice Act (EAJA), 42 U.S.C. 2412, provides for attorney fees in cases in which the plaintiff is the "prevailing party" and in which the SSA was not "substantially justified" in defending the earlier decision. Awards of fees are not uncommon. See longer discussion on the EAJA in Chapter 18 herein, Obtaining Attorney Fee Awards.

### **Practice Note**

Despite the holding in *Sims v. Apfel*, 520 U.S. 103 (2000), finding that issue preclusion does not apply to issues not raised by claimants at the Appeals Council, the First Circuit Court of Appeals has held that issue preclusion does apply to issues not raised before the ALJ. See *Mills v. Apfel*, 244 F.3d 1 (1st Cir. 2001), *cert. denied*, 122 S. Ct. 822. *Mills* involves three issues of first impression in the First Circuit Court of Appeals that all advocates need to be aware of, and need to be prepared to address, in the administrative appeals process or in federal court. In *Mills*, the First Circuit held that:

- when the appeals council refuses review, a reviewing court must review the ALJ decision solely on the evidence presented to the ALJ;
- appeals council refusals to review are reviewable by the federal courts on the grounds of “egregious error/explicit mistake”; and
- issues not raised before the ALJ, at least where the appeals council refuses review the ALJ decision, are waived and may not be considered by the reviewing court.

## **§ 1.7 SSI BENEFITS FOR CHILDREN UNDER AGE EIGHTEEN**

Children under age eighteen may qualify for SSI if they:

- meet SSA’s blindness standard or SSA’s disability standard for children,
- are income and asset eligible; and
- satisfy the residence and citizenship or alien-status eligibility criteria.

The residence and citizenship or alien-status eligibility criteria for children are the same as those for adults. The income and asset counting rules that apply to adults also apply to the income and assets of children. In addition, some of the countable income and assets of a child’s parents may also be counted to determine the child’s eligibility, as explained in 1.5.14, SSI Eligibility - Income, above. The blindness standard for children is also the same as that for adults. However, the disability standard for children is quite different than that for adults and has undergone several recent changes, as described below.

### **§ 1.7.1 Disability Standard Changes as of August 22, 1996**

The Welfare Act of 1996 (PRWORA), Pub. L. No. 104-193 (Aug. 22, 1996), made several substantial changes in the SSI program that affect eligibility for children with disabilities. The changes made by the SSI provisions of the PRWORA were generally effective on August 22, 1996.

Section 211 of the PRWORA required three changes that have resulted in a more restrictive disability standard for children, as follows:

- *New Definition of Disability* - Prior to August 22, 1996, the Social Security Act defined SSI-qualifying disability for children to require impairments of comparable severity to those that would disable an adult. 42 U.S.C.

1382c(a)(3)(A). The PRWORA established a new definition of disability for children that requires physical or mental impairments resulting in marked and severe functional limitations.

- *Elimination of Individual Functional Assessment* - The prior “comparable disability” standard was interpreted to require the SSA to perform an individualized functional assessment (IFA) before finding a child not disabled. See *Sullivan v. Zebley*, 493 U.S.521 (1990). When the *Zebley* IFA standard was in use, a child, whose impairments did not meet or equal the severity of a listed impairment, needed “moderate”-level functional limitations in three domains of age-appropriate function or “marked”-level limitations in one domain and moderate”-level limitations in another domain to qualify for SSI. The PRWORA specifically required the SSA to discontinue the use of the IFA developed to implement the *Sullivan v. Zebley* decision. Children’s functional limitations are still evaluated under the new standard. However, the severity level to qualify has been raised. Generally, under the PRWORA standard, a child must have an extreme limitation in one broad area of function or a marked limitation in two broad areas of function.
- *Maladaptive Behavior Evaluation Changes* - Prior to August 22, 1996, the listings for children’s mental and emotional impairments included evaluation of “maladaptive behaviors” in the personal/behavioral domain of function. The PRWORA requires the elimination of references to “maladaptive behaviors” in the personal/behavioral domain in listings 112.00C.2. and 112.02B.2.c.(2). However, these behaviors may still be evaluated in a different broad area of function. Further, no mental impairments for children have been removed from consideration. A child with ADHD or a conduct disorder may still qualify for SSI, as long as the child’s condition has the necessary severity level.

### **§ 1.7.2 Nondisability Changes Affecting Children as of August 22, 1996**

The PRWORA makes several other changes in the SSI program that affect children’s eligibility for SSI, as follows:

- Section 402 of the act changes the SSI alien-status eligibility criteria to make most noncitizens ineligible for SSI.
- Section 204 changes the effective date of the SSI application for all applicants.
- Section 212 requires more frequent continuing disability reviews for SSI eligible children.
- Section 221 requires installment payments for large retroactive SSI awards for all applicants and recipients.
- Section 213 requires the establishment of limited use “dedicated accounts” for certain retroactive SSI awards for children. These changes are covered in the 1.11, Posteligibility Issues, below.

### **§ 1.7.3 PRWORA Standard Implementing Regulations and Training Materials**

The SSA published final rules implementing the PRWORA changes in the Federal Register at 65 Fed. Reg. 54,747 (Sept. 11, 2000). The effective date of the final regulations is January 2, 2001. These final regulations clarify and amend the interim final regulations published at 62 Fed. Reg. 6408 (Feb. 11, 1997). In the preface to the final regulations, the SSA outlines the history of the childhood disability standard and explains the basis for the revisions in the final regulations. See 65 Fed. Reg. 54,747-54,751.

Although the final regulations make some significant changes in the interim final regulations, the following have not changed:

- the definition of disability for children under age eighteen;
- the three-step sequential analysis of disability for children;
- the severity standard for children (“listings level,” i.e., two “marked” or one “extreme”); and
- the age groupings for children, i.e., 0-1, 1-3, 3-6, 6-12, 12-18.

The bulk of the clarifications and revisions in the final regulations involve the functional equivalence analysis and severity assessments for functional limitations. The SSA has also reorganized and consolidated many of the childhood disability regulations. The SSA expects the final regulations to result in fewer erroneous decisions and a slight increase in the allowance rate.

#### **Practice Note**

The SSA has produced several sets of training materials for its adjudicators that provide insight into the application of the childhood disability standard. These materials are compiled in a “Childhood Q & A Compendium,” issued by SSA in May, 2001. The Q & A Compendium is available on-line in the Disability section of [www.masslegalservices.org](http://www.masslegalservices.org).

### **§ 1.74 MassHealth and Children with Disabilities**

Massachusetts provides for automatic MassHealth Standard for children who receive SSI. In addition, in Massachusetts, many children under age eighteen who are not eligible for SSI can still be eligible for MassHealth coverage. Children who are not income or resource eligible for SSI, for example, because of a parent’s income—and who are not eligible for MassHealth Standard because of family income, can qualify for MassHealth CommonHealth for Disabled Children. MassHealth CommonHealth uses the disability standard in place in the SSI program prior to August 22, 1996. The prior standard, known as the *Zebley* standard, is similar to the functional equivalence standard currently in use. The difference is that the current severity standard is higher than that in use prior to August 22, 1996. See 1.7.2, PRWORA Nondisability Changes Affecting Children, above, for more information on the *Zebley* standard. The CommonHealth program for disabled children permits the child’s caregivers to purchase Medicaid coverage by paying a premium based on income and family size. There is no asset test in the CommonHealth program.

#### **§ 1.7.5 SSI Disability Definition for Children**

An individual under age eighteen must have a medically determinable impairment or combination of impairments that results in functional limitations that are marked and severe and that has lasted or is expected to last for at least twelve months or result in death. 20 C.F.R. 416.906.

### **§ 1.7.6 The Sequential Evaluation of Disability for Children**

The SSA has developed a sequential analysis to guide the application of the disability standard in individual child cases. The steps must be followed in order. At each step, the SSA must consider all available, relevant, and material evidence, both medical and nonmedical. In addition, the SSA must consider the effects of all the child's impairments in combination.

- Step 1: Is the child engaging in substantial gainful activity? If yes, the claim is denied. If not, the claim continues to step 2.
- Step 2: Does the child have a severe (more than de minimis) impairment or combination of impairments? If not, the claim is denied. If yes, the claim continues to Step 3.
- Step 3: Does the child's impairment, or combination of impairments, meet the criteria of a listed impairment? If yes, the claim is allowed. If not, consider medical equivalence.
  - Is the child's impairment, or combination of impairments, medically equivalent to the severity of a medically analogous listed impairment? If yes, the claim is allowed. If not, consider functional equivalence.
  - Is the child's impairment, or combination of impairments, functionally equivalent to the severity of any listed impairment? If yes, the claim is allowed. If not, the claim is denied.

20 C.F.R. 416.924(b), (c), (d), (e), (f).

### **§ 1.7.7 Step 1: Is the Child Performing Substantial Gainful Activity?**

For both adults and children, the SSA first considers whether the SSI applicant is working and performing "substantial gainful activity" (SGA). Those who are will not be found eligible for SSI.

#### **Practice Note**

Note that whether or not work is considered SGA, the income it produces must be considered under the SSI income counting rules.

The SGA considerations for a child are the same as those for an adult. See 20 C.F.R. 416.924(b), and the discussion at 1.8, Disability Standards for Adults, below.

### **§ 1.7.8 Step 2: Does the Child Have a Severe Impairment?**

The SSA defines a “severe impairment” as more than a slight abnormality or combination of slight abnormalities that causes “more than minimal functional limitations.” 20 C.F.R. 416.924(c). This step serves to screen out cases that could not possibly result in a finding of disability. In making the severity assessment, the SSA is required to consider both medical and nonmedical evidence and examine a child’s overall functioning considering all the child’s impairments in combination. The Step 2 severity requirement is a de minimis test to do no more than screen out groundless claims. See, e.g., *McDonald v. Sec’y of HHS*, 795 F.2d 1118, 1124 (1st Cir. 1986).

### **§ 1.7.9 Step 3: Does the Child Have an Impairment That Meets or Equals a Listed Impairment?**

The listed impairments are specifically described physical or mental conditions that the SSA has determined disabling. The listing of impairments for children under age eighteen contains sixty-six childhood diseases and conditions that the SSA considers severe enough to meet the disability standard for children.

A child may also be evaluated under the adult listing of impairments if the condition has a similar effect on adults and younger persons. 20 C.F.R. pt. 404, subpt. P, app.1, pt. A.

A child may be found disability eligible at this step if the child’s impairment meets, medically equals, or functionally equals the severity of a listed impairment.

If the child’s impairment does not meet nor medically equal the medical criteria of a listed impairment, the SSA must assess the overall functional limitations resulting from the child’s impairment or combination of impairments. This entails looking at the things the child cannot do due to his or her impairments and comparing those functional limitations to the functional consequences of the listings.

#### **(a) Meeting a Listing (20 C.F.R. 416.925)**

A child’s impairment meets a listing only when it manifests the specific findings described in the medical criteria for that listing. This is shown by comparing the symptoms, signs, and laboratory findings of the impairment with the corresponding criteria shown for the listing. The listings are divided into fourteen categories or body systems. See 20 C.F.R. pt. 404, subpt. P, app. 1, pt. B. These include the following:

- growth impairments ( 100.00);
- musculoskeletal system ( 101.00);
- special senses and speech ( 102.00);
- respiratory system ( 103.00);

- cardiovascular system ( 104.00);
- digestive system ( 105.00);
- genito-urinary system ( 106.00);
- hemic and lymphatic system ( 107.00);
- endocrine system ( 109.00);
- multiple body systems ( 110.00);
- neurological ( 111.00);
- mental disorders ( 112.00);
- neoplastic diseases (malignant) ( 113.00); and
- immune system (including HIV/AIDS) ( 114.00).

The PRWORA made no change in the listings for children, other than elimination of the references to maladaptive behaviors in the personal/behavioral domain of function in listings paragraphs 112.00C.2.and 112.02B.2.c. (Organic Mental Disorders). The maladaptive behavior reference in the Part A criteria for listing 112.08 (Personality Disorders) remains unchanged. Listing 112.11 for Attention Deficit Disorder is also unchanged.

**Practice Note**

The SSA is currently reviewing many of the listings of impairments for potential revision. The SSA recently published substantial revisions to the musculoskeletal listings for both children and adults at 66 Fed.Reg. 58,009 (Feb. 19, 2002). The SSA has also published proposed regulations for revisions to the listings for hemic and neoplastic disorders, 66 Fed. Reg. 59,306 (Nov. 27, 2001); digestive system disorders, 66 Fed. Reg. 57,009 (Nov. 14, 2001); and disorders affecting multiple body systems, 67 Fed. Reg. 78,196 (Dec. 23, 2002). The SSA has also proposed a new listing for skin disorders at Section 108.00, 66 Fed. Reg. 63,634 (Dec. 10, 2001). The best resource for tracking these changes is the SSA's website at [www.ssa.gov/regulations/final-rules.htm](http://www.ssa.gov/regulations/final-rules.htm)

**(b) Medically Equaling a Listing**

When a child's impairment or combination of impairments does not meet a listing, the SSA must consider whether the child's impairment is medically equivalent to a medically analogous listed impairment. The regulations describe four methods for determining when a child's impairments are medically equivalent. 20 C.F.R. 416.926(b).

- When an impairment is described in a listing but not all specified medical findings are exhibited, medical equivalence is shown when there are other medical findings related to the impairment that are of "equal medical significance."
- When an impairment is described in a listing but not all medical findings are as severe as specified in the listing, medical equivalence is shown when there are other medical findings related to the impairment that are of "equal medical significance."
- When an impairment is not described in the listings, medical findings will be compared with those in a "closely analogous" listing. Equivalence to the analogous listing is shown when the medical findings are of "equal

- medical significance.”
- When there is a combination of impairments, no one of which meets or equals a listing, the medical findings are also compared to a “closely analogous” listing. Equivalence is shown when the combination of medical findings establishes severity equivalent to the most closely analogous listing.

If a child’s impairment neither meets nor equals a listed impairment, the SSA must assess the overall functional limitations resulting from the child’s impairment or combination of impairments. This is the “functional equivalence” analysis described below. It entails considering the things the child cannot do due to his or her impairments and comparing his or her functional capacity to that of a same child without impairments.

**(c) *Functional Equivalence Under the Final Regulations, Effective As of January 2, 2001 (20 C.F.R. 416.926a, Final Regulations, 65 Fed. Reg. 54,782, 54,790)***

**\*\* Note that SSA published 8 helpful Social Security Rulings on applying functional equivalence in February 2009. SSRs 09-1p, 09-2p, 09-3p, 09-4p, 09-5p, 09-6p, 09-7p, 09-8p. The SSRs explain functional equivalence. i.e., the “whole child” approach, school evidence, and each of the six functional equivalence domains of childhood function.**

Perhaps the biggest change in the final regulations is the simplification of the functional equivalence analysis from four methods of analysis to one. The remaining method is based on domains of function and is essentially the same type of analysis as that used in the broad areas of function under the interim final regulations described above.

The final regulations describe six domains of function that apply to all age groups. Specific functional criteria are described for each age group in each domain. Each domain includes a general description of the kinds of activities that should be evaluated in terms of what a child of the same age without an impairment should be able to do. Except for the health and well-being domain, each domain description also includes two types of example illustrating typical functioning and limitations.

Functional equivalence under the final regulations still involves assessing the functional limitations caused by the child’s impairments in terms of what the child cannot do, has difficulty doing, needs help doing, or is restrained from doing. The SSA must consider how appropriately, effectively, and independently the child initiates and sustains domain activities as compared to other children of the same age who do not have impairments.

It is no longer necessary to refer to a specific listing for the functional equivalence analysis. A functional equivalence allowance requires a showing that a child has medically determinable impairments resulting in “marked”-level limitation in two domains or an “extreme” in one. The functional equivalence analysis applies to both mental impairments and physical impairments.

### **Practice Note**

Functional equivalence focuses on the child's functional limitations. The child must have a medically determinable impairment that could cause the symptoms, but it is not unusual or fatal to the claim for thereto be no definitive diagnosis, especially for young children.

In addition, the final regulations provide that the SSA will request and consider information on the following questions when evaluating function in the domains:

- What activities is the child able to perform?
- What activities is the child unable to perform?
- Which of the child's activities are restricted or limited compared to other children the same age who do not have impairments?
- Where does the child have difficulty with activities—at home, in childcare, at school, or in the community?
- Does the child have difficulty independently initiating, sustaining, or completing activities?
- What kind of help does the child need to perform his or her activities, how much help, and how often is it needed?

20 C.F.R. 416.926a(b)(2).

### **(d) *Functional Equivalence: The Six Domains of Function (20 C.F.R. 426.926a(b), Final Regulations, 65 Fed. Reg. 54,782-54,783)***

The final regulations describe six domains of function to capture a broader range of childhood function than under the interim final regulations. For example, the new domains take a more sophisticated approach to the communication functions, recognizing that it has three components: speech; language for learning; and language for interacting and relating. These components are addressed in the domains appropriate to the function. For a functional equivalence finding, a child must have "marked"-level functional limitations in two domains or an "extreme" in one. The new domains are as follows:

- *Acquiring and using information* -This domain includes the ability to think, to acquire and use information, visual and verbal reasoning, problem solving, and idea development. It also includes perceptual, sensorimotor, language, and memory processes necessary to learn.
- *Attending and completing tasks* -This domain considers the child's level of alertness, ability to work at an appropriate pace, allay impulses, and initiate, sustain, and change focus. It also includes the capacity to focus on certain stimuli and ignore others.
- *Interacting and relating with others* -This domain assesses all aspects of social interaction and relationships with groups and individuals. This incorporates speech and language skills necessary to communicate effectively. It also includes the ability to respond to emotional and behavioral cues and form intimate relationships and externalized

maladaptive behaviors, e.g., running away, hurting others, etc.

- *Caring for yourself* -This domain measures the child's ability to care for his or her physical needs and to maintain a healthy emotional state. It includes the ability to care for one's own health and safety and to cooperate with others to meet one's needs. It also incorporates the concept that the child should be developing an increasing sense of independence and competence.
- *Moving about and manipulating objects* -This domain looks at the child's ability to perform physical functions like sitting, standing, balancing, shifting weight, bending, crawling, running, and transferring. It also includes the ability to hold, carry, and manipulate objects, as well as the capacity to plan, remember, and execute movements. Also considered are the child's coordination, dexterity, and integration of sensory input.
- *Health and physical well-being* -This domain looks at the cumulative physical effects of physical or mental impairments. Considered are the effects of chronic illness, including shortness of breath, reduced stamina, pain, and poor growth. Also included are the impact of therapies, medications, and periods of exacerbation and remission.

**(e) Functional Equivalence: Improvements in Information Gathering and Functional Limitation Assessments (20 C.F.R. 416.924a, 416.926a, Final Regulations, 65 Fed. Reg. 54,779 - 54,782)**

The ability to function in the domains means the ability to “independently initiate, sustain or complete” activities. In addition, the SSA must also consider the “interactive and cumulative” effects of impairments, meaning that the effects of an impairment must be considered in all affected domains. The SSA also makes clear that the effects of multiple impairments, considered together, may have greater effect on an ability to function in a domain or domains than when considered separately. 20 C.F.R. 416.926a(c). Perhaps the most helpful change is the clarification that a child's ability to function must be compared to that of same-age children without impairments. 20 C.F.R. 416.924a(b)(3).

The final regulations also beef up the regulatory language on “other factors,” making it much more clear how these factors must be used. See 1.7.10(c), Functional Equivalence Under the Interim Final Regulations Effective Until January 2, 2001, above. First, the SSA retains all the “other factors” but deletes the word “other” and clarifies that the “factors” are to be used simultaneously with the assessment of the child's ability to function in the domains, and not as an add-on after the functional analysis is complete. Second, the SSA deletes “highly” from the “structured setting” factor to clarify that all structures and supports must be considered in the severity assessment. Third, the SSA includes a separate section on special education and other school accommodations with an example that shows that children in special classes and reports are not being compared to same-age children without impairments.

The point is that the SSA must consider the standard used by the person conducting the evaluation or writing the report. Fourth, the SSA expands on its guidance of “extra help” to clarify that it is necessary to consider the amount of help a child needs to function. The key word is “extra,” meaning more help than would typically be needed by a child without impairments. “Help” can include special equipment, devices, medications, or assistance from parents, professionals, or other people. Finally, “factors” like the effects of chronic illness and the effects of treatment are also better described. The SSA clarifies that these are only some of the factors that can be considered. See 20 C.F.R. 416.924a(b).

Some of the other “factors” the SSA will consider when determining a child’s ability to function are listed below. The difference between the factors and the domains is that the factors apply to all domains, activities, and settings.

- symptoms such as pain, fatigue, decreased energy, anxiety, etc.;
- age-appropriate functioning;
- combined effects of multiple impairments;
- ability to initiate, sustain, and complete activities, including the amount of help or adaptations needed and the effects of structured or supportive settings;
- unusual settings, i.e., testing settings;
- participation in early intervention and other school programs;
- impact of chronic illness and limitations that interfere with activities over time; and
- effects of treatment, including medication and therapies.

20 C.F.R. 416.924a(b).

In addition, whenever the SSA assesses whether a child can initiate, sustain, and complete activities, the SSA must consider the following:

- the child’s range of activities;
- the child’s ability to do the activities independently, including any prompting necessary to begin, carry through, and complete the activity;
- the child’s pace;
- the effort the child must expend to do the activity; and
- how long the child is able to sustain the activity.

20 C.F.R. 416.924a(b)(5).

Other changes or clarifications in the final regulations include the following.

- A new provision cautions adjudicators against strict adherence to IQ and other test scores. Instead, the SSA says it is reiterating its longstanding policy of considering all relevant evidence in the record and against considering evidence in isolation. The SSA did not include a provision on the Standard Error of Measurement (SEM) but did state that a child with test scores slightly higher than “marked” may be considered to have a “marked” limitation, based on the totality of the evidence, and vice versa.

20 C.F.R. 416.926a(e)(4).

- A new reference in “medical sources” explains the SSA’s longstanding policy of considering information provided by a nonmedical source (a parent or child) to be a clinical sign when the medical source has accepted and relied upon it to reach a diagnosis.

20 C.F.R. 416.924a(a)(2).

- A new section on the effect of “unusual settings” on a child’s function, i.e., child may be more subdued in a test setting. 20 C.F.R. 416.924a(b)(6).
- Many more cross references are provided throughout the childhood disability regulations.
- Medical source references updated to conform to the changes in “acceptable medical sources.” 20 C.F.R. 416.924a(a).
- A new SSA Form 538 has been created to include the functional equivalence changes. 20 C.F.R. 416.924(g). This form, SSA-538-F6, is available at the Social Security Advisory Service website at [www.ssas.com/child.pdf](http://www.ssas.com/child.pdf).

#### **Practice Note**

In 2002, the SSA began using a Teacher Questionnaire (form SSA-BK-5665) which asks teachers to rate, on a 1-5 scale, the child’s functioning in various activities within the domains. The form not only explains the factors to be used in the teacher’s functional assessment, it also explains, in plain language, why it is important that the teacher complete the form. It can be a useful tool for advocates in developing their cases. The Teacher Questionnaire is available on the SSA’s website at <http://www.socialsecurity.gov/online/ssa-5665.pdf> and in the Disability section of [www.masslegalservices.org](http://www.masslegalservices.org).

#### **(f) Definition of Marked and Extreme (20 C.F.R. 416.926a(e), Final Regulations, 65 Fed. Reg. 54,783–54,784)**

- *Marked* - In the final regulations, “marked” remains defined as “seriously interfering” with the child’s ability to independently initiate, sustain, or complete activities, but this general definition has been moved to the beginning of the definition. A standardized test score between two and three standard deviations below the norm for the test is one way to meet this standard. 20 C.F.R. 416.926a(e)(2).
- *Extreme* - The definition of “extreme” has been improved. In the final rules, “extreme” has been redefined as “interferes very seriously” with the ability to function. A test score at or below three standard deviations below the norm for the test is one way to meet this standard. In addition, the new regulations state that the SSA will not consider any piece of evidence in isolation, including test scores. The developmental milestones standard

still generally applies to younger children, unless standardized test scores are in the record. 20 C.F.R. 416.926a(e)(3).

