

# ESTABLISHING DISABILITY FOR YOUNG ADULTS

By Linda Landry, Senior Attorney at the Disability Law Center, Boston, Massachusetts and Thomas Yates, General Counsel at Health and Disability Advocates (formerly the SSI Coalition for a Responsible Safety Net), Chicago, Illinois

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## I. Introduction

Young adults (ages 18-25) face unique challenges in meeting the disability definition used for the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs. In many ways, for purposes of determining disability, young adults more closely resemble children than adults. SSA uses the adult disability standard in determining disability eligibility for young adults, and the decisions often fail to consider evidence that shows functional limitations in young adults, particularly evidence from school-based settings. In addition, the decisions may not have considered factors that may mask the true impact of a young adult's functional limitations. In many cases, the childhood disability regulations provide better guidance for assessing the functional limitations of a young adult than do the adult disability regulations. We discuss these factors below.

In the first section, we will explore how the childhood disability standard's focus on functioning in different areas or domains can be used to show limitations that would satisfy the adult disability standard. In the second, we review the work rules for issues particularly relevant for young adults.

Generally speaking, young adults relying on or seeking SSI benefits fall into three categories:

- ◆ 18-year-olds who are receiving SSI childhood disability benefits; at age 18 they must have their eligibility for SSI reassessed. When Social Security redetermines whether an 18-year-old is still disabled, it applies its adult disability rules.
- ◆ Many young adults apply for SSI disability benefits for the first time at age 18. Because of Social Security rules that count parents' income until a child turns age 18, many children cannot qualify for SSI before they turn age 18. At age 18, however, Social Security no longer counts parents' income, even if the young adult is still living at home with his or her parents.
- ◆ Young adults may seek Social Security Disability Insurance benefits on the earnings record of their parent, if that parent is retired, disabled, or deceased. To qualify, young adults must show that they have a disabling condition that began prior to turning age 22.

## **II. Factoring Childhood Functional Measures Into the Adult Disability Standard**

A young adult must show that s/he is disabled using the adult SSI standard. The adult standard, which covers persons from age 18 until they turn age 65, is hard to meet; an individual age 18 or older must show that s/he is unable, due to a medical impairment or combination of medical impairments that have lasted, or are expected to last 12 months or result in death, to perform any jobs that exist in substantial numbers in the national or local economy. At a minimum, young adults must show the following to be found disabled under the adult disability standard:

- ◆ be unable to meet the basic demands of at least sedentary work on a sustained basis; or
- ◆ be unable to meet the basic mental demands of simple, unskilled work.

Showing that, however, can be difficult because much young adults do not have a longitudinal history of work history that can be used in assessing disability. This difficulty shows up most clearly when a child who has been receiving benefits based on the disability for children under age 18 has to prove disability under the adult standard to retain eligibility.

SSA 's disability standards for adults and children are based on two different evaluation models: children are evaluated on a model that looks at functioning in a number of different areas while adults are assessed by how well they can do work-related activities.

### **A. Functional Capacity and the Childhood Disability Standard**

#### **1. The Sequential Evaluation Process for Children**

SSA now uses a three-step sequential evaluation to determine childhood disability. 20 C.F.R. § 416.924. It is set forth below:

1. Is the child working (engaging in substantial gainful activity)? (The SSA rules on substantial gainful activity are set forth at 20 C.F.R. §§ 416.971-76). If yes, deny the claim. If no, go to step 2.
2. Does the child have a medically determinable impairment or combination of impairments that is severe? 20 C.F.R. § 416.924(c). If no, deny the claim. If yes, go to step 3.
3. Does the child's impairment(s):
  - a) meet the requirements of a listed impairment in the Listing of Impairments in 20 C.F.R. Part 404, Subpt. P, App. 1; or

- b) medically equal the requirements of a listed impairment in the Listing of Impairments in 20 C.F.R. Part 404, Subpt. P, App. 1; or
- c) are the functional limitations caused by the impairment(s) the same as the disabling functional limitations of any listing, and therefore, functionally equivalent to that listing.

If yes, the child is disabled. If no, the child is not disabled.

## **2. Evaluating Functional Capacity**

### **a. Functional Domains**

In determining functional equivalence, SSA looks at six different domains, defined below. A child is considered disabled if s/he has marked limitations in two domains or an extreme limitation in one domain. The six domains are:

#### **◆ Acquiring and Using Information**

This domain is defined as how well a child acquires or learns information, and how well the child uses the information the child has learned. 20 C.F.R. § 416.926a(g).

#### **◆ Attending and Completing Tasks**

This domain is defined as how well a child is able to focus and maintain his or her attention, and how well the child begins, carries through, and finishes his or her activities, including the pace at which the child performs activities and the ease with which the child changes them. 20 C.F.R. § 416.926a(h).

#### **◆ Interacting and Relating With Others**

This domain is defined as how well a child initiates and sustains emotional connections with others, develops and uses the language of the child's community, cooperates with others, complies with rules, responds to criticism, and respects and takes care of the possessions of others. 20 C.F.R. § 416.926a(i).

#### **◆ Moving About And Manipulating Objects**

This domain is defined as how a child moves his or her body from one place to another and how the child moves and manipulates things. Put another way, this domain assesses gross and fine motor skills. 20 C.F.R. § 416.926a(j).

#### **◆ Caring For Yourself**

This domain is defined as how well a child maintains a healthy emotional and physical state, including how well the child gets his or her physical and emotional wants and needs met in appropriate ways; how the child copes with stress and changes in his or her environment; and whether the child takes care of his or her own health, possessions, and living area. 20 C.F.R. § 416.926a(k).

◆ **Health and Physical Well-Being**

This domain is defined as the cumulative physical effects of physical or mental impairments and their associated treatments or therapies on the child's functioning that SSA did not consider in the domain of Moving About and Manipulating Objects. 20 C.F.R. § 416.926a(l).

**b. What Evidence Is Considered**

The same general evidence gathering and weighing rules that apply in adult cases also apply in children's cases. *See* 20 C.F.R. §§ 404.1527, 416.927. An "acceptable medical source" is needed to establish a medically determinable impairment. 20 C.F.R. §§ 404.1513, 416.913. Important to cases for both children and young adults, is the addition of the of the following "acceptable medical sources:" licensed or certified school psychologists for mental retardation, learning disabilities, and borderline intellectual functioning; and qualified speech and language pathologists for speech and language impairments. *Id.* Evidence of the functional severity of medically determinable impairments is not limited to that from acceptable medical sources, and can also come from other medical sources such as nurse practitioners and therapists, other professional sources such as counselors and teachers, and lay sources. 20 C.F.R. §§ 404.1513, 416.913, SSR 06-3p.

SSA has provided guidance to its decision makers about the gathering and evaluation of school evidence. The childhood regulations provide that school evidence should be requested and evaluated. 20 C.F.R. § 416.924a(a)(2)(iii). In addition, the regulation provides guidance on how to weigh evidence that a child is in a special education program or receives accommodations, 20 C.F.R. § 416.924a(b)(7)(iv), and that a child has medical impairments that limit his or her attendance and participation in school activities. 20 C.F.R. § 416.924a(b)(7)(v).

**c. How Evidence Is Considered**

A feature of the childhood disability standard that is not nearly as uniformly present in the adult disability standard is the concept that SSA decision makers must consider, among other things, whether factors are present that either mask functional limitations, or cause or exacerbate the disabling functional limitations themselves.

