SECTIONS 223(d) and 1614(a)(3) (42 U.S.C. 423(d) and 1382c(a)(3))DISABILITY—AGE CRITERION OF THE VOCATIONAL FACTORS REGULATIONS—USE OF CHRONOLOGICAL AGE—CONSTITUTIONALITY

20 CFR 404.1560-404.1569 and 416.960-416.969 **SSR 82-46c**

Fogg v. Schweiker, 1st Circuit, Civ. No. 81-1232 (10/13/81)

When the claimant applied for supplemental security income and disability insurance benefits, the Social Security Administration (SSA) found that the claimant could not do his former job, but that he could do sedentary work. SSA determined, under its Medical-Vocational Guidelines, that the claimant was not disabled and denied his applications. The claimant appealed, contending that SSA had failed to consider the effects of his urinary problems on his ability to perform sedentary work. He also contended that the age criterion of the guidelines is meant to refer to "physiological age" rather than "chronological age." He based this contention on the argument that physiological age is more relevant to the determination of disability than is chronological age. He claimed that his physiological age was much more than his chronological age and that he should have been classified as an individual "closely approaching advanced age" rather than as a "younger individual." Had he been so classified, the guidelines would have directed a finding of "disabled." The claimant went on to argue that if age is meant to be chronological age, the guidelines establish an irrebuttable presumption which prevents him from introducing relevant evidence of his disability and thus unconstitutionally deprives him of due process of law. Contrary to the claimant's contention, the court found that SSA had considered the claimant's urinary problems and had concluded that he did not have a urinary tract disease. It also found no evidence that the regulations were intended to encompass physiological age rather than chronological age. Consequently, *in affirming* SSA's denial of the claimant's applications, the court *held* that SSA's determination that the claimant did not have a nonexertional impairment resulting from a urinary tract disease was supported by substantial evidence. The court *further held* that the age criterion in the guidelines was meant to incorporate chronological age only and thus does not refer to physiological age. The court *further held* that the use of chronological age does not prevent a claimant from introducing evidence of his or her disability and is a constitutional means of classification.

BREYER, Circuit Judge:

This case is an appeal from a decision of the United States District Court for the District of Maine affirming the decision of the Secretary of Health and Human Services that the appellant, William H. Fogg, was not disabled within the meaning of 42 U. S. C. §§ 423(d)(1)(A) and 1382c(a)(3). Specifically, appellant claims that the Secretary improperly applied the Medical-Vocational Guidelines (the "guidelines") which have been adopted by the Social Security Administration in order to aid in the determination of disability in that he (1) failed to take into consideration limitations on the appellant's ability to perform sedentary work, and (2) failed to apply the age criterion in the guidelines in a flexible manner. Because we find that the Secretary properly considered appellant's nonexertional limitations, correctly applied the age criterion, and is supported by substantial evidence in his determinations of fact, we affirm the decision below.

William H. Fogg, a forty-six year-old resident of West Rockport, Maine, originally applied for Disability Insurance Benefits and Supplemental Social Security Income on November 15, 1976. He alleged that he had become unable to work in June, 1975, because of pains in his legs and chest and breathing problems. These claims were denied on June 18, 1977, and were not appealed. Mr. Fogg again filed applications on December 27, 1977, alleging the same onset date. These applications were denied initially and on reconsideration by the Social Security Administration. Appellant, his attorney, and a vocational expert appeared before an Administrative Law Judge ("ALJ") who considered the claim *de novo*. On March 28, 1979, the ALJ found that the appellant was not disabled. The Appeals Council denied appellant's request for review on August 17, 1979. Upon consideration of additional medical evidence submitted by appellant, on November 9, 1979, the Appeals Council found no basis for vacating its previous denial, thereby rendering the ALJ's decision the final decision of the Secretary of Health and Human Services, subject to judicial review.