- *Totality of Evidence* - SSA will not rely on any one piece of evidence, including test scores, in isolation. Instead, the totality of the evidence must be considered in determining whether the child has marked or extreme limitations. The final regulations also provide that the interpretation of test scores is primarily for the professional who administered the test, meaning that medical source information may be necessary to resolve inconsistencies. 20 C.F.R. 416.926a(e)(1), 416.926a(e)(4).
- *Marked and Extreme in the “Health and Physical Well-Being” Domain* - The intent of this domain is to capture the effects of chronic illness and episodic illness. In this domain, a “marked” limitation requires episodes of illness or exacerbations that occur an average of three times in a year, each lasting two weeks or more. More frequent episodes of shorter duration or less frequent episodes of longer duration may also be individually considered. “Extreme” in this domain is defined as exacerbations substantially in excess of the standard for “marked.” The SSA cautions that impairments with an “extreme” level of exacerbations should generally medically meet or equal a listing. Note that the other definitions of “marked” and “extreme” also apply in this domain, where appropriate. 20 C.F.R. 416.926a(e)(2)(iv), 416.926a(e)(3)(iv).
- *Definition of Exacerbation* - The final regulations contain no definition of an “exacerbation” and no guidance on when an episode begins or ends. However, the preface of the Federal Register publication of the final regulations references similar episodic criteria in two adult listings. 65 Fed. Reg. 54,747, 54,757 - 54,758 (Sept. 11, 2000). The adult mental impairment listings use the same episodic standard as the final regulations for the new “Repeated Episodes of Decompensation” B criterion. See 65 Fed. Reg. 50,746, 50,777 (Sept. 20, 2000). The preface to the mental impairment listings at 12.00C defines “episodes of decompensation” as “exacerbations or temporary increases in symptoms or signs accompanied by loss of adaptive functioning, as manifested by difficulties in performing ADLs [activities of daily living], maintaining social relationships, or maintaining concentration, persistence or pace.” The preface further provides that “episodes of decompensation may be demonstrated by an increase in signs or symptoms that would ordinarily require increased treatment or a less stressful situation (or both) [and] . . . may be inferred from medical records showing significant alteration in medication; or . . . need for a more structured setting . . .; or other relevant information. . . .” The adult immune system listing for HIV at 14.00D.8. also uses similar episodic criteria that may provide a useful analogy. See 20 C.F.R. pt. 404, subpt. P, app.1, 14.000.8.

**(g) Functional Equivalence Examples (20 C.F.R. 416.926a(d))**

The regulations provide twelve non-inclusive examples of functional equivalence. These examples are not new and include:

- documented need for a major organ transplant;
- frequent need for life-sustaining device lasting or expected to last twelve months;
- disabling condition requiring staged surgical procedures;
- ambulation only with bilateral assistance;
- impairments causing marked limitations in personal and motor function;
- complete inability to function independently outside the home;
- requirement for twenty-four-hour-a-day supervision; and
- gastrostomy in a child under age three.

These are non-inclusive examples and tend to represent an “extreme” level of severity.

The following infants also meet the functional equivalence guidelines:

- infants weighing less than 1,200 grams (two pounds, ten ounces) at birth; and
- infants between 1,200 and 2,000 grams who are small for gestational age.

20 C.F.R. 416.926a(m)(8), (9). The SSA considers these children disabled until age one, by which time the SSA must conduct a continuing disability review. Disability for these children is easily documented by providing the specified weight and prematurity data. Presumptive disability is also available for these infants.

***(h) Responsibility for Making Medical and Functional Equivalence Determinations (20 C.F.R. 416.926(d), 416.926a(e), 416.927; Social Security Ruling 96-2p, Social Security Ruling 96-5p)***

At the initial and reconsideration levels, the state DDS medical or psychological consultant has the overall responsibility for determining both medical and functional equivalence. When children are entitled to a hearing at the reconsideration level, the hearing officer has this responsibility. The ALJ and the appeals council make the medical or functional equivalence determinations at those levels of appeal. 20 C.F.R. 416.926(d), 416.926a(e).

20 C.F.R. 416.927(e) provides that whether an individual is disabled or whether an impairment meets or equals a listing is one of the issues reserved to the SSA. This means that the SSA will not give controlling weight to the opinions of treating physicians on the ultimate issue of equivalence. 20 C.F.R. 416.927(e)(2). Note, however, that the regulation does not specifically refer to functional equivalence.

Social Security Rulings 96-2p (Giving Controlling Weight to Treating Source Opinions) and 96-5p (Medical Source Opinions on Issues Reserved to the Commissioner) also address the weight to be given to medical opinions concerning meeting or equaling a listing. The rulings basically repeat the language of the regulations cited above. Some ALJs have interpreted these rulings to prevent them from considering opinions on the issue of listing

equivalence. However, both of the rulings remind adjudicators that the prohibition only concerns controlling weight or special significance. Treating source opinions are always to be considered and carefully evaluated. In fact, Social Security Ruling 96-5p states that, where a treating source provides medical evidence that demonstrates that the claimant's impairment meets a listing and where that opinion is consistent with the evidence, the adjudicator's finding on this issue will generally agree with the treating source's opinion.

## § 1.8 DISABILITY STANDARD FOR ADULTS

The SSA uses the same adult disability standard for SSI and the SSDI programs. The standard for eligibility based on blindness is also the same in both programs.

### § 1.8.1 Blindness

Blindness has been specifically defined as central visual acuity of 20/200 or less in the better eye with corrective lenses, or a limitation in the field of vision so that the widest diameter of the visual field subtends an angle no greater than twenty degrees. 20 C.F.R. 404.1581, 416.981. Individuals with vision impairments who do not meet the specific blindness standard can be considered for eligibility based on disability.

#### **Practice Note**

It is important to consider eligibility based on blindness for individuals with vision impairments because there are several advantages to establishing eligibility on this basis. SSI recipients who are eligible on the basis of blindness have a higher maximum benefit rate than individuals eligible on the basis of disability and are eligible for a wider range of earned income deductions. Also, for both SSI and SSDI benefits recipients, the level of income that constitutes "substantial gainful activity" is much higher for individuals eligible on the basis of blindness than for those eligible on the basis of disability. This is especially important for those eligible for SSDI benefits. See the discussion on Work Incentive Programs in 1.11, Posteligibility Issues, below.

**\*\* Note that,** As a result of a decision by the Federal District Court for the Northern District of California, *American Council of the Blind v. Astrue*, blind and visually impaired beneficiaries and representative payees have additional choices in how they receive notices from SSA including large print, Braille, and Microsoft Word CD.

See <http://www.socialsecurity.gov/notices/index.htm>

### § 1.8.2 Definition of Disability for Adults

The definition of disability is the inability to engage in any substantial gainful activity by reason of medically determinable physical or mental impairments that can be expected to last for a continuous period of not less than twelve months or result in death. The medically determinable impairment or combination of impairments must result in functional limitations of a severity that prevent work. See 20 C.F.R. 404.1505, 416.905.

The SSA has developed a five-step sequential analysis to determine disability under this standard. See 20 C.F.R. 404.1520, 416.920:

- **Step 1:** Is the individual engaging in substantial gainful activity (SGA)? If yes, the claim is denied. If no, the claim proceeds to Step 2.
- **Step 2:** Does the individual have a severe impairment? If no, the claim is denied. If yes, the claim proceeds to Step 3.
- **Step 3:** Does the individual have an impairment that meets or equals the severity of a listed impairment? If yes, the claim is allowed. If no, the claim proceeds to Step 4.
- **Step 4:** Does the individual have the residual functional capacity (RFC) to perform his or her past relevant work, generally, work performed in the last fifteen years? If yes, the claim is denied. If no, the claim proceeds to Step 5.
- **Step 5:** Does the individual have the RFC to perform any other work that exists in significant numbers in the regional or national economy? The SSA considers factors such as the applicant's age, education, work history (skilled or unskilled), and ability to communicate in English when determining if there is other work the claimant can perform. If no, the claim is allowed. If yes, the claim is denied.

Each step in the sequential analysis of disability is explained in more detail below. Some of the most important regulations, social security rulings, and federal case citations are included. However, additional research, as well as extensive fact development, will be needed in every individual case. The sequential analysis provides a road map to the factual and legal argument development needed.

### **§ 1.8.3 Step 1: Is the Individual Performing Substantial Gainful Activity (SGA)?**

#### **(a) Definition of SGA**

The vocational portion of the definition of disability requires that the claimant be “unable to engage in any substantial gainful activity [SGA].” 20 C.F.R. 404.1505, 416.905. SGA involves the performance of significant physical or mental duties productive in nature. At Step 1 in the sequential analysis of disability, it is not necessary that the work be full-time to be “substantial”; part-time work may be sufficient.

“Gainful activity” is activity for remuneration or profit or intended for profit whether or not it is realized. It may be less responsible or less gainful than that in which the individual engaged before the onset of the impairment, but it may still be gainful for SSDI or SSI purposes. 20 C.F.R. 404.1572, 416.972.

Significant duties” implies not only that the duties are useful in the accomplishment of the job or the operation of a business but also that they have a degree of economic value. Work performed in self-care or one’s own household tasks, and non-remunerative work on hobbies, institutional therapy or training, school attendance, clubs, social programs, etc., does not constitute SGA in and of itself. 20 C.F.R. 404.1572, 416.972. However, the SSA may look to these to see if the claimant has the functional capacity to do SGA-level work.

### **(b) Determining SGA**

The SSA has developed a complex set of rules for evaluating when work activity should be considered SGA. The primary consideration for employees is the amount of gross monthly wages. For the self-employed, the SSA considers not only earnings but also the value of the activity to the business. In addition, there are several factors that may be applied to reduce earnings below the SGA level. As the SSA seldom completely develops these factors, it is important to be aware of them and develop them where appropriate. See the SGA evaluation rules at 20 C.F.R. 404.1571 *et seq.*; 20 C.F.R. 416.971 *et seq.*

### **(c) The Pre-2001 SGA Rules**

For work performed prior to January 2001, there is a three-tiered definition of SGA. Gross wages of less than \$300 a month, in the absence of evidence to the contrary, are presumed not to be SGA. 20 C.F.R. 404.1574(b)(3), 416.974(b)(3). Gross monthly wages over the SGA threshold are presumed to be SGA. For individuals with gross earnings in the middle tier, between \$300 and the SGA threshold, the SSA is required to investigate whether the earnings constitute SGA. The determining factors are:

- whether the work is comparable to that of unimpaired individuals engaged in similar occupations as their means of livelihood, taking into account the time, energy, skill, and responsibility involved in the work; or
- whether the work, though significantly less than that done by an unimpaired worker, is nonetheless reasonably worth wages at the SGA level, according to local pay scales. If either of these factors is answered in the affirmative, the individual is considered to be engaging in SGA. 20 C.F.R. 404.1574(b)(6), 416.974(b)(6).

For work performed in or after January 2001, the SSA is not required to investigate whether these midlevel earnings should be considered SGA. Instead, the SSA will generally not consider other evidence to determine whether mid-level wages show the ability to do SGA, unless there is evidence of SGA or evidence of wage suppression. See 20 C.F.R. 404.1574(b)(6), 416.974(b)(6), published at 65 Fed. Reg. 82,905, 82,912 (Dec. 29, 2000).

### **(d) Presumed SGA**

In general, in 2010 and 2011, a disabled employee who earns \$1000 or more a month in gross wages will be considered engaging in SGA. For blind employees, the 2010 and 2011 SGA threshold is \$1640 gross a month.

In 2001, the SGA threshold became subject to annual cost-of-living adjustments. The following are the SGA thresholds for prior years:

- 2009 - \$980 disabled, \$1640 blind
- 2008 - \$950 disabled, \$1570 blind
- 2007 - \$900 disabled, \$1500 blind
- 2006 - \$860 disabled, \$1450 blind
- 2005 - \$830 disabled, \$1390 blind
- 2004 - \$810 disabled, \$1350 blind;
- 2003 - \$800 disabled, \$1330 blind
- 2002 - \$780 disabled, \$1300 blind;
- 2001 - \$740 disabled, \$1240 blind;
- July 1999 – Dec. 2000 - \$700 disabled (blind \$1170 in 2000, \$1110 in 1999);
- January 1990 to June 1999 - \$500 disabled (blind SGA changed yearly); &
- 1980 to 1989 - \$300 disabled (blind SGA changed yearly).

20 C.F.R. 404.1574, 416.974. See POMS DI 10501.105 for SGA amounts for prior years.

#### **Practice Note**

Information about cost-of-living increases is available on the SSA's website at [www.socialsecurity.gov](http://www.socialsecurity.gov) and in the Disability section of [www.masslegalservices.org](http://www.masslegalservices.org).

The presumption of SGA can be rebutted through the exceptions to SGA, as follows:

- when the earnings include a **subsidy** reducing the true earnings below the SGA level, 20 C.F.R. 404.1574(a)(2), 416.974(a)(2);
- the work activity involves **special circumstances** such that it should not be considered SGA, 20 C.F.R. 404.1573(c), 416.973(c);
- the individual's impairment forces him or her to quit working within a short period of time (three to six months), constituting an **unsuccessful work attempt**, 20 C.F.R. 404.1574(c), 416.974(c) and SSR 05-02: Determination of Substantial Gainful Activity if Substantial Work Activity Is Discontinued or Reduced--Unsuccessful Work Attempt; and
- the individual has **impairment- related work expenses** that reduce monthly wages below the SGA level, 20 C.F.R. 404.1576, 416.976.

#### **(e) Self-Employment Income**

To determine whether self-employment income is SGA, SSA considers net income less the reasonable value of any significant unpaid help from family members. 20 C.F.R. 404.1575(c), 416.975(c), as published at 65 Fed. Reg. 42,771, 42,784 (July 11, 2000). That amount is then compared to the SGA amount tests. In addition, however, SSA also considers two additional tests to determine SGA for self-employment income, as follows:

- first, SSA considers whether the individual renders services that are significant to the operation of the business and receives a substantial income from the business;
- second, SSA considers whether the work activity of the individual is comparable to that of individuals without impairments in the community in the same or similar businesses, in terms of hours, skills, energy output, efficiency, duties, and responsibilities; and
- third, SSA considers whether the work activity, although not comparable to that of individuals without impairments, is clearly worth the amount for presumed SGA or is comparable to what an employer would pay for the same work. 20 C.F.R. 404.1575(a), 416.975(a).

**(f) Exceptions to SGA**

As mentioned above, SGA-level gross monthly wages will not be considered SGA for a particular month if it can be shown that any of the following exceptions apply:

- **Subsidy/Special Circumstances.** 20 C.F.R. 404.1573, 404.1574, 416.973, 416.974. A subsidy occurs when, for whatever reason, an employer is paying an employee more than the reasonable value of his or her services. The amount of the subsidy is determined by comparing the time, energy, skill, and responsibility involved in the individual's services with the same elements involved in the performance of similar work by unimpaired individuals. The proportionate difference would be considered the amount of subsidy. Evidence that a subsidy exists includes marked difference in productivity, the necessity for an unusual amount of supervision and assistance, or marked slowness and inefficiency.

Work performed under special circumstances may show that the individual does not have the ability to do SGA. Special circumstances may include:

- special assistance from other employees;
- irregular hours or frequent rest periods;
- specially arranged circumstances, e.g., permitting the individual to get to and from work;
- lower standard of productivity or efficiency; and
- family relationships or past association with the employer.

See 20 C.F.R. 404.1573(c), 416.973(c).

### **Practice Note**

A full investigation of the facts is required anytime it appears that a subsidy or special circumstances might be involved. Of particular assistance are statements from employers or those providing supportive services as to the nature and amount of supports/special circumstances and the degree to which the individual does or does not fully earn his or her pay.

- **Impairment Related Work Expenses (IRWE)** may be used to reduce monthly earnings below the SGA level. An IRWE is a cost of employment borne by the claimant. The cost of an IRWE must be paid by the recipient and without reimbursement from any source. 20 C.F.R. 404.1576(b)(3), 416.976(b)(3). IRWE costs documented by the claimant will be deducted from monthly gross earnings before the SSA is allowed to make an SGA determination. IRWE deductions may include the unreimbursable claimant-paid costs of items or services necessary to the claimant's ability to work, including medications, wheelchairs, counseling services, specially adapted vehicles, etc.
- **Unsuccessful Work Attempts.** An Unsuccessful Work Attempt (UWA) is a short, aborted attempt by a recipient to reenter the workforce. To be considered a UWA, the work attempt must be terminated because of an impairment-related inability to perform the work activity. As a general rule, the SSA will consider a work attempt terminated in less than three months to be a UWA. Work attempts lasting between three to six months require more evidence showing disability-related problems and termination. A UWA should not result in a determination that the claimant is able to engage in SGA. The SSA will not consider the work activity or wages earned by the claimant during the UWA as evidence of ability to perform SGA. See 20 C.F.R. 404.1574(a)(1), 416.974(a)(1). See also SSR 05-02: Determination of Substantial Gainful Activity if Substantial Work Activity is Discontinued or Reduced—Unsuccessful Work Attempt.

### **(g) Duration Requirement**

As stated above, the definition of disability is the inability to engage in any substantial gainful activity by reason of medically determinable physical or mental impairments that can be expected to last for a continuous period of not less than twelve months or result in death. A 2002 Supreme Court case dealt with the issue of what the 12-month duration requirement applies to: a person's "inability" to engage in SGA or simply the disabling impairment(s) that causes the inability to work. In *Barnhart v. Walton*, 122 S.Ct. 1265, 152 L.Ed.2d 330, 70 U.S.L.W. 4231 (2002), the Court clarified that, in order for a claimant to meet the legal definition of disability, his/her inability to engage in SGA must last, or be expected to last, at least 12 months from the date of onset of the disabling impairment(s). Under *Walton*, if a claimant returns to SGA level work within 12 months of the date of onset *and* before the SSA makes a decision on his/her application for benefits, then he/she cannot be found disabled. If, however, a claimant returns to SGA level work *after* SSA has found him/her disabled but

within 12 months of the onset date, the finding of disability will stand. See 20 CFR 404.1592(c).

#### **§ 1.8.4 Step 2: Does the Individual Have a Severe Impairment?**

A severe impairment is a physical or mental impairment (or combination of impairments) that significantly limits the ability of the applicant to do basic work activities, including: walking; standing; sitting; lifting; pushing; pulling; reaching; carrying; handling; seeing; hearing; speaking; understanding; carrying out and remembering simple instructions; using judgment; responding appropriately to supervision, coworkers, and usual work situations; and dealing with changes in a routine work setting. 20 C.F.R. 404.1521, 416.921.

The Step 2 severity requirement is a *de minimis* test to do no more than screen out groundless claims. A finding of “non-severe” is only to be made where medical evidence establishes only a slight abnormality or combination of slight abnormalities that would have no more than a minimal effect on an individual’s ability to work even if vocational factors were considered. Unless an impairment is so minimal that it would not prevent the claimant from working—even if he or she were of advanced age, had minimal education, and limited work experience, a denial at Step 2 is improper. See *McDonald v. Sec’y of HHS*, 795 F.2d 1118, 1124 (1st Cir. 1986).

SSA must take into consideration the combined effect of all of the claimant’s impairments at Step 2. “[V]arious physical, mental, and psychological defects, each non-severe in and of itself, might in combination, in some cases, make it impossible for a claimant to work.” *McDonald v. Sec’y of HHS*, 795 F.2d at 1127; 20 C.F.R. 404.1521-.1523, 416.921-.923.

#### **Practice Note**

**Impairments must be considered in combination at all steps of the sequential analysis of disability.** This means that it is incorrect to determine that an impairment is “non severe” at this step and then fail to consider it in combination with other impairments at later steps. Even if all impairments are not severe when considered separately, the SSA must consider whether, together, they result in a severe impairment. See Social Security Ruling 99-3p.

#### **§ 1.8.5 Step 3: Does the Individual Have an Impairment That Meets or Equals a Listing?**

The listed impairments are specifically described physical or mental conditions. For each listing, the SSA has described specific medical criteria that presume functional limitations that the SSA considers disabling without further inquiry. The Listing of Impairments is published in App. 1 of Subpt. P of Pt. 404 of 20 C.F.R. See 20 C.F.R. 404.1525, 416.925.

The listings change over time, as medical knowledge expands and new treatments are developed. In recent years, the SSA has made several changes to the listings of impairments. For example:

- In 2000, the SSA changed the mental impairment listings significantly. See 1.8.8, Mental Impairments, below.
- In 2000, SSA added a listing for Non-Mosaic Down Syndrome in adults—10.06, published at 65 Fed. Reg. 31,800 (May 19, 2000), and a new listing for Autistic Disorder and Other Pervasive Developmental Disorders in adults— 12.10, 65 Fed. Reg. 50,745 (Sept. 20, 2000). Documentation of disability is through both clinical confirmation and laboratory tests, including chromosomal analysis.
- In 2000, the SSA added Section 11.00F to the adult neurological listing that provides guidance on the evaluation of traumatic brain injury.
- In 1999, the SSA eliminated the obesity listing at 9.09. See 64 Fed. Reg. 46,122 (Aug. 24, 1999). The loss of the obesity listing did not mean that obesity was no longer considered in the sequential analysis, however. The SSA added instructions in the prefaces to the musculoskeletal, cardiovascular, and respiratory listings clarifying that obesity remains a medically determinable impairment and the included guidance on evaluating obesity in relationship to those impairments. In addition, the SSA issued Rulings which provide detailed and helpful guidance on evaluating the effects of medically determinable obesity throughout the sequential analysis of disability. See Social Security Ruling 02-1p, Evaluation of Obesity (superseding Social Security Ruling 00-3).

The SSA's review of the listings is ongoing.

#### **Practice Note**

The online edition of SSA's publication, *Disability Evaluation Under Social Security*, also known as the Blue Book, contains a version of the listings that incorporates the all changes that have become effective, through May 2002. The online Blue Book is updated more frequently than the hard copy of the Code of Federal Regulations and is a good resource for advocates. See [www.ssa.gov/disability/professionals/bluebook](http://www.ssa.gov/disability/professionals/bluebook).

#### **§ 1.8.6 Step 4: Does the Individual Have the Ability to Do Past Relevant Work?**

At this step, the SSA determines the individual claimant's residual functional capacity (RFC). The RFC is basically what a person can still do despite his or her physical or mental impairments. 20 C.F.R. 404.1594(c)(2), 416.994(b)(iv), 404.1545, 416.945. See also SSR 96-8p. The claimant has the burden of proof at this stage. *Gray v. Heckler*, 760 F.2d 369 (1st Cir. 1985). The SSA compares the individual claimant's RFC with the functional requirements of the individual's past relevant work, as customarily performed in the economy. 20 C.F.R. 404.1546, 416.946.

Past relevant work usually means work performed in the last fifteen years. 20 C.F.R. 404.1565, 416.965. **SSR 82-61—Titles II and XVI—Past Relevant Work—The Particular Job or Occupation Generally Performed**

Work performed sporadically or for too short a period to have learned the job may not be past relevant work. See Social Security Ruling 82-62. In a 2003 decision, *Barnhart v. Thomas*, 124 S.Ct. 376, 157 L.Ed.2d 333, 72 USLW 4001 (2003), the Supreme Court ruled that at Step 4 there is no requirement that the claimant's previous work still exists in the national economy. In other words, a claimant will be found not disabled at step 4 if s/he retains the ability to return to a job that is obsolete or no longer exists.

At this step of the sequential analysis, it is critical to develop a detailed and truly individualized assessment of the claimant's functional capacity. It is important to pay particular attention to RFCs for impairments where a major limitation is pain or fatigue, for mental impairments, and for combinations of mental and physical impairments because these RFCs will often be understated by the SSA. Further, the SSA will consider work completed outside of the United States at Step 4 of the sequential evaluation. If a claimant can perform past work, despite that work being done in another country, the claimant will be determined "not disabled." As a result, a very detailed job duty description is critical. See Social Security Ruling 82-40 (The Vocational Relevance of the Past Work Performed in a Foreign Country).

#### **Practice Note**

SSA relies primarily on the *Dictionary of Occupational Titles* (DOT)), and the companion book *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* (SCO), published by the Department of Labor, for information about general job duties, demands, and responsibilities of particular jobs. The DOT is available online at the Department of Labor's website at [www.oalj.dol.gov/libdot.htm](http://www.oalj.dol.gov/libdot.htm). The SSA's reliance on the DOT may come to an end, however. The DOT has not been revised since 1991. The Department of Labor (DOL) has developed O\*Net, the Occupational Information Network, for DOL purposes. O\*Net is available at <http://online.onetcenter.org>. O\*Net is an online database that contains information on job and skill requirements but does not address all of SSA's adjudicative needs. SSA has appointed a study group to consider developing a replacement for the DOT as the standard vocational reference in SSI and SSDI cases, but nothing has been decided as of yet. See also SSR 00-04p—Titles II and XVI—Use of Vocational Expert and Vocational Specialist Evidence and Other Reliable Occupational Information in Disability Decisions

#### **§ 1.8.7 Step 5: Does the Individual Have the Ability to Perform Other Work?**

At this final step in the sequential analysis, the SSA determines whether the claimant can perform other work that exists in the regional or national economy, considering his or her RFC and vocational factors, i.e., age, education and literacy, and work history. If there are other jobs that exist in significant numbers in the regional economy, disability benefits will be denied. If such other jobs do not exist, benefits will be paid. 20 C.F.R. 404.1560, 416.960.