For children, SSA decision makers must consider, in assessing the severity of functional limitations, the amount of help or adaptations a child requires and the impact of structured or

supportive settings. In so doing, decision makers are to consider the following: a) the range of activities a child does; b) the child's ability to do them independently, including any prompting the child requires to begin, carry through, and complete those activities; c) the pace at which the child does those activities; d) how much effort the child needs to do those activities; and e) how long the child is able to sustain such activities. 20 C.F.R. § 416.924a(b)(5). Among the factors specifically considered are the following.

◆ **Extra Help**

SSA decision makers are required to consider any extra help that a child requires to do age-appropriate activities. 20 C.F.R. § 416.924a(b)(5)(i). In making the disability determination or decision, the decision makers must assess how a child would function without the extra help. Extra help is more help than a child of the same age without an impairment would be expected to need. 20 C.F.R. § 416.924a(b)(5)(ii).

◆ **Structured or Supportive Settings**

A child with a serious impairment(s) may spend some or all of his or her time in a structured or supportive setting beyond what a child without such an impairment(s) normally requires. SSA decision makers must consider how that child would function outside of the structured or supportive setting because the structured or supportive setting may minimize signs and symptoms of the child's impairment(s) and help to improve his or her functioning while he or she is in it, even though the child's signs, symptoms, and functional limitations might worsen outside this type of setting. 20 C.F.R. § 416.924a(b)(5)(iv).

◆ **Unusual Settings**

SSA recognizes that children may behave differently in unusual settings and that behavior should not be relied upon in isolation in determining the severity of functional limitations. The final regulations state:

Children may function differently in unfamiliar or one-to-one settings than they do in their usual settings at home, at school, in childcare or in the community. You may appear more or less impaired on a single examination (such as a consultative examination) than indicated by the information covering a longer period. .... We will not draw inferences about your functioning in other situations based only on how you function in a one-to-one, new, or unusual situation.

20 C.F.R. § 416.924a(b)(6).

◆ **Effects of Medications**

In determining disability, SSA decision makers must consider how a child functions with the benefit of prescribed medications. 20 C.F.R. § 416.924a(b)(9). The final regulations state that if a child's symptoms or signs are reduced by medications, SSA must still consider, among other things, whether the medications create side effects that cause or contribute to the child's functional limitations. 20 C.F.R. § 416.924a(b)(9)(i)(A)-(E).

◆ **Treatment Effects**

The effects of treatment must also be considered in determining disability. 20 C.F.R. § 416.924a(b)(9)(ii). Treatment includes occupational, physical, speech, and language therapy, psychotherapy and psychosocial counseling. The final regulations provide that frequent therapy may also interfere with a child's functioning. Therefore, decision makers must consider the frequency of therapy; how long the child has received therapy or will need it; whether the therapy interferes with the child's participation in activities typical of children of that age without impairments, such as attending school or classes or socializing with peers; and the length and frequency of hospitalizations. 20 C.F.R. § 416.924a(b)(9)(ii).

**B. The Adult Disability Standard**

For adults, people age 18 and older, SSA defines disability as the inability to engage in any substantial gainful activity by reason of medically determinable physical and/or mental impairment(s) which can be expected to last for a continuous period of not less than 12 months or result in death. 20 C.F.R. §§ 404.1505, 416.905. SSA uses a five step sequential analysis to determine disability under this standard. *See* 20 C.F.R. §§ 404.1520, 416.920.

1. Is the applicant engaging in Substantial Gainful Activity (SGA)? If yes, the application is denied. If no, the application proceeds to Step 2.
2. Does the applicant have a severe impairment or combination of impairments that are severe? If no, the application is denied. If yes, the application proceeds to Step 3.
3. Does the applicant have an impairment which meets or equals the severity of a listed impairment? If yes, the application is approved. If no, the application proceeds to Step 4.
4. Does the applicant have the residual functional capacity (RFC) to perform his/her past relevant work (work performed in the last 15 years)? If yes, the application is denied. If no, the application proceeds to Step 5.
5. Does the applicant have the RFC to perform any other work that exists in significant numbers in the national economy? SSA considers factors such as the applicant's age, education, work history (skilled or unskilled), and ability to

communicate in English, are considered when determining if there is other work the applicant can perform. If no, the application is approved. If yes, the application is denied.

## **C. Finding Common Ground Between The Childhood and Adult Disability Standard**

### **1. What Evidence Is Relevant**

The regulations provide, at 20 C.F.R. § 416.913(e), that information from non-medical sources is important in determining how medical impairments affect the ability to work. It lists the following sources as relevant:

- ◆ public and private social welfare agencies and social workers;
- ◆ observations by people who know you (for example, spouses, parents and other caregivers, siblings, other relatives, friends or neighbors, clergy);
- ◆ other medical practitioners (for example, nurse practitioners and physicians' assistants, naturopaths, and chiropractors);
- ◆ therapists (for example, physical, occupational, or speech and language therapists); and
- ◆ educational agencies and personnel (for example, school teachers, school psychologists who are not acceptable medical sources, and school counselors.

20 C.F.R. § 416.913(e). *See also* SSR 06-3p.

### **2. Evaluating Function at Step Three – The Listings**

As described above, an adult is disabled if s/he meets or medically equals a listing in the Listings of Impairments. Most of the listings do not incorporate function. However, SSA has been making some effort, as it updates the listings for physical impairments, to incorporate functional measures.

The mental impairment listings do incorporate functional measures in the “B” and “C” criteria. The “B” and “C” of the adult mental impairment listings should be advocates’ main focus. The “A” criteria fulfill the statutory requirement that a person have a medically determinable impairment or impairments to be found disabled. The “B” and “C” criteria “describe impairment-related functional limitations that are incompatible with the ability to work. The criteria included in paragraphs B and C of the listings for mental disorders have been chosen because they represent functional areas deemed essential to work.” 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.A.

#### **i. The “B” Criteria and “C” Criteria**

The “B” criteria considered are as follows:

**Activities of Daily Living**, refers to daily adaptive activities such as:

- ◆ cleaning;
- ◆ shopping;
- ◆ cooking;
- ◆ taking public transportation;
- ◆ paying bills;
- ◆ maintaining a residence;
- ◆ caring appropriately for one’s grooming and hygiene;
- ◆ using telephones and directories; and
- ◆ using a post office.

20 C.F.R. Part 404, Subpt. P, App. 1, §12.00.C.1.

In the context of the individual’s overall situation, the quality of these activities is judged by their independence, appropriateness and effectiveness. It is necessary to define the extent to which the individual is capable of initiating and participating in activities independent of supervision or direction.

**Social functioning** refers to your capacity to interact independently, appropriately, effectively, and on a sustained basis with other individuals. Social functioning includes the ability to get along with others, such as family members, friends, neighbors, grocery clerks, landlords, or bus drivers. You may demonstrate impaired social functioning by, for example, a history of altercations, evictions, firings, fear of strangers, avoidance of interpersonal relationships, or social isolation. You may exhibit strength in social functioning by such things as your ability to initiate social contacts with others, communicate clearly with others, or interact and actively participate in group activities. We also need to consider cooperative behaviors, consideration for others, awareness of others' feelings, and social maturity. Social functioning in work situations may involve interactions with the public, responding appropriately to persons in authority (*e.g.*, supervisors), or cooperative behaviors involving coworkers. 20 C.F.R. Part 404, Subpt. P, App. 1, §12.00.C.2.

