

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

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NOTE:

This outline does not include changes to SSA access or appeal processes due to the corona virus public health emergency. See SSA's regularly updated corona virus webpage <https://www.ssa.gov/coronavirus/> to keep up with those changes as the situation evolves and changes are made in response.

This outline also does not include information about obtaining stimulus payments. See the SSA corona virus page for the evolving information for Social Security benefit recipients. For IRS filing requirements, see <https://www.irs.gov/coronavirus/non-filers-enter-payment-info-here>

See the portion of this outline on SSI income and resource eligibility for the effect of 2020 and 2021 stimulus payments and other pandemic related financial assistance, including federal and state enemployment benefits.

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1.1 Introduction

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

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

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

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

1.2 OVERVIEW OF SSI

1.2.1 SSI (Title XVI)

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

Massachusetts SSI State Supplement. Many states, including Massachusetts, supplement the FBR with state money. When the program was enacted and implemented in the early 1970s, states were entitled to choose whether and how to supplement the FBR. Massachusetts chose to supplement based on categorical eligibility, i.e., age, disability, or blindness, and living arrangement, i.e., full cost, shared living, or living in the household of another. Effective April 1, 2012, Massachusetts switched from federal administration to state administration of the Massachusetts SSI state supplement. For more information on the Massachusetts state supplement go to

<http://www.mass.gov/eohhs/consumer/basic-needs/financial/ssp.html> . After April 1, 2012, “SSI” refers only to the SSI Federal Benefit Rate and notices from the SSA apply only to SSI. The state supplement is determined, paid and noticed by the State Supplement Program (SSP). However, as a transition, SSA continued to determine and pay both SSI and the state supplement through March 2013 for those applications filed prior to April 1, 2012 and decided after that date. The state supplement regulations are at 106 CMR 327.010 – 327.300 on the website of the Department of Transitional Assistance, <http://www.mass.gov/eohhs/gov/departments/dta/> .

See **Exhibit 1A** for the SSI and SSP benefit rates in Massachusetts for 2021. The FBR plus the applicable state supplement is the **maximum** monthly amount of SSI that an eligible individual can receive.

In order to qualify for SSI, an individual must be eligible in each of the following five qualifying areas: 1) categorical, i.e., age, disability, or blindness; 2) income; 3) resources; 4) residence; and (5) citizenship or immigration status.

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

1.2.2 Massachusetts Medicaid (MassHealth)

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

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

The Medicaid program was created at about the same time as the SSI program, and states chose whether to provide Medicaid to SSI recipients or to make their own Medicaid eligibility determinations using different eligibility criteria. Most states, including Massachusetts, provide Medicaid to individuals who qualify for SSI. These states are known as “1634” states for the section of the Social Security Act governing the relationship of their Medicaid programs and the SSI program. They accept the SSA’s eligibility determinations for SSI as eligibility determinations for Medicaid. This means that SSI-eligible individuals do not need to file a separate Medicaid application with the state Medicaid agency. *See* 42 C.F.R. §435.909.

In Massachusetts, when SSI eligibility is determined, the SSA shares this information electronically with the Office of Medicaid, which issues a MassHealth card to the recipient. **MassHealth eligibility is also retroactive with retroactive SSI eligibility.**

Although recipients do not receive good notice of this, they can have their providers submit bills for covered services for the retroactive period.

Practice Note

Individuals who need MassHealth coverage before the SSI application has been decided can file an application with the state Medicaid agency. For application forms and other information, see www.mass.gov/MassHealth. In Massachusetts, the Medicaid agency uses a component known as the Disability Evaluation Service (DES) that performs disability determinations for MassHealth eligibility purposes.

Practice note re: SSDI applicants and recipients

Similarly SSDI applicants can also apply for MassHealth. SSDI recipients are not automatically eligible for MassHealth but can apply. MassHealth will accept the SSA's disability determination for the disability eligibility portion of the eligibility criteria.

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

Practice Note

See also state Medicaid Director Letter, dated April 22, 1997, available on the website of the Centers for Medicare & Medicaid Services (CMS) at <https://www.medicaid.gov/Federal-Policy-Guidance/downloads/SMD042297.pdf>

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

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

Practice Note

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

1.3 SOCIAL SECURITY INSURANCE BENEFITS (Title II)

1.3.1 Wage Earner Eligibility

The Social Security Insurance programs were enacted under Title II of the Social Security Act. These “Title II” programs pay monthly cash benefits to insured workers who have reached retirement age or who meet the SSA’s disability or blindness standard. The SSDI benefit program is the Title II program available to workers under Full Retirement Age who meet the SSA’s disability or blindness standard. It provides cash benefits for disabled workers who have a recent employment history. *See* 20 C.F.R. §§404.130, 404.315-.317. The Retirement Insurance Benefit (RIB) program is the Title II program available to retired workers at Full Retirement Age or as early retirement benefits as early as 62.. 20 C.F.R. §404.310. A permanent reduction applies to early retirement benefits. <https://www.ssa.gov/benefits/retirement/learn.html#h3>

Title II benefits are not needs-based and have no income or asset test. Instead, a worker must have earned “insured status” in order to be eligible for an SSDI or RIB benefit. 20 C.F.R. §404.110, 404.120. Insured status is earned by working in “covered” work and earning “quarters of coverage” (QCs). “Covered” work is work on which the social security taxes have been paid. Workers earn insured status by earning QCs in covered work. 20 C.F.R. §404.146. *E.g.*, in 2020, a worker had to earn \$1410 gross in covered work to earn one of the four quarters of coverage available per year. In 2021, that number is \$1470. *See* 20 C.F.R. §404.146; Increment Amounts - Exhibit, POMS RS 00301.250, for the QC amounts for prior years. No more than four QCs can be earned in any year. Most workers need 40 quarters to be “:fully insured.” The monthly cash benefit paid by the SSDI program is essentially based on the amount of time worked and the amount of earnings in “covered” work. *See* 20 C.F.R. §§404.210 -.212. **The worker’s base benefit is called the “primary insurance amount” (PIA).** 20 C.F.R. §404.201. Each January, the SSA determines whether a cost-of-living increase should be applied to current Title II benefits. 20 C.F.R. §§404.270-.278.