Appellant filed suit in the United States District Court for the District of Maine seeking review. Both parties moved for summary judgment and oral argument was waived. The court, upon review of the administrative record and consideration of the briefs filed by the parties, held that the Secretary's decision was supported by substantial evidence and granted the Secretary's motion for summary judgment. Appellant appeals from this decision.

The Secretary's determination of no disability, the finding in dispute in this appeal, was derived by use of the Medical-Vocational Guidelines found at Appendix II to Subpart P of Part 404 of Title 20 of the Code of Federal Regulations (for Disability Insurance Benefits) and Appendix II to Subpart I of Part 416 of Title 20 of the Code of Federal Regulations (for Supplemental Security Income), enacted pursuant to the Social Security Act § 205, 42 U.S.C. § 405(a).[1] These guidelines consist of a series of rules, organized into a grid, which direct a conclusion of "disability" or "no disability" based upon the claimant's residual ability to perform, age, education, and previous work experience. Medical evidence of any impairment suffered by a claimant is considered at two stages in the determination. If the claimant has an exertional impairment, *i.e.*, a strength limitation, that evidence is considered in determining whether he had the residual work capacity to do sedentary, light, medium, heavy, or very heavy work. If a claimant has nonexertional limitations, either alone or in addition to his exertional impairments, the Secretary is directed to turn first to the grid to determine whether there can be a finding of "disability" based on exertional limitations alone. If not, the

[1] "The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder."

rules reflecting the individual's maximum residual strength capabilities, age, education, and work experience are to provide a framework for consideration of how much the individual's work capability is further diminished by those nonexertional limitations. In considering the effect of nonexertional limitations all of the relevant facts of the case are to be considered. Appendix II, § 200(e)(2).

In applying these guidelines, the ALJ made the following findings of facts:

> (4) The claimant has the following medically determinable impairments: Chronic obstructive lung disease with a severe obstructive component; bullous emphysema; muscular chest pain; and residuals of pelvic fracture with mild to moderate pelvic pain which can be exacerbated by activity. There is no established urinary tract or bladder disease, no evidence of peripheral vascular disease, and no evidence of any coronary disease.
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> (5) The claimant's impairment is severe in that it significantly limits his ability to perform basic work-related functions.
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> (6) The claimant does not have an impairment which is listed in Appendix 1 to either Subpart P of the Regulations No. 4 or to Subpart I of the Regulations No. 16, nor does the claimant have an impairment which is medically the equivalent of a listed impairment.
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> (7) The claimant's past relevant work consists of employment as a gravel truck driver, a carpenter's helper, and an automobile dealer car preparer.
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> (8) Despite his impairment, the claimant retains the residual functional capacity to walk up to 100 yards stopping once, to be on his feet for up to 20 minutes, to bend halfway to his toes and to lift and carry up to ten (10) pounds.
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> (9) Said residual functional capacity permits the claimant to perform work of a sedentary nature on a sustained basis.
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> (10) The claimant's past relevant work required the functional capacity to perform work of more than a sedentary exertional level.
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> (11) The claimant's impairments do prevent him from meeting the physical and mental demands of past relevant work.
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> (12) The claimant was 43 years of age at the alleged onset and was 45 years of age at the date last insured, and was 46 at the time of hearing; each of which is defined as 'younger individual.'
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> (13) The claimant has a limited education.
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> (14) The claimant's past relevant work was of an 'unskilled' nature.
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> (15) The claimant's impairment is solely exertional, in that it gives rise to strength limitations.
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> (16) In view of the fact that the claimant's maximum sustained work capability limits him to performing work of a sedentary nature, and that the claimant was a "younger individual," has

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> a 'limited' education and an 'unskilled' past relevant work history, Rules 201.18 (for age 45) and 201.24 (for age 43-44), Table No. 1, of the Appendix 2 to both Subpart P of the Regulations No. 4 and to Subpart I of the Regulations No. 16 directs a conclusion of 'not disabled.'

This appeal is limited to a challenge to the ALJ's application of the Medical-Vocational Guidelines in that it is contended that (1) the ALJ failed to take into consideration limitations on the appellant's ability to perform sedentary work, and (2) the ALJ failed to apply the age criterion of the grid in a flexible manner.