**Concentration, persistence, or pace** refers to the ability to sustain focused attention and concentration sufficiently long to permit the timely and appropriate completion of tasks commonly found in work settings. Limitations in concentration, persistence, or pace are best observed in work settings, but may also be reflected by limitations in other settings. In addition, major limitations in this area can often be assessed through clinical examination or psychological testing. Wherever possible, however, a mental status examination or psychological test data should be supplemented by other available evidence. 20 C.F.R. Part 404, Subpt. P, App. 1, §12.00.C.3.



On mental status examinations, concentration is assessed by tasks such as having you subtract serial sevens or serial threes from 100. In psychological tests of intelligence or memory, concentration is assessed through tasks requiring short-term memory or through tasks that must be completed within established time limits.

In work evaluations, concentration, persistence, or pace is assessed by testing your ability to sustain work using appropriate production standards, in either real or simulated work tasks (*e.g.*, filing index cards, locating telephone numbers, or disassembling and reassembling objects). Strengths and weaknesses in areas of concentration and attention can be discussed in terms of your ability to work at a consistent pace for acceptable periods of time and until a task is completed, and your ability to repeat sequences of action to achieve a goal or an objective.

**Episodes of decompensation** are exacerbations or temporary increases in symptoms or signs accompanied by a loss of adaptive functioning, as manifested by difficulties in performing activities of daily living, maintaining social relationships, or maintaining concentration, persistence, or pace. Episodes of decompensation may be demonstrated by an exacerbation in symptoms or signs that would ordinarily require increased treatment or a less stressful situation (or a combination of the two). Episodes of decompensation may be inferred from medical records showing significant alteration in medication; or documentation of the need for a more structured psychological support system (*e.g.*, hospitalizations, placement in a halfway house, or a highly structured and directing household); or other relevant information in the record about the existence, severity, and duration of the episode. 20 C.F.R. Part 404, Subpt. P, App. 1, §12.00.C.4.

The term *repeated episodes of decompensation, each of extended duration* in these listings means three episodes within 1 year, or an average of once every 4 months, each lasting for at least 2 weeks. If you have experienced more frequent episodes of shorter duration or less frequent episodes of longer duration, we must use judgment to determine if the duration and functional effects of the episodes are of equal severity and may be used to substitute for the listed finding in a determination of equivalence.

If the “B” criteria are not met, SSA looks at additional functional criteria (paragraph C criteria) in 12.02, 12.03, 12.04, and 12.06. These criteria do the same thing as the other factors discussed above for children (structured settings, etc.).

## ii. Special Factors in Weighing Evidence in Adult Claims

As set forth above, the childhood regulations provide specific guidance in assessing the severity of functional limitations about the impact of the amount of help or adaptations a child requires and the impact of structured or supportive settings. The same points are made in the adult mental impairment listings. However, they are not as clearly set out. These factors are discussed below.

### ◆ Effects of Structured Settings

SSA recognizes that overt symptomatology may be controlled or attenuated by psychosocial factors such as placement in a hospital, halfway house, board and care facility, or other environment (including one's home) that provides similar structure in cases involving chronic mental disorders. Such settings may greatly reduce the mental demands placed on a person. With lowered mental demands, overt symptoms and signs of the underlying mental disorder may be minimized. At the same time, however, the person's ability to function outside of such a structured or supportive setting may not have changed. If someone's symptomatology is controlled or attenuated by psychosocial factors, SSA must consider your ability to function outside of such structured settings. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.F. *See also* SSR 85-15 (discussing stress and mental illness).

◆ **Effects of Medication**

SSA recognizes that medication effects a person's symptoms, signs, and ability to function. While drugs used to modify psychological functions and mental states may control certain primary manifestations of a mental disorder, *e.g.*, hallucinations, impaired attention, restlessness, or hyperactivity, such treatment may not affect all functional limitations imposed by the mental disorder. In cases where overt symptomatology is attenuated by the use of such drugs, particular attention must be focused on the functional limitations that may persist.

The introductory language to the Listings recognizes that drugs used in the treatment of some mental illnesses may cause drowsiness, blunted effect, or other side effects involving other body systems. Those symptoms must be considered in evaluating the overall severity of someone's impairment. Where adverse effects of medications contribute to the impairment severity and the impairment(s) neither meets nor is equivalent in severity to any listing but is nonetheless severe, SSA considers such adverse effects in the RFC assessment. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.G.

◆ **Effects of Treatment**

With adequate treatment some individuals with chronic mental disorders not only have their symptoms and signs ameliorated, but they also return to a level of function close to the level of function they had before they developed symptoms or signs of their mental disorders. Treatment may or may not assist in the achievement of a level of adaptation adequate to perform sustained SGA. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.H.

◆ **Unusual Settings**

Unlike the childhood disability regulations, the adult mental impairment standard does not specifically recognize unusual settings. In the childhood context, the unusual settings language is intended in large part to instruct decision makers that reliance on evidence generated from one-on-one encounters such as consultative examinations is often misplaced because such reliance ignores that many children do not exhibit the symptoms of their mental impairments in

such settings. Similar language is contained in the adult mental impairment listings, although it is not separately set forth.

In discussing the B criteria of concentration, persistence, or pace, the listings state:

We must exercise great care in reaching conclusions about your ability or inability to complete tasks under the stresses of employment during a normal workday or work week based on a time-limited mental status examination or psychological testing by a clinician, or based on your ability to complete tasks in other settings that are less demanding, highly structured, or more supportive. We must assess your ability to complete tasks by evaluating all the evidence, with an emphasis on how independently, appropriately, and effectively you are able to complete tasks on a sustained basis.

20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.C.3. In addition, the mental impairment listings stress the need for longitudinal evidence, recognizing that a person's level of functioning may vary considerably over time. "Proper evaluation of your impairment(s) must take into account any variations in the level of your functioning in arriving at a determination of severity over time. Thus, it is vital to obtain evidence from relevant sources over a sufficiently long period prior to the date of adjudication to establish your impairment severity." 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.D.2.

### **3. Evaluating Function at Steps Four and Five-Residual Functional Capacity**

At steps four and five in the adult sequential evaluation, SSA assesses how an adult functions in determining disability. The adult assessment is residual functional capacity (RFC). RFC is what the person can still do despite the functional limitations imposed by all of his or her impairments. *See* 20 C.F.R. §§ 404.1545, 416.945. Put another way, RFC is:

a multidimensional description of the work-related activities [that a person] retain[s] in spite of ... medical impairments. An assessment of ... RFC complements the functional evaluation necessary for the paragraphs B and C of the listings by requiring consideration of an expanded list of work-related capacities that may be affected by mental disorders ...

20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.A.

An RFC includes both exertional and nonexertional functional capacities:

- ◆ Exertional functional capacity includes the ability to walk, stand, sit, lift, push, pull, reach, carry, and handle items.
- ◆ Nonexertional functional capacity includes the ability to see, hear, speak, to tolerate fumes, dust, heat and cold understand, and to carry out, and remember simple instructions, use judgment, respond appropriately to supervision,

co-workers, and usual work situations, and deal with changes in a routine work setting.