To qualify for SSDI, an individual must meet the SSA’s disability or blindness standard and must be “fully insured” and “currently insured,” *i.e.*, must have earned a certain number of quarters of coverage in proximity to the date of onset (generally within twenty out of the last forty calendar quarters). 20 C.F.R. §404.130. There are special provisions for younger workers (under age 31) for acquiring insured status and currently insured status for disability benefits. 20 C.F.R. §404.130. For the fully insured insured status requirements for retirement benefits, see 20 C.F.R. §404.115.

1.3.2 Benefits for Dependents and Survivors of Wage Earners

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

Eligible dependents and survivors and maximum benefit amounts include the following:

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

Receipt of dependents' benefits does not affect the benefit amount of the wage earner. SSA determines a "family maximum" benefit to cap the total benefit amount payable to a wage earner and the wage earner's dependents. 20 C.F.R. §§ 404.403. If the amount remaining in the family maximum after payment of the wage earner's monthly benefit is not sufficient to pay all dependents their full benefits, the SSA will reduce each dependent's benefit *pro rata*. See 20 C.F.R. §404.406 for the rules concerning the retroactivity of the reduction.

Practice Note

Under Massachusetts law, receipt of Title II dependent's benefits on the obligor's wage record should result in the obligor receiving a credit against his/her child support obligation. *Rosenberg v. Merida*, 482 Mass. 182, 697 N. E. 2d 987,990 (1998). *Rosenberg* held that such a credit is reasonable because the dependent's benefits derive from the wage earning record of the now-disabled obligor and that the same reasoning applies whether the obligor's benefit is SSDI or RIB. *Id.* at 990-991.

1.3.3 Immigration Eligibility Criteria for Social Security Insurance Benefits

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

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

SSA accepts the definition of “lawfully present” contained in regulations published by the Department of Justice, which were effective as of September 6, 1996. 8 C.F.R. §103.12; Evidence Requirements for Lawful Presence, POMS RS 00204.025(B). The overall definition of “lawfully present” is a noncitizen who has been inspected and admitted to the United States and who has not violated the terms of the status. Specifically included are the following: legal permanent resident aliens; refugees; asylees; certain parolees; certain conditional entrants; withholding of deportation status; Temporary Protected Status (TPS); Cuban/Haitian entrants; Family Unity beneficiaries; Deferred Enforced Departure (DED); applicants for asylum; and others. *See* 61 Fed. Reg. 47.039 - .041 (1996); Evidence Requirements for Lawful Presence, POMS RS 00204.025(B).

1.3.4 Medicare

Individuals who receive an SSDI or dependent’s or survivor’s benefit based on disability are eligible for Medicare. However, eligibility does not begin until the individual has received the benefit for 24 months. The only exceptions to the 24 month waiting period are people eligible on the basis of ALS or ERSD (End Stage Renal Disease). Retroactive periods of eligibility count toward the 24-month period. 42 U.S.C. §426; 42 C.F.R. §406. No application is necessary because eligibility occurs automatically in month 25 of eligibility. The SSA provides written notice of Medicare eligibility just prior to month 25. The notice explains that Medicare Part A is available without a premium. The notice also explains that the premium for Medicare Part B will be deducted from the individual’s Social Security Insurance benefit and that the individual may choose to opt out of Medicare Part B. In 2020, the Medicare Part B premium was \$144.30 for those with incomes lower than \$85,000. In 2021 it’s \$148.50. *See* <https://www.medicare.gov/basics/get-started-with-medicare> for more detail. Some individuals are eligible for state assistance with these premiums, *e.g.*, those eligible for MassHealth Standard or those who eligible for the Medicare buy-in (generally, up to 135% federal poverty guidelines). *See* <https://www.medicarefaq.com/faqs/medicare-savings-programs/> for the details.

Medicare, like private health insurance, has many coverage limitations, copays, and deductibles. MassHealth may be available to help with those out of pocket costs. Because the Massachusetts Medicaid program uses the same disability standard as the SSA, individuals with incomes below 133% of the federal poverty guidelines will be eligible for MassHealth Standard if they apply through the Office of Medicaid. Those with higher incomes may be eligible for MassHealth CommonHealth. Complete an application by telephone by calling the MassHealth customer service center, (800) 841-2900, TTY (800) 497-4648, or (877) MA ENROLL (623-6765); Contact the MassHealth Enrollment Center at 1-888-665-9993 for voice or at 1-888-665-9997 for TTY. Or, download an application from the MassHealth website at www.mass.gov/MassHealth. See <https://www.mass.gov/how-to/apply-for-masshealth-the-health-safety-net-or-the-childrens-medical-security-plan> for any updates, Another option is to complete an application in person with a navigator or a certified application counselor (CAC). <https://www.mahealthconnector.org/help-center> Many hospitals and health centers have certified application counselors.

Starting in 2006, Medicare includes a new Medicare prescription drug benefit, Modernization Act of 2003 (MMA) added Medicare Part D. This benefit replaces Medicaid drug coverage for those dually eligible for Medicaid and Medicare. To keep up with developments, see the following : <https://www.medicare.gov/drug-coverage-part-d>

1.4 ADMINISTRATION OF THE SSDI AND SSI PROGRAMS

1.4.1 Offices and Responsibilities

Both the SSI and the SSDI programs are administered by the SSA. District or field offices are the point of public entry to the Social Security programs for most persons. District office personnel take applications and appeals, receive and develop evidence, make preliminary decisions on non-disability claims, and offer public information.