II

Appellant claims that his urinary problems, evidence of which was introduced at the hearing, constituted a nonexertional impairment which required the ALJ to consider the effects of those problems upon his ability to perform sedentary work. Appellant further argues that in the presence of such nonexertional limitations use of the grid alone constituted a failure to carry the burden of establishing that alternate jobs existed which appellant could perform.

The short answer to this objection is that the ALJ did consider the appellant's evidence of urinary problems and concluded that "[t]here is no established urinary tract or bladder disease," Finding No. 4, and further that "[t]he claimant's impairment is solely exertional . . . ," Finding No. 15. After reviewing the record, we believe that these conclusions were supported by substantial evidence.

The limited role of this court in reviewing these findings of fact is set out by the Social Security Act § 205(a), 42 U. S. C. § 405(a), which provides, in part, that "[t]he findings of the Secretary as to any fact, if supported by substantial evidence shall be conclusive . . . ." Thus the Secretary, as trier of fact, is charged with the duty to weigh the evidence, to resolve material conflicts in the testimony, and to determine the case accordingly. The findings of the Secretary are conclusive if supported by substantial evidence, *i. e.*, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson* v. *Perales*, 402 U. S. 389 (1971).

The evidence adduced at the hearing with regard to the claimed urinary problems was as follows. The appellant testified that he had urinary problems involving both voiding frequency and bladder incontinence. He offered evidence that in October of 1966 he had bloody urine and pain in the abdomen associated with urination. At that time he was admitted to Camden Community Hospital, Camden, Maine, where all tests including cystoscopy and bilateral retrograde pyelography indicated that the appellant's urinary tract was well within normal functioning limits. The final diagnosis was a recently passed left uretal stone.

Appellant next complained of voiding frequency in November, 1976, when he was examined by Dr. P. A. Millington. Dr. Millington did not conduct any tests of the urinary system, but diagnosed urinary frequency as secondary to a severe accident in 1973 which resulted in broken legs, broken pelvis, and urinary bladder involvement.

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In January of 1978 appellant was examined by Jack McCue, M.D., who determined from X-rays that the appellant had a normal upper urinary tract, but opined that the urinary frequency and hesitancy were suggestive of prostatism. Dr. McCue urged further examination of the urinary problems by a specialist in this field.

Appellant then saw such a specialist, Dr. William E. Nuesse, a board-certified urologist, in July, 1978. Dr. Nuesse found absolutely normally functioning kidneys, normally draining uterers, and a bladder which functioned normally. Because there was no evidence of any abnormalities in his urinary tract, Dr. Nuesse felt that he was dealing with a basically healthy urinary tract. Dr. Nuesse further stated that frequent urination does not necessarily indicate a disease, but can result from psychological problems. Finally, Dr. Nuesse noted that the appellant had had no medical treatment whatsoever for his urinary problems and that many drugs which would help patients decrease their voiding frequency were available for reasonable medical treatment. Dr. Nuesse recommended against the granting of any disability prior to at least such medical treatment.

The appellant himself testified that he had significant urinary frequency problems for over six months and dating back to a year, with somewhat less frequency in the beginning, requiring him to urinate 20 to 30 times a day and five times a night. He indicated that for the prior two weeks, since his examination with Dr. Nuesse, such frequency was not necessary at all. Although the appellant testified that there was some seepage during that period, he said that his urinary frequency was approching normal; indeed claimant did not show any necessity for urination until one hour and forty-five minutes into the hearing.