When considering the individual functional limitations of individuals with mental impairments at steps four and five of the sequential analysis, it is extremely important to ensure that evidence of the individual's ability to perform the basic mental demands of unskilled work is included and considered. The basic mental demands of even unskilled work include the abilities to understand, carry out, and remember simple instructions; to respond appropriately to supervision, co-workers, and usual work situations; and to deal with changes in a routine work setting and customary work pressures. *See* Social Security Ruling 85 -15 and 85-16. Evidence of the ability to perform these basic demands of unskilled work on a *sustained* basis is also critical.

The introductory materials (20 C.F.R. Part 404, Subpt. P, App.1, § 12.00) to the mental impairment listings, as discussed earlier, contain 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. *See* 20 C.F.R. §§ 404.1520a(c), 416.920a(c).

**a. Evaluating the Impact of Stress and the Need for Structured Settings**

SSR 85-15 contains helpful language about the impact of stress on persons with mental impairments, mirroring substantially, the language about the impact of structured settings in the childhood disability regulation and the adult mental impairment listings:

Stress and Mental Illness -- Since mental illness is defined and characterized by maladaptive behavior, it is not unusual that the mentally impaired have difficulty accommodating to the demands of work and work-like settings. Determining whether these individuals will be able to adapt to the demands or "stress" of the workplace is often extremely difficult. This section is not intended to set out any presumptive limitations for disorders, but to emphasize the importance of thoroughness in evaluation on an individualized basis.

Individuals with mental disorders often adopt a highly restricted and/or inflexible lifestyle within which they appear to function well. Good mental health services and care may enable chronic patients to function adequately in the community by lowering psychological pressures, by medication, and by support from services such as outpatient facilities, day care programs, social work programs and similar assistance.

The reaction to the demands of work (stress) is highly individualized, and mental illness is characterized by adverse responses to seemingly trivial circumstances. People with mental impairments may cease to function effectively when facing such demands as getting to work regularly, having their performance supervised, and remaining in the

workplace for a full day. A person may become panicked and develop palpitations, shortness of breath, or feel faint while riding in an elevator; another may experience terror and begin to hallucinate when approached by a stranger asking a question. Thus, people with mental impairments may have difficulty meeting the requirement of even so-called "low stress" jobs. *See Lancellotta v. Secy*, 806 F.2d 284 (1<sup>st</sup> Cir. 1986) (stress is not a characteristic of job, but instead reflects an individual's subjective response to a particular situation)

Because response to the demands of work is highly individualized, the skill level of a position is not necessarily related to the difficulty an individual will have in meeting the demands of the job. An individual's condition may make performance of an unskilled job as difficult as an objectively more demanding job, for example, a busboy need only clear dishes from tables. But an individual with a severe mental disorder may find unmanageable the demand of making sure that he removes all the dishes, does not drop them, and gets the table cleared promptly for the waiter or waitress. Similarly, an individual who cannot tolerate being supervised may be not able to work even in the absence of close supervision; the *knowledge* that one's work is being judged and evaluated, even when the supervision is remote or indirect, can be intolerable for some mentally impaired persons. Any impairment-related limitations created by an individual's response to demands of work, however, must be reflected in the RFC assessment.

#### **b. Incorporating School Evidence Into The RFC Determination**

Among other things, SSR 85-16 provides that the following types of evidence should be considered in determining RFC:

- ◆ Reports of the individual's activities of daily living and work activity, as well as testimony of third parties about the individual's performance and behavior.
- ◆ Reports from job coaches, workshops, group homes, or similar assistive entities.

In analyzing the evidence, it is necessary to draw meaningful inferences and allow reasonable conclusions about the individual's strengths and weaknesses. Consideration should be given to factors such as:

- ◆ Quality of daily activities, both in occupational and social spheres (*see* Listing 12.00, Introduction), as well as of the individual's actions with respect to a medical examination.
- ◆ Ability to sustain activities, interests, and relate to others *over a period of time*. The frequency, appropriateness, and independence of the activities must also be considered.

- ◆ Level of intellectual functioning.
- ◆ Ability to function in a work-like situation.

Many young adults have school-based evidence, including evidence of academic work and school-based vocational program work, that addresses these issues.

The regulations provide that evidence from teachers and school psychologists, or physical, occupational, or speech-language therapists shall be considered. 20 C.F.R. § 416.913(e). The childhood disability regulations explain that relevant school evidence includes:

- ◆ Evidence from teachers about the child’s performance in activities throughout the school day;
- ◆ Special education services including information in Individualized Education Program (IEP) plans;
- ◆ Special education or accommodations—“We will consider the circumstances of your school attendance, such as your ability to function in a regular classroom or preschool setting with children your age who do not have impairments. Similarly, we will consider that good performance in a special education setting does not mean that you are functioning at the same level as other children your age who do not have impairments.”
- ◆ Attendance and participation—“We will also consider factors affecting your ability to participate in your education program. You may be unable to participate on a regular basis because of the chronic or episodic nature of your impairment(s) or your need for therapy or treatment.”

20 C.F.R. § 416.924a(b)(7).

Advocates should look to school evidence for the following in determining whether young adults can work:

- ◆ A young adult’s ability to understand, carry out, and remember simple instructions and work-like procedures in the classroom is evidence of his or her ability to do these things in a job.
- ◆ A young adult’s ability to communicate spontaneously, interactively, and age-appropriately in the classroom is evidence of ability to do these things in a job.
- ◆ A young adult’s ability to maintain attention for extended periods of time and to sustain an ordinary daily routine without special supervision is evidence of ability to do these things in a job.

- ◆ A young adult's ability to work with authority figures and to follow direction in school, responding appropriately to correction or criticism, is evidence of ability to deal with supervision in a job.
- ◆ A young adult's ability to interact with peers in school, school-related activities, and other age-appropriate environments is evidence of ability to relate to co-workers in a job.
- ◆ A young adult's ability to regulate mood and behavior in various school settings is evidence of ability to deal with change in the work setting.
- ◆ A young adult's ability to engage in physical activities both in and out of school is evidence of ability to perform the physical demands of work.
- ◆ A young adult's skills derived from specific vocational education and/or part-time employment are evidence of ability to use those skills in a job.

### **III. Title II Disabled Adult Child Benefits**

Adult children of a wage earners who are age eighteen or older and disabled may qualify for the Title II dependent's benefit for disabled adult children (DAC) of wage earners. The adult child must be age 18 or older and must show that s/he has continuously met the adult disability standard, described above, since prior to attaining age twenty-two. The parent wage earner must either be entitled to disability or retirement benefits or have died with insured status. 20 C.F.R. § 404.350(a)(5). SSA refers to this benefit as a Childhood Disability Benefit (CDB). 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)(4).

The amount of this dependent's benefit is a percentage of the parent wage earner's primary insurance amount (PIA). If the parent wage earner is alive, the disabled adult child's benefit is 50% of the parent's PIA. If the parent wage earner has died, the benefit is 75% of the parent's PIA. If other dependents are receiving benefits on the parent wage earner's PIA, the benefit may be reduced, pursuant to the family maximum rules. *See* 20 C.F.R. § 404.403. Medicare entitlement begins after 24 months of eligibility, just as with SSDI benefits.