To make this determination, the SSA first looks to the Medical Vocational Guidelines, also known as the "Grids," at 20 C.F.R. Pt. 404, Subpt. P, App. 2. 20 C.F.R. 404.1569, 416.969. The Grids are a set of three matrices, based on

exertional capacities for sedentary, light, and medium work, designed to match the availability of significant numbers of jobs with the claimant's age, education and literacy, and work history. [SSR 83-10—Titles II and XVI—Determining Capability to Do Other Work—The Medical Vocational Rules of Appendix 2](#) The exertional levels are defined at 20 C.F.R. 404.1567, 416.967. The age criteria are defined at 20 C.F.R. 404.1563-68, 416.963-68. The rules for applying the Grids are found in Section 200 of Appendix 2. If the applicant's impairments are exertional only, the Grids are determinative of disability or nondisability at Step 5. Exertional impairments basically result in limitations in the ability to perform the "strength" demands of jobs. 20 C.F.R. 404.1569a, 416.969a.

The Grids do not apply to nonexertional impairments. Nonexertional impairments are impairments that interfere with an individual's ability to work whether or not they are exerting themselves, e.g., mental impairments, skin and sensory impairments, pain, and fatigue. If the individual's impairments are all nonexertional, the SSA must perform an individualized determination at this step. [SSR 85-15—Titles II and XVI—Capability to Do Other Work—The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments](#)

If the claimant's impairments are both exertional and nonexertional, the SSA may first look to the Grids to see whether the claimant can be found disabled on his or her exertional impairments alone. If not, the SSA must consider the degree to which the nonexertional impairments diminish the claimant's capacity for work he or she could otherwise do considering his or her exertional capacity, age, education, and work history. 20 C.F.R. Pt. 404, Subpt. P, App. 2, 200.00(e). [SSR 83-14—Titles II and XVI—Capability to Do Other Work—The Medical-Vocational Rules as a Framework for Evaluating a Combination of Exertional and Nonexertional Impairments](#)

If the claimant's occupational base is significantly eroded by nonexertional impairments or if the claimant's impairments are solely nonexertional, the SSA must make an individualized determination at Step 5, using the appropriate regulations. See *Ortiz v. Sec'y*, 890 F.2d 520 (1st Cir. 1989). See also, Social Security Ruling 96-9p (Determining Capability To Do Other Work--Implications Of A Residual Functional Capacity For Less Than A Full Range Of Sedentary Work). As the Grid rules are quite rigid, it is usually beneficial to determine whether the claimant has nonexertional impairments that can be documented in order to get an individualized determination at Step 5.

Social Security Ruling 85-15 emphasizes the importance of the testimony of a vocational expert in these cases. See also *Heggarty v. Sullivan*, 947 F.2d 990 (1st Cir. 1991); *Ortiz v. Sec'y*, 890 F.2d 520 (1st Cir. 1989); *Lopez v. Sec'y HHS*, 747 F.2d 37 (1st Cir. 1989); *Gagnon v. Sec'y HHS*, 666 F.2d 662 (1st Cir. 1981). Social Security Ruling 00-4p (Use of Vocational Expert and Vocational Specialist Evidence, and other Reliable Occupational Information in Disability Decisions) clarifies the standards for the use of vocational experts and vocational reference materials such as the DOT.

### **Practice Note**

Many disability benefit claims are denied for lack of specific documentation of functional limitations. Even greater effort is often required for claims involving nonexertional impairments, e.g., mental impairments and pain. Documentation issues are discussed in more depth below for three types of claims involving nonexertional limitations for impairments.

## **§ 1.8.8 Mental Impairments**

The standards for evaluating mental impairments. The introductory materials (20 C.F.R. pt. 404, subpt. P, app. I, Rule 12.00) to the mental impairment listings contain helpful language that is useful to the evaluation of mental impairments throughout the sequential analysis, i.e., the need for a longitudinal assessment; the importance of lay evidence in completing the assessment of functional limitations; and the need to consider the effects of structured settings to accurately assess the ability to function in a work setting. Social Security Rulings 85-15, 85-16, 96-8p, and 96-9p (Assessing Residual Functional Capacity In Initial Claims) also contain helpful language about evaluating mental impairments.

The SSA published final regulations at 65 Fed. Reg. 50,745 (Sept. 20, 2000) that revised portions of both the mental impairment listings and rules for assessing functional limitations. Included are revisions to 20 C.F.R. 404.1520a and 416.920a to explain that individual functional limitation assessment in mental impairments is a complex and highly individualized process requiring consideration of multiple issues, including structured settings, chronicity, and a longitudinal view of function. The SSA also added in the preface at Section 12.00 an expanded discussion of psychological and neuropsychological testing, alternatives to traditional IQ testing in special circumstances, and a new paragraph on the evaluation of eating disorders. The revisions also include renaming of Episodes of Deterioration or Decompensation in the “B criteria” of the mental listings. This change was to recognize that episodes of decompensation may be evidence in settings other than work settings. The SSA also changed the “C criteria” at 12.03C., and added “C criteria” to listings 12.02 and 12.04. Finally, the revisions read that ALJs and the appeals council will no longer be required to complete the psychiatric review technique form (PRTF). Instead, they must include the PRTF analysis in the body of the decision.

### **Practice Note**

Because the severity of the functional limitations due to mental impairments varies from person to person, the listings of mental impairments usually include both medical criteria (A criteria) and functional criteria (B criteria). **Some mental impairment listings also include C criteria. The C criteria are functional criteria for mental impairments attenuated by treatment but that still result in significant functional limitations due to the impairment itself or to treatment.**

When the SSA considers the individual functional limitations of claimants with mental impairments at Steps 4 and 5 of the sequential analysis, it is not unusual to see claimants with quite severe mental impairments considered capable of

unskilled work by the SSA. This is especially true for younger claimants. However, the basic mental demands of even unskilled work include the abilities (on a sustained basis)

- to understand, carry out, and remember simple instructions;
- to respond appropriately to supervision, coworkers, and usual work situations; and
- to deal with changes in a routine work setting and customary work pressures.

See Social Security Rulings 85-15, 85-16, and 96-8p (Assessing Residual Functional Capacity In Initial Claims).

It is also common to see denials based upon the ability to work in “low stress” jobs. **However, the reaction to the demands of work (stress) is highly individualized, and mental illness is characterized by adverse responses to seemingly trivial circumstances.** *Lancellotta v. HHS*, 806 F.2d 284, 286 (1st Cir. 1986). Because stress is an individual’s subjective response to a particular situation and not a job characteristic, it is often inappropriate to find a claimant capable of “low-stress” work without an individualized evaluation of what produces the stress. *Lancellotta*, 806 F.2d 284 - 87, citing SSR 85-15.

Another common rationale for denial is to “laundry list” the claimant’s daily activities and to conclude that they show the ability to work. However, this approach does not necessarily assess the sustainability of work-like activities in an ordinary work schedule and the effect of nonexertional impairments. *Waters v. Sec’y HHS*, 709 F. Supp. 278, 284 (D. Mass. 1989); see also Social Security Ruling 85-15 (individuals with mental disorders often adopt a highly restrictive or inflexible lifestyle with which they appear to function well).

### § 1.8.9 Pain, Fatigue, and Other Subjective Symptoms

SSA’s regulations and federal case law recognize that the severity of an individual’s pain or other subjective symptoms may be greater than would be expected by looking at medical test results alone. The law requires consideration of a host of factors and fairly specific findings to justify a decision that the individual does or does not meet the disability standard, as set out below.

The Social Security Act, 42 U.S.C. 423(d)(5), provides:

An individual’s statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment . . . which can reasonably be expected to produce the pain alleged.

In July 1986, the Court of Appeals for the First Circuit interpreted the Social Security Act pain provision and set out the standard for evaluating complaints of subjective symptoms like pain in *Avery v. Sec’y HHS*, 797 F.2d 19 (1st Cir.1986). The *Avery v. Sec’y* court found that:

as a primary requirement there must be a clinically determinable medical impairment that can reasonably be expected to produce the pain alleged. *Avery v. Sec’y*, 797 F.2d at 21. The court recognized that “pain can result in greater severity of impairment than may be clearly demonstrated by the objective physical manifestations of a disorder.” *Avery v. Sec’y*, 797 F.2d at 22.

The *Avery v. Sec’y* court concluded that so long as statements of a claimant or his doctor are not inconsistent with the objective findings, they could, if found credible by the adjudicator, permit a finding of disability where the medical findings alone would not. *Avery v. Sec’y*, 797 F.2d at 21.

The court attached several pages of POMS to its decision. These POMS set out detailed instructions on evaluating the severity of complaints of pain. The court said that these instructions conform faithfully to the requirements of the Social Security Act. *Avery v. Sec’y*, 797 F.2d at 22. The POMS attached to the *Avery v. Sec’y* decision require that in evaluating complaints of pain, the adjudicator must give full consideration to all of the available evidence, medical and other, that reflects on the impairment and any attendant limitations of function. The RFC assessment must describe the relationship between the medically determinable impairment and the conclusions of RFC that have been derived from the evidence and must include a discussion of why reported daily activity restrictions are or are not reasonably consistent with the medical evidence. Consideration must also be given to the effect of mental impairments on the severity of pain experienced by the claimant.

On November 14, 1992, the SSA promulgated regulations, at 20 C.F.R. 404.1529, 416.929, for evaluating subjective symptoms. The regulations describe an evaluation process very similar to the *Avery v. Sec’y* standard. The evidentiary development required by the regulations provides a great opportunity for advocates to develop subjective evidence. The more evidence presented and the greater the number of sources of such evidence, the more likely it will be accepted as credible and reasonable. Significantly, fatigue is specifically included as a subjective symptom entitled to this analysis. 20 C.F.R. 404.1529(b), 416.929(b). This gives an analytic framework for fatigue complaints and should result in greater credibility for those complaints.

Under the regulations and the *Avery v. Sec’y* pain standard, the adjudicator remains free to find the claimant’s descriptions of pain not credible. This finding, however, must be supported by substantial evidence, and the adjudicator must make specific findings as to the relevant evidence considered in deciding to disbelieve the claimant. *DaRosa v. Sec’y*, 803 F.2d 24, 26 (1st Cir. 1986); *Nguyen v Chater*, 172 F.3d 31 (1st Cir.1999); *Waters v. Sec’y HHS*, 709 F. Supp. 278, 282 (D. Mass. 1989). See also POMS DI 24515.061.

After *Avery v. Sec’y* and *DaRosa v. Sec’y*, it is clear that it is insufficient to find pain complaints not credible simply because objective medical evidence does not fully support the degree of pain alleged. See also *Bazile v. Apfel*, 113 F. Supp.2d 181 (D. Mass. 2000); *Aguiar v. Apfel*, 99 F. Supp.2d 130 (D. Mass. 2000); Social Security Rulings 96-3p (Considering Allegations Of Pain And Other Symptoms In Determining Whether A Medically Determinable Impairment Is Severe), 96-4p (Symptoms, Medically Determinable Physical And Mental Impairments, And Exertional And Nonexertional Limitations), and 96-7p (Evaluation Of Symptoms In Disability Claims: Assessing The Credibility Of An Individuals Statements). The *DaRosa v. Sec’y* court also stated that pain may be a nonexertional factor to be considered in combination with exertional limitations, even though it may also serve as a separate and independent ground for disability. *DaRosa v. Sec’y*, 803 F.2d at 26.

**(a) Proof of the Underlying Impairment Versus Proof of Intensity of the Pain**

These two issues are often confused by adjudicators. The underlying impairment must be medically determinable (by a doctor) using medically acceptable clinical and laboratory diagnostic techniques. See 20 C.F.R. 404.1508, 404.1513, 404.1529, 416.908, 416.913, 416.929. If the severity of the pain alleged is greater than indicated by the objective medical evidence, the adjudicator must then consider all the available evidence, medical and other, that reflects on the nature and severity of the impairment and resulting limitations of function. “Other” evidence that may be used to show the severity of pain includes medical sources not “acceptable” under 20 C.F.R. 404.1513, 416.913, like chiropractors, as well as “lay” sources, like family and friends, employers, counselors, etc. See Social Security Rulings 96-3p (Considering Allegations Of Pain And Other Symptoms In Determining Whether A Medically Determinable Impairment Is Severe), 96-4p (Symptoms, Medically Determinable Physical And Mental Impairments, And Exertional And Nonexertional Limitations), and 96-7p (Evaluation Of Symptoms In Disability Claims: Assessing The Credibility Of An Individuals Statements).

**(b) The Necessary Nexus Between the Underlying Impairment and the Degree of Pain**

As a practical matter, the greater the disparity between the medical findings and the severity of the pain, the greater the need for evidence explaining the disparity or tending to show that the claims of pain are credible, e.g., evidence showing a mental impairment, history of many attempts to get relief from pain, use of strong medication, limited ability to function day to day, etc.

**(c) Clinical Diagnostic Evidence Versus Laboratory Diagnostic Evidence**

Both are objective medical evidence. Clinical diagnostic evidence is that shown by observable facts and signs that can be medically described and evaluated. See 20 C.F.R. 404.1528, 416.928. Laboratory evidence includes laboratory tests (x-rays, blood studies, etc.) and psychological tests. 20 C.F.R. 404.1528, 416.928.

**Practice Note**

Claims involving conditions such as Chronic Fatigue Syndrome (CFS), for which there is no definitive laboratory test establishing a diagnosis, have tended to be particularly difficult. Social Security Ruling 99-2p (Evaluating Cases Involving Chronic Fatigue Syndrome), provides helpful guidance on evaluating CFS. The ruling confirms that CFS, when accompanied by appropriate medical signs or laboratory findings, is a medically determinable impairment that can be the basis for a finding of disability. In addition, the ruling gives examples of the kinds of medical signs and laboratory findings that may establish a medical diagnosis of CFS. See also Evaluation of Chronic Fatigue Syndrome, POMS DI 24515.075; *Rose v. Shalala*, 34 F.3d 13 (1<sup>st</sup> Cir. 1994). Recent Social Security Rulings on a similarly difficult-to-prove conditions may also provide guidance to advocates. See SSR 02-2p, Evaluation of Interstitial Cystitis (IC), 67 Fed. Reg. 67,436 (Nov. 5, 2002); SSR 03-2p - Reflex Sympathetic Dystrophy (Complex Regional Pain Syndrome), 68 Fed. Reg. 59971 (10/20/03).

### **§ 1.8.10 Limitation on Disability Benefit Eligibility for Alcoholism and Drug Abuse**

On March 29, 1996, Congress passed Pub. L. No. 104-121, Section 105, amending 42 U.S.C. 423(d)(2) and 1382c(a)(3), which went even further and eliminated substance abuse as a basis for SSI and SSDI benefits eligibility. However, claimants with drug addiction or alcoholism (DAA) may still be eligible for SSI and SSDI benefits if DAA is “not material” to the disability determination, i.e., if they are independently disabled due to other impairments. 20 C.F.R. 404.1435(b), 416.935(b). Drug addiction or alcoholism is material only if the evidence establishes that the individual would not be disabled if the substance use were to stop. DAA Material Determinations, POMS DI 90070.050(D)(3). Conditions caused by substance abuse, e.g., organic brain damage, liver conditions, etc., may be independent disabilities if severe enough. DAA Material Determinations, POMS DI 90070.050(D)(2). Many claimants have mental impairments that underlie substance abuse problems. In these cases, it is often critical to present facts showing the existence of an independent or preexisting mental impairment that is severe and would remain disabling if the substance use were to stop.

The SSA must use a three-step process when substance use is an issue in a disability benefits case:

- **Step 1**- Does the individual meet the disability standard, using the five-step sequential analysis of disability and considering all the individual's impairments, including any DAA impairments? If not, the individual is not disability eligible.
- **Step 2** - If so, is there medical evidence of drug addiction or alcoholism? Medical evidence is defined as evidence from an “acceptable medical source” that is sufficient and appropriate to establish that the individual has a medically determinable substance abuse disorder. Statements by claimants alone are insufficient to establish a substance abuse disorder. Medically determinable substance use disorders are medical conditions

described as “substance dependence” and “substance abuse” disorders in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (DSM-IV), American Psychiatric Assoc., Washington, D.C., 1995. If not, the individual is “disabled.”

- **Step 3** - If so, is the individual’s substance use condition material to the disability determination? If so, the individual is not “disabled” for disability benefits purposes. If not, the individual is disability eligible. The materiality assessment requires an evaluation as to which functional limitations would remain without the DAA and whether the individual would still meet the disability standard considering only those limitations.

See 20 C.F.R. 404.1535(b)(1), 416.935(b); DAA Material Determinations, POMS DI 90070.050 ; HALLEX I-5-3-14A . See also **Exhibit 1C** for information on POMS, EMs and HALLEX.

If the effects of a substance use condition are so intertwined with the effects of other impairments, e.g., mental impairments, that they cannot be separated, the materiality determination cannot be made and the disability determination made at Step 1 must stand. See e.g. *Bruggeman v. Barnhart*, 348 F.3d 689 (8<sup>th</sup> Cir. 2003) (court reverses and remands because the ALJ did not follow the procedure in EM-96-94(8/30/96), recently renumbered by SSA as EM-96200 and included on SSA’s website); *McGoffin v. Barnhart*, 288 F.3d 1248 (10<sup>th</sup> Cir. 2002)(court affirms the EM procedure); *Clark v. Apfel*, 98 F. Supp.2d 1182 (D. Ore. 2000); *Cutlip v. Comm’r*, No. 5:97CV154 (N.D.W.VA Jan. 22, 1999). *But see Para v. Astrue*, 481 F.3d 742 (9<sup>th</sup> Cir.2007); *Doughty v. Apfel*, No. 99-15411 (11<sup>th</sup> Cir. 2001); *Mittlestedt v. Apfel*, 204 F.3d 857(8<sup>th</sup> Cir. 2000); *Brown v. Apfel*, 192 F.3d 492 (5<sup>th</sup> Cir. 1999). *But see Parra v. Astrue*, 481 F.3d 742(9<sup>th</sup> Cir. 2001). Also note that the appeals council has issued at least two decisions upholding the policy the EM. This issue comes up most often in dual diagnosis cases.

#### **Practice Note**

EM-96200 (Aug. 30, 1996) is an emergency teletype issued by SSA to its adjudicators. It contains a series of questions and answers on DAA policy issues. It is available in the Disability section of [www.masslegalservices.com](http://www.masslegalservices.com) and on SSA’s website at <https://secure.ssa.gov/apps10/>

## **§ 1.9 EVALUATION OF EVIDENCE IN DISABILITY DETERMINATIONS**

The statutory definition of disability for both adults and children requires a “medically determinable” impairment or impairments as a starting point. There are a limited number of sources that may establish a medically determinable impairment. However, once there is evidence of a medically determinable impairment, evidence from medical, other professional, and lay sources should be considered to show impairment severity and the resulting functional limitations.

### **§ 1.9.1 Acceptable Medical Sources to Establish Medically Determinable Impairments**

Medical determinable impairments must be diagnosed by “acceptable medical” sources. 20 C.F.R. 404.1513, 416.913, as published at 65 Fed. Reg. 34,950 (June 1, 2000). Generally, an acceptable medical source must be a licensed physician, osteopath, or psychiatrist. The term also includes licensed or certified psychologists. In addition, the following are acceptable sources for limited diagnoses:

- optometrists for visual acuity and visual field measurements;
- podiatrists for foot and ankle impairments;
- licensed or certified school psychologists for mental retardation, learning disabilities, and borderline intellectual function; and
- qualified speech and language pathologists for speech and language impairments.

### **§ 1.9.2 Evidence to Establish the Nature and Severity of the Impairment**

Evidence of the impact of the medical determinable impairment or impairments on the individual’s ability to function may be provided by physicians, other medical sources, other professional sources, and lay sources. 20 C.F.R. 404.1513, 416.913. Physician evidence tends to be preferred, but it is often the case that other sources have more information on the individual’s day-to-day experience with the impairment. Non-physicians and other professionals who see the individual in their professional capacities for reasons related to the impairment can provide very helpful and credible information on the individual’s ability to function. These sources include nurse practitioners, physicians’ assistants, chiropractors, therapists, teachers, and counselors. For individuals who have worked recently, information from employers can be valuable in establishing the impact of medically determinable impairments on the ability to function at work. **See SSR 06-3p** for SSA’s helpful instructions on considering evidence other than acceptable medical sources in evaluating disability claims.

Finally, lay evidence should not be overlooked. Family and friends can also be a valuable source of information about daily functioning. The importance of these sources that are not medically acceptable sources will be determined in individual cases by the nature of the impairment and the individual’s ability to be a good historian.

The form taken by evidence of impairments and function may vary greatly. Because the formal rules of evidence do not apply, any type of information will be accepted for the record. However, greater weight and credibility will be assigned to certain types of information. Generally, the SSA prefers documentation prepared in the normal course of treatment, e.g., treatment notes. However, treatment records often do not include all the information needed because they are prepared for a different purpose. It is often necessary to ask the treating source for additional information to clarify, fill in gaps, or explain.

#### **Practice Note: Medical Records Laws**

In Massachusetts, medical providers must furnish a copy of existing records free of charge when the request is made in connection with an application for federal or state disability benefits. See G.L. c. 111, 70 (hospitals, clinics); G.L. c. 12, 12CC (physicians).

### § 1.9.3 Weighing Evidence

It is worth the effort to ensure that the record contains sufficient evidence from **treating sources**. Treating source evidence is often entitled more weight than that from other sources, e.g., the doctors hired by the SSA to review claims and provide an opinion or to provide a consultative examination and report. This is due to the treating source's greater familiarity with the individual and the impairment, based on examinations of the individual and longitudinal perspective. The SSA's criteria for the contents of a complete medical report are at 20 C.F.R. 404.1513(d), 416.913(d).

To qualify as a treating source, a medical provider must be an "acceptable medical source" and have a sufficient treating relationship with the individual. 20 C.F.R. 404.1502, 416.902. The length of the treating relationship and the frequency of examination necessary to qualify as a treating source depends of the nature of the impairment. Generally, however, the longer the relationship and the greater the frequency of examination, the better. Another important factor is whether the treating source is a specialist in the area of the individual's impairment.

If the treating source's opinion is well supported and not inconsistent with other substantial evidence in the record, the opinion must be given controlling weight on the issues of diagnosis and severity of the individual's impairment. 20 C.F.R. 404.1527, 416.927. Certain conclusions, e.g., whether the individual's medical criteria equal the severity of a listed impairment or whether the individual has a residual functional capacity (RFC) for light or sedentary work, are issues reserved for the SSA. But the underlying facts necessary to establish those conclusions may be established by treating sources. **SSR 96-5p—Policy Interpretation Ruling—Titles II and XVI—Medical Source Opinions on Issues Reserved to the Commissioner.** 20 C.F.R. 416.927(e) provides that whether an individual is disabled or whether an impairment meets or equals a listing is one of the issues reserved to the SSA. This means that the SSA will not give controlling weight to the opinions of treating physicians on the ultimate issue of equivalence. 20 C.F.R. 416.927(e)(2). Note, however, that the regulation does not specifically refer to functional equivalence.

Social Security Rulings 96-2p (Giving Controlling Weight to Treating Source Opinions) and 96-5p (Medical Source Opinions on Issues Reserved to the Commissioner) also address the weight to be given to medical opinions concerning meeting or equaling a listing. The rulings basically repeat the language of the regulations cited above. Some ALJs have interpreted these rulings to prevent them from considering opinions on the issue of listing equivalence. However, both of the rulings remind adjudicators that the prohibition only concerns controlling weight or special significance. Treating source opinions are always to be considered and carefully evaluated. In fact, Social Security

Ruling 96-5p states that, where a treating source provides medical evidence that demonstrates that the claimant's impairment meets a listing and where that opinion is consistent with the evidence, the adjudicator's finding on this issue will generally agree with the treating source's opinion.

Even if a treating source's opinion is not entitled to controlling weight, it may still be given great weight or deference when compared against other medical evidence in the record. Further, when the treating source has provided an opinion on an issue reserved for the SSA, it may not be ignored. Instead, the SSA must explain the consideration given to the treating source opinion. Evidence from other sources, including nonmedical sources, will also be weighed and judged for credibility, but is not entitled to controlling weight or any particular deference. See Social Security Ruling 96-2p.