On the basis of this evidence the ALJ concluded that there was no impairment resulting from urinary disorders. We think that he was supported by substantial evidence in this decision. The ALJ was entitled to rely on the evaluation and opinion of Dr. Nuesse, the only urologist who examined appellant and only physician who performed tests on his urinary system. The ALJ was also entitled to consider both his own observations of the appellant's voiding frequency and the appellant's statements that after his visit to Dr. Nuesse his urinary frequency was approaching normal. In light of this evidence and the fact that "[i]t is for the Secretary, not a reviewing court, to determine what weight to give to particular items of evidence," *Miranda* v. *Secretary of Health, Education, and Welfare*, 514 F.2d 996, 998 (1st Cir. 1975), we cannot say that the Secretary's determination that there was no nonexertional impairment resulting from urinary tract disease was not supported by substantial evidence. Thus, the ALJ did not misapply the guidelines when he failed to consider a nonexistent nonexertional impairment.

III

The appellant also claims that the ALJ erred in his failure to apply the age criterion of the grid in a flexible manner. The appellant contends that the "age" criterion of the grid is meant to refer to "physiological age" rather than "chronological age." Appellant bases this contention on the argument that physiological age is more relevant to the determi-

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nation of disability than is chronological age, and further argues that if chronological age alone is considered, then the use of the age requirement creates an unconstitutional irrebuttable presumption. We believe that the ALJ correctly applied the age criterion when he considered chronological age only and that the application was constitutionally sound.

In 1975, when the appellant first applied for Disability Insurance Benefits and Supplemental Security Income, his chronological age was 43. He was chronologically 45 on Sept. 30, 1977, when his insured status for the purpose of disability benefits expired, and chronologically 46 at the time of the hearing.[2] According to the classifications established in the guidelines appellant was at all relevant times a "younger individual" in either the 18-44 or the 45-49 age bracket. For a person of appellant's residual work capacity, education, and previous work experience in either of those age brackets a finding of "not disabled" is directed by the grid. Appellant claims, however, that his physical age was much in advance of his chronological age and that he should have classified as an individual "closely approaching advanced age." Were he so classified, the grid would direct a finding of "disabled."

The appellant points to evidence of his premature aging in the record consisting of general statements to the effect that at various times he looked older than his stated age, two made by doctors and one made by a Social Security Administration official. Each of these statements reflects a visual impression of the appellant's appearance and is neither based on specific testing results nor is linked to any particular claims of resulting impairment. No reference to physiological age as such was offered at the hearing, and in his brief the appellant offers no indication of what his precise physiological age is, but merely suggests that it ought to be at least four years older than his chronological age.[3] He claims that the ALJ erred in ignoring this evidence of early aging.

It is our opinion, however, that the age criterion in the guidelines was meant to incorporate chronological age only and not to refer to physiological age. There is no evidence whatsoever that the regulations were intended to encompass "physiological age" rather than the common, well-known concept of chronological age. Physiological age is not a standard measure supported by any established scientific guidelines. It is not capable of precise or accurate determination; indeed, the appellant cannot say what his precise physiological age is, but merely contends that it must be at least fifty. Although it may be that there is such a thing as physiological age which can be roughly calculated, we believe that the use of exact years in the guidelines implies reference to a

[2]Appellant's insured status for the purposes of Disability Insurance Benefits expired on September 30, 1977, and therefore he needed to be found disqualified as of or prior to that date to be eligible for disability benefits. There is no insured status requirement, however, under the Supplemental Security Income program.

[3]Apellant would have to have been even further in advance of his chronological age than is suggested in his brief in order to be found an individual "closely approaching advanced age" at the other relevant dates of June, 1975, when he first applied for benefits, and September 30, 1977, when his insured status for disability benefits expired.