The work incentives described below for SSDI benefits apply to these benefits. Note that performance of Substantial Gainful Activity (SGA), described below, after attaining age 22 and prior to establishing eligibility for these benefits will result in loss of entitlement to these benefits. This is because the individual must prove continuous disability eligibility since prior to attaining age 22. If an initial claim for these benefits is denied due to SGA at Step 1 of the sequential analysis of disability, it is very important to carefully evaluate whether any of the SGA exceptions pertain.

Once entitlement to these benefits has been established, however, entitlement can be regained after a period of ineligibility. The general rule is that the individual may become reentitled to these benefits within 84 months of the prior period of entitlement. *See* 20 C.F.R. § 404.351(c).POMS DI 10115.040. Recently, the general rule was expanded for individuals who lose these benefits due to work activity. The new rule will permit reentitlement for these

individuals after the general 84 months reentitlement period. *See* § 420A, Pub.L. No. 108-203 (3/2/04); POMS GN 10115.040 (01-07). The new rule will be effective for benefits payable in October 2004 and later.

### **Practice Tip: Disabled Adult Children and Medicaid Grandfathering**

SSI regulations require recipients to apply for all other benefits for which they may be eligible as a condition of SSI eligibility. 20 C.F.R. § 416.210. This means that SSI recipients must apply for CDB benefits when a parent dies, or begins to receive Title II retirement or Title II disability benefits. Eligibility for CDB benefits may result in financial ineligibility for SSI and SSI-related Medicaid.

Congress acted to remedy this situation in 1986. *See* Pub.L.No.99-643, § 6a (1986). Pursuant to this change, state Medicaid programs must cover individuals who:

- \* are at least 18 years old;
- \* began receiving Title II benefits for a disability or blindness that began before age 22;
- \* lost SSI because of entitlement to or an increase in Title II dependents or survivors benefits; and
- \* would still eligible for SSI in the absence of such benefits or an increase in such benefits.

*See* 42 U.S.C. § 1383c(c), POMS SI 01715.015 Special Groups of Former SSI Recipients.

Consider checking your state's Medicaid regulations and systems to make sure that there are rules and processes in place for protecting the Medicaid eligibility of this group of former SSI recipients.

## **IV. How Work Affects SSI and SSDI Eligibility for Young Adults**

Many young adults are working, or want to go to work, and work opportunities are important for all youth. However, it is important that youth who receive SSI or SSDI or CDG benefits understand how wages will affect their benefit eligibility - if only to avoid an overpayment of benefits. At the application stage, SSA looks primarily at the wages that a young adult earns at work to decide whether that work shows that he or she is not disabled. Generally speaking, a young adult will be considered to be working and not disabled if he or she is employed and earning more than \$900 per month in gross wages (if eligible on the basis of disability in 2007) or \$1500 (if eligible on the basis of blindness in 2007). There are exceptions, however. *See* sections IV.A. - D. below. Once the young adult has been determined eligible for SSI, SSDI or CDB benefits, the effect of work on benefits varies depending on which type of benefit the young person receives. *See* Section IV. E. below. Sections IV. A. - C. below provide an overview of the rules concerning the way in which wages are counted to determine benefit eligibility.



## **A. Wages and SSI Income Eligibility**

Note that, once a young person attains age 18, parental income and resources no longer count to determine the young person's eligibility for SSI, even if the young person continues to live with his or her parents.

Virtually all wages earned by an SSI recipient are countable after certain deductions and/or exclusions. Generous deductions apply to earned income and there are also special deductions and exclusions that apply to certain young adults, as described below.

The SSI earned income deduction is \$65 plus half of the remainder. 20 C.F.R. § 416.1112(c)(5) & (7). For example, \$565 in gross monthly wages results in \$250 in countable income for SSI purposes ( $\$565 - \$65 = \$500$  divided by 2 = \$250). In addition, unused portions of the \$20 general income deduction can be used if not used against unearned income. 20 C.F.R. § 416.1112(c)(4).

Impairment Related Work Expenses (IRWEs) and wages set aside in a Plan to Achieve Self Support (PASS) are also excluded from countable income. 20 C.F.R. §§ 416.1112(c)(6) & (9) (see below for more information on PASS & IRWEs).

Students under age 22 who are regularly attending school can exclude up to \$1,510 per month but not more than \$6100 in calendar year 2007. 20 C.F.R. § 416.1112(c)(3). POMS SI 00820.510. Effective 1/1/02, these amounts were indexed to the annual COLA. In addition, effective April 2005, this exclusion applies regardless of whether the students are married or heads of households, pursuant to section 433, Pub.L.No. 108-203 (3/2/04).

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 federal work study programs and others listed in POMS SI 00830.455. This means that this federal educational assistance does not count even if used for food and shelter. The income and resource counting rules for other types of educational assistance are more restrictive.

Other types of educational grants, scholarships or fellowships are not countable as income in the month of receipt if used to pay for tuition, fees, or other necessary education expenses. 20 C.F.R. § 416.1124(c)(3). In addition, any portion of a grant, scholarship, fellowship, or gift used for or set aside for paying the cost of tuition, fees or other necessary educational expenses does not count as a resource for 9 months. 20 C.F.R. § 416.1210(u).

## **B. Substantial Gainful Activity**

The definition of disability for both SSI and SSDI requires that the applicant 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. 20 C.F.R.

§§ 404.1572, 416.972. It is not necessary that the work be full-time to be substantial; part-time work may be sufficient. *Id.* Gainful activity is activity for remuneration or profit or intended for profit whether or not it's realized. *Id.* 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. *Id.* However, SSA may look to these to see if the individual has the ability to do SGA. 20 C.F.R. §§ 404.1574(a)(1), 416.974(a)(1).

SSA has developed a complex set of rules for evaluating when work activity should be considered SGA. *See* 20 C.F.R. § 404.1571 *et seq.*, 20 C.F.R. § 416.971 *et seq.* The primary consideration for employees is the amount of gross monthly wages. 20 C.F.R. §§ 404.1574, 416.974. For the self-employed, SSA considers not only wages but also the value of the activity to the business. 20 C.F.R. §§ 404.1475, 416.975. In addition, there are several factors that may be applied to reduce earnings below the SGA level. *See* 20 C.F.R. §§ 404.1473, 404.1474(c), 404.1576, 416.973, 416.974(c), 416.976, POMS DI 10505.010. These factors are seldom adequately developed, so it is important to be aware of them and investigate them where appropriate.

### **1. Presumed SGA Wages**

In general, for calendar year 2007, SSA will presume that any employee who earns more than \$900 a month in gross wages is engaging in SGA (\$1500 for those eligible on the basis of blindness). The SGA amount has been indexed to the yearly COLA since 2001. Prior presumed SGA amounts for people eligible in the basis of disability include the following: \$860 for 2006; \$830 for 2005; \$810 for 2004; \$800 for 2003; \$780 for 2002; \$740 for 2001; \$700 for 7/99 - 12/00; and \$500 for 1/90 - 6/99. Prior presumed SGA amounts for people eligible on the basis of blindness include the following: \$1450 for 2006; \$1380 for 2005; \$1350 for 2004; \$1330 for 2003; \$1300 for 2002; \$1240 for 2001; \$1170 for 2000; \$1110 for 1999. *See* POMS DI 10501.015 for the SGA earnings tables.