Practice Note

There are ten Regional offices that oversee the district offices. Massachusetts is in Region I. The Region I office is located at JFK Federal Building, Room 1900, Boston, MA 02203 and can be reached at (617) 565-2881.

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

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

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

Implementing regulations for the SSI program are found at 20 C.F.R. §416 app. to subpt. K. Those for the SSDI program are found at 20 C.F.R. §404.170 - .290. The regulations are at https://www.ssa.gov/OP_Home/cfr20/cfrdoc.htm

The Program Operations Manual System (POMS) provides guidelines for day-to-day operations in the district offices and at DDS, although it does not have the force of law. The SSA often relies on the POMS to implement statutory changes until it goes through the formal rule making procedure for promulgating regulations. See the POMS at <https://secure.ssa.gov/apps10/poms.nsf/partlist> Additional operating instructions in the form of **Emergency Messages (EMs)** and **Chief ALJ Bulletins** are available at the same link.

Social Security Rulings (SSRs) are based on federal court and administrative decisions, policy statements, and opinions of the Office of General Counsel. Although not required to do so, SSA publishes its SSRs in the Federal Register. The SSRs are not published for notice and comment and do not have the force of law. However, they are binding on all components of the SSA. The SSRs are available on the SSA's website at https://www.ssa.gov/OP_Home/rulings/rulings.html

Emergency Messages (EMs) EMs provide emergency changes to operations instructions for SSA employees, generally prior to completing the longer process of making changes to relevant POMS instructions. EMs have been heavily used during the pandemic emergency to transmit policy and process updates to SSA employees.

Hearings, Appeals and Litigation Law Manual. Instructions used by employees of SSAs Office of Hearings Operations in processing and adjudicating claims at the hearing, Appeals Council review, and civil actions levels of appeal. The HALLEX is available on SSAs website at http://www.socialsecurity.gov/OP_Home/hallex/hallex.html

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

Federal case law - 42 U.S.C. §405(g) provides for a right of review in the federal courts for “final” administrative decisions. There are a great many federal court decisions interpreting the Social Security Act and regulations. Many are very fact specific and have little precedential value. Decisions interpreting the statute and regulations are often of value in federal court appeals but are generally of lesser value in the administrative appeals process. The SSA considers federal district court cases as not binding in the administrative appeals process. However, the SSA must apply U.S. Circuit Court of Appeals decisions, unless the government appeals or relitigates the issue. When the SSA disagrees with the interpretation of a court of appeals, the SSA must issue an acquiescence ruling that explains how the SSA will apply the decision. *See* 20 C.F.R. §§404.985(b), 416.1485(b). SSR 96-1p - Policy Interpretation Ruling—Application by the SSA Of Federal Circuit Court and District Court Decisions. See **Exhibit 1C** for further sources of law and information.

1.5 SSI ELIGIBILITY

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

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

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

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

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

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

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

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

1.5.3 Citizenship and Non-citizen immigration Status

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

1.5.4 Citizenship

For SSI purposes, a citizen of the United States is a person born in the United States, Puerto Rico, Guam, or the U.S. Virgin Islands. Individuals born in American Samoa, Swains Island, and the Northern Marianas Islands are United States Nationals and are treated as United States citizens for SSI purposes. 20 C.F.R.

416.1610(d). Citizenship may also be obtained through the naturalization process.

Practice Note

Immigrants who naturalize have the same rights to receive public benefits as other citizens. Many immigrants with disabilities have avoided the naturalization process for fear that they will be unable to complete certain parts. Others have tried and have not received reasonable accommodation. The Department of Homeland Security (DHS) is subject to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which requires programmatic access for individuals with disabilities.

1.5.5 SSI Eligibility for Noncitizens Prior to 8/22/96

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

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

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

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

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

(a) PRWORA Noncitizen Status Eligibility Criteria

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

- **refugees, asylees, and persons granted withholding of deportation**, but only for **seven years** (increased from five to seven years by Balanced Budget Act)

after obtaining these statuses. Basic SSI Eligibility and Development Requirements, POMS SI 00502.100 , Documentary Evidence of Qualified Alien Status, POMS SI 00502.130 . (Note that those who adjust to legal permanent resident status before the seven years runs remain eligible for the remainder of the period, and that Amerasians and Cuban/Haitian entrants are treated as refugees for the purpose of determining eligibility for time-limited benefits.) A two year extension of the 7 year period was available to some in this category, but it ended on September 30, 2011. POMS SI 00502.301 (Legislative efforts to extend were stalled as of 10.14.11);

- **“qualified aliens” who are honorably discharged veterans or active duty armed services personnel**, their spouses, and unmarried dependent children. Veteran or Active Duty Member of the Armed Forces, a Spouse or Dependent Child, POMS SI 00502.140;
- **legal permanent residents who have earned forty qualifying quarters** as defined by Title II of the Social Security Act (as of January 1, 1997, no quarter qualified in which the wage earner was also receiving a Federal means-tested benefit). LAPR with 40 Qualifying Quarters of Earnings, POMS SI 00502.135; and
- **legal permanent residents who may be credited with forty qualifying quarters** from one or both parents, if the quarters were earned before the individual turned age eighteen, or from their current spouse (the federal mean-tested benefit exception described above applies for quarters earned after January 1, 1997). LAPR with 40 Qualifying Quarters of Earnings, POMS SI 00502.135(B).

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

(b) Definition of “Qualified Alien”

The term “qualified alien” was first created and defined in Section 431 of the PRWORA. It was expanded by subsequent laws, including the 1997 Balanced Budget Act. With some exceptions, a noncitizen must have a status within the definition of “qualified alien” to qualify for SSI. **The definition of “qualified alien” now includes:** legal permanent residents; asylees; refugees; persons granted withholding of deportation; Cuban /Haitian entrants; persons paroled into the United States for a period of at least one year; and certain spouses and children affected by domestic violence. Basic SSI Alien Eligibility Requirements, POMS SI 00502.100 ; *see also* Qualified Alien Status Based on Battery or Extreme Cruelty by a Family Member, POMS SI 00502.116, for the domestic violence criteria.