### **Practice Note**

In an amendment to the evidence weighing rules, the SSA added the following other factors for consideration:

- the amount of understanding that an acceptable medical source has of our disability programs and their evidentiary requirements, regardless of the source of that understanding, and the extent to which an acceptable medical source is familiar with the other information in your case record; and
- state agency medical and psychological consultants and other program physicians and psychologists are highly qualified physicians and psychologists who are also experts in Social Security disability evaluation. 20 C.F.R. 404.1527(d)(6), 416.927(d)(6), published at 65 Fed. Reg. 11,866 (Mar. 7, 2000). These revisions would appear to favor agency doctor opinion, at least on opinions reserved for the SSA. See also Social Security Ruling 96-2p, [SSR 96-6p—Policy Interpretation Ruling—Titles II and XVI—Consideration of Administrative Findings of Fact by State Agency Medical and Psychological Consultants and Other Program Physicians and Psychologists at the Administrative Law Judge and Appeals Council Levels of Administrative Review; Medical Equivalence.](#)

## **§ 1.10 SSI PRESUMPTIVE DISABILITY**

A child or an adult who appears to meet the disability standard and who meets all other SSI eligibility criteria at the initial application may be presumptively eligible for up to six months while the SSA completes the formal eligibility determination process. Presumptive disability decisions may not be made at the reconsideration or higher stages. Presumptive disability payments are not considered overpayments if the SSA later determines that the child is not disabled. An overpayment may result if the SSA later determines that the child was not financially eligible for SSI.

Presumptive disability decisions can be made by either the district office or the DDS. District offices are authorized to made presumptive disability findings for

impairments on the following list consisting of impairments which are easily observable or confirmable:

- amputation of leg at hip;
- total deafness or blindness;
- confinement to bed or immobility without a wheelchair, walker, or crutches, due to a longstanding condition;
- stroke more than three months ago with marked difficulty in walking or using a hand or arm;
- cerebral palsy, muscular dystrophy, or muscular atrophy and marked difficulty in walking, speaking, or coordination of hands or arms;
- diabetes with amputation of a foot;
- Down's syndrome;
- severe mental retardation on behalf of a claimant who is at least seven years of age;
- confirmation by physician or knowledgeable hospice official that claimant receives hospice services due to terminal cancer; and
- documentation of AIDS or symptomatic HIV.

POMS DI 11055.240.

The district offices may also make presumptive disability determinations for infants younger than six months of age with documentation of birth weight below 1,200 grams (two pounds, ten ounces).

Also eligible for presumptive disability are infants younger than six months of age who were small for gestational age at birth. The DDS may make a presumptive disability finding at any point in the development of an initial application at which the available evidence demonstrates a strong likelihood that the claimant meets the disability standard. Failure of the district office to make a presumptive disability finding does not preclude the DDS from doing so. Cases considered to have high presumptive disability potential include those involving mental retardation, neoplasms, central nervous system diseases resulting in paralysis or motor dysfunction, chronic renal disease, and HIV infection.

## **§ 1.11 POSTELIGIBILITY ISSUES**

### **§ 1.11.1 Retroactive Benefits**

Because the SSA's eligibility determination process generally takes months or even years to complete, successful applicants are usually entitled to an award of retroactive benefits. Once the individual has been determined disability eligible, the case is returned to the SSA component responsible for implementing the decision and determining benefit amount. Individuals who are concurrently eligible for SSI and SSDI benefits will not receive full retroactive awards of both benefits. Instead, the SSA will use the "windfall offset" provisions to reduce the retroactive award of the benefit paid last by the amount of the benefit paid first. See 20 C.F.R. 404.408b, 416.1123(d). The SSA will generally pay the retroactive SSI first, which is calculated ignoring SSDI benefit eligibility. Then, when the SSA calculates the retroactive SSDI benefit, the SSA will offset the

retroactive amount by the retroactive SSI for the same period. The “windfall offset” applies to the full retroactive SSI amount and not the amount actually due the recipient after any interim assistance reimbursement described below. See The Windfall Offset Provision, POMS SI 02006.001.

**Practice Note: TAFDC**

Note that an individual who lives in a family receiving Transitional Aid to Families with Dependent Children (TAFDC) benefits and who anticipates a retroactive award of SSDI benefits should consult a welfare advocate well in advance of receiving the award to avoid the potentially devastating impact of the “lump sum” rules. Under this rule, receipt of a retroactive award of SSDI in a family receiving TAFDC can result in TAFDC ineligibility for the number of months equal to the amount of the award divided by the TAFDC standard of need for the family. See 106 C.M.R. 204.240. In Massachusetts, as of this writing, retroactive awards of SSDI benefits, but not SSI benefits, trigger the lump sum rule in the TAFDC program. For more information on the lump sum rule, see the latest edition of MCLE’s *TAFDC Advocacy Guide*.

**(a) Retroactive SSDI Benefits**

SSDI benefits may be paid retroactively for a period of up to one year prior to the date of application. 20 C.F.R. 404.621(a). Benefits are not payable for five full calendar months after the onset of disability, unless the individual is applying for a second period of eligibility within sixty months of the ending of a prior period of eligibility. This is called the “**five-month waiting period**.” See 42 U.S.C. 423(a); 20 C.F.R. 404.320; Waiting Period for DIB, POMS DI 10105.070-.075(A) (1990). When determining disability in these cases, the SSA will determine the actual date of disability onset. When the five-month waiting period applies, the earliest possible payment month is the sixth full month following disability onset, but only if that month is within one year of the date of application.

**(b) Retroactive SSI Benefits**

Once an SSI applicant has been determined disability eligible, the case is returned to the SSA district office where the application was filed. A claims representative in that office will contact the applicant to verify nondisability eligibility, i.e., income, resources, residence, and citizenship or alien status, for the period covered by the application and the disability determination. Depending on how quickly the applicant responds and how easily the required verifications are obtained, this process can take two or more months.

For SSI applications filed prior to August 22, 1996, benefits may be paid retroactively to the date of application. 20 C.F.R. 416.335 (1995). Section 204 of the PRWORA changes the effective date of SSI applications to the month after the month of application. This change applies to applications filed on or after August 22, 1996. The change means, for example, that the earliest month for which benefits can be paid on an application filed on April 1, 2010, is May 2010. If the claimant had filed on March 31, 2010, benefits could be paid for April 2010.

In Massachusetts, SSI applicants who received the state benefit, Emergency Aid to Elders, Disabled and Children (EAEDC), pending a decision on their SSI applications, may see their retroactive award of SSI reduced by the amount of "interim assistance," i.e., EAEDC, received while the SSI application was pending. This is because the SSA and Massachusetts have entered into an "interim assistance reimbursement agreement," which permits, under certain conditions, the SSA to reimburse the state for "interim assistance" from an individual's retroactive SSI award. See 20 C.F.R. 416.1901 - .1922. EAEDC recipients who appear to meet the SSI disability definition must apply for SSI as a condition of eligibility. 106 C.M.R. 320.200(B).

The state welfare agency, the Department of Transitional Assistance (DTA), must obtain the recipient's signature on an "interim assistance reimbursement" (IAR) form (AP-SSI-1), which permits the SSA to reimburse the state. IAR cannot occur unless a current and valid IAR authorization form covers the application period. See Interim Assistance (IA), POMS SI 02003.001(3)(c). Individuals are entitled to notice from the SSA that their retroactive SSI check was sent to the state and a notice from DTA that includes a month-by-month accounting of the amount of the reimbursement. Recipients should file an appeal with the SSA if the SSA did not follow correct procedures and with the DTA if the reimbursement amount is incorrect. See IA Appeals, POMS SI 02003.045.

**SSI recipients have nine months, effective for payments received on or after 3/2/04 (20 C.F.R. section 416.1235, as amended by 431, Pub.L.No.108-203 (3/2/04)) to spend down retroactive awards of SSI or SSDI benefits before those benefits count toward countable resources.** The exclusion period for underpayments received prior to 3/2/04 was six months. However, for the exclusion to apply, the retroactive funds must be identifiable from other funds. Generally, this will mean that the retroactive funds must be held in a separate account until spent down. 20 C.F.R. 416.1233. Recipients should keep receipts to verify that the funds have been spent and on what, i.e., not on countable resources.

#### **§ 1.11.2 Installment Payments for Large SSI Retroactive Awards (20 C.F.R. 416.545)**

Effective for past-due benefits paid on or after May 22, 2006, or later, section 7502 of the Deficit Reduction Act of 2005, (P.L. 109-171), enacted February 8, 2006, changes the installment formula for SSI past due benefits. The new law requires that past-due SSI benefits that exceed three times the maximum monthly SSI benefit (federal benefit plus state Supplement, if any) be paid in up to three installments, six months apart. The amount of the first two installments is limited to three times the maximum monthly SSI benefit. All remaining benefits will be paid in the third installment. There are hardship provisions allowing for an increase in the installment payments if the recipient has debts or current or anticipated expenses related to food, shelter, or medically necessary services, supplies, equipment or medicine. See POMS SI 02101.020.

The original installment formula, created by Section 221 of the PRWORA (1996), required that retroactive SSI benefits exceeding twelve times the maximum benefit payable be paid in up to three installments at six-month intervals.

Each installment payment is exempt from SSI resource counting for nine months, pursuant to 20 C.F.R. 416.1210, as long as the rules in 20 C.F.R. 416.1233 are followed. Installment Payments of Large Past-Due Benefits—Individual Alive, POMS SI 02101.020(C)(2) .

**§ 1.11.3 Dedicated Accounts for Children (20 C.F.R. 416.640(e), 416.1247; POMS GN 00602.140)**

After August 22, 1996, retroactive awards of SSI payable to eligible children that exceed six times the maximum monthly benefit payable are subject to rules that limit its use. The SSA will notify the child's representative payee that he or she must open a separate account into which the SSA will pay the retroactive award. These funds will not be counted toward the child's SSI resource limit. See 20 C.F.R. 416.640(e).

The child's payee will have access to the dedicated account funds. However, the payee is limited in how he or she can spend the money. Generally, dedicated account funds must be spent on items or services that are related to the child's disability and which benefit the child. Examples of appropriate expenditures might include medical treatment and education or job training. Other examples of items that may be related to a child's disability include:

- personal needs assistance,
- special equipment,
- housing modification,
- therapy or rehabilitation,
- specialized camp or day care, and
- special clothing or dietary needs.

Also included are respite care for parents, repair or replacement of furniture destroyed by a disabled child, and even a reasonable expense for a car necessary to take a child to medical treatment or moving expenses necessitated by the child's impairment. Attorney fees for SSI representation on the child's disability case are appropriate. The POMS section cited above contains the most complete description of the policy and includes examples of appropriate and inappropriate expenditures. Permitted Expenditures from Dedicated Accounts, POMS GN 00602.140 .

**Any expense that is related to the child's disability and which benefits the child may be appropriate.** The payee will be asked to document the disability-related need for many of these expenses and should keep copies of any such documentation. Also, in certain emergency situations, dedicated account funds may be used to prevent eviction and malnutrition. The SSA has two ways of monitoring how payees spend dedicated account funds:

- First, payees may request prior approval of a proposed expense from their

local Social Security offices. Payees must be prepared to explain how the proposed expense is related to the child's disability and provide documentation, i.e., from the child's doctor or other provider. The SSA must review the request and provide a written notice either approving or denying the request. These decisions are appealable through the SSA's administrative appeal process. Permitted Expenditures from Dedicated Accounts, POMS GN 00602.140(C)(2), (6) .

- Second, the SSA will review each payee's dedicated account expenditures on a yearly basis. If the SSA finds that the payee knowingly spent the money on items that are not related to the child's disability, the SSA will require the payee to repay the money to the SSA. Decisions that payees have misapplied dedicated funds are also appealable. Permitted Expenditures from Dedicated Accounts, POMS GN 00602.140(C)(7).

It is the choice of the payee whether to request prior approval of a dedicated account expense. It is probably a good idea to request prior approval whenever there is any doubt about whether a proposed expense is appropriate. Permitted Expenditures from Dedicated Accounts, POMS GN 00602.140 .

Children's representative payees must keep records and receipts for the use of dedicated account funds and provide them to the SSA upon request. Representative payees will be liable to repay the SSA for knowing use of dedicated account funds for expenses that are not permitted. A determination that a use of funds is not permitted is appealable. 20 C.F.R. 416.640(e)(4). Children who are eligible for past due benefits in amounts in excess of twelve times the maximum benefit payable will be subject to both the installment payment rule and the dedicated account rules. Permitted Expenditures from Dedicated Accounts, POMS GN 00602.140 .

Retroactive awards of benefits smaller than six times the maximum benefit payable will be paid to the child's representative payee. Expenditure of these funds is not limited to the disability-related needs of the child. Instead, the child's payee must spend these funds in the best interest of the child. See 1.11.7, Representative Payment, below, for general discussion of the duties of a representative payee. These retroactive awards are exempt from resource counting for nine months, pursuant to 20 C.F.R. 416.1210, as long as the rules in 20 C.F.R. 416.1233 are followed. Installment Payments of Large Past-Due Benefits —Individual Alive, POMS SI 02101.020(C)(2) .

#### **§ 1.11.4 SSI and SSDI Recipient Reporting Responsibilities**

Benefit recipients must report to the SSA any change that may affect benefit eligibility and payment amount. SSI recipients have the greater reporting burden because there are more eligibility criteria and many circumstances that affect payment amount. At this writing, the SSA, spurred by Congress, is focusing on "fraud," making reporting an especially important issue for recipients. Do not assume that benefit recipients understand the rules and their responsibilities for their benefits. Many have had a lot of information thrown at them during the application process, a very stressful time for most—and may not even be aware

that they missed something or do not understand. Due to the SSA staff reductions, many may have had little or no opportunity for further meaningful contact with the SSA about their rights and responsibilities. People with cognitive limits, mental impairments, or limited proficiency in English are especially vulnerable.

**(a) *What to Report***

All benefit recipients must report any change in circumstances that may affect their eligibility. SSI recipients have the most to report. The required reports for SSI recipients include, but are not limited to:

- changes in address or living arrangements;
- changes in income or resources;
- changes in marital status;
- admission to or discharge from an institution, jail, prison, or health-care facility;
- eligibility for other benefits;
- death of a spouse or anyone in household; and
- absence from the U.S.

20 C.F.R. 416.704, 416.708.

These reporting duties also apply to representative payees. 20 C.F.R. 416.635, 404.2035. See Reporting Instructions - Title II Claims, POMS GN 00203.005 for SSDI reporting issues.

**Practice Note**

Recipients should endeavor to ensure that there is a record of any reports they make. The best way to do this is to make each report in writing and either mail it certified mail, return receipt requested or bring the writing to a SSA District Office and request a “receipt.” SSA staff may be able to provide a “receipt” by using the SSA Report of Contact form. This is a blank form on which the SSA employee taking the report can note what has been reported and the date and provide a copy to the recipient. Recipients should always keep copies of anything submitted to the SSA and file the copies in a place where they can be retrieved. If information is received over the telephone, the recipient should keep a written record of the date and time of the conversation, the name of the SSA employee, the phone number used, and what was said. Reports of earnings should result in a computer generated receipt, whether the report is made in person or otherwise.

**(b) *When to Report***

Changes in circumstances must be reported within ten days after the end of the month in which the event happens. 20 C.F.R. 416.714. Failure to report correct information may lead to an overpayment of benefits.

**§ 1.11.5 Effect of Residence in an Institution**

### **(a) SSI Benefits**

Generally, an SSI recipient who enters any public institution or facility that provides food, shelter, and treatment or services and who remains for a full calendar month is ineligible for SSI. 20 C.F.R. 416.1325. However, **recipients who enter medical institutions may continue to receive their full benefits for up to three months if a doctor certifies that the stay is not likely to exceed three months, and if the recipient needs the money to maintain a living arrangement outside the hospital. Temporary Institutionalization (TI) Benefits**, POMS SI 00520.140(B)(5), (6). When living in an institution results in SSI ineligibility, benefits are suspended, rather than terminated. 20 C.F.R. 416.1325. Unless suspense status continues for twelve continuous months, benefits may be reinstated when the claimant shows that he or she has left the institution. 20 C.F.R. 416.1335.

### **(b) Children's SSI**

Section 214 of the PRWORA reduces the SSI benefit of children who are hospitalized for a full calendar month and who are covered by private insurance to the same \$30.00 monthly Federal Benefit Rate (FBR) once limited to children whose medical bills are covered by Medicaid. Massachusetts supplements the \$30 FBR by \$42.80, for a total of \$72.80.

Deeming of parental income and assets does not apply to children who are residents of medical care facilities and who are subject to the \$30 FBR. 20 C.F.R. 416.1165(g)(5); Waiver of Parental Deeming Rules, POMS SI 01310.201. In addition, children who were eligible for the \$30 FBR may remain eligible for the deeming exemption when they leave the medical care facility under the following circumstances:

- the child continues to meet the disability standard;
- the child is eligible for Medicaid under a state home care plan; and
- the child would be ineligible for SSI benefits if parental income or assets were deemed.

Waiver of Parental Deeming Rules, POMS SI 01310.201; *see also* 20 C.F.R. 416.1161a, 416.12. In Massachusetts, the children who are eligible for this SSI-deeming waiver tend to be children eligible for home and community based services through the Kaleigh Mulligan program. For more information on the Kaleigh Mulligan, see 130 CMR 519.007(A).

### **(c) SSDI**

**SSDI benefit recipients can continue to receive their benefits while in a public institution, unless they are confined by court order in connection with a crime punishable by a sentence of one year or more.** See Title II Prisoner and Other Inmate Suspension Provisions, POMS GN 02607.001. This rule took effect as of March 1995. The effect is to create ineligibility for SSDI beneficiaries for any month in which they are confined at public expense to a

correctional facility for conviction of a crime punishable by imprisonment for more than one year or to a mental health facility by reason of a verdict of not guilty by reason of insanity or a finding that the individual is incompetent to stand trial in connection with such a crime. 42 U.S.C. 402(x).

Dependents of the confined wage earner may continue to receive their benefits. Once the individual is no longer confined at public expense, benefits may be reinstated. This includes individuals released to spend the duration of their sentence in the community, e.g., with electronic monitoring. Title II Prisoner and Other Inmate Suspension Provisions, POMS GN 02607.001 .

#### **(d) Prohibition of Payment of Retroactive Benefits to Prisoners**

On December 15, 2009, the President signed H.R. 4218, the “No Social Security Benefits for Prisoners Act of 2009”, which became Public Law 111-115. The new law prohibits the payment of any retroactive Title II and Title XVI benefits to individuals while they are in prison, are in violation of conditions of their parole or probation, or are fleeing to avoid prosecution for a felony or a crime punishable by sentence of more than one year. Under this law, SSA would not pay these retroactive benefits until the beneficiary is no longer a prisoner, probation or parole violator, or fugitive felon. The provision is effective with respect to payments that would otherwise be made on or after December 15, 2009.

#### **§ 1.11.6 SSI and SSDI Ineligibility for “Fugitive Felons and Probation and Parole Violators”**

##### **§ 1.11.6a. *Martinez* Settlement and *Clark* Status**

###### ***Martinez v. Astrue***

**\*\*Note that a settlement in *Martinez v. Astrue*, a nationwide class action challenging SSA’s policies of suspending SSI and Social Security Insurance because of outstanding warrants without a finding of intent to flee, has made some changes in how these policies apply, as follows:**

- 1. SSA stopped, effective 4/1/09, suspending benefits for other than a) warrants for probation or parole violations, and b) warrants with code 4901, 4902, 4999, which are issued for flight or escape. See EM 09025, 4/1/09.**
- 2. The *Martinez* settlement does not apply to warrants for probation and parole violations because the statute clearly does not require intent for benefit suspensions for those warrants.**
- 3. Those whose benefits were suspended or denied on or after January 1, 2007, or who received an administrative appeal decision after January 1, 2007, and those with a live administrative claim on 8/11/08, who continue to be otherwise eligible, will receive be reinstated with retroactive benefits without having to reapply or undergo a continuing disability review.**

**4. Those whose benefits were suspended or denied between 2000 and 2006 will be notified and given a chance to re-establish eligibility with a protective filing date of April 1, 2009, if they contact SSA within 6 months of receiving the notice. Any overpayments currently being collected from this group will be forgiven.**

**5. The settlement did not take full effect until 11/30/09.**

**For more information on the Martinez settlement, see the website of the National Senior Citizens Law Center, lead class counsel, at [www.nsclc.org](http://www.nsclc.org)**

### ***Clark v. Astrue***

**1. Clark applies to probation and parole warrants. The case was remanded in a very strong decision by the Second Circuit Court of Appeals to the federal district court, where a national class was certified. A settlement is now in the works.**

**2. SSA has published EM-11032 (5.9.11) prohibiting further benefit suspensions base solely on outstanding probation or parole warrant.**

**3. Stay tuned for details on class relief at [www.NSCLC.org](http://www.NSCLC.org)**

### **§ 1.11.6b. SSI/SSDI Suspense Rules for Outstanding Warrants**

**The rules below continue to apply to suspensions based on a) warrants for probation or parole violations, and b) warrant codes 4901, 4902, and 4999.**

Section 202(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 140-193 (Aug. 22, 1996, precludes SSI eligibility for applicants and recipients who are

- fleeing to avoid prosecution for a crime, or an attempt to commit a crime, which is a felony;
- fleeing to avoid custody or confinement after conviction for a crime, or an attempt to commit a crime, which is a felony; or
- violating a condition of probation or parole imposed under federal or state law.

See 42 USC § 1382(e)(4); 20 C.F.R. 416.202(f); 416.708(o) and (l), 416.1339; Denial of SSI Benefits for Fugitive Felons and Parole and Probation Violators, POMS SI 00501.050 .

An individual who is found ineligible for SSI and benefits may not be suspended for these reasons for any month prior to August 1996. Although individuals are required to report these matters, the SSA will also obtain this information, generally in electronic format, from law enforcement.

Section 203 of the Social Security Protection Act of 2004 (SSPA), Pub.L. No. 108-203 (3/2/04) extended the so-called fleeing felon provisions to Title II benefits, effective January 1, 2005. See 42 USC § 402(x)(1)(A). See also POMS GN 02613.000 et seq. An individual who is found ineligible for SSDI or another Title II benefit and benefits may not be suspended for these reasons for any month prior to January 2005.

The SSPA also added two categories of **good cause exceptions**, mandatory and discretionary, which apply to both Title XVI & Title II. See 42 USC §§ 1382(e)(4) and 402(x)(1)(B). See also Emergency Message (EM) 04080: *Titles II/XVI Fugitive Felon and Probation and Parole Violators Suspension Provisions* (12/28/2004). See also POMS SI 00530.000 et seq. (SSI), GN 02613.000 et seq. (Title II).

### **Mandatory Good Cause**

The mandatory good cause exception provides that SSA **shall**, for good cause shown, pay the individual benefits that have been withheld or would otherwise be withheld if:

- a court of competent jurisdiction has:
  - (1) found the individual not guilty of criminal offense,
  - (2) dismissed the charges,
  - (3) vacated the warrant for arrest, or
  - (4) issued any similar exonerating order (or taken similar exonerating action); or
- the individual was erroneously implicated in connection with the criminal offense by reason of identity fraud.

Mandatory good cause may be raised at any time.

### **Discretionary Good Cause**

The discretionary good cause exceptions provide that SSA may, for good cause based on mitigating factors, pay the individual benefits if all of the conditions under either of the options below are met:

Option 1:

- The offense or parole or probation violation was nonviolent AND not drug-related; AND
- The claimant attests that s/he was not convicted of or did not plead guilty to another felony since date of warrant; AND
- The law enforcement agency reports it will not extradite or is unwilling to act on warrant.

Option 2:

- The offense or parole or probation violation was nonviolent AND not drug-related; AND
- The claimant attests that s/he was not convicted of or did not plead guilty to another felony since date of warrant; AND

- The warrant is the only existing warrant and is 10 or more years old; AND
- One of following applies:
  - claimants medical condition impairs his/her mental capacity to resolve warrant; or
  - claimant is “incapable” or “legally incompetent;” or
  - claimant has a rep payee.

Note: To determine whether a crime is violent, SSA uses the criminal justice codes. See POMS GN 02613.900. SSA uses diagnostic codes to determine whether claimants mental capacity is impaired. See POMS GN 02613.910 for a non-inclusive list.