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

- 1) the earnings include a subsidy reducing the true earnings below the SGA level, 20 C.F.R. §§ 404.1475(a)(2), 416.974(a)(2);
- 2) the work involves special circumstances such that it should not be considered SGA, 20 C.F.R. §§ 404.1573(c), 416.973(c);
- 3) the individual's impairment forces him/her to quit working within a short period of time (3 - 6 months), constituting what is called an unsuccessful work attempt, 20 C.F.R. §§ 404.1574(c), 416.974 (c); and
- 4) the individual has impairment related work expenses that reduce monthly wages below the SGA level, 20 C.F.R. §§ 404.1576, 416.976.

### **2. Presumed Non-SGA Wages**

A individual earning less than \$300 a month in gross wages, in the absence of evidence to the contrary, will not be considered engaging in SGA. Exceptions to this rule include individuals doing volunteer work or work with little remuneration, which nevertheless is comparable to those engaged in SGA, or situations where there is evidence of wage suppression. 20 C.F.R. §§ 416.404.1574(b)(3), 416.974(b)(3).

### **C. Factors That May Show Inability To Do SGA**

The following factors may be used to rebut the presumption created by earnings at or above the SGA level. One reason to consider use of these factors is to preserve the work incentives for the time when the individual is ready to attempt work that may be self-supporting.

#### **1. Unsuccessful Work Attempts**

This factor should be developed when the young adult has either stopped working or lost a job due to impairment related reasons within 3 - 6 months. Work that constitutes an Unsuccessful Work Attempt (UWA) is not SGA. 20 C.F.R. §§ 404.1574(c)(1), 416.974(c)(1). A UWA is a short, failed attempt to work. To be considered a UWA, the work attempt must have terminated because of an impairment related inability to perform the work activity. 20 C.F.R. §§ 404.1574(c), 416.974(c). As a general rule, SSA will consider a work attempt terminated in less than three months to be a UWA. 20 C.F.R. §§ 404.1574(c)(3), 416.974(c)(3). Work attempts lasting between 3-6 months require more evidence showing disability related problems and termination. 20 C.F.R. §§ 404.1574(c)(4), 416.974(c)(4). A UWA should not result in a determination that the individual is able to engage in SGA because SSA will not consider the work activity or wages earned during the UWA as evidence of ability to perform SGA. *See* 20 C.F.R. §§ 404.1574(a)(1), 416.974(a)(1), as published at 65 Fed. Reg. 42771 (7/11/00) and Social Security Ruling 84-25 for more information on UWAs.

#### **2. Subsidies and Special Conditions**

Some young adults will have participated in structured work programs that may or may not have had reduced expectations and production requirements. In these cases, the possibility that the work was subsidized or performed under special circumstances should be investigated. Subsidized work and work performed under special circumstances may show that the individual does not have the ability to perform SGA, even if the individual's wages are at or above the SGA level. *See* 20 C.F.R. §§ 404.1573, 404.1574, 416.973, 416.974, published at 65 Fed. Reg. 42771 (7/11/00). A subsidy exists when an employer pays an employee more than the reasonable value of his/her services. 20 C.F.R. §§ 404.1574(a)(2), 416.974(a)(2). 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 individuals without impairments. *Id.* For example, an employee who produces 75% of the production requirement and is paid the same as those expected to meet the production requirement receives a 25% subsidy. Evidence that a subsidy exists includes marked lack of productivity, necessity for

an unusual amount of supervision and assistance, or marked slowness and inefficiency.

Work performed under special circumstances may also show that the individual does not have the ability to do SGA. The concept of special circumstances should be investigated whenever the employee

- ◆ receives special assistance from other employees;
- ◆ works irregular hours or takes frequent rest periods;
- ◆ works under specially arranged circumstances;
- ◆ has lower standard of productivity or efficiency; or
- ◆ has family relationships or past association with the employer.

*See* 20 C.F.R. §§ 404.1573(c), 416.973(c), as published at 65 Fed. Reg. 42771, 42783 (7/11/00). An example of work performed under special circumstances could include a young adult who earns SGA level wages but who does so only with significant services from a job coach provided by a social service agency.

### **3. Impairment-Related Work Expenses**

Some young adults may be earning SGA level wages but spending significant unreimbursed amounts on Impairment Related Work Expenses (IRWEs). The value of any such (IRWEs) can be deducted from monthly earnings, and may reduce those earnings below the SGA level. An IRWE is a disability related expense that helps the employee function at work. 20 C.F.R. §§ 404.1576(a), 416.976(a). The cost of an IRWE must be an out of pocket expense paid by the recipient that is not reimbursed by any source. 20 C.F.R. §§ 404.1576(b)(3), 416.976(b)(3). Verified IRWE costs must be deducted from monthly gross earnings before SSA makes an SGA determination. 20 C.F.R. 404.1576(a), 416.976(a). Significant IRWEs can reduce gross earnings below the SGA level. For example, a recipient who earns \$1000 in gross monthly wages in 2007 but who has \$150 per month in out of pocket expenses for prescription medication for his mental impairment is not performing SGA. Other IRWE deductions may include out of pocket, unreimbursable costs for items and/or services necessary to the individual's ability work, such as wheelchairs, assistive technology, counseling services, specially adapted vehicles, etc. 20 C.F.R. §§ 404.1576(c), 416.976(c).

### **4. Plans for Achieving Self-Support**

A plan for achieving self-support (PASS) allows a disability benefit recipient to set aside income and/or resources for a specified time for a vocationally achievable work goal. 20 C.F.R. § 416.1180. A young adult could use a PASS to save money to pay expenses for education, vocational training, adaptive equipment, job coaching, or starting a business - as long as the expenses are related to achieving the work goal. POMS SI 00870.000 *et seq.* SSA does do not count the income set aside under the PASS when computing the SSI payment amount. 20 C.F.R. § 416.1112(c)(9). Further, SSA does not count the resources set aside under the PASS to

determine resource eligibility for SSI. 20 C.F.R. § 416.1225. This means that a PASS can help establish or maintain SSI eligibility and can increase the SSI payment amount.

A PASS must

- ◆ be designed especially for the individual;
- ◆ be in writing (preferably on form SSA-545-BK);
- ◆ state a specific work goal the individual is capable of performing;
- ◆ state a specific time frame for reaching the work goal;
- ◆ show what money and other resources will be used to reach the goal;
- ◆ show how the funds will be used to reach the goal;
- ◆ include a detailed business plan if the goal is self-employment;
- ◆ show how the set aside funds will be kept identifiable from other funds;
- ◆ be approved by SSA; and
- ◆ be reviewed by SSA periodically to assure the plan is actually helping achieve progress.

20 C.F.R. §§ 416.1181, 416.1126. POMS SI 00870.006. Assistance with creating a PASS and getting it approved may be available through the Work Incentives Planning and Assistance (WIPA) program. For information on the availability of WIPA services in your state, see [www.ssa.gov/work/ServiceProviders/providers.html](http://www.ssa.gov/work/ServiceProviders/providers.html).