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

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

August 21, 1996. Qualified Aliens Receiving Benefits on 8/22/96 (Balanced Budget Act of 1997, P.L. 105-33), POMS SI 00502.150(B)(2)(6) . The importance of being a “current recipient” is that most “current recipients” are “grandfathered” into the SSI program.

(d) Definition of “Lawfully Residing”

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

1.5.7 SSI Noncitizen Eligibility Criteria Now in Effect

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

(a) “Current Recipients” (Grandfatherees)

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

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

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

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

In addition, individuals who are long-term SSI recipients (since prior to January 1, 1979) will continue to be eligible in the absence of “clear and convincing evidence” of

ineligibility on the basis of immigration status. Eligibility on the Basis of Receiving SSI Benefits on an Application Filed Before January 1, 1979, POMS SI 00502.120(B).

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

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

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

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

(c) All Other Noncitizens

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

(d) Exceptions

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

- individuals born in Canada who establish one-half American Indian blood; and

- foreign-born members of federally recognized United States Indian tribes.

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

1.5.8 Verification

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

1.5.9 Reporting Requirement

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

Practice Note

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

1.5.10 Public Charge

By law, most noncitizens who want to get a green card or visa to the United States must show that they are not likely to become dependent upon government benefits for support, i.e., a “public charge.” DHS’s implementation of the public charge policy had been confusing and inconsistent. As a result, many immigrants have avoided seeking basic benefits and services for fear that use of such government programs would lead to denial of a green card or deportation.

Public Charge Policy – 1999 – 2/23/2020 and 3/9/2021 and later

In May 1999, the Department of Justice (DOJ) published proposed regulations at 64 FR 28,676. The DOJ also published a Field Guidance at 64 FR 28,689, which was immediately effective, pending publication of final regulations. The new guidance provides much needed standardization and clarification of the DHS public charge policy. See Alien Requests for Information About Possible Deportation for Receiving SSI, POMS SI 00501.450 for the SSA’s policy statement on the Field Guidance. Highlights of the public charge clarification include the following:

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

Use of MassHealth or other public health services by immigrants or their family members do not make the immigrants public charges, unless these or other government funds are used to pay for long-term care. 64 FR 28,682, 28,684, 28,685.

Public Charge Policy - 2/24/2020 – 3/9/2021

Update: On March 9, 2021 the U.S.Doj decided to stop defending use of the restrictive 2019 policies described below. This means that the 1999 policies described above are once again in use.

Restrictive revisions to the Public charge were published at 84 FR. 41202 (8/14/2019). The effective date was 10/15/2019 for applications for admission to U.S., to adjust to LPR status, and to change or extend a temporary status. However, implementation of the revisions was enjoined on 10/11/2019. On 2/21/2020, the U.S. Supreme Court lifted the last remaining injunction. The Department of Homeland Security began implementing the new policy on 2/24/2020. Litigation continues, but the revised policies are in place. To stay abreast of developments, see www.masslegalservices.org and/or the websites of Justice in Aging, www.justiceinaging.org . An overview of the current public charge policy is as follows.

- Adds noncash public benefits to those considered under public charge policy: SNAP; Federal Housing programs (Section 8 Housing Choice vouchers, Section 8 Project Based Rental Assistance, federal public housing; Medicaid (with some exceptions). Medicaid benefits that do not count for public charge consideration are State funded Medicaid benefits, Federal Medicaid benefits received by children under age 2, and pregnant woman (while pregnant and for 60 days after delivery, and Federal Medicaid benefits for emergency services.
- The newly included noncash public benefits received before 10/15/2019 will not be considered.
- Only public benefits received by the noncitizen applicant will be considered, i.e., not those received by family members.
- The Public Charge rule does not apply to 27 categories of immigrants, including: Asylees, refugees, battered immigrants/VAWA petitioners, trafficking victims, special immigrant juveniles, and people with U-visas or TPS, LPRS applying to renew their green cards, LPRS applying for U.S. citizenship, and DACA recipients renewing their DACA status.

1.5.11 Notes About Social Security Numbers

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

Practice Note

A child who does not have an SSN must apply for one when he or she applies for SSI. If the child meets the citizenship or immigrant status standards for SSI, the child will be eligible for an SSN. As of February 9, 1998, the SSN application for a child requires the SSA to request the parents’ SSNs. An exception applies to parents cannot be assigned SSNs. POMS GN 00502.107, GN 00502.117.

Regulations issued in 1996 provide that, based on a persons immigration status, a restrictive legend may appear on the face on an SSN card to indicate that work is either not authorized or that work may be performed only with DHS authorization. 20 C.F.R. §422.103. In addition, SSA has setting a limit on the number of replacement SSN cards. Unless the individual provides evidence establishing significant hardship if a replacement card is not issued, SSA will limit individuals to 3 replacement cards per year and 10 per lifetime. 20 C.F.R. §422.103.

1.5.12 Financial Eligibility - Resources

Eligibility for SSI is dependent upon the financial position of the applicant and, in some cases, on that of other members of the applicant’s household. One consideration of financial eligibility is the resource eligibility of the applicant or recipient. The SSI resource limit is \$2,000 in countable resources for an individual, and \$3,000 for a couple.

Certain resources are excluded. The following information can be used to determine if an applicant/recipient is eligible to receive SSI benefits. 20 C.F.R. §416.1200 et seq.

(a) *Definition of a Resource*

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

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

20 C.F.R. §416.1201.

(b) *Valuation of Resources*

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

(c) *Resource Limit*

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

(d) *Timing*

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

Example

Maria, an SSI recipient, received \$800 in wages in January 2021. These funds will be counted under the SSI income rules for January. Any remaining funds retained as of the first moment of February 1, 2021, count toward her countable resource limit for February 2021, and in subsequent months until spent down.