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measure that is exactly determinable in years, not the inherently imprecise concept of physiological age. We are further bolstered in this conclusion by the guidelines reference to "age" in the context of a borderline situation. A "borderline situation" exists when there would be a shift in results caused by "the passage of a few days or months." 43 Fed.Reg. 55359.[4] This definition clearly contemplates a determination of age that is tied to some specific calendar date, as is chronological age. In contrast, physiological age could not be so accurately determined as to make this definition of a borderline situation meaningful. In short, we are unwilling to believe that the Social Security Agency would introduce such an imprecise and unusual concept as physiological age into their guidelines without clearly indicating the departure from chronological age.[5]

The appellant goes on to argue that if "age" is meant to be "chronological age" then the guidelines establish an irrebuttable presumption which prevents a claimant from introducing relevant evidence, *i.e.*, his physiological age, as to the ultimate issue, which is disability. Because such an irrebuttable presumption so limits him, the appellant argues that it unconstitutionally deprives him of due process of law. In support of this contention the appellant cites *Vlandis v. Kline*, 412 U.S. 441 (1973), in which the Supreme Court held that an irrebuttable presumption of nonresidency for students who began school as nonresidents was unconstitutional.

The *Vlandis* analysis has, however, been limited by the Court's subsequent decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975). In that case the Court upheld a duration of marriage requirement for the receipt of surviving widow's and children's benefits, establishing that in the case of a Social Security classification " 'the Due Process clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.' " 422 U.S. at 768, *quoting Fleming v. Nestor*, 363 U.S. 603, 611 (1960).

It is our opinion that the use of chronological age is not so utterly lacking in rational justification as to run afoul of the Due Process clause. In taking account of age, the Secretary has recognized "the increasing physiological deterioration in the senses, joints, eye-hand coordination, reflexes, thinking processes, etc., which diminish a severly impaired person's aptitude for learning and adaptation to a new job." 43 Fed.Reg. 55359. "[W]ork capacity does decline as age increases be-

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[4] In the case of a borderline situation, the Secretary is directed to apply the guidelines flexibly to avoid dramatic shifts in results. Appellant also claims that his physiological age made him a borderline case and that the ALJ should thus have adopted a flexible approach to the grid. It is clear however that the appellant is not a borderline case within the intended meaning of the regulations as it requires a passage of at least four years, rather than "a few days or months" to place him into the higher age classification.

[5] Nor are we convinced that Congress, in referring to "age" as a factor to be considered in determining disability, meant to refer to anything other than chronological age. Had Congress purposely intended to refer to physiological age, it, too, would have signalled this departure from the expected by clearer language. Instead Congress simply noted that age was a relevant factor and accorded the Secretary broad powers to issue regulations which would take age into account as a part of disability. 42 U. S. C. § 423(d)(2). We cannot find that the Secretary exceeded his powers by contravening Congressional intent.

43 Fed. Reg. 55349 (1978 12

yond a certain age; this is a logical and reasonable factor to be taken into account." *Stallings* v. *Harris*, 493 F.Supp. 956, 960 (W.D. Tenn. 1980)

Moreover, the specific use of chronological rather than physiological age is a constitutional means of classification. *Weinberger* makes it clear that the validity of a classification depends not upon whether the classifying regulation fits the purpose of the classification precisely, correctly identifying all members of the class, but rather upon the existence of a rational relation which links the classification to a reasonable end coupled with inherent difficulties in making individual determinations. 422 U.S. at 777. In this case chronological age is rationally related to those bodily changes which occur with approaching old age, albeit sooner for some people than for others. Given the inherent difficulties in defining, much less proving, physiological age on an individual basis, we think that classification by chronological age is appropriate. Such a classification does no more than impute to each member of an age bracket the average effects of aging for persons within that age bracket. That imputation may underestimate the effects of aging on some and overestimate those effects for others, yet the classification is defensible in light of the morass into which attempts to determine the physiological age of claimants would lead.

Finally, we note that contrary to the appellant's fears, this decision will not prevent a claimant from introducing evidence of his disability. A claimant is free to show any discernible exertional or nonexertional impairment. If the effects of premature aging for an individual should rise to the level of a demonstrable or measurable exertional or nonexertional impairment, there is no bar to the introduction and consideration of evidence related to that impairment. The use of chronological age in the age criterion portion of the guidelines merely eliminates speculation about intangible, subtle, unmeasurable changes in the aging process. There is no cognizable prejudice to the appellant or to other claimants in the elimination of such speculation.

Affirmed.

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