#### **D. Work at the Initial Application Stage**

It is not unusual for young adults to be involved in work or work programs. At the application stage, when the young adult has earned SGA level wages after the date of benefit application or after the alleged date of disability onset, careful evaluation of the work activity and the rules for rebutting the SGA presumption is required. As stated above, the definition of disability is the inability to engage in any substantial gainful activity by reason of medically determinable physical and/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 meaning of the 12-month duration requirement in a case involving an SSDI application and work. The first question for the Court was the meaning of the twelve duration requirement; does it mean the person's "inability" to engage in substantial gainful activity (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 an applicant to meet the legal definition of disability, it is the inability to engage in SGA that 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 applicant 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, the applicant cannot be found disabled. See also 20 CFR 404.1592(c). If, however, a applicant returns to SGA level work after SSA has determined disability, even if the SGA occurs within 12 months of the onset date, the finding of disability will stand. (Note that *Walton*

did not affect the Title II requirement that SGA level work cannot occur during the 5 months immediately after the month of disability onset.)

The issue of SGA level work that occurs at the application stage is especially complicated for Title II benefits based on disability. Title II disability benefits recipients are generally entitled to certain work incentives, explained below, before SGA level work affects their benefits. The statute at 42 U.S.C. § 422(c) conditions eligibility for a trial work period on entitlement for benefits. Entitlement to benefits requires insured status, the filing of an application, and meeting the disability standard. SSA had interpreted this to mean that return to work demonstrating the ability to engage in SGA before the approval of the claim **and** prior to the running of the 12 month period after disability onset requires denial of the claim or even reopening and denial of allowed claims. *See* SSR 82-52. A number of courts disagreed with this interpretation, finding that the language of the statute and the regulations does not require that a trial work period be conditioned on a prior receipt of benefits and/or the lapse of a twelve month period of disability. For example, the 7<sup>th</sup> Circuit held that

... under the Act's definition of disability, one need not actually be impaired for twelve months to be entitled to benefits. An applicant may be entitled to benefits if he or she suffers from an impairment which is expected to last for a minimum of twelve consecutive months. Whether an individual is actually disabled for twelve months as originally anticipated is not controlling with respect to the determination of disability. The Act requires only a prediction that the disability will continue for at least twelve consecutive months after the onset of the disability. The requirement is therefore forward-looking and is not to be nullified by hindsight. *Sierakowski v. Weinberger*, 504 F.2d 831, 834-35 (6th Cir. 1974). When an individual has been disabled for five consecutive months and suffers from an impairment which can be expected to last for a continuous period of twelve months, that person is entitled to disability benefits. And, even after qualifying for such an entitlement, one may engage in a trial work period. 42 U.S.C. § 422(c)(3).

*McDonald v. Bowen*, 800 F.2d 153 (7<sup>th</sup> Cir.1986, amended on reh'g 818F.2d 559 (7<sup>th</sup> Cir. 1987), as quoted in AR 88-3(7). *See also Salamalekis v. Apfel*, 221 F.3d 828(6th Cir. 2000)(AR 00-5(6)); *Newton v. Chater*, 92 F.3d 688 (8<sup>th</sup> Cir.1996) AR 98-1(8); *Walker v. Secy. HHS*, 943 F.2d 1257 (10<sup>th</sup> Cir.1991) (AR 92-6(10)).

Subsequently, SSA amended its regulations to provide that individuals are not entitled to a trial work period

- for any month prior to the date of application,
- if they perform working demonstrating the ability to do SGA during any required 5 month waiting period, or
- if they perform work demonstrating the ability to engage in SGA within 12 months of the onset of the impairment(s) preventing performance of SGA and before the date of any notice of determination or decision finding them disabled.

20 C.F.R. § 404.1592(d)(2) (2000). This interpretation of the statute was upheld by the U.S. Supreme Court in *Barnhart v. Walton*, 122 S.Ct.1265, 152 L.Ed.2d 330, 70 U.S.L.W. 4231 (2002).

## **E. Work Incentives**

Many young adults will want to try to return to work at some point after establishing eligibility for disability benefits. The SSI and the SSDI programs include work incentive rules that permit individuals to test their abilities to work without immediate loss of benefits and related health insurance. These work incentive rules can help a young adult with disabilities transition from school to work.

### **1. SSI Work Incentive Program.**

SSI recipients who work after establishing eligibility may qualify for the 1619 program. See 20 C.F.R. §§ 416.260 -.267. Recipients who continue to meet the medical disability standard and 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 medical disabled and meet all other 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. SSA will use the SSI earned income deductions and exclusions described above to determine the countable amount of earnings that will reduce the SSI payment. Medicaid eligibility also continues with 1619(a) eligibility. SSI recipients will notice no difference between regular SSI and 1619(a) benefits.

When earnings, alone or in combination with other income, become too high to allow for a cash SSI payment, even after all the deductions and exclusions from earned income, the recipient may be eligible for 1619(b) (continued Medicaid eligibility as a deemed SSI recipient). 20 C.F.R. §§ 416.268 - .269. In order to qualify for 1619(b) Medicaid, the recipient must:

- ◆ have been eligible for an SSI cash payment for at least one month;
- ◆ still meet the disability definition;
- ◆ still meet other non-disability requirements (including the SSI asset test);
- ◆ need Medicaid in order to work; and
- ◆ have gross earned income insufficient to replace SSI and Medicaid.

**POMS SI 02302.010.** Note that in order to be eligible for 1619(b) Medicaid, individuals who reside in 209(b) states must have been eligible for Medicaid in the month immediately prior to becoming eligible for 1619 status to retain their Medicaid eligibility. The 209(b) States are: Connecticut; Hawaii; Illinois; Indiana; Minnesota; Missouri; New Hampshire; North Dakota; Ohio; Oklahoma; and Virginia

Individuals who continue to meet the SSI medical disability standard can move between SSI, 1619(a) and 1619(b) without a new application, as their circumstances change. This works well for individuals with chronic conditions and disabilities whose ability to work fluctuates and for whom it is critical to maintain access to Medicaid coverage.

## 2. SSDI Work Incentive Programs

SSDI recipients who continue to meet the medical disability standard are entitled to a 9 month trial work period during which benefits are not affected. 20 C.F.R. § 404.1592. *See* POMS DI 1310.035. A trial work month is a month in which the recipient earns more than \$640 in gross wages (in 2007) in work that is not training or therapy. *Id.* For a table showing prior years' trial work period earning levels, see POMS DI 13010.050. For self-employment, beginning 1/1/02, a trial work period month is one in which net monthly earnings are at the "services" level or the individual worked more than 80 hours in the business. 20 C.F.R. § 404.1592(b)(2). POMS DI 13010.050A..

Recipients continue to receive their full SSDI benefit during the trial work months, no matter how much they earn. The 9 months do not have to be consecutive. 20 C.F.R. § 404.1592(e). The trial work period is completed when the recipient has had 9 trial work months in a rolling 60 month period. *Id.* POMS DI 13010.060B. When the 9 month trial work period is complete, SSA will review the work to determine whether the recipient is performing substantial gainful activity. POMS DI 13010.070. SSA should also conduct a continuing disability review to see whether the recipient remains medically disabled. *Id.* 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. The EPE is a consecutive 36 month period that begins the month following the end of the trial work period. *See* 20 C.F.R. § 404.1592a(b). During the EPE, recipients are not eligible for a cash benefit for months in which they work at the substantial gainful (SGA) activity level. 20 C.F.R. § 404.1592a(a). However, as long as the recipient 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. *Id.* Medicare benefits continue during the EPE regardless of whether the recipient is eligible for a cash benefit. POMS *See* POMS DI 28066.001. Eligibility will cease at the end of the 36 months if the recipient is performing work at the SGA level. 20 C.F.R. § 404.1592a. If the recipient is not working at the SGA level, eligibility will cease with first month the recipient does perform SGA. *Id.*

Although SSA can look at any work to see if it shows the ability to perform substantial gainful activity (SGA), SSA presumes that work resulting in gross wages at or above the SGA level constitutes SGA. The regulations at 20 C.F.R. § 404.1574, provides a useful chart indicating the SGA level applicable to various time periods. Any special circumstances and the monthly value of any subsidies or impairment related work expenses (IRWEs) should be deducted from monthly gross wages before deciding whether the wages show SGA.