## **Good Cause Procedures**

*Notices.* Prior to implementing a fleeing felon suspension of benefits or denial of eligibility, SSA screens fleeing felon cases for good cause criteria. If SSA can establish good cause based on the information it has, then no notice of suspension goes out and benefits continue. If good cause cannot be established, then SSA sends out an advance notice. For Title II beneficiaries, the notice is called Advance Notice of Suspension, GN 02613.960; for SSI recipients, it’s a Notice of Planned Action, SI 00530.017. These notices list the good cause criteria that are met and the criteria that need additional documentation.

***Keeping Aid Pending Good Cause Determination.*** To prevent suspension of benefits, SSI recipients must file a Request for Reconsideration appealing the planned suspension, request continued benefits, and request good cause within 10 days of receiving the Notice of Planned Action (5 days for mailing is presumed). SSDI and other Title II beneficiaries must protest within 30 days of receiving the Advance Notice of Suspension. Both SSI and SSDI recipients have 90 days from the date of requesting good cause to provide evidence of good cause. If protests were filed within the specified time periods, benefits will continue during this 90-day period.

Recipients may request good cause after the “aid pending” deadlines, but benefits will be suspended while the determination is being made. While mandatory good cause may be raised at any time, claimants must request discretionary good cause within 12 months of receipt of the Advance Notice of Suspension or Notice of Planned Action.

### **Practice Note**

These benefit suspensions are appealable through the appeals process laid out in 20 C.F.R. 416.1400 *et seq.* See POMS 00501.005. In addition, recipients can request appeals and/or waivers of any resulting overpayments. Potential issues for appeal may include factual as well as legal issues. The information SSA receives from law enforcement may be out of date or incorrect, *e.g.*, the matter was resolved but the resolution was not entered into the appropriate database. The information from law enforcement may also not indicate whether the warrant issued on the basis of an appropriate finding that the claimant was fleeing to avoid prosecution, etc., as required by 20 C.F.R. 416.1339(b)(i). The basis on

which warrants issue will vary from state to state. Finally, although the SSA has taken the position that it does not consider intent to flee in determining whether an individual with an outstanding felony-related warrant is a “fleeing felon,” as would seem to be required in the choice of the words “fleeing” or “fugitive,” a number of courts have endorsed the intent requirement. See, e.g., *Fowlkes v. Adamec*, 432 F.3d 90 (2<sup>nd</sup> Cir. 2005); *Hull v. Barnhart*, 336 F.Supp.2d 1113 (D.Or. 2004); *Thomas v. Barnhart*, No. 03-182-B-W (D. Me. August 4, 2004); *Blakely v. Comm’r Social Security*, 330 F.Supp.2d 910 (W.D. Mich. 2004); *Garnes v. Barnhart*, 352 F.Supp.2d 1059 (N.D.Cal. 2004).

### **§ 1.11.7 Representative Payment**

Generally, SSA recognizes that benefit recipients have the right to receive and use their benefits on their own behalf. However, in certain circumstances, the SSA will appoint a representative payee to receive the benefits on behalf of the recipient and to use them in the recipient’s best interest. 20 C.F.R. 404.2001, 416.601.

#### **(a) Individuals Who Must Receive Benefits Through a Representative Payee**

The following recipients must receive their benefits through a representative payee. Their benefits eligibility will be put in suspense status, and they will not be paid until a payee is in place. See 20 C.F.R. 404.2010, 416.610. The SSA is obligated to assist these persons in finding a suitable payee:

- persons adjudicated legally incompetent; and
- minor children under eighteen, although older children may be paid directly if they can show they are capable of handling their benefits in their own best interest.

20 C.F.R. 404.2010, 416.610.

#### **(b) Individuals Whom the SSA May Determine to Require a Representative Payee**

The SSA may also individually determine that it is in a recipient’s best interest to receive benefits through a payee. 20 C.F.R. 404.2001(b), 404.2010(a), 404.2015, 416.601(b), 416.610(a), 416.615. These recipients may appeal the determination that they need a payee by presenting evidence that they are mentally or physically capable of managing their own benefits. 20 C.F.R. 404.902(o), 416.1402(d). Also, if no suitable payee is available, the SSA must pay the recipient directly while continuing to assist the recipient to look for a payee. The SSA may not suspend the benefits of these recipients because they do not have a payee, unless the SSA determines that direct payment would result in substantial harm to the recipient. Even then, the SSA can only suspend payment for thirty days. When the Suspension of Benefits is Permitted, POMS GN 00504.110(D).

Prior to the enactment of the 1994 Reform Act, P. L. No.104-21, individuals whose alcoholism or drug addiction (DAA) was material to the disability determination were required to receive their benefits through a payee. The 1994 Reform Act eliminated benefits eligibility for DAA beneficiaries and created a new class of beneficiaries—those with DAA conditions. A DAA condition exists when a beneficiary has a medically determined substance use disorder that is not material to the disability determination. There is no mandatory payee requirement for DAA condition beneficiaries. Instead, the SSA must determine, on a case-by-case basis, the capability of these beneficiaries, as described above. POMS GN 00502.020A.4.

**(c) Representative Payee Responsibilities (20 C.F.R. 404.2035, 404.2040, 416.635, 416.640)**

The obligation of representative payees is to use SSI or Social Security benefits in the best interest of the recipient. This means that a payee must first ensure that basic needs for food, clothing, shelter, medical care, and personal comfort items are met. Payees must also maintain records of their use of the benefits. If funds are held in a bank, they must be kept in a separate account. Payees must also take care that conserved benefit amounts do not result in resource ineligibility for SSI recipients. The SSA requires payees to submit periodic written reports. 20 C.F.R. 404.2035, 416.635; POMS GN 00605.000, et seq.

**(d) The SSA's Responsibilities (20 C.F.R. 404.2020, et seq.; 20 C.F.R. 416.620 et seq.)**

Potential payees must file an application to be a payee for a specific recipient. The SSA must investigate potential payees to determine who is best situated to use a recipient's benefits in the recipient's best interest. The SSA considers the relationship of the payee to the recipient, the amount of interest in the beneficiary, and the potential payee's ability to identify the recipient's needs. 20 C.F.R. 404.2020, 416.620. Generally, the SSA may not appoint payees who are creditors of recipients or who have misused benefits in the past. POMS GN 502.001, 502.133, 502.135, 502.136.

If the SSA becomes aware that a payee may be misusing a recipient's benefits, the SSA must investigate the complaint and remove the payee if necessary. Under old regulations, in all cases, SSA was only required to repay misused benefits if the SSA was negligent in appointing the payee, in failing to respond to complaints of misuse, or in monitoring the payee. 20 C.F.R. 404.204, 416.641; POMS GN 00604.001-00604.060. The Social Security Protection Act of 2004 has expanded the SSA's obligation to repay benefits misused by organizational payees and individual payees serving 15 or more beneficiaries (see (e) below)

**(e) Representative Payee Provisions in the Social Security Protection Act of 2004**

The Social Security Protection Act of 2004, Pub.L. No. 108-203 (3/2/04), created several important new protections for individuals receiving their benefits through representative payees, including:

- SSA must re-issue Title XVI or Title II benefits determined to have been misused by an organizational representative payee or by an individual payee serving 15 or more beneficiaries. Misuse is defined as conversion of benefits for use by other than the beneficiary. This provision is effective for determinations of misuse made on or after 1/1/95. 101, Pub.L.No. 108-203. See *Final Rule: Representative Payment Under Titles II, VIII and XVI of the Social Security Act*. 69 Fed. Reg. 60224 (10/7/04) and POMS sections GN 00604.070 and GN 00604.065 (10/04).
- Re-issued benefits will be excluded from countable resources for 9 months. *Id.*
- Non-governmental organizational representative payees must be both licensed and bonded under state law, effective 4/1/05. 102, Pub.L.No. 108-203.
- SSA must monitor organizational representative payees, including periodic onsite reviews, and report annually to Congress on the results of onsite reviews. *Id.*
- Individuals who have been convicted of an offense resulting in imprisonment of more than one year, or who are fleeing prosecution, custody or confinement are disqualified from serving as representative payees, unless SSA determines otherwise in individual cases. This provision is effective beginning 4/1/05. 103, Pub.L.No. 108-203.
- Representative payees forfeit their fees for any months during which they are determined to have misused beneficiaries benefits. This provision is effective for misuse determinations made on or after 8/30/04. 105, Pub.L.No. 108-203.
- Benefits misused by a nongovernmental representative payee will be treated as overpayments to the representative payee, subject to all SSAs recovery authorities. *Id.* Any misused benefits recovered that had not already been reissued to the beneficiary would returned to the beneficiary, up to the amount misused. This provision is effective for misuse determinations made on or after 8/30/04.
- SSA may redirect benefits to local Social Security offices when representative payees fail to provide annual accountings, effective 8/30/04. 111, Pub.L. No. 108-203.
- SSA may impose a civil monetary penalty for offenses involving representative payee misuse of Social Security or SSI benefits, effective for violations committed after 3/2/04. 106, Pub.L. No. 108-203
- SSA must report to Congress on the effectiveness on the representative payee selection criteria and on how benefits are used by representative payees. 103, 107, Pub.L. No. 108-203.

### **(f) Noncitizen Parents of SSI Eligible Children**

Noncitizen parents, including undocumented parents, can help their children file for benefits and can be their representative payees. A parent must file an application to be appointed as a child's representative payee. This application is usually taken at the same time as the application for benefits. The payee application requires that the applicant provide his or her Social Security Number (SSN), primarily for identification purposes. There is one exception to the SSN requirement, however. If the applicant is a parent filing to be the representative payee for his or her minor child and the parent cannot be assigned an SSN, the SSA must use an alternative procedure and appoint the parent if otherwise suitable. See Obtaining a Representative Payee Application, POMS GN 00502.107, Verification of Information Provided by Payee Applicants, POMS GN 00502.117.

#### **Practice Note**

A bigger problem for some noncitizen parents may lie in the income and asset verification requirements. The SSI application requires information about the income and assets of the both the child and the parents who live with the child. The SSA must verify the parents' income and assets before the child can be found eligible for benefits. This is because a portion of the parents' income and assets is counted to the child to determine whether the child is SSI eligible and what the benefit amount should be.

Verification is by paychecks, bank statements, and tax records. The SSA also verifies reported income with the parents' employers. This reporting and verification process may pose significant problems for parents who are working without authorization or working "under the table." Also note that the SSA shares reported and verified income with the IRS on a regular basis.

## **§ 1.12 ELIGIBILITY REDETERMINATIONS**

The SSA must periodically redetermine both disability and nondisability eligibility criteria. The fact that the SSA reviews eligibility periodically does not relieve recipients of their reporting responsibilities, as described above.

### **§ 1.12.1 SSI Nondisability Criteria**

Depending on the stability of the recipient's situation, nondisability eligibility (income, resources, citizenship, etc.) should be reviewed annually or at least once every three years. 20 C.F.R. 416.204. Individuals found ineligible due to one of the nondisability criteria are generally put into suspense status rather than terminated. See 20 C.F.R. 416.1321 *et seq.* When benefit payment is suspended, payments can be resumed when the individual shows that he or she is again eligible, as long as eligibility is regained within twelve months. When suspense status continues for twelve consecutive months, eligibility terminates. 20 C.F.R. 416.1335. When benefit eligibility terminates, the individual must reapply to regain eligibility.

## **§ 1.12.2 Continuing Disability Reviews (CDRs)**

The SSA must redetermine the disability eligibility of most SSI and SSDI benefit recipients at least every three years. Recipients deemed likely to medically improve may be reviewed more frequently. Recipients deemed permanently disabled will be reviewed less frequently, usually every seven years. For children under age eighteen 42 U.S.C. 421(a)(3)(C)(i)(1) requires a CDR every three years, unless medical improvement is not expected; and by the child's first birthday if SSI eligibility was based on low birth weight. 20 C.F.R. 416.990. Children turning age eighteen will receive a redetermination of eligibility under the adult disability standard. See 1.12.7, CDR Review Standard for Children Under Age Eighteen, below.

## **§ 1.12.3 CDR Standard for Adults**

### **(a) Medical Improvement**

The SSA regulations define "medical improvement" as any decrease in the current medical severity of any of the claimant's impairments that were present at the time of the most recent favorable medical decision. 20 C.F.R. 404.1594(b)(1), 416.994(b)(1)(i). To determine whether there has been any decrease in the medical severity of the claimant's impairments, the SSA looks for changes (improvements) in the medical findings (signs, symptoms, and laboratory findings) since the last favorable medical decision. 20 C.F.R. 404.1594(b)(1), 416.994(b)(1)(i). The earlier decision, which can be either an initial disability determination or a continuing disability determination, is known as the comparison point decision (CPD). Unless temporary or truly minor, any favorable change in the medical findings for an impairment present at the time of the CPD will result in a decision that medical improvement has occurred. Nature and Quantity of Change Needed to Find MI, POMS DI 28010.020(A)(1). Medical improvement may be found where one impairment has improved while another has worsened. Comparison of Symptoms, Signs and Laboratory Findings, POMS DI 28010.015.

To determine whether medical improvement has occurred, the SSA looks only at the symptoms, signs, and laboratory findings for impairments that were present and considered at the time of the CPD. 20 C.F.R. 404.1594(b)(7), 416.994(b)(1)(vii). New impairments will not be considered at this step. However, some "new" impairments may be closely related to or the result of CPD impairments. Two examples of "related" impairments might include deteriorated eyesight due to diabetes and back problems resulting from knee or hip impairments. Advocates should consider arguing that such closely related impairments constitute a worsening of the original impairment, rather than new impairments, and should be included in the medical improvement step of the CDR.

A finding of medical improvement requires evidence of actual change in the signs, symptoms, and laboratory findings associated with the claimant's impairments present at the last favorable medical decision. In *Rice v. Chater*, 86 F.3d 1 (1st Cir.1996), the court reversed the ALJ's cessation determination

based on the lack of evidence for an etiology for the claimant's pain, finding that there had also been no etiology for the pain at the time of the CPD.

The SSA's regulations address the problem of determining medical improvement for impairments subject to temporary remissions and worsenings. Where the claimant is in a period of remission at the time of the CDR, the SSA must consider "the longitudinal history of the impairment, including the occurrence of prior remissions, and prospects of future worsenings." 20 C.F.R. 404.1594(c)(3)(iv), 416.994(b)(2)(iv)(D). If the improvement is only temporary, it will not warrant a finding of medical improvement. *Carlson v. Sullivan*, 841 F. Supp.1031 (D. Nev. 1993); see also *Baguera v. Apfel*, 65 F. Supp. 2d 1345 (M.D. Fla. 1999). Similarly, a temporary worsening at the time of the CPD should not be used to find medical improvement at the time of the CDR, where the impairment is otherwise unchanged. Impairment Subject to Temporary Remission, POMS DI 28010.115.

### **(b) Medical Improvement Related to the Ability to Work**

If the SSA determines that medical improvement has not occurred, the claimant's disability benefits will be continued. If the decision is that medical improvement has occurred, the SSA must then determine whether the medical improvement is related to the claimant's ability to work. 20 C.F.R. 404.1594(c)(4), 416.994(b)(1)(ii). To make this determination, the SSA will consider the claimant's residual functional capacity (RFC).

RFC is what a person can still do despite his or her physical or mental impairments. 20 C.F.R. 404.1594(c)(2), 416.994(b)(iv), 404.1545, 416.945. The SSA will compare the claimant's RFC for the impairments present at the time of the CPD with the claimant's RFC for those same impairments at the time of the CDR. 20 C.F.R. 404.1594(b)(2) and (3), 416.994(b)(1)(iii) and (vii). To do this the SSA must construct a current RFC that includes prior impairments but excludes new ones. In these cases, the SSA must determine which functional limits are related to which impairments.

When the SSA compares the CPD RFC with the current RFC for the CPD impairments, the SSA will find medical improvement related to the ability to work if there is any increase in the individual's ability to perform basic work activity. Unlike the medical improvement decision, this decision must be made on the basis of all the prior impairments, and not on a finding that the RFC for one prior impairment has increased. Additional Examples of Cases With and Without MI, POMS DI 28015.025 . Also, the increased current RFC must be based on actual changes in impairment signs, symptoms, or laboratory findings. 20 C.F.R. 404.1549(c)(2), 416.994(b)(2)(iii).

Where the individual's impairment previously met a listing but no longer does, the SSA will deem increased RFC and find medical improvement related to the ability to work. 20 C.F.R. 404.1594(c)(3)(i), 416.994(b)(2)(iv)(A). The SSA will apply the same listing to determine whether medical improvement related to the ability to work has occurred, even if the listing has since been revised. 20 C.F.R. 404.1594(c)(3)(i), 416.994(b)(2)(iv)(A). Excepted from this rule are the adult

mental impairment listings. Instead, the SSA must use the more favorable 1985 version of these listings. Prior versions of the listings are included in the POMS. Pre-1968 Obsolete Versions of Part A Listings, POMS DI 34101.000 - .015; Obsolete Versions of Part A, the Listing of Impairments, POMS DI 34100.000 .

When there is no CPD RFC assessment in the record, the SSA will assign the maximum RFC consistent with an allowance. 20 C.F.R. 404.1594(c)(3)(ii), 416.994(b)(2)(iv)(c). Advocates will want to try to avoid this by presenting evidence where possible of the actual CPD RFC. However, when the CPD record shows that a mental impairment was present but not developed in the adjudication of disability eligibility, the SSA will deem a “no limits” RFC for that CPD impairment. MIRS Issues in Adult and Child Cases Involving Mental Impairments - General, POMS DI 28010.135. This is beneficial to the recipient who can prove current functional limits resulting from that impairment.

The RFC rules for determining whether medical improvement is related to the ability to work contain two provisions that may be favorable for recipients. The first requires consideration of the effects of aging and sustained periods of inactivity on a claimant’s functional capacity. 20 C.F.R. 404.1594(b)(4)(ii), 416.994(b)(1)(iv)(B). The second requires consideration of the length of time away from the workplace for persons over fifty years of age. 20 C.F.R. 404.1595(b)(4)(iii), 416.994(b)(1)(iv)(C). Although providing little guidance on how to apply these provisions to determine RFC, these provisions specify that they are intended to ensure that the disadvantages of inactivity and the aging process in a long period of disability will be considered. *See Hutchinson v. Sullivan*, No. 90-35844 (9th Cir. July 30, 1991), in which the court remanded the case of a 56-year-old man who had been unemployed for six years for consideration of the “age and time on the rolls” factors.

### ***(c) Medical Improvement Does Not Necessarily Mean Cessation: Current Disability Determination Requirement***

A finding of medical improvement related to the ability to work does not necessarily mean the beneficiary’s benefits will terminate. In most cases, unless an exception applies, the SSA must go on to determine whether the claimant is currently disabled using the sequential evaluation of disability. 20 C.F.R. 404.1594(b)(5), 416.994(b)(5). See also 1.12.8, CDR Sequence of Review for Children, below. In making this determination, the SSA must consider all the claimant’s impairments, not just those present at the time of the CPD. 20 C.F.R. 404.1594(b)(5), 416.994(b)(5). The SSA must also develop a complete medical history for at least the preceding twelve months before determining that a disability has ceased. 20 C.F.R. 404.1589, 416.989. Further, claimants whose current impairments prevent them from performing their prior work will receive the benefit of the vocational considerations (age, education, and work experience) when the SSA determines whether they have the functional capacity for other work that exists in significant numbers in the regional or national economy.

### **Practice Note**

“Gaps” in eligibility do not necessarily mean termination of benefits. “Except where retroactive cessation applies (DI 28005.205) find that disability continues if the current impairment(s) warrants continuance, regardless of whether longitudinal medical evidence shows a retroactive period (after the CPD) of possible nondisability.” New Impairments/ Subsequent Disability, POMS DI 28005.210(B)(3).

#### **§ 1.12.4 Exceptions to the Medical Improvement Standard**

The Social Security Act and regulations provide for a number of exceptions to the medical improvement standard. When an exception applies, the SSA may terminate the claimant’s disability benefits while skipping portions or all of the medical improvement standard. 42 U.S.C. 423(f)(2)(A). 20 C.F.R. 404.1594(d), 416.994(b)(3) and (4).

##### **(a) *The First Group of Exceptions***

This is the more important of the two groups of exceptions. These exceptions allow the SSA to skip only the medical improvement portion to the CDR process, i.e., whether there has been any decrease in the medical severity of the impairments. If one of these exceptions applies, the SSA must still show, considering all the claimant’s current impairments, that the claimant is now able to perform substantial gainful activity before terminating benefits. 20 C.F.R. 404.1594(d), 416.994(b)(3). These exceptions have been seldom applied.

##### **Substantial Gainful Activity**

This exception applies when the claimant is currently engaging in substantial gainful activity (SGA). Whenever the SSA applies this exception, advocates should carefully check whether the SSA has correctly determined that the claimant’s work activity meets the definition of SGA. See 1.8.3, Step 1: Is the Individual Performing Substantial Gainful Activity (SGA)?, above.

The SGA exception does not apply at all to SSI recipients. 20 C.F.R. 416.994(b)(3)(v). An SSI recipient determined to be performing SGA is entitled to benefits under Section 1619(a), the SSI work incentive program, as long as he or she continues to have a disabling impairment. This means that the disability eligibility of SSI recipients cannot be terminated merely for performing SGA, regardless of their earnings. They may be terminated, however, for medical reasons, as the result of a CDR, and they may lose financial eligibility for cash benefits as a result of their earnings.

The SGA exception to the medical improvement standard does apply to SSDI recipients. However, the normal trial work period (TWP) and reentitlement period rules, as well as the SGA rules noted above, apply in these circumstances. 20 C.F.R. 404.1594(d)(5). In order to be eligible for a TWP and reentitlement period, the claimant must continue to meet the disability standard. Therefore, benefits may be terminated prior to completion of a TWP and reentitlement period only if the claimant is found no longer medically disabled after a CDR.

**Practice Note**

An SGA termination of SSDI benefits does not affect the Section 1619 eligibility for concurrently eligible SSDI and SSI recipients. Rehabilitation Incentive Provisions, POMS DI 40520.010(B)(3) (1990). Many claimants receive both SSDI and SSI benefits and will have to consider the effect of work activity on each of their benefits separately under the rules outlined above.

**Advances in Medical or Vocational Technology or Therapy**

This exception applies when there is substantial evidence that shows that the individual has benefited from advances in treatment or rehabilitative methods. Substantial evidence means new medical evidence and a new individualized assessment of RFC. The evidence must show that these advances have favorably affected either the severity of the individual's impairments or the claimant's ability to do basic work activities. 20 C.F.R. 404.1594(d)(1), 416.994(b)(3)(i).

This exception does not apply in SSI cases where the claimant is eligible for special cash benefits under the Section 1619(a) work incentive program. For concurrent recipients, an SSDI benefit cessation on this ground does not preclude Section 1619 eligibility. SSA Program Circular 07-87-OD.

**Vocational Therapy**

This exception applies when there is substantial evidence that shows that the claimant has undergone vocational therapy that improves the claimant's ability to meet the vocational requirements of more jobs. The evidence considered must include new medical evidence and a new RFC assessment. 'Vocational therapy' can include education, training, or work experience. 20 C.F.R. 404.1594(d)(2), 416.994(b)(3)(ii). This exception also does not apply in SSI cases where the claimant is eligible for the Section 1619(a) work incentive program.

**New or Improved Diagnostic Techniques or Evaluations**

This exception applies when there is substantial evidence, based on new or improved diagnostic techniques or evaluations, that the claimant's impairment is not as disabling as it was considered at the time of the CPD. The new or improved diagnostic technique must have been generally available after the date of the CPD. 20 C.F.R. 404.1594(d)(3), 416.994(b)(3)(iii). The SSA must publish notice when it determines that a new or improved diagnostic is generally available. 20 C.F.R. 404.1594(d)(3)(ii), 416.994(b)(3)(iii)(B)(1) and (2). For a list of these techniques, see Scope of the Subchapter—Cumulative List of Medical Diagnostic or Evaluative Techniques, POMS DI 33535.001 and POMS DI 33535.005-.035.

**The Prior Disability Decision Was in Error**

This exception applies when there is substantial evidence that any prior disability determination was in error. 20 C.F.R. 404.1594(d)(4), 416.994(b)(3)(iv). The key

point here for advocates is that this exception is not intended to substitute current judgment for that used in the prior favorable decision, e.g., the SSA cannot simply rereview the same evidence and make a different decision. There are only three circumstances that will meet the error test:

- substantial evidence, on its face, shows that the prior decision was wrong, i.e., test results were misread and a correct reading would result in a different decision;
- required and material evidence, which was missing at the time of the last review, becomes available and substantial evidence shows that it would have resulted in a different decision; or
- substantial new evidence, which relates to the earlier decision, shows that the earlier decision was wrong, i.e., a tumor thought to be malignant was actually benign.