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

Example

Joe, an SSI recipient, had \$2,500 in countable resources on January 1 2021. He is not eligible for SSI for the month of January, even if he reduces his countable resources below \$2,000 before the end of the month.

(e) *Countable Resources*

Countable resources are those that are considered toward the SSI resource limitation. Examples of countable resources include the following: cash on hand that is not current month's income; money in savings, checking, or credit union accounts that is not current month's income; stocks and bonds; certificates of deposit; U.S. savings bonds; land or property on which the person does not reside; life insurance policies with a face value of over \$1,500; and certain trusts created to benefit the recipient. 20 C.F.R. §416.1205.

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

(f) *SSA Access to Financial Institutions*

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

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

- Good cause exists if permission cannot be obtained from the individual and there is evidence that the individual is harassing you, abusing you, or endangering your life.
- Good cause may exist if an individual other than one listed in paragraph 20 C.F.R. §416.207(h)(3) of this section refuses to provide permission and: you acted in good faith to obtain permission from the individual but were unable to do so through no fault of your own, or you cooperated with us in our efforts to obtain permission.
- Good cause does not apply if the individual is your representative payee and your legal guardian, if you are a minor child and the individual is your representative payee and your custodial parent, or if you are a noncitizen and the individual is your sponsor or the sponsors living-with spouse.

20 C.F.R. §§416.207, 416.1321.

(g) *Excluded (Noncountable) Resources*

Examples of excluded resources include the following:

- The **home in which the person lives** and the contiguous land on which it stands. 20 C.F.R. §416.1212.
- **One vehicle, regardless of value**, if used for transportation for the SSI recipient or a member of the recipient's household. This rule is effective as of 3/9/05. All other vehicles are countable as to their equity value. 20 C.F.R. §416.1218. (The rule prior to 3/9/05 excluded one car, regardless of value, if necessary for work or

to get to medical services and appointments, or if specially modified to transport a person with disabilities. It also allowed for the exclusion of up to \$4,500 of the current market value of a second vehicle.)

- Prior to 3/9/05, **personal or household goods** were excluded if total equity value was under \$2,000. Effective 3/9/05, personal effects are considered separately from household goods. Amended rule 20 C.F.R. §416.1216, excludes household goods if found in or near the home and used on a regular basis or if needed for maintenance, use and occupancy. Personal effects are excluded if ordinarily worn or carried by the individual or otherwise intimately related to the individual.
- **Life insurance policies** with a face value under \$1,500. 20 C.F.R. §416.1230.
- **Burial funds** of \$1,500, or less, if the person owns any excluded life insurance (see above). These funds must be specifically identified as burial funds and set aside in a separate account. See 20 C.F.R. §416.1231(b)(1). The value of this exemption must be reduced by certain other burial funds excluded from countable resources. 20 C.F.R. §416.1231(b)(5).
- **Burial plots or spaces.** An individual may exclude both burial spaces and burial funds. 20 C.F.R. §416.1231(b)(1).
- **Property used for self-support.** Effective May 1990, all property used in a trade or business or property used by an employee for work is excluded regardless of its value. Property Essential to Self-Support - Overview, POMS SI 01130.500(B)(1)(a) (1994). This includes up to \$6,000 equity in non-business property used to produce “goods or services essential to daily activities.” See Property Essential to Self-Support - Overview, POMS SI 01130.500(B)(1)(b) (1994); Essential Property Excluded Regardless of Value or Rate of Return, POMS SI 01130.501 (1990); and the examples included therein.
- The **proceeds from the sale of a home**, if the proceeds are used within three months to purchase another primary residence. 20 C.F.R. §416.1212(d).
- **Underpayments of SSI and Social Security benefits for nine months from the month of receipt**, effective for payments received on or after 3/2/04. 20 C.F.R. §416.1233, as amended by Section 431, Pub.L.No.108-203 (3/2/04). The exclusion period prior to 3/2/04 was six months. *See* 1.12, Eligibility Redeterminations, below, for the rules on certain retroactive awards of SSI for children.
- **Federal Income Tax Refunds, Earned Income Tax Credits, Child Tax Credits, Making Work Pay Tax Credits, First-Time Homebuyer’s Tax Credits and Deemed First Time Homebuyer’s Tax Credits are excluded for 12 months from the month of receipt.** The change was made by the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (JCA) (P.L. 111-312) and is effective for refunds and tax credits received after December 31, 2009. *See* POMS SI 01130.676. Prior to December 31, 2009, the following exclusions applied: 9 months - Federal Income Tax Refunds, EITC and CTC; 2 months - MWP; no asset exclusion - First-Time Homebuyers Tax Credit and Deemed First-Time Homebuyers Tax Credit. **Note that the changes do not apply to refunds of state and local income taxes**, which will continue to count toward the asset limit with the month after the month of receipt.
- **Resources identified as necessary to fulfill a Plan to Achieve Self-Support (PASS).** 20 C.F.R. §416.1210(f). *See* 1.14.3, Plans to Achieve Self-Support (PASS), below.