## **F. Benefit Continuation Based On Participation in Vocational Rehabilitation Programs**

SSA is required to conduct periodic continuing disability reviews (CDR) to determine whether benefit recipients continue to meet the medical disability standard. *See* 20 C.F.R. §§ 404.1594, 416.94. Benefits for some individuals may be continued even after SSA conducts a CDR and determines that their impairments are no longer medically disabling. These are individuals who are participating in approved programs of vocational rehabilitation that began before SSA determined that their disabilities ended. 42 U.S.C. §§ 425(b), 1383(a)(6)(A),(B), 20 C.F.R. §§ 404.1586(g), 404.1596(c), 404.327 - .328, 416.1338. Generally, SSA must also determine that completion or continuation of the program will reduce the likelihood that the recipient will need to rely on disability benefits. 20 C.F.R. §§ 404.328, 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). This rule is known as the "301" benefit continuation rule because it was created by Section 301 of the Social Security Disability Amendments of 1980, P.L. 96-265.

The 301 benefit continuation rule also applies to age-eighteen review determinations, described below. Prior to August 1999, SSA applied the 301 benefit continuation rule only to CDR terminations. SSA changed its policy through EM-99079 (August 10, 1999). Note that the 301 benefit continuation rule does not apply until SSA determines that the recipient is no longer medically disabled.

Programs which may qualify for 301 benefit continuation include traditional state vocational rehabilitation programs, other vocational rehabilitation services, employment services, and programs undertaken pursuant to the Ticket to Work Act. *See* 20 C.F.R. §§ 404.327, 416.1338(c). In addition, individualized education programs (IEPs) developed under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, qualify as approved programs of vocational rehabilitation for students ages 18 through 21. 20 C.F.R. §§ 404.327(a)(4), 416.1338(c)(4). 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. §§ 404.328(b), 416.1338(e)(2), as amended by 70 Fed. Reg. 30649 *et seq.* (5/24/05).

## **G. The Ticket to Work and Work Incentives Improvement Act of 1999**

Young adults who have established eligibility for benefits under the adult disability standard may be able to use the Ticket to Work Program as part of their rehabilitation program. The following is an overview of the Ticket to Work.

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.

See POMS DI 55001.001.

**Note that the Ticket to Work Act did not change the rules regarding current work incentive programs, such as the Trial Work Period, Extended Period of Eligibility and the Section 1619 programs., are not changed by the ticket to work and continue to be available to disability benefit recipients.**

### **1. The Ticket to Work**

SSA will provide a “ticket to work” to eligible disability benefit recipients. Recipients who are not eligible for a “ticket” include recipients who are:

- \* 18 and under;
- \* 65 and older (or at full retirement age and older); and
- \* expected to improve within 3 years and who have not had their first continuing disability review.

The “Ticket” received by the recipient is a largely symbolic piece of paper. Eligibility for a Ticket allows the recipient to shop for and obtain employment services, vocational rehabilitation services, or other support services from any approved provider (public or private) willing to provide services to that individual. Information accompanying the ticket explains SSA’s commitment to pay for all services provided, under certain conditions, 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. While the ticket provisions were effective on January 1, 2001, and Massachusetts was in the first group of “roll out” states, ticket “roll out” did not begin until early 2002.

### **2. Expanded Medicare Benefits**

Effective October 1, 2000, Medicare coverage for Title II disability benefit recipients can be extended for up to 93 months after the trial work period ends. See 42 C.F.R. § 406.12. However, individuals must continue to meet the Social Security disability standard and undergo continuing disability reviews in order to be eligible. In addition, once SSDI benefits end, the individual must independently pay for the Medicare Part B premium in order to remain eligible. Expanded Medicare coverage became available to all individuals who had Medicare coverage on

October 1, 2000, were in their trial work period or extended period of eligibility, and whose Medicare coverage was not scheduled to terminate until after October 1, 2001. The expansion is not limited to “ticket” users. Pub. L. No. 106-170, § 202.

### **3. State Option to Expand Medicaid Benefits**

States have the option of expanding Medicaid coverage to allow for “buy-in” programs for disabled benefit recipients who return to work. States can choose to cover people with incomes up to 450% of the poverty level. Recipients must also work at least forty hours per month and continue to have a severe impairment to be eligible. Pub. L. No. 106-179, § 201.

### **4. Elimination of Work Disincentives - Two Types of CDR Protection**

Effective January 1, 2001, SSA may not initiate continuing disability reviews (CDR) for SSI or SSDI recipients who are “using” a Ticket to Work. Ticket to Work and Work Incentives Improvement Act of 1999, P.L. 106-170, § 101C (12/17/1999), POMS DI 55001.001. This prohibition applies both to work-triggered and regularly schedule CDRs.

Effective January 1, 2002, SSA may not initiate a CDR triggered solely as a result of work activity for SSDI recipients or concurrently eligible SSDI and SSI recipients who have been entitled to benefits for at least 24 months. P.L. 106.170, § 111. POMS DI 13010.012. This provision does not prohibit regularly scheduled CDRs and applies whether or not the recipient has or is using a Ticket to Work. POMS 13010.012. See also Emergency Message (EM) 01219 (12/20/01).

### **5. 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.

### **6. Expedited Reinstatement of Benefits**

Disability benefit recipients who stop work activity because of their medical impairments may avail themselves of an expedited reinstatement of benefits process. Expedited reinstatement (EXR) is available to former SSI and SSDI cash recipients who reapply for benefits with 60 months for the same or a closely related disability. Pub. L. No. 106-170, § 112, amending 42 U.S.C. § 423(I). 20 C.F.R. §§ 404.1592b, 404.1592c, 416.999, 416.999a. Individuals who appear eligible for EXR can receive provisional benefits for up to 6 months while SSA determines disability eligibility for EXR. 20 C.F.R. §§ 404.1592e, 416.999c. Provisional benefits will not be considered an overpayment if the person is determined ineligible for EXR, unless SSA determines that the individual knew or should have known that s/he was ineligible for

EXR. 20 C.F.R. §§ 404.1592e(h), 416.999c(h). SSA will consider the date of application for EXR as the date of application for a new application for benefits if EXR is denied. 20 C.F.R. §§ 404.1592f(h), 416.999d(f). SSA should explain the pros and cons of applying for EXR or filing a new application for benefits. *See* POMS 13050.020.

Eligibility for EXR essentially reinstates former SSI and SSDI recipients to a kind of EPE: recipients are eligible for SSI or SSDI benefit payments in months in which they do not work at the SGA level. *See* 20 C.F.R. §§ 404.1592f(d), 416.999c(d). After 24 months of eligibility for a benefit payment, recipients are reinstated to regular SSI or SSDI and are eligible for the work incentive programs associated with those programs. *See* POMS DI 13050.000 *et seq.*