20 C.F.R. 404.1594(d)(4)(i)-(iii), 416.994(b)(3)(iv)(A)-(C).

### **(b) *The Second Group of Exceptions***

This group of exceptions allows the SSA to terminate a claimant's disability benefits without finding medical improvement or the ability to engage in substantial gainful activity. 42 U.S.C. 423(f); 20 C.F.R. 404.1594(e), 416.994(b)(4). The SSA may consider this group of exceptions at any point in the review process. This group essentially codifies the SSA's current administrative practices.

#### **Fraud**

The prior decision was fraudulently obtained. 20 C.F.R. 404.1594(e)(1), 416.994(b)(4)(i). The SSA may also apply the reopening rules at 20 C.F.R. 404.988, 416.1488 to the prior claim.

#### **Noncooperation**

This exception applies when the individual fails to cooperate, without good cause, after the SSA has made all reasonable attempts to resolve the matter. 20 C.F.R. 404.1594(e)(2), 416.994(b)(4)(ii). The usual "good cause" rules at 20 C.F.R. 404.911, 416.1411 apply. *See, e.g., Odorizzi v. Sullivan*, 841 F. Supp. 72 (E.D.NY 1993), in which the court found that the ALJ was not excused from applying the medical improvement standard because the claimant's failure to cooperate was, at worst, the result of a misunderstanding.

#### **Practice Note**

Note that for good cause determinations made after July 1, 1990, the SSA is required to specifically take into account any physical, mental, educational, or linguistic limitations that the person may have. 20 C.F.R. 404.1511(a)(4), 416.911(a)(4).

Under the noncooperation exception, benefits end with the first month in which the claimant fails to cooperate. A claimant's later decision to cooperate will be considered a request for reconsideration. If the claimant is found disabled, the termination will be revised to a continuance. Failure to Cooperate (FTC) and Whereabouts Unknown (WU) Cases- General, POMS DI 13015.001.

### **Inability to Locate**

This exception applies when the SSA cannot locate the claimant after every reasonable effort. 20 C.F.R. 404.1594(e)(3), 416.994(b)(4)(iii). "Every reasonable effort" includes contacts with the post office, former landlords, and medical institutions. Failure Issues, POMS DI 25205.020 . Under this exception, benefits end with the first month in which a question arose and the claimant could not be located. In SSI cases, payments will be suspended, rather than terminated. See 20 C.F.R. 416.1321 -.30 for the SSI rules on suspension.

### **Failure to Follow Prescribed Treatment**

This exception applies when the claimant fails, without good cause, to follow prescribed treatment, which is expected to restore the ability to work. 20 C.F.R. 404.1594(e)(4), 416.994(b)(4)(iv). See *Pancheco v. Sullivan*, 931 F.2d 695 (10th Cir, 1991) (Statement by recipient's doctor that he needed knee surgery before he could work was insufficient for application of this exception, because there was no evidence that the recipient had refused prescribed treatment). See 20 C.F.R. 404.1530, 416.930, and Social Security Ruling 82-59 for examples of "good cause." Social Security Ruling 82-59 includes inability to afford the prescribed treatment among its examples of good cause. Under this exception, benefits end with the first month the claimant failed to follow prescribed treatment.

#### **Practice Note**

The SSA stores many files, especially "inactive files," in several large storage areas around the country. Sometimes files or complete files cannot be located at CDR time. When the SSA cannot find a file in a CDR case, it will continue benefits if it determines that the claimant is currently eligible and if none of the medical improvement exceptions apply. 20 C.F.R. 404.1594(c)(3)(v), 416.994(b)(2)(iv)(E). Even where the claimant is determined currently able to perform SGA, benefits will be continued if relevant portions of the file cannot be reconstructed. The evidence of claimant's current impairments will then be the basis for any future review. The POMS sets out the rules for reconstructing files. Lost Folders/Medical Evidence—Background, POMS DI 28035.01; see also *Flemming v. Sullivan*, 806 F. Supp. 13 (E.D. NY 1992) (court overturned a termination because evidence from the last favorable medical decision was not available so that there could be no medical improvement determination); *Dicus v. Sullivan*, 1990 WL 24796 (E.D. Wash. 1990), (court discussed the missing file rules and remanded the case for consideration of these and other medical improvement standard rules).

### **§ 1.12.5 Benefit Continuation With Participation in Vocational Rehabilitation Programs**

Finally, benefits for some individuals may be continued even after the SSA determines that their impairments are no longer disabling. These are individuals who are participating in approved program of vocational rehabilitation begun before their disabilities ended. 20 C.F.R. 404.1586(g), 416.1338. The SSA must also determine that completion or continuation of the program will significantly reduce the likelihood that the recipient will need to rely on disability benefits. 20 C.F.R. 404.1586(g), 416.1338; see also 20 C.F.R. 404.1598, 416.998; *Whittler v. Chater*, 59 F.3d 95 (8th Cir. 1996).

Section 301 of the Social Security Disability Amendments of 1980, P.L. 96-265, amended the Social Security Act to create this rule. It provides that disability benefit recipients determined no longer medically disabled after a continuing disability review are nevertheless eligible for continued benefits if:

- they are participating in an approved program of vocational rehabilitation that began prior to the determination of medical improvement; and
- SSA determines that continuation in or completion of the program increases the likelihood that the recipient will stay off benefits.

42 U.S.C. 425(b), 1383(a)(6)(A),(B), 20 C.F.R. 404.1597, 416.1338. Under this rule, SSA can determine whether benefits should continue following a CDR termination, and, if so, for how long.

In recent years, SSA has made two improvements to this rule that makes it more accessible to young people. Prior to August, 1999, SSA applied this rule only to CDR terminations. SSA changed its policy to include age-18 review terminations via EM-99079 (August 10, 1999). In addition, on June 24, 2005, SSA published final regulations containing improvements with great potential to benefit young people with disabilities. The improvements expand the programs which can qualify for benefit continuation beyond traditional state vocational rehabilitation programs. Under the new regulations, the programs that can qualify a recipient for benefit continuation include vocational rehabilitation services, employment services, and programs undertaken pursuant to the Ticket to Work Act.

Perhaps the most important expansion for young people is the inclusion of individualized education programs (IEPs) developed under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., for students ages 18 through 21. For students meeting the IEP criteria, SSA will not make a separate determination as to whether continuation in or completion of the educational program is necessary to reduce dependence on benefits; evidence of participation in the program is sufficient for benefit continuation if the student is determined no longer disabled after an age-18 review or CDR. 20 C.F.R. 404.1597, 416.1338(e)(2).

The revised benefit continuation rules also improve the criteria for determining when the individual needs to continue in or complete the program in order to

increase the likelihood of staying off benefits. For example, the revised regulations remove the modifier “significantly” from the phrase “significantly increase the likelihood.” SSA implements this new language by requiring a determination that completion of or participation in the program will provide the individual with:

- an improvement in the individual’s work experience so that s/he would be more likely to be able to do past relevant work, despite a possible future reduction in his/her RFC; or
- an improvement in any of the vocational factors of education, work experience, or skills so that s/he would be more likely to be able to do other work that exists in the national economy, despite a possible future reduction in his/her RFC.

20 C.F.R. 404.1597, 416.1338.

### § 1.12.6 CDR Sequence of Review for Adults

The following is the CDR sequence of review for adults set out in 20 C.F.R. 416.994(b)(5), 404.1594(f):

- **Step 1:** Is the individual engaging in SGA? If yes, and the claimant is not entitled to eligibility under Section 1619 or to a TWP or reentitlement period, the SSA will terminate the claimant’s benefits. If no, go to Step 2.
- **Step 2:** Do the individual’s current impairments meet or equal the Listings of impairments? If yes, the SSA will find that the claimant’s disability continues. If no, go to Step 3.
- **Step 3:** Has there been medical improvement in the conditions the individual had at the time of the last medical review? If yes, go to Step 4. If no, go to Step 5.
- **Step 4:** Is the medical improvement related to the individual’s ability to work? (Compare current fictional RFC with old RFC or deemed or reconstructed RFC). If yes, go to Step 6. If no, go to Step 5.
- **Step 5:** Do any of the first or second group of exceptions apply? If one of the first group of exceptions applies, 20 C.F.R. 404.1594(d), 416.994(b)(3), go to Step 6. If one of the second group of exceptions applies, 20 C.F.R. 404.1594(e), 416.994(b)(4), the SSA will terminate or suspend the individual’s benefits. Remember that the second group of exceptions may be applied at any time. If no exceptions apply, the individual’s benefits will continue.
- **Step 6:** Does the individual have a “severe” impairment, considering all the individual’s current impairments? If yes, go to Step 7. If no, the individual’s benefits will end.
- **Step 7:** Is the individual able to perform past work, considering all the

individual's current impairments? If yes, the individual's benefits will end. If no, go to Step 8.

- **Step 8:** Is the individual able to perform other work, considering all the individual's current impairments and the individual's age, education, and work history? If yes, the individual's benefits will end. If no, the individual's benefits will continue.

### **§ 1.12.7 CDR Review Standard for Children Under Age Eighteen**

The SSA also uses the medical improvement standard for CDRs for children under age eighteen. Benefits may not usually be terminated unless there is a finding that the recipient's condition has medically improved, meaning that there must be a decrease in the medical severity of the recipient's impairments, based on changes in signs, symptoms, or laboratory findings. 20 C.F.R. 416.994a(b)(2) and (c). To decide whether there has been any decrease in the medical severity of the recipient's impairments, the SSA must look for changes in the medical findings of the recipient's impairments present at the time of the last favorable medical decision or review. 20 C.F.R. 416.994a(b). Even if medical improvement has occurred, benefits may not usually be terminated until after the SSA has determined that the recipient is not currently disabled, using the sequential analysis of disability and considering all current impairments. 20 C.F.R. 416.994a(b)(5).

The differences in the CDR sequence of review for children has to do with the fact that the children's disability standard does not consider the ability to work and unlike the adult disability standard, does not include a functional capacity assessment below the severity level of the listings of impairments listings level, i.e., one "extreme" or two "marked"-level limitations in areas of function.

The children's CDR sequence of review also has fewer exceptions to the medical review standard. The exceptions that do apply are exactly the same as described above for adults. The first group of exceptions includes only the decisional error and new diagnostic or evaluation techniques exceptions. 20 C.F.R. 416.994a(e). Just as for adults, SGA is not an exception for SSI eligible children because of the Section 1619 work incentive provisions. The CDR Evaluation Process - Title XVI Child - Step-by-Step Discussion, POMS DI 28005.030(B)(4) . The second group of exceptions is exactly the same as described above for adults. 20 C.F.R. 416.994a(f).

### **§ 1.12.8 CDR Sequence of Review for Children**

- **Step 1:** Has there been medical improvement in the impairments present at the time of the most recent favorable decision? If there has been medical improvement, go to Step 2. If there has been no medical improvement, eligibility continues, unless an exception applies. If a group 1 exception applies, go to Step 3. If a group 2 exception applies, eligibility terminates.
- **Step 2:** Do the impairments considered at the time of the most recent

favorable decision meet or equal the severity of the listing they met or equaled at that time? Use the listing considered at that time even if it has been revised or removed. If the answer is yes, eligibility continues, unless an exception applies. If the answer is no, go to Step 3.

- **Step 3:** Does the child have a severe (more than de minimis) impairment, considering all the child's current impairments in combination? If the answer is no, eligibility terminates. If the answer is yes, go to Step 4.
- **Step 4:** Do the child's current impairments meet or medically equal the severity of a listed impairment? If the answer is yes, eligibility continues. If the answer is no, go Step 5.

**Step 5:** Do the child's current impairments functionally equal the severity of a listed impairment? If the answer is yes, eligibility continues. If the answer is no, eligibility terminates.

20 C.F.R. 416.994a; The CDR Evaluation Process - Title XVI Child - Step-by-Step Discussion, POMS DI 28005.030(C).

#### **§ 1.12.9 Duty to Ensure That a Child Is Receiving Treatment (20 C.F.R. 416.994a(g))**

42 U.S.C. 1382c(a)(3)(H)(ii)(II) - (IV) requires the representative payee of a child under age eighteen to show that the child has been and is receiving available medically necessary treatment for the impairments on which the disability finding was based. Payees who refuse to comply with this requirement without good cause may be removed as payee, if removal is determined to be in the best interests of the child. 20 C.F.R. 416.994a(i).

#### **§ 1.12.10 Child Recipients Who Attain Age Eighteen (20 C.F.R. 416.987)**

Children who were eligible for SSI prior to turning eighteen will not receive a CDR using the medical improvement standard at age eighteen. Instead, they must be redetermined under the adult disability standard within one year from the date they attain age eighteen. 42 U.S.C. 1382c(a)(3)(H)(iii). Disability Redeterminations—Childhood (Under Age 18) and Over Age 18 Cases - General Instructions, POMS DI 11070.010 . This change is due to the uncoupling of the childhood disability standard from the adult disability standard by Section 212(b) of the PRWORA. Prior to the PRWORA, the Social Security Act, 42 U.S.C. 1382c, provided that children could be eligible if they had medical conditions of comparable severity to those that would disable adults. The PRWORA changed the definition of disability for children to require medical impairments resulting in "marked and severe functional limitations." 42 U.S.C. 1382c(a)(3)(i).

The SSA initiates the age-eighteen redetermination between the recipient's eighteenth and nineteenth birthdays and will notify the recipient of the review and of the right to submit evidence. If the SSA determines that the recipient is not eligible under the adult disability standard, the SSA will notify the recipient of the

appeal rights and the right to request continued benefits pending appeal. 20 C.F.R. 416.987(d).

Even though the SSA does not use the CDR standard of review (medical improvement) for the age eighteen redeterminations, the SSA does use the beneficial CDR procedure, described below.

The SSA also applies the participation in vocational rehabilitation rule, described above in 1.12.6, CDR Sequence of Review for Adults.

The age-eighteen reviews have resulted in a high termination rate for young adults. As of the end of January 1999, the national initial continuation rate for the age-eighteen reviews was 43 percent for physical impairments and 44 percent for mental impairments. By comparison, the initial continuation rate for adult CDRs is about 80 percent, and for children's CDRs, it is about 75 percent. For those who appealed age-eighteen terminations, the termination was replaced with a continuance at the rate of 30 percent at reconsideration and 33 percent at the ALJ level of appeal.

There are several potential reasons for the high termination rate. First, the SSA reports a high 'no show' rate in the age-eighteen reviews for consultative examinations and at the face-to-face hearings at reconsideration. Second, historically, the CDR termination rate was much higher prior to 1984, before Congress acted to require the SSA to use the medical improvement standard. Prior to 1984, the SSA could simply make a different determination after reviewing the same or similar evidence. Third, a young adult who does not meet a listing faces unfavorable vocational considerations and must be unable to perform the full range of work defined as sedentary to be found disabled at Step 5 of the sequential analysis. See 20 C.F.R. Pt 404, Subpt P, App 2, R. 201.00(h). Fourth, although many young adults with disabilities are entitled to public special education services until age twenty-two, the adult disability standard does not specifically provide for consideration of school evidence to determine impairment severity and residual functional capacity. Neither does the adult disability standard specifically provide for consideration of any highly structured setting provided, for example, in a special education setting. Advocacy can make a difference with all of these negative factors.

### **§ 1.12.11 CDR and Age-Eighteen Review Procedure**

The SSA will notify a recipient that a review has begun and will invite the recipient to submit evidence of continuing disability. Recipients who receive notice that their benefits will be terminated because they are no longer disabled may appeal that decision through the appeals process set out in 1.6, Applications and Appeals, above. They may also elect to receive continuing benefits through the ALJ hearing appeal step, as long as they appeal within ten days at each appeal step and request continuing benefits. 20 C.F.R. 404.1596(g), 416.996(g).

If the recipient loses on appeal, the SSA will consider the continued benefits to be an overpayment and will ask the recipient to repay. The recipient may,

however, request a waiver of the overpayment and should meet the “not at fault” portion of the waiver standard if he or she appealed the termination in good faith and cooperated with the appeal. 20 C.F.R. 404.1596(g), 416.996(g). See 1.13, Overpayments, below, for more information on the waiver standard.

If the SSA fails to give notice of the right to continue benefits or otherwise terminates benefits without adequate notice, the only adequate remedy is to reinstate benefits from the date of the original suspension or termination. Allegations of Improper or No Due Process, POMS DI 28080.055(A) (1990). Additionally, benefits should be similarly reinstated where the notice was sent but the claimant has a bona fide (good cause) reason for not receiving the notice. Allegations of Improper or No Due Process, POMS DI 28080.055(A) (1990).

### **§ 1.12.12 The Effect of Fraud or Similar Fault in Disability Determinations (Social Security Ruling 00-2p)**

The SSA published Social Security Ruling (Social Security Ruling) 00-2p to implement provisions imposed by the Social Security Independence and Program Improvement Act of 1994, Pub. L. No. 103-296, amending 42 U.S.C. 405(u), 1383(e)(6). The amendments require the SSA to

- redetermine benefit eligibility if there is reason to believe that fraud or “similar fault” was involved in the application; and
- to disregard evidence if there is reason to believe that fraud or similar fault was involved in its providing. “Similar fault” is defined to include knowingly making incorrect or incomplete statements or knowingly concealing material evidence.

## **§ 1.13 WORK INCENTIVE PROGRAMS**

Both the SSDI and SSI programs contain “work incentive” programs for recipients who want to test their ability to work without immediate loss of monthly cash and health benefits. The work incentive programs for SSDI and SSI recipients are different and will be covered separately in this chapter. Both work incentive programs apply to persons who receive both SSDI and SSI benefits.

### **Practice Note**

The SSA’s publication, A Summary Guide To Employment Support For People With Disabilities Under The Social Security Disability Insurance And Supplemental Security Income Programs, also known as the Red Book, contains a good overview of the SSI and SSDI work incentives. It is available online at <http://www.socialsecurity.gov/redbook/eng/main.htm>

### **§ 1.13.1 SSDI Work Incentive Programs**

#### **(a) Trial Work Period**

SSDI recipients are entitled to a nine-month trial work period. 20 C.F.R. 404.1592. A trial work month is a month in which the recipient earns \$720 or more in gross wages (in 2011) in work that is not training or therapy. (See POMS DI 1301.050 for a table of trial work period trigger amounts for prior years.) Recipients continue to receive their full SSDI benefits during the trial work months, no matter how much they earn. The nine months do not have to be consecutive. Beneficiaries only get one trial work period for each period of disability.

The trial work period is completed when the recipient has had nine trial work months in a rolling sixty-month period. When the nine-month trial work period is complete, the SSA will review the work to determine whether the recipient is performing substantial gainful activity. The SSA should also conduct a continuing disability review to see whether the recipient remains medically disabled.

Note that the trial work month earnings amount increased and indexed to allow for annual increases, effective January 1, 2001. Prior to January 1, 2001, lower earnings levels were used to define trial work. Be sure to review the trial work regulations in order to apply the appropriate trial work earnings amount to the time period involved in the recipient's trial work period. An earnings level explanation can be found at 20 C.F.R. 404.1592(b).

If the individual is no longer medically disabled, benefits will cease. Recipients who remain medically disabled begin the extended period of eligibility (EPE). 20 C.F.R. 404.1592a.

### **(b) Extended Period of Eligibility**

The Extended Period of Eligibility (EPE), also called the Reentitlement Period, is a consecutive thirty-six-month period that begins the month following the end of the trial work period. During the EPE, recipients are not eligible for a cash benefit for months in which they work at or above the Substantial Gainful Activity (SGA) level, but they are eligible in months in which they work below the SGA level. 20 C.F.R. 404.1592a.

*Determining SGA.* See [1.8.3](#) above for more information about SGA. In 2011, SSA presumes that gross wages of \$1000 per month or more shows the ability to perform SGA. (\$1640 in 2011 for those eligible on the basis of blindness.) This SGA threshold became subject to annual cost of living adjustments in 2001 and was lower in earlier years (see 1.8.3 for SGA levels for earlier years). In determining whether work during the EPE constitutes SGA, it is important to consider the following:

- **Impairment Related Work Expenses (IRWEs)** may be used to reduce monthly earnings below the SGA level. An IRWE is a cost of employment borne by the claimant. The cost of an IRWE must be paid by the recipient and without reimbursement from any source. 20 C.F.R. 404.1576(b)(3), 416.976(b)(3). IRWE costs documented by the claimant will be deducted from monthly gross earnings before the SSA is allowed to make an SGA determination. IRWE deductions may include the unreimbursable

claimant- paid costs of items or services necessary to the claimant's ability to work, including medications, wheelchairs, counseling services, specially adapted vehicles, etc.

- The value of any **subsidies**, 20 C.F.R. 404.1574(a)(2), **special conditions**, 20 C.F.R. 404.1573(c), should be deducted from monthly gross wages before deciding whether the wages show SGA. POMS DI 10505.010.
- **Wages count when they are earned**, not when they are paid (note that this is different in the SSI program in which wages are counted when paid). Earnings put into pre-tax retirement plans count toward SGA. POMS DI 10505.005 and DI 10505.010.
- Only pay for work activity counts in determining SGA. **Pay for time not worked, such as paid sick or vacation time**, should not be included. POMS DI 10505.010.
- **For self-employed beneficiaries**, SSA counts net income less the reasonable value of any significant unpaid help from family members. 20 C.F.R. 404.1575(c), 416.975(c). In addition to counting actual earnings, SSA also considers the comparable worth of the self-employment activity. 20 C.F.R. 404.1575(a). See 1.8.3 (e) above for more on self-employment.

**The Cessation Month.** The first month in which the beneficiary performs SGA after the end of the trial work period is called the **cessation** month. In determining whether a beneficiary has performed SGA for the first time, SSA considers unsuccessful work attempts, 20 C.F.R. 404.1574(c), and average earnings, 20 C.F.R. §404.1574a, in addition to IRWEs, subsidies, and special conditions. 20 C.F.R. 404.1592a(a)(1). After the cessation month, unsuccessful work attempts and averaging do not apply in determining SGA. Benefits are payable in the cessation month and the following two months, regardless of the level of earnings. 20 C.F.R. 404.1592a(a)(2)(i). The cessation month may occur during the EPE or after.

**Averaging Earnings.** In determining whether work is SGA, SSA may average earnings until the cessation month. Earnings may be averaged for periods in which the work or self-employment was continuous without significant change in work patterns or earnings, and there has been no change in the substantial gainful activity earnings levels. 20 C.F.R. §404.1574a. If there is a significant change in work pattern or earnings during the period of work requiring evaluation, SSA will average earnings over each separate period of work. 20 C.F.R. §404.1574a(c). POMS DI 10505.015 Averaging Countable Earnings.

As long as the beneficiary remains medically disabled, benefits can be reinstated during the EPE without a new application for any month in which the person does not work at the SGA level. Medicare benefits continue during the EPE, regardless of whether the recipient is eligible for a cash benefit.

### **(c) Termination of Benefits After the EPE**

Entitlement terminates at the end of the thirty-six months if the recipient is performing work at the SGA level. If the recipient is not working at the SGA level at that time, entitlement terminates with first month the recipient does perform SGA after the end of the EPE. 20 C.F.R. 404.1592a(a)(3).

### **§ 1.13.2 SSI Work Incentive Programs**

#### **(a) Earned Income Exclusion**

The favorable treatment of earned income in the SSI program is a significant work incentive for SSI recipients. Using an income exclusion formula, Social Security counts and reduces SSI payments by less than half of the recipients earned income. The formula subtracts \$65 from gross monthly earnings and excludes one-half the remainder. See 20 CFR §416.1112. For example, earned income in the amount of \$585 results in \$250 in countable monthly income.

$$\begin{array}{r} \$585.00 \text{ gross earnings} \\ - \underline{20.00} \text{ (if unused on unearned income)} \\ \$565.00 \\ - \underline{65.00} \\ \$500.00 \\ \$500 \text{ divided by } 2 = \$250 \text{ (countable income)} \end{array}$$

SSI benefit is reduced by \$250.

#### **(b) Impairment Related Work Expenses (IRWEs)**

IRWEs are deducted from gross monthly income before applying the earned income exclusion to determine the monthly SSI benefit. See 20 CFR §416.976. Using the example above with \$100 in IRWEs:

$$\begin{array}{r} \$585.00 \text{ gross earnings} \\ - \underline{20.00} \text{ (if unused on unearned income)} \\ \$565.00 \\ - \underline{65.00} \\ \$500.00 \\ - \underline{100.00} \text{ (IRWEs)} \\ \$400.00 \\ \$400 \text{ divided by } 2 = \$200 \text{ (countable income)} \end{array}$$

SSI benefit is reduced by \$200.