- **Real property, for up to nine months, pending efforts to sell.** Conditional benefits are paid during this time and are recoverable as overpayments upon sale of the property. 20 C.F.R. §416.1245.
- **Real property, the sale of which would cause undue hardship,** for example, if upon sale a co-owner of the property would be rendered homeless. 20 C.F.R. §416.1245.
- Effective with benefits payable in July 2004, **any grant scholarship, fellowship, or gift for the cost of tuition or fees, for nine months.** 20 C.F.R. §416.1210 (u). POMS SI 01320.115.
- **All federal student financial assistance** received under Title IV of the Higher Education Act, including federal work study, or under BIA student assistance programs, is excluded from income and resources, regardless of use. POMS SI 00830.455B.
- **Under \$100,000 in funds held in a beneficiary’s ABLÉ Account.** See POMS SI 01130.740.
- **Disbursements from ABLÉ Accounts** are not countable resources in the month of disbursement if for a QDE. If for a non-housing QDE, they also do not count in subsequent months, if identifiable, as long as eventually spent on a non-housing QDE. If for a housing related QDE, the disbursement will count as a resource if not spent in the month of disbursement. POMS SI 01130,740.
- Certain **pandemic related financial assistance** is not counted as income or as a resource. See EM EM-20014 REV 4 (9/30/2021) and EM-21050 (9/30/2021). <https://secure.ssa.gov/apps10/reference.nsf/instructiontypecode!openview&restricttocategory=EM>

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

(h) Jointly Held Accounts at Financial Institutions

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

- If an SSI applicant or recipient is the only named holder, SSA presumes sole ownership in the holder.
- If there are joint holders and only one holder is an SSI applicant or recipient, SSA presumes sole ownership in the SSI applicant or recipient. If more than one joint holder is an SSI applicant or recipient, SSA presumes equal shares ownership in the SSI applicants or recipients. However, SSA allows rebuttal of both of these presumptions. See Checking and Savings Accounts, POMS SI 01140.200, SI 01140.205.
- It may be possible to rebut SSA’s ownership presumptions. See SI 01140.205D.

(i) Resource Deeming

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

Resource Exclusions

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

Parent-to-Child Resource Deeming Mechanics

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

Example

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

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

Sponsor-to-Alien Deeming Changes

The PRWORA, Pub. L. No. 104-193 (Aug. 22, 1996) required the DHS to design a new legally enforceable affidavit of support to be used by immigrants who enter with sponsors. The form is effective for use after December 19, 1997. For immigrants whose sponsors have signed the new affidavit, deeming will apply until the immigrant attains United States citizenship or earns forty quarters of coverage. Remember that after December 31, 1996, no quarter of coverage will count for SSI eligibility purposes if the noncitizen received a federal means-tested benefit during that quarter. See SSI Eligibility for Noncitizens On and After 8/22/96, above. This deeming change applies only to immigrants with sponsors who have signed the new affidavits of support. Note that the old deeming rules in the SSI program continue to apply to immigrants whose sponsors signed the old affidavit of support. Sponsor-to-Alien Deeming, POMS SI 00502.200(A)(2) .

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

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

1.5.13 Transfer of Asset Penalty

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

Prior to July 1, 1988, a 24-month transfer of asset penalty existed. This penalty provision was eliminated on July 1, 1988, by the Medicare Catastrophic Care Act. Between July 1, 1988 and December 14, 1999, SSI recipients could transfer, or give away, countable resources without affecting their SSI eligibility. The SSA was required to report any transfers made during this period of time to the state Medicaid administering agency in order to assist the implementation of Medicaid transfer laws.

The reinstated transfer of asset penalty, effective for transfers made on or after December 14, 1999, was contained in the Foster Care Improvements Act of 1999, Pub. L. No. 106-169, 206 (Dec. 14, 1999) (amending 42 U.S.C. §1382b(c)). The new transfer penalty will penalize an individual who disposes of assets for less than fair market value within a 36-month “look back” period. The penalty for such a transfer is SSI ineligibility for the number of months equal to the amount of the uncompensated value of the transferred asset, divided by the maximum monthly SSI benefit payable to that individual after considering the individual’s living arrangement and eligibility category (aged, blind, or disabled), capped at 36 months. SSA has not promulgated regulations for the reinstated

transfer of asset penalty, relying instead on the POMS at SI 01150.000 et seq.
Implementation

Example

Tom is a Massachusetts recipient of SSI and SSDI benefits who inherited \$5,000 from his deceased uncle. In 2021, he receives \$520 in SSDI and \$294 in SSI. Knowing he could have up to \$2,000 in countable resources and maintain his SSI eligibility, he disposed of \$3,000. He purchased new furniture, paid some debts, and gave his brother \$2,000 to help pay his college tuition. When he reported to the SSA, Tom was informed that the \$2,000 gift to his brother was subject to the transfer of asset penalty because Tom received no value for the gift of \$2,000. Tom will face a transfer penalty for a period of two months as a result of the penalized transfer, unless an exception to the penalty application applies. The penalty period is calculated by dividing \$2,000 by \$794 (the 2021 SSI Federal Benefit Rate) and rounding down to the nearest whole number. *See* Computing the Period of Ineligibility for Resources Transferred on or After 12/14/99, POMS SI 01150.111.

Practice Tip

Clients should be advised that they must spend down excess funds on themselves for fair market value. They must also keep receipts to verify when the funds were spent and on what. To facilitate the verification, the funds should be kept in a separate account, identifiable from other funds of the beneficiary.

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

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

See POMS SI 01150, 120.

1.5.14 Transfers and Trusts

The transfer of asset issue is raised when an SSI recipient (or spouse) uses resources to create a trust. Between July 1, 1988 and December 14, 1999, SSI recipients could transfer assets (retroactive awards, personal injury settlements, etc.) to a trust without incurring a transfer penalty. As long as the trust satisfied the SSI resource rules for noncountability, SSI eligibility was not affected. Only Medicaid eligibility for long-term care or other institutional coverage was affected by such a transfer during that period of time.

Effective December 14, 1999, SSI recipients face transfer of asset penalties when they (or their spouses) transfer assets to a trust. There are exceptions to the rule, which are similar to the exceptions in the Medicaid program. These include transfers to a “pooled” trust or to a “Medicaid payback” trust for the benefit of a disabled individual under age sixty-five. *See* 42 U.S.C. §1382b(c)(1)(B). A hardship waiver is also available. As of this

writing, the SSA had issued only subregulatory instructions to implement these changes. *See Other Resources Provisions, POMS SI 01150.001 - .210.*

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

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

1.5.15 SSI Eligibility - Income

(a) Definition of Income

Income is anything an individual receives in cash or in kind that could be used either directly, or by conversion, to meet one’s basic needs for food, clothing, or shelter. 20 C.F.R. §416.1102. Almost all income is countable, although there are certain income deductions and exclusions. Countable income reduces the maximum monthly benefit amount to which an SSI recipient would otherwise be entitled. If large enough, countable income can reduce the benefit amount to \$0, making the individual financially ineligible for SSI. 20 C.F.R. §416.1100 et seq.

(b) Types of Income

Unearned Income

Unearned income consists of income from non-work sources, including: alimony; child support; pensions; annuities; rents; interest from bank accounts; Social Security benefits; VA benefits; worker’s compensation benefits; unemployment benefits; prizes; awards; gifts; and inheritances. 20 C.F.R. §416.1121.

Earned Income

Earned income is income from work, including: wages; salary; tips; commissions; and bonuses paid through employment or self-employment. 20 C.F.R. §416.1110.

In-Kind Income

When an SSI recipient receives food or shelter-related items for free or at a reduced charge, SSA counts the value of the item received as in-kind income. 20 C.F.R. §416.1130. SSA does not count the value of free or low-cost goods or services that are not food or shelter-related, e.g., entertainment, car maintenance, medical supplies, etc. For the items that count as shelter-related, see 20 C.F.R. §416.1133(c). POMS SI 00835.465. **Note: effective 3/5/05, gifts of clothing to SSI recipients are no longer count as in-kind income.**

Garnished Income

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

Overpayment Recovery

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

(c) *Basic Income Rules*

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

(d) *Income Exclusions*

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

Examples of excluded income include:

- income tax refunds;
- proceeds of a loan (however, if the proceeds are not spent in the month received, they will be counted as a resource in the following month);
- **bills paid by others, directly to the vendor, for goods or services that are not food or shelter** (Note: effective 3/5/05 clothing paid for by others will not as income to the SSI recipient);
- weatherization assistance;
- any portion of a grant, scholarship, or fellowship used for paying tuition, fees, or other necessary education expenses (Note that all student financial assistance received under Title IV of the Higher Education Act of 1965, or under BIA Student Assistance Programs, is excluded from income and resources, regardless of use. Title IV programs include: Pell Grants; federal work study programs; Upward Bound, and others specified in POMS SI 00830.455.);
- one-third of child support paid by an absent parent for a minor child (child support is countable income to the child for whom paid POMS SI 00830.420);

- assistance based on need from a state or local government, including rent subsidies;
- in-kind income based on need provided by nonprofit organizations;
- impairment-related work expenses;
- domestic commercial airline tickets received as gifts, as long as not cashed in;
- income earned by a blind or disabled student under age 22 regularly attending school, up to \$1930 per month capped at \$7770 per calendar in 2021.
- Food stamps;
- effective July 2004, all interest and dividend income earned on countable resources, see 430, Pub.L.No.108-203(3/2/04);
- effective 7/04, the amount excluded for infrequent or irregular earned income increased to \$30 per quarter, pursuant to 430, Pub.L.No. 108-203 (3/2/04), POMS SI 00810.410; and
- effective 7/04, the amount excluded for infrequent or irregular unearned income increased to \$60 per quarter, pursuant to 430, Pub.L.No. 108-203 (3/2/04), POMS SI 00810.410.
- ABL Account Disbursements are not countable income. They are instead a resource has changed form. POMS SI 01130.740. See section 1-5.12(g) above for ABL Account distributions and resources.
- Certain pandemic related financial assistance is not counted as income or as a resource. See EM EM-20014 REV 4 (9/30/2021) and EM-21050 (9/30/2021). <https://secure.ssa.gov/apps10/reference.nsf/instructiontypecode!openview&restricttocategory=EM>

(e) Income Deductions

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

General/Unearned Income Deduction

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

Earned Income Deduction

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

$$\begin{array}{r}
 \$585.00 \\
 - \underline{20.00} \text{ (if unused on unearned income)} \\
 \$565.00 \\
 - \underline{65.00} \\
 \$500.00 \\
 \text{divided by 2} = \$250.00 \text{ (countable income to child)}
 \end{array}$$

See 20 C.F.R. §§416.1112(c)(5)&(7).

(f) Income Deeming

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

Deeming Circumstances

Deeming applies only in the following situations:

- from SSI-ineligible spouse to SSI-eligible spouse in the same household;
- from SSI-ineligible parent to SSI-eligible child in the same household;
- from sponsor to SSI-eligible noncitizen (see 1.5.11, Financial Eligibility - Resources, above, for PRWORA changes); and
- from SSI-ineligible essential person. (See 20 C.F.R. §416.1160(d) for the definition of "essential person." Since essential persons had to be identified prior to 1974, there are few left.)

Deeming Process - Parent-to-Child Income Deeming

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

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

Deeming Process - Spouse-to-Spouse Income Deeming

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

couples who face a “change in circumstances.” Some of these circumstances include the following:

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

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

Deeming Process - Sponsor-to-Alien Income Deeming

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

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

(g) Counting In-Kind Income

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

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

- **One-third reduction rule** - When an SSI applicant or recipient lives in the household of a person who supplies **both** food and shelter, the SSI benefit amount will be reduced by one-third of the SSI FBR. 20 C.F.R. §416.1131. In Massachusetts, this puts the SSI recipient in the lowest SSI payment category, Living in the Household of Another.
- **Presumed maximum value rule** - This rule applies when the One-third reduction rule does not apply, i.e., only shelter is provided or the SSI recipient makes partial payment for food or shelter. Under this rule, the SSA reduces the SSI recipient's benefit by the lesser of the actual value of the in-kind income or one-third the FBR plus \$20 (the presumed maximum value) 20 C.F.R. §416.1140. This rule does not apply if every member of the household receives public income-maintenance payments.