#### **(c) Blind Work Expenses (BWEs)**

There are additional work expense deductions available to people who receive SSI on the basis of blindness. See POMS SI 00820.535. Some examples of BWE items are:

- Service animal expenses,
- Transportation to and from work,
- Federal, state, and local income taxes,
- Social Security taxes,
- Attendant care services,
- Visual and sensory aids,
- Translation of materials into Braille,
- Professional association fees, and
- Union dues.

Any Item that would count as an IRWEs is also a BWE, and should be treated as a BWE because it is more advantageous to the SSI recipient because BWEs are deducted after application of the earned income exclusion. Using the above example with \$100 in BWEs instead of IRWEs demonstrates this point:

\$585.00 gross earnings  
 - 20.00 (if unused on unearned income)  
 \$565.00  
 - 65.00  
 \$500.00  
 \$500 divided by 2 = \$250

\$250.00  
 - 100.00 (BWEs)  
 \$150.00 countable income

SSI benefit is reduced by \$150.

#### **(d) Student Earned Income Exclusion**

For students under age 22 and regularly attending school, SSA does not count up to \$1,640 of earned income per month in 2011 in calculating the SSI payment amount. The maximum yearly exclusion is \$6,640 in 2010. See POMS SI 00820.510. These amounts increase each January with the COLA.

“Regularly attending school” means that you take one or more courses of study and attend classes:

- In a college or university for at least 8 hours a week; or
- In grades 7-12 for at least 12 hours a week; or
- In a training course to prepare for employment for at least 12 hours a week (15 hours a week if the course involves shop practice); or
- For less time than indicated above for reasons beyond the students control, such as illness. See POMS SI 00501.020.

#### **(e) Special Cash Benefits and Medicaid under 1619a and 1619b**

Supplemental Security Income recipients who work at the SGA level are eligible for the 1619 program. 42 U.S.C. 1382h; 20 C.F.R. 416.260-.267; POMS SI

02302.000 et seq. Recipients who have earnings above the SGA level can continue to receive cash payments under the 1619(a) program (special SSI payments for people who work) as long they remain medically disabled and meet all other SSI financial and categorical eligibility requirements. The recipient's financial eligibility and payment amount will be calculated in the same way as for someone who is not working at the SGA level. Medicaid eligibility also continues with 1619(a) eligibility. When earnings become too high to allow for a cash payment, the recipient may be eligible for 1619(b) (continued Medicaid eligibility). 42 U.S.C. 1382h(b); 20 C.F.R. 416.268-.269; POMS SI 02300.000 et seq.

In order to qualify, the recipient must

- have been eligible for an SSI cash payment for at least one month,
- still meet the disability definition,
- still meet other nondisability requirements,
- need Medicaid in order to work, and
- have gross earned income insufficient to replace SSI and Medicaid.

Persons who remain medically disabled can move between SSI, 1619(a), and 1619(b) without a new application as their circumstances change. However, changes in circumstances will not be known to the SSA without timely reports of changes made by the recipient.

### **§ 1.13.3 Plans to Achieve Self-Support (PASS)**

PASS is a little-used SSI program that allows SSI blind and disabled applicants and recipients to save income and resources, which would otherwise be countable under SSI, for a vocationally feasible goal. Examples of income that may be sheltered in a PASS include the following:

- earned income,
- SSDI benefits,
- veterans' benefits, and
- private pension benefits.

20 C.F.R. 416.1226.

Excess resources, including property, may also be used in a PASS and "sheltered" from the usual SSI resource limitations.

Under the Social Security Act and regulations, an individual can enter into a written plan with SSA to save and expend funds to achieve a vocational goal and, as a result, gradually achieve financial independence. 42 U.S.C. 1382a(b)(4)(A)(iii) and (B)(iv), 1382b(a)(4); 20 C.F.R. 416.1226; POMS SI 00870.000 et seq. All funds saved in a PASS are excluded from countable income and resources, IF the individual follows the written plan in expending the PASS funds. The legislative history shows that Congress expressed "a desire to

provide every opportunity and encouragement to the blind and disabled to return to gainful employment.” Plans for Achieving Self-Support - Overview, POMS SI 00870.001(A).

In a reviewing a PASS, SSA will focus significant attention on the plan’s “feasibility” in terms of costs and vocational goals desired. Compliance reviews will be reinforced and scheduled as a part of the plan’s terms.

The following is a partial list of potential PASS goals:

- tuition at a trade school or college;
- support for living expenses, away from home, while receiving training;
- tools and equipment used on the job;
- startup costs of a business;
- child care;
- adaptive devices at home, work, or in a vehicle to make the workplace accessible to the person with disabilities;
- job coaching or counseling services; and
- purchase of a vehicle necessary to achieve the vocational goal.

A PASS must meet the following requirements, as laid out in Elements of a PASS, at POMS SI 00870.006 and 71 Fed. Reg. 28262 (5/16/06):

- be designed especially for the individual;
- be in writing;
- be approved by the SSA (a change of plan must also be approved);
- be designed for an initial period of not more than eighteen months. (The period may be extended for an indefinite number of 6 month extensions. POMS SI 00870.001) There is no time limit placed on PASS plans and, in fact a federal court struck down a 48 month time limit that existed in the prior version of the PASS regulations, *see Panzarino v. Heckler*, 624 F. Supp. 350 (S.D.N.Y. 1985). On May 16, 2006, SSA issued final regulations, published at 71 Fed. Reg. 28262 (5/16/06), establishing individualized time limits for Plans to Achieve Self-Support. These regulations implement Section 203 of the Social Security Independence and Program Improvements Act of 1994, Pub. L. 103-296;
- show the individual’s specific occupational goal;
- show what resources the individual has or will receive for purposes of the plan and how he or she will use them to attain his or her occupational goal;
- show how the resources the individual set aside under the plan will be kept identifiable from his or her other funds;
- show a list of current earnings, if any, and estimated earnings when the vocational goal is obtained;
- show a detailed business plan, when self-employment is a goal, addressing each item set forth in Elements of a PASS, POMS SI 00870.006(A)(10) ; and
- show a list of “milestones” and “interim steps” to be achieved during the life of the PASS and an estimated time frame for the achievement of each “milestone.”

All expenses involved with a PASS are subject to a “reasonable and necessary” test. For example, if the PASS includes the purchase of a vehicle, it may be necessary to explain in the PASS why leasing a vehicle will not satisfy the vocational goal. Any SSA challenge to a “reasonable and necessary” expense must contain local office documentation as to what less expensive options are available. Leveraging other sources of services and funding may add to the likelihood that a particular plan will be approved. For instance, a recipient could use tuition grants, state rehabilitation services, or Medicaid to provide some of the services or funding needed for items included in the plan. This may make the overall plan more financially feasible.

An individual may develop a plan on his or her own initiative, and any employer, social agency, the SSA employee, or other person can assist in setting up the plan and its goals. If appropriate, an individual may also be referred to a state rehabilitation agency or an agency for the blind for assistance. Any fee for the preparation of a PASS is an allowable expense and can be included in the PASS. Fees must be reasonable, and no fees for private PASS monitoring will be allowed.

SSA may reject the plan if, for instance, it concludes that the goals of the plan are not realistic for the particular individual or the funds available will not be adequate to meet the plan’s goals. The POMS and emergency instructions encourage SSA to consider vocational information in order to determine if a PASS applicant’s goal is “feasible” in light of that individual’s disabling impairments. Vocational information can include the applicant’s prior work history and education. PASS denials are appealable through SSA’s regular administrative appeals process (Reconsideration, ALJ hearing, Appeals Council).

SSA regularly monitors PASS compliance and will begin to count the recipient’s earned and unearned income and resources excluded under the PASS at the point that

- the recipient reaches the goal or completes the time schedule set forth in the plan, or
- abandons or fails to follow the conditions of the plan. A PASS may be suspended, then reinstated and modified, with the written approval of the SSA, upon the recipient’s request.

**Practice Note**

Free work incentive planning assistance is available for SSI/SSDI recipients through two programs in Massachusetts. Benefits specialists from Project Impact and BenePLAN provide clients with individualized analyses of the effect of work on SSI, SSDI, government assisted housing, food stamps, and other benefits. They also assist clients with PASS.

**Project IMPACT:**

Voice: 617-204-3854; 800-734-7475 (Toll Free). TTY: 617-204-3834, Serving Barnstable, Bristol, Dukes, Nantucket, Plymouth and Suffolk Counties

***BenePLAN:***

Voice: 508-647-1722; 877-937-9675 (Toll Free). TTY: 508-652-7284  
Serving Berkshire, Franklin, Hampshire, Hampden, Worcester, Essex,  
Norfolk and Middlesex Counties

**§ 1.13.4 The Ticket to Work and Work Incentives Improvement Act of 1999**

On December 17, 1999, the Ticket to Work and Work Incentives Improvement Act was signed into law. Pub. L. No. 106-170 (Dec. 17, 1999). This act represents the most significant return-to-work development since the implementation of the SSI Section 1619 program. The express purposes of the act are:

- to provide health care and employment preparation and placement services to individuals with disabilities,
- to encourage states to adopt an expansion of Medicaid availability,
- to expand Medicare availability to disabled workers, and
- to establish a “ticket to work” that will allow an individual with a disability to obtain necessary services and supports to obtain and retain employment and reduce dependency on cash benefits.

Current work incentive programs, such as the Trial Work Period, Extended Period of Eligibility and the Section 1619 programs, are not affected by the new act and continue to be available to disabled SSDI recipients who wish to return to work.

**(a) *The Ticket to Work***

A disabled beneficiary will be provided a “Ticket to Work” which will allow that individual to obtain employment services, vocational rehabilitation services, or other support services from any provider (public or private) that is willing to provide services to that individual. The Ticket will explain the SSA’s commitment to pay for all services provided in order to assist in the return to work effort. Each participating individual will develop an “individual work plan” with the provider that will set forth the planned employment goal as well as the services and supports necessary to attain that goal. Pub. L. No. 106-170, 101. Ticket distribution in Massachusetts began in early 2002. Tickets will be mailed to newly eligible recipients on a monthly basis. Current statistics indicate that about 1000 tickets are mailed to Massachusetts recipients each month. Nearly 7,000,000 Tickets have been sent out nationwide.

**(b) *Expanded Medicare Benefits***

SSA published final regulations at 69 Fed. Reg. 57, 224 (Sept. 24, 2004) to implement the Ticket to Work and Work Incentives Improvement Act of 1999 provision establishing additional Medicare coverage for disabled beneficiaries who lose Title II disability benefits due to SGA. (SSA began implementing this provision on October 1, 2000 using subregulatory instructions.)

Prior to this change, Medicare entitlement ended with performance of SGA after the 36<sup>th</sup> Extended Period of Eligibility (EPE) month. Effective October 1, 2000, Medicare entitlement can continue for up to 78 months after the 15<sup>th</sup> EPE month. Those who have lost entitlement to Title II disability cash benefits due to SGA, must continue to meet the disability standard to be eligible for continued Medicare.

**(c) Expanded Medicaid Benefits**

States will have the option of expanding Medicaid coverage to allow for “buy-in” programs for disabled beneficiaries who return to work. Options to cover up to 450 percent of the poverty level exist for each state. Disabled workers must work at least forty hours per month and continue to have a severe impairment. Pub. L. No. 106-179, 201.

**(d) Elimination of Work Disincentives – Two Types of CDR Protection**

*Section 101C Protection.* Under Section 101C of The Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA), effective January 1, 2001, SSA will not initiate a Continuing Disability Review (CDR) for beneficiaries who are “using” a Ticket to Work. Section 101C protection applies to both work-triggered and regularly scheduled CDRs. To determine whether a Ticket is “in use,” the Vocational Rehabilitation agency or Employment Network to whom the Ticket is assigned has to certify that the beneficiary is making “timely progress” toward an employment outcome. This certification process has proved burdensome and confusing for VR agencies and ENs, and on December 29, 2005, SSA suspended all timely progress reviews until final regulations simplifying the process become effective. Proposed regulations amending the Ticket to Work and Self-Sufficiency Program were issued at 70 Fed. Reg. 57222 (9/30/05).

*Section 111 Protection.* Section 111 of TWWIIA created a new work incentive that encourages long-term disability beneficiaries to return to work by ensuring that work activity would not trigger a medical Continuing Disability Review (CDR). Effective January 1, 2002, a title II or concurrently entitled title II and title XVI disability beneficiary, who has been entitled to benefits for at least 24 months, will not have a medical CDR triggered solely as result of work activity. This new work incentive is called "Section 111 protection." It applies whether or not the beneficiary has a Ticket to Work. Beneficiaries protected under section 111 will be subject to regularly scheduled medical CDRs unless they are using a ticket as part of the Ticket to Work program. See SSA Emergency Message (EM) - 01219 (12/20/01).

**(e) Expedited Reinstatement of Benefits**

The purpose of Expedited Reinstatement of Benefits (EXR) is to give people who have been terminated from SSDI or SSI benefits due to work activity a new and (theoretically) quick way to get back on benefits. Before EXR, filing a new application was the only way for a person to become eligible for benefits after termination. Here’s one typical scenario: an SSDI recipient completed her trial work period and 3-year extended period of eligibility (EPE), working on and off

during the EPE. After the EPE she continued to work and her earnings eventually went above the substantial gainful activity (SGA) threshold. The first month her earnings went over SGA after her EPE, her SSDI was terminated. Period. If she later became unable to work due to her disability, her only option was to file a new application for benefits.

EXR has changed all that. Now a person who has been terminated from SSI or SSDI due to work and later requires disability benefits again can choose between reinstatement of prior entitlement to benefits (EXR) and a new application for entitlement to benefits.

Proposed EXR regulations were published at 68 Fed. Reg. 61162 (10/27/03) and the final regulations were published at 70 Fed. Reg. 57133 (9/30/05). The initial set of Ticket to Work regulations, issued in January, 2002, did not include EXR regulations, although EXR POMS were issued in early 2002. See POMS DI 13050.000 and DI 28057.000. The new EXR regulations add new sections 404.1592b through 404.1592g and 416.999 through 416.999e to 20 C.F.R. Following are the key provisions of the POMS and EXR regulations:

Criteria for entitlement to EXR:

- SSDI: You were previously entitled to a disability benefit on your own record of earnings or as a disabled child or disabled widow(er), or to Medicare entitlement based on disability. SSI: You were previously eligible for a benefit based on disability or blindness.
- SSDI: Your disability entitlement was terminated because you did substantial gainful activity. SSI: Your disability or blindness eligibility was terminated because of earned income or a combination of earned and unearned income.
- In the month you file your request for reinstatement, you are not performing substantial gainful activity.
- Your current impairment must be the same as or related to your prior impairment and you must be disabled as determined under the *medical improvement review standard (MIRS)*. This is the same standard used in Continuing Disability Reviews. The advantage of using MIRS is that SSA will generally find that you are disabled unless your impairment has improved so that you are able to work or unless an exception under the MIRS process applies.
- Your current impairment must be the same as or related to your prior impairment and you must be disabled as determined under the *medical improvement review standard (MIRS)*. This is the same standard used in Continuing Disability Reviews. The advantage of using MIRS is that SSA will generally find that you are disabled unless your impairment has improved so that you are able to work or unless an exception under the MIRS process applies.
- SSA must receive your written request for EXR within the consecutive 60-month period that begins with the month in which your SSDI entitlement terminated due to doing substantial gainful activity or your SSI eligibility terminated due to earned income, or a combination of earned and unearned income. SSA may grant an extension for good cause.

- EXR went into effect January 1, 2001. No EXR benefits are payable prior to January 2001 for SSDI and February 2001 for SSI.

#### Provisional Benefits:

- You may receive up to 6 consecutive months of provisional cash benefits during the provisional benefit period, while SSA determines whether your disability benefit entitlement can be reinstated.
- The amount of the provisional benefits is equal to the last monthly benefit payable to you during your prior entitlement, increased by any cost of living increases that would have been applicable to the prior benefit amount. For SSI, provisional benefits do not include the state supplement.
- If SSA denies your request for reinstatement, it generally will not consider the provisional benefits you received as an overpayment.

#### 24-Month Reinstatement Period:

- Your 24-month initial reinstatement period begins with the month your benefits are reinstated and ends with the 24th month that you have a benefit payable. For SSDI, a benefit is payable in a month when you do not do SGA. Averaging of earnings and unsuccessful work attempt do not apply during this period. For SSI, a benefit is payable in a month when, using normal SSI payment calculation procedures SSA determines you are due a monthly payment.
- After the 24-month initial reinstatement period is completed you are eligible for additional work incentives under SSDI (such as a trial work period and an extended period of eligibility), as well as possible future reinstatement through the expedited reinstatement provision under SSDI and SSI.

#### Other Provisions:

- If you are reinstated on your own earnings record, SSA will compute your primary insurance amount with the same date of onset used in your most recent period of disability on your earnings record.
- Reinstated SSDI benefits can start as early as a year before the request for reinstatement is filed. Reinstated SSI benefits start with the month after the month you filed your request for reinstatement.
- If your reinstatement request is denied, SSA will treat that request as your intent to file an initial application for benefits.

For a helpful discussion of the relative merits of filing for EXR and reapplying, see POMS DI 13050.020 Filing Considerations - Expedited Reinstatement Versus Initial Claim.

#### **(f) Removal of Sanctions for Refusal to Accept Vocational Rehabilitation**

SSA regulations at 20 C.F.R. 404.422, 416.213 provided for sanctions for benefit recipients who refused, without good cause, to accept rehabilitation services

made available by a state vocational rehabilitation (VR) agency. The Ticket to Work and Work Incentives Improvement Act of 1999 repealed these rules, effective January 1, 2001, in favor of voluntary participation and choice in provider. The final regulations published at 68 Fed. Reg. 40119 (July 7, 2003) make the revisions required by the Ticket to Work Act.

## **§ 1.14 OVERPAYMENTS**

Overpayments result when a recipient receives more than the maximum amount he or she was eligible to receive. Sometimes the SSA makes mistakes and issues incorrect benefit payments. Sometimes a recipient causes overpayments by failing or forgetting to report changes in circumstances affecting eligibility. Sometimes a recipient reports changes but the SSA does not correct the benefit amount in a timely manner. Regardless of the cause, the SSA may ask the recipient to repay the overpayment.

### **§ 1.14.1 Notice of Overpayment**

The SSA must give written notice of a decision that a recipient has been overpaid that explains the reason for the overpayment, repayment options, and appeal rights. 20 C.F.R. 404.502a, 416.558. Notification of Overpayment, POMS GN 02201.009 ; SSI Overpayment—Notifying the Individual, POMS SI 02220.010 . The notice must be in clear, simple language, understandable to the recipient.

### **§ 1.14.2 Overpayment Appeal Rights**

If the recipient disagrees that he or she has been overpaid or disagrees with the amount of the overpayment, he or she may file a request for reconsideration. The appeal process applicable to overpayments is the appeal process described above in 1.6, Applications and Appeals. The recipient has sixty days from the date of receipt of the notice of overpayment in which to file an appeal. However, if the appeal is filed within thirty days, the SSA cannot begin recovering the overpayment until a reconsidered decision has been made. 20 C.F.R. 404.502a(h); Notification of Overpayment, POMS GN 02201.009(B)(5) (Advance Notice Requirement) .

### **§ 1.14.3 Request for Waiver of Overpayment**

If the recipient agrees that he or she has been overpaid and agrees with the amount of the overpayment, he or she may file a request for waiver of the overpayment, asking to be relieved of the obligation to repay.

There are no time limits in which to file a waiver. Amount for Which Waiver Is Considered, POMS GN 02250.310(A); SSI Overpayment - Basic Requirements Concerning Waiver, POMS SI 02260.001 . However, if a waiver request is filed within thirty days of the receipt of the overpayment notice, the SSA may not begin recovery of the overpayment until an initial decision on the waiver has been made. Precoupment Review, POMS GN 02201.011; SSI Overpayment - Basic Requirements Concerning Waiver, POMS SI 02260.001 . Even if a waiver

is not filed until recovery has begun, recovery should stop with the filing of a waiver request until an initial decision has been made on the request. Precoupment Review, POMS GN 02201.011; SSI Overpayment - Basic Requirements Concerning Waiver, POMS SI 02260.001 . If the waiver request is denied and the recipient files a request for reconsideration within thirty days, recovery should again be stayed pending the reconsidered decision. If the reconsidered decision is unfavorable, the recipient can proceed through the appeal steps described in Section in 1.6, Applications and Appeals, above, but recovery of the overpayment may begin.

The SSA will grant a waiver of overpayment if both the following criteria are met:

- The recipient was without fault in causing the overpayment or appealed a termination of benefits with a good faith belief of continuing eligibility (The SSA will consider whether the recipient complied with reporting requirements and knew or reasonably should have known that they were not entitled to the benefit amounts received. The SSA will also consider the person's age and mental or physical capacity to understand eligibility criteria and comply with the reporting requirements.); and
- The recipient needs all or substantially all of his or her income for ordinary living expenses (i.e., he or she cannot afford to repay the overpayment). SSI recipients are assumed to be unable to afford to repay the overpayment, regardless of the amount of SSI received. SSDI recipients will need to provide monthly household budget information indicating that all of monthly income is needed to meet basic needs.

#### **§ 1.14.4 Overpayment Recovery**

The usual means of overpayment recovery is for the SSA to deduct money from the monthly benefit check until the overpayment is repaid. This is called recoupment. 20 C.F.R. 404.515, 416.570.

In cases involving SSI benefits, recoupment is limited to the total monthly SSI benefit, or 10 percent of total monthly income, whichever is less. Where the individual cannot meet "current ordinary and necessary living expenses" recoupment may be reduced to less than 10 percent, and may be as little as \$1 per month. See 20 C.F.R. 416.571; Collection of Title XVI Overpayments by Mandatory Cross Program Recovery, POMS SI 02220.020 . If overpayments involve SSDI benefits, 100 percent of the monthly benefit can be withheld. Reductions in withholding can be requested in cases involving financial hardship, as is the case in SSI cases. 20 C.F.R. 404.515; Considering Different Rate of Adjustment, POMS GN 02210.030 .

#### **(a) Administrative Offset**

Since December 1997, the SSA has had final regulations, pursuant to Pub. L. 103 -387, Section 5 (1994) and Pub. L. 104-134, 31001(z)(2)(1996), in place to permit reporting of Title II overpayments that are past due and legally enforceable to the Department of Treasury ("the Treasury") for administrative

offset against federal tax refunds (20 C.F.R. 404.520) and against other federal payments due the overpaid individual (20 C.F.R. 404.527, 422.305 -.317). The SSA and other federal agencies have had the ability to certify certain overpayments to the Treasury as past due and legally enforceable for administrative offset.

Note that the first \$750 of Title II benefits are protected from offset. The offset is further limited to 15 percent of the individual's monthly benefit. See [www.fms.treas.gov/news/factsheets/benefitoffset.html](http://www.fms.treas.gov/news/factsheets/benefitoffset.html).

It is important for Title II benefit recipients to pay attention to the notices federal agencies will send about the intent to certify a debt to the Treasury for administrative offset. See 31 C.F.R. 285.4. The individual's best bet for contesting the debt and the appropriateness of certification probably lies with the debtor agency. Once the debt is certified to Treasury, the individual will have to deal with Treasury. Collection of Title II Overpayments by Administrative Offset, POMS GN 02201.031 ; Collection of Title XVI Overpayments by Administrative Offset, POMS SI 02220.013 .

### **(b) Tax Refund Offset**

In certain circumstances, the SSA can recover SSDI and SSI overpayments by intercepting the overpaid individual's federal income tax refund. 20 C.F.R. 404.520 - .526, 416.580 - .586; Collection of Title II Overpayments by Tax Refund Offset (TRO), POMS GN 02201.030 - .031 ; Collection of Title XVI Overpayments by Tax Refund Offset (TRO), POMS SI 02220.012 . The SSA may not use this method of collecting an overpayment if there any appeals pending on the overpayment or on a waiver of the overpayment. If the overpaid individual is making payments of the overpayment, the SSA may not use tax refund offset. Before intercepting the tax refund, the SSA must send the overpaid individual a sixty-day advance notice. The individual must be given those sixty days to dispute the overpayment or file a request for waiver of the overpayment.

### **(c) Cross-Program Recoupment**

The Noncitizen Benefit Clarification and Other Technical Amendment Act of 1998, Pub. L. No. 105-306, 1147 (Oct. 28, 1998) amending 42 U.S.C. 1383(b), allows SSA to recover SSI overpayments from SSDI benefits. Prior to this change, SSA could not perform cross-program recoupment without the permission of the recipient. This amendment specifically waives the anti-assignment clause of 42 U.S.C. 407 to allow for recovery of SSI overpayments from SSDI benefits where the overpaid individual no longer receives SSI. Recoupment is limited to 10 percent of the SSDI benefit payable, unless the overpayment was due to fraud. The provision applies to overpayments outstanding on the day of enactment. SSA published final regulations implementing this change on July 26, 2001. See 20 C.F.R. 404.401, 416.570 (published at 66 Fed. Reg. 38,902 (July 26, 2001)).

The Social Security Protection Act of 2004, Pub.L.No. 108-203, 201(3/2/04),

expands SSAs cross-program recoupment authority to include all benefits. This means that SSA can collect overpayments in any program from benefits paid under any other program. Recovery from current recipients is limited to 10% of Title II benefits and to the lesser of the monthly SSI benefit or 10% of monthly income. However, up to 100% of any underpayment may be withheld to recover an overpayment. These new provisions apply to overpayments outstanding on March 2, 2004.

**(d) Administrative Wage Garnishment**

On January 22, 2004, final regulations went into effect regulations allowing SSA to require employers to garnish pay to recover SSI and SSDI benefit overpayments, after certain procedural requirements are met. SSA can bring civil actions against employers who fail to comply.

SSA will NOT apply Administrative Wage Garnishment (AWG) in the following circumstances:

- while Title II benefits are stopped during a reentitlement period (EPE)
- during the deemed Medicare entitlement period (Ticket to Work Medicare Extension);
- when the recipient is "using" a Ticket to Work.

Otherwise, AWG will be available to SSA when:

- the debt (overpayment) is past due;
- SSA has completed its billing system (initial, reminder and past-due notice);
- the individual is no longer receiving benefits;
- the individual has not made an installment payment agreement or has missed two consecutive payments;
- the individual has not requested reconsideration or reconsideration has been denied; and
- the individual has not requested waiver or waiver has been denied.

Prior to implementing AWG, SSA must send the individual 60 days advance notice. Within the 60 days, the individual may request information about and review of the debt, inspect and copy records, and request waiver. If the individual responds within 60 days, SSA will NOT begin AWG until the review is complete. Good cause applies to this 60 day period. If review is requested late with good cause, SSA will tell the employer to stop any AWG that has started. AWG applies to "disposable pay." Disposable pay is total compensation, including salary, wages, bonuses, commissions and vacation pay, after deductions for health insurance premiums and amounts withheld as required by law. SSA plans to garnish the lesser of 15% of "disposable pay" or the amount by which "disposable pay" exceeds 30 X the minimum wage provided in 15 U.S.C. 1673(a)(2).

The final regulations include a hardship provision for requesting a reduction in the garnished amount. The individual must present evidence showing that the AWG amount would deprive the individual of income necessary to meet ordinary

and necessary living expenses- including basic expenses, medical & similar expenses, expenses for the support of those for the individual is legally responsible, & other reasonable expenses which are part of the individuals standard of living. However, SSA will not reduce AWG below \$10 per pay period

The final regulations were published at 68 Fed. Reg. 74177 (12/23/03), following proposed regulations published in January 2003. POMS instructions on AWG were issued in January 2005. See GN 02201.040.

***(e) Additional SSI Overpayment Recovery Options***

Section 203 of the Foster Care Independence Act of 1999, Pub. L. No. 106-169 (Dec. 14, 1999), amends 42 U.S.C. 1383(b) to authorize the SSA to the same debt collection tools in the SSI program as are available to recover overpayments of SSDI overpayments. These are laid out in 31 U.S.C. Ch. 37, and include the use of private collection agencies, reporting delinquent accounts to consumer reporting agencies, and the use of administrative offset. The provision applies to overpayments outstanding on or after the date of enactment. The SSA published final regulations to implement this amendment at 65 Fed. Reg. 67,078 (Dec. 28, 2001). The proposed regulations would apply the collection activities in 20 C.F.R. 422.301 -.317 to the SSI program. These methods can only be used for overpayments that occurred after the individual attained age eighteen. In addition, the overpayment must be determined otherwise unrecoverable.

This means that the individual:

- has been sent a past due notice,
- has not entered into an installment payment agreement or is not complying with the agreement,
- has not requested waiver, or
- has not requested reconsideration of a waiver denial.

**EXHIBIT 1 - Massachusetts SSI Payment Levels in 2011**

**Living Arrangement A - FULL COST OF LIVING**

	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT	<u>TOTAL</u>
<b>INDIVIDUAL</b>	<b>Aged</b>	\$674.00	\$128.82	<b>\$802.82</b>
	<b>Disabled</b>	\$674.00	\$114.39	<b>\$788.39</b>
	<b>Blind</b>	\$674.00	\$149.74	<b>\$823.74</b>
<b>MEMBER OF A COUPLE</b>	<b>Aged</b>	\$505.50	\$100.86	<b>\$606.36</b>
	<b>Disabled</b>	\$505.50	\$ 90.03	<b>\$595.53</b>
	<b>Blind</b>	\$505.50	\$318.24	<b>\$823.74</b>

**Living Arrangement B - SHARED LIVING**

	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT	<u>TOTAL</u>
<b>INDIVIDUAL</b>	<b>Aged</b>	\$674.00	\$ 39.26	<b>\$713.26</b>
	<b>Disabled</b>	\$674.00	\$ 30.40	<b>\$704.40</b>
	<b>Blind</b>	\$674.00	\$149.74	<b>\$823.74</b>
<b>MEMBER OF A COUPLE</b>	<b>Aged</b>	\$505.50	\$100.86	<b>\$606.36</b>
	<b>Disabled</b>	\$505.50	\$ 90.03	<b>\$595.53</b>
	<b>Blind</b>	\$505.50	\$318.24	<b>\$823.74</b>

**Living Arrangement C - HOUSEHOLD OF ANOTHER**

	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT	<u>TOTAL</u>
<b>INDIVIDUAL</b>	<b>Aged</b>	\$449.34	\$104.36	<b>\$553.70</b>
	<b>Disabled</b>	\$449.34	\$ 87.58	<b>\$536.92</b>
	<b>Blind</b>	\$449.34	\$374.40	<b>\$823.74</b>
<b>MEMBER OF A COUPLE</b>	<b>Aged</b>	\$337.00	\$107.90	<b>\$444.90</b>
	<b>Disabled</b>	\$337.00	\$ 97.09	<b>\$434.09</b>
	<b>Blind</b>	\$337.00	\$486.74	<b>\$823.74</b>

**Living Arrangement E - LICENSED REST HOME**

	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT	<u>TOTAL</u>
<b>INDIVIDUAL</b>	<b>Aged</b>	\$674.00	\$293.00	<b>\$967.00</b>
	<b>Disabled</b>	\$674.00	\$293.00	<b>\$967.00</b>
	<b>Blind</b>	\$674.00	\$149.74	<b>\$823.74</b>
<b>MEMBER OF A COUPLE</b>	<b>Aged</b>	\$505.50	\$461.50	<b>\$967.00</b>
	<b>Disabled</b>	\$505.50	\$461.50	<b>\$967.00</b>
	<b>Blind</b>	\$505.50	\$318.24	<b>\$823.74</b>

**Living Arrangement F - RESIDENT OF A TITLE XIX FACILITY WHERE MEDICAID PAYS MORE THAN 50 % OF COST OF CARE**

	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT	<u>TOTAL</u>
<b>INDIVIDUAL</b>	<b>Aged</b>	\$30.00	\$42.80	<b>\$72.80</b>
	<b>Disabled</b>	\$30.00	\$42.80	<b>\$72.80</b>
	<b>Blind</b>	\$30.00	\$42.80	<b>\$72.80</b>
<b>MEMBER OF A COUPLE</b>	<b>Aged</b>	\$30.00	\$42.80	<b>\$72.80</b>
	<b>Disabled</b>	\$30.00	\$42.80	<b>\$72.80</b>
	<b>Blind</b>	\$30.00	\$42.80	<b>\$72.80</b>

**Living Arrangement G - ASSISTED LIVING**

	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT	<u>TOTAL</u>
<b>INDIVIDUAL</b>	<b>Aged</b>	\$674.00	\$454.00	<b>\$1128.00</b>
	<b>Disabled</b>	\$674.00	\$454.00	<b>\$1128.00</b>
	<b>Blind</b>	\$674.00	\$454.00	<b>\$1128.00</b>
<b>MEMBER OF A COUPLE</b>	<b>Aged</b>	\$505.50	\$340.50	<b>\$846.00</b>
	<b>Disabled</b>	\$505.50	\$340.50	<b>\$846.00</b>
	<b>Blind</b>	\$505.50	\$340.50	<b>\$846.00</b>

**EXHIBIT 1B– 2010 SSI and SSDI Threshold Amounts**

<b>SSI Resource Limit - Individual</b>	<b>\$2000.00</b>
<b>SSI Resource Limit - Couple</b>	<b>\$3000.00</b>
<b>SSI Federal Benefit Rate</b>	<b>\$674.00 (individual) \$1011.00 (couple)</b>
<b>SSI Child Allocation</b>	<b>\$337.00</b>
<b>SSI Student Earned Income Exclusion</b>	<b>\$1640.00/month up to \$6600.00/year</b>
<b>1619(b) Thresholds (individualized threshold available if actual medical expenses are higher than average Medicaid expenditure)</b>	<b>\$36,133 gross/yr. (disabled) \$36,982 gross/yr. (blind)</b>
<b>Substantial Gainful Activity - Disabled</b>	<b>\$1000.00/month</b>
<b>Substantial Gainful Activity - Blind</b>	<b>\$1640.00/month</b>
<b>SSDI Trial Work Month</b>	<b>\$720.00</b>
<b>SSDI Cost of 1 Quarter of Coverage</b>	<b>\$1120.00 (\$4480/year for 4 QC)</b>
<b>Maximum Monthly Social Security Retirement Benefit</b>	<b>\$2323.00</b>

**Medicare Part B Premium**

**\$96.40/110.50/115.40  
mo. if income  
under\$82,000  
(premiums higher for  
higher incomes)**

## EXHIBIT 1C Sources of Law and Information

### **Social Security Act**

Title II (SSDI), 42 U.S.C. 401 et seq.

Title XVI (SSI), 42 U.S.C. 1381 et seq.

Online at [http://www.ssa.gov/OP\\_Home/ssact/comp-ssa.htm](http://www.ssa.gov/OP_Home/ssact/comp-ssa.htm).

### **Regulations**

20 C.F.R. 404 et seq. (SSDI)

20 C.F.R. 416 et seq. (SSI)

Online at [http://www.ssa.gov/OP\\_Home/cfr20/cfrdoc.htm](http://www.ssa.gov/OP_Home/cfr20/cfrdoc.htm) (revised through April 1, 2010).

### **Regulatory Changes—Federal Register**

Federal Register published daily. Online at

<http://www.gpoaccess.gov/fr/index.html>.

**Social Security Rulings** available on the SSA's website, at

[http://www.ssa.gov/OP\\_Home/rulings/rulings.html](http://www.ssa.gov/OP_Home/rulings/rulings.html).

**Program Operations Manual System (POMS)**. Available free on the SSA's website at <http://policy.ssa.gov/poms.nsf/poms?OpenView>. Easily browsable and searchable. Additional operating instructions in the form of **Emergency Messages (EM's)** are available online at <http://policy.ssa.gov/>.

**Hearings, Appeals and Litigation Law Manual (HALLEX)** available on the SSA's website at [www.ssa.gov/OP\\_Home/hallex/hallex.html](http://www.ssa.gov/OP_Home/hallex/hallex.html).

**National Organization of Social Security Claimants' Representatives (NOSSCR) Social Security Practice Guide 1-5** Matthew Bender, Inc., *National Organization of Social Security Claimants' Representatives Social Security Practice Guide*. Five-volume, loose-leaf service by Matthew Bender, Inc. Available by subscription from Lexis Publishing, New York and San Francisco. See <http://www.bookstore.lexis.com> or call 1-800-223-1940.

**Commerce Clearing House Social Security Reporter 1, 1A & 1B**, Commerce Clearing House, Inc., *Social Security Reporter*. Loose-leaf updates. Available by subscription from Commerce Clearing House, Inc., Chicago, Ill. See <http://www.cctt.com> or call 1-800-449-9525.

**West Social Security Reporting Service** Available by subscription from West Publishing Company. For more information about this service, see <http://www.westgroup.com> or call 1-800-733-2889.

### **Social Security Disability Practice**

C. Hall, *Social Security Disability Practice*, West's Handbook Series, republished yearly.

**Dictionary of Occupational Titles I–II**, U.S. Dep’t of Labor, Employment & Training Admin., *Dictionary of Occupational Titles* (4th ed.1991). Online at <http://www.oalj.dol.gov/libdot.htm>.

### **Newsletters**

NOSSCR, *Social Security Forum*. Published monthly. Available by subscription from NOSSCR, 6 Prospect Street, Midland, NJ 07432. NOSSCR website: <http://www.nosscr.org>.

National Senior Citizens Law Center, *NSCLC Social Security/SSI Advocates Informational Mailing*. Published monthly. Available by subscription from NSCLC, 1101 14<sup>th</sup> Street, Suite 400, Washington, D.C. 20005. NSCLC website: <http://www.nsclc.org>.

Disability Benefits Project at the Disability Law Center (DLC), *SSI Coalition Newsletter*. Published bimonthly. Also available at [www.masslegalservices.org](http://www.masslegalservices.org), Disability Section.

### **Basic Medical References**

Merck, Sharpe & Dohme Research Laboratories, *The Merck Manual of Diagnosis and Therapy* (17th ed. 1999). Online at <http://www.merck.com/pubs/mmanual>.  
Medical Economics Co., *Physician’s Desk Reference (Medications)* (56th ed. 2002).

F.A. Davis Co., *Tabers Cyclopedic Medical Dictionary* (19th ed.)

American Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders, DSM-IV* (4th ed. 1994).

Centers for Disease Control website: <http://www.cdc.gov>.

Massachusetts Board of Registration in Medicine website: <http://www.massmedboard.org>.

National Library of Medicine website: <http://www.nlm.nih.gov>.

### **Websites**

Social Security Online: [www.socialsecurity.gov](http://www.socialsecurity.gov).

Massachusetts Legal Services: [www.masslegalservices.org](http://www.masslegalservices.org) (Disability section)

Disability Law Center: [www.dlc-ma.org](http://www.dlc-ma.org).

Massachusetts Office of Medicaid (MassHealth): <http://www.state.ma.us/dma/>

NOSSCR Online: [www.nosscr.org](http://www.nosscr.org).

Social Security Advisory Service: <http://www.ssas.com>.

Bazelon Center for Mental Health Law: <http://www.bazelon.org/>

THOMAS, for tracking federal legislation: <http://thomas.loc.gov>.

Government Printing Office (Federal Register): [www.gpoaccess.gov](http://www.gpoaccess.gov)

**EXHIBIT 1D Parent-to-Child Deeming Worksheet (2011)**

20 C.F.R. 416.1165

**PARENTS' INCOME TREATMENT:**

1. Unearned income \$ \_\_\_\_\_
2. Less allowance for non-SSI eligible children<sup>1</sup> - \_\_\_\_\_
3. Less \$20 general exclusion - (20.00)
4. Total—parents' countable unearned income ' \$ \_\_\_\_\_
5. Gross earned income \$ \_\_\_\_\_
6. Less balance of child allocation(s)<sup>2</sup> - \_\_\_\_\_
7. Less balance of \$20 general exclusion<sup>3</sup> - \_\_\_\_\_
8. Less \$65 earned income disregard - (65.00)
9. Subtotal ' \_\_\_\_\_
10. Less of 1/2 subtotal (earned income deduction) - \_\_\_\_\_
11. Total countable earned income ' \_\_\_\_\_
12. Total countable income ' \_\_\_\_\_
13. Less individual or couple FBR<sup>4</sup> - \_\_\_\_\_
14. Amount deemed to SSI child. ' \_\_\_\_\_

1 Allocation for non-SSI children living in the same household as the SSI child is \$337 for calendar year 2010. Allocations are reduced by the non-SSI child's own income and the allocation is not available to a child who receives public maintenance assistance payments.

2 Any or all of the allocation not used in #2 can be deducted from earned income in #6.

3 See footnote 2.

4 In calendar year 2011 the FBR for an individual is \$674 and the FBR for a couple is \$1011.

## CALCULATING A CHILD'S MONTHLY SSI GRANT

1. Child's SSI grant level<sup>5</sup> \$ \_\_\_\_\_
2. Unearned income (including deemed income from #14 on deeming worksheet).  
\$ \_\_\_\_\_
3. Two-thirds of child support paid on behalf of the SSI child + \_\_\_\_\_
4. Less \$20 general exclusion - (20.00) ' \_\_\_\_\_
5. Countable earned income<sup>6</sup> + \_\_\_\_\_
6. Child's total countable income - \_\_\_\_\_
7. Child's monthly SSI grant ' \_\_\_\_\_

5 The grant for a disabled child where deeming applies is \$788.39 in calendar year 2011. Be sure to use the proper category, e.g. blind, disabled, in order to determine the correct grant amount.

6 The first \$1,640 per month (up to \$6,600 annually) of a student's earned income is excluded in 2011. Children also receive the benefit of all the deductions for earned income available to adults, e.g., \$65 exclusion, less remainder.

## EXHIBIT 1E Spousal Deeming Worksheet (2011)

**Step 1 Children's Allocations<sup>1</sup>** \$ \_\_\_\_\_

### Step 2 Unearned Income Treatment

Spouse's Unearned Income \$ \_\_\_\_\_  
Subtract Children's Allocations \$ \_\_\_\_\_  
TOTAL UNEARNED INCOME \$ \_\_\_\_\_

### Step 3 Earned Income Treatment

Spouse's Earned Income \$ \_\_\_\_\_  
Subtract Children's Allocations<sup>2</sup> \$ \_\_\_\_\_  
TOTAL EARNED INCOME \$ \_\_\_\_\_

### Step 4 Total countable income

Unearned income (step 2) \$ \_\_\_\_\_  
Add earned income (step 3) \$ \_\_\_\_\_  
TOTAL COUNTABLE INCOME \$ \_\_\_\_\_

If the TOTAL COUNTABLE INCOME (step 4) is \$337, or less, no income will be deemed to the eligible spouse. If the TOTAL COUNTABLE INCOME is more than \$337, income will be deemed to eligible spouse and calculations must continue.

### Step 5

Calculate SSI payable to eligible spouse by using SSI Benefit Calculation Worksheet (2011).

1. First determine SSI benefit payable without deeming application; as if the ineligible spouse did not exist.
2. Compute an SSI payment level with deeming, using TOTAL COUNTABLE INCOME figures from Spousal Deeming Worksheet (2011).
3. The SSI recipient will receive the lesser of SSI payable amounts from 1 & 2 above.

1 The 2011 Child Allocation is \$337 per child, less the child's own countable income. No allocation is allowed for children receiving public benefits.

2 Children's allocation can only be taken once. At this step in the deeming process, only the amount of the children's allocation not exhausted by unearned income can be deducted.

## SSI BENEFIT CALCULATION FOR DEEMED INCOME WORKSHEET (2011)

**Step A:** Compute Countable Unearned Income.

### Total Income

ADD: Unearned Income, DIB Payments, etc. \$ \_\_\_\_\_

PLUS: Rental Income + \_\_\_\_\_

PLUS: Deemed Income+ \_\_\_\_\_

1. TOTAL UNEARNED INCOME \$ \_\_\_\_\_

### Deductions

ADD: General Deductions \$20.00

PLUS: Expenses Incurred for Rental Property + \_\_\_\_\_

PLUS: 1/3 Child Support Received by SSI Child + \_\_\_\_\_

2. TOTAL DEDUCTIONS -\$ \_\_\_\_\_

3. COUNTABLE UNEARNED INCOME (Subtract Line 2 from Line 1) ' \$ \_\_\_\_\_

**Step B:** Compute Countable Earned Income.

### Total Income

ADD: Gross Wages, Workshop Income, etc. \$ \_\_\_\_\_

PLUS: Net Earnings from Self-employment + \_\_\_\_\_

4. TOTAL EARNED INCOME \$ \_\_\_\_\_

**Deductions** ADD: \$20 (or remainder), if not used in Step A \_\_\_\_\_

PLUS: Student Earnings (\$1,640/month up to \$6,600 annually + \_\_\_\_\_

PLUS: Earned Income Deduction + 65.00 PLUS: IRWEs (if disabled) + \_\_\_\_\_

5. TOTAL DEDUCTIONS - \$ \_\_\_\_\_ Subtract Line 5 from Line 4 ' \$ \_\_\_\_\_

Divide Result by 2 \_\_\_\_\_

Subtract: Work Expenses (if blind) - \_\_\_\_\_

Subtract: PASS (if applicable) - \_\_\_\_\_

6. COUNTABLE EARNED INCOME ' \$ \_\_\_\_\_

**Step C:** Determining the SSI Monthly Payment

ADD: Countable Earned Income (Line 6) \_\_\_\_\_

PLUS: Countable Unearned Income (Line 3) + \$ \_\_\_\_\_

7. TOTAL COUNTABLE INCOME ' \$ \_\_\_\_\_

Maximum SSI Grant for Month \_\_\_\_\_

Subtract: Countable Income (Line 7) - \_\_\_\_\_

8. SSI Monthly Payment' \$ \_\_\_\_\_

**EXHIBIT 1F Sponsor-to-Alien Deeming Worksheet (2011)**

**Step A:**

Sponsor's Gross Income

Enter Gross Nonexcludable Income of Sponsor and Spouse (if any) \$ \_\_\_\_\_

Deductions

ADD: Sponsor Allowance \_\_\_\_\_

PLUS: Allowance for Sponsor's Spouse (if any)

a. \$674 (if co-sponsor)      b. \$337 (if not) + \_\_\_\_\_

PLUS: Dependent Deduction (\$337 x number of dependents) + \_\_\_\_\_

TOTAL DEDUCTIONS ' \_\_\_\_\_

Subtract Deductions from Gross Income-\$ \_\_\_\_\_

TOTAL INCOME DEEMED TO ALIEN '\$ \_\_\_\_\_

**Step B:**

ENTER TOTAL INCOME DEEMED TO ALIEN IN STEP A OF SSI BENEFIT  
CALCULATION WORKSHEET (2011)

## SSI BENEFIT CALCULATION FOR DEEMED INCOME WORKSHEET (2011)

### Step A: Compute Countable Unearned Income.

#### Total Income

ADD: Unearned Income, DIB Payments, etc. \_\_\_\_\_

PLUS: Rental Income + \_\_\_\_\_

PLUS: Deemed Income + \_\_\_\_\_

1. TOTAL UNEARNED INCOME \$ \_\_\_\_\_

#### Deductions

ADD: General Deductions (\$20.00) + \_\_\_\_\_

PLUS: Expenses Incurred for Rental Property+ \_\_\_\_\_

PLUS: 1/3 Child Support Received by SSI Child + \_\_\_\_\_

2. TOTAL DEDUCTIONS -\$ \_\_\_\_\_

3. COUNTABLE UNEARNED INCOME (Subtract Line 2 from Line 1) ' \$ \_\_\_\_\_

### Step B: Compute Countable Earned Income.

#### Total Income

ADD: Gross Wages, Workshop Income, etc. \_\_\_\_\_

PLUS: Net Earnings from Self-employment + \_\_\_\_\_

4. TOTAL EARNED INCOME \$ \_\_\_\_\_

#### Deductions

ADD: \$20 (or remainder), if not used in Step A \_\_\_\_\_

PLUS: Student Earnings (\$1,640/month up to \$6,600 annually) + \_\_\_\_\_

PLUS: Earned Income Deduction + 65.00 + \_\_\_\_\_

PLUS: IRWEs (if disabled) + \_\_\_\_\_

5. TOTAL DEDUCTIONS -\$ \_\_\_\_\_ Subtract Line 5 from Line 4 ' \$ \_\_\_\_\_

Divide Result by 2 \_\_\_\_\_

Subtract: Work Expenses (if blind) - \_\_\_\_\_

Subtract: PASS (if applicable) - \_\_\_\_\_

6. COUNTABLE EARNED INCOME ' \$ \_\_\_\_\_

### Step C: Determining the SSI Monthly Payment

ADD: Countable Earned Income (Line 6) \_\_\_\_\_

PLUS: Countable Unearned Income (Line 3) + \_\_\_\_\_

7. TOTAL COUNTABLE INCOME ' \$ \_\_\_\_\_

Maximum SSI Grant for Month \_\_\_\_\_

Subtract: Countable Income (Line 7) - \_\_\_\_\_

8. SSI Monthly Payment ' \$ \_\_\_\_\_