Practice Note – In-Kind Loans

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

Practice Note: ABLE Accounts

Instead of giving money to or paying for items for an SSI recipient, third parties can consider contributing to the recipient's ABLE Account. These funds do not count as income to the SSI recipient when the third party deposits them and will not count as in-kind income or as an asset when disbursed - if rules for disbursements are followed. See POMS SI 01130.740. Current limitations are 1) that eligibility for ABLE Accounts is limited to those who acquired their disability prior to age 26, and 2) that total annual contributions to an ABLE Account are capped at \$15,000. For information on Attainable the Massachusetts ABLE Account see <https://www.mefa.org/save/attainable-savings-plan> and <https://www.fidelity.com/able/attainable/overview>

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

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

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

1.6 APPLICATIONS AND APPEALS

1.6.1 Applications

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

(a) *Who Can Apply?*

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

(b) *How to Apply*

The application must be in writing using an SSA form and can be filed at any convenient district office. Applications for Title II benefits (not SSI for most applicants) and the Adult Disability Report form (SSA 3368) for both SSI and SSDI applications may be completed online on SSA's website, <https://www.ssa.gov/benefits/disability/> Individuals can make an appointment with SSA to complete an application in person at an SSA office or by telephone. Also note that helpful application starter kits are available on SSA's website. www.socialsecurity.gov/applyfordisability

Practice Note: The applicant must sign the application, with very limited exceptions. 20 C.F.R. §§404.612(g) – 404.613, 404.320, 416.315(c), POMS GN 00201.010.

(c) *Retroactivity*

Prior to the PRWORA, Pub. L. No. 104-193 (Aug. 22, 1996), SSI payments could be retroactive to the date of application or the date all eligibility requirements were met, whichever was later, benefit payments were prorated for a partial month of eligibility. Section 204 of the PRWORA changed the effective date of an SSI application to the first day of the month after the month in which the application is filed and the individual becomes eligible. 20 C.F.R. 416.330, 416.331. For example, the first possible payment month for an SSI application filed on August 1, 2020, would be September 2020. The maximum retroactivity on applications for Title II disability benefits, including SSDI, is twelve months prior to the month of application. Whether the applicant is eligible for the maximum retroactivity depends on the date of disability onset. For example, an individual applies for SSDI on December 31, 2019. However, SSA determines the date of disability onset as May 2019. Due to the five month waiting period from the date of disability onset, the first possible payment month is November 2019.

(d) *Treating an Application Under One Title as an Application Under both Titles*

SSA will treat the filing of an application for either SSDI (Title II) or SSI (Title XVI) as an inquiry about the other benefit and will utilize that date if an application is filed within sixty days. 20 C.F.R. §416.350. POMS GN 00201.005C.5., SI 00601.035.

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

If an applicant writes or inquires orally about SSI, the SSA will mail a notice explaining the right to apply, and, if an application is completed within sixty days, the date of the initial inquiry is considered the application date. This is known as a “protective filing date.” POMS GN 00204.007.

(f) *Failure to Cooperate*

If an applicant refuses permission to verify the contents of the application, the SSA can withhold further action for failure to cooperate. *See* Failure to Cooperate, POMS GN 00205.001, SI 00601.110.

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

If a claimant can show that misinformation from the SSA resulted in late filing, the claimant may be considered to have applied on the date of the misinformation or the date all eligibility criteria are met, whichever is later. POMS GN 00204.008. It is important that the claimant have the name of the SSA worker and the date of contact with the SSA in order to prove a misinformation allegation. In fact, it is always good practice to keep a log of when and with whom the applicant spoke during an SSA contact.

(h) *Necessary Documents*

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

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

<https://www.ssa.gov/benefits/disability/>

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

(i) *Applicant's Rights*

Individuals have the right to apply for SSI benefits regardless of whether the SSA believes they will be found eligible. *See* 20 C.F.R. §§416.305, 404.603, POMS GN 00201.005C. They also have the right to be informed of all SSA-administered benefits they might eligible for and to be assisted in developing evidence to meet the eligibility criteria.

(j) *Communication Access*

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

<http://www.socialsecurity.gov/multilanguage/langlist1.htm>

As a result of a federal court decision in *American Council of the Blind v. Astrue*, No. 05-04696(N.D.Cal. Oct.3, 2008) blind and visually impaired beneficiaries and representative payees have additional choices in how they receive notices from SSA including large print, Braille, and Microsoft Word CD. <http://www.socialsecurity.gov/notices/index.htm>, <https://www.ssa.gov/people/blind/> <https://secure.ssa.gov/apps10/poms.nsf/lrx/0901001000> (Notice options)

See SSA's Multilanguage Gateway website page for more information on language access. <https://www.ssa.gov/site/languages/en/> Also note that SSA has publications in many languages other than English available in the Publications section of its website. <https://www.ssa.gov/pubs/>

(k) SSI Requirement to File for Other Benefits (20 C.F.R. §416.210)

As noted above, SSI is a needs-based federal welfare program. As such, an applicant or recipient must seek assistance from any other program for which the applicant may be eligible before seeking assistance from the SSI program. For instance, a disabled worker must seek worker's compensation benefits, SSDI benefits, or any other non-needs-based benefit, if potential eligibility exists, prior to applying for SSI. The SSA will inform the SSI applicant of all other benefits that could potentially assist the applicant. Applicants (or recipients) who fail, without good cause, to apply for any and all other benefits for which they may be eligible will be denied SSI.

(l) Quick Disability Determination (QDD)

The Quick Disability Determination process began as part of the Disability Service Improvement (DSI) initiative in the Boston region (SSA's Region 1) but has been expanded nationwide. *See* 72 Fed. Reg. 51173 (9/6/07). The purpose of QDD is to make a quick decision in obvious cases. SSA states that it uses criteria highly predictive of disability to determine which cases are selected for QDD consideration. Criteria may include medical history, treatment, and the availability of medical evidence - not necessarily specific impairments. Selection for QDD processing is done by SSA, based on the information in the application. 20 C.F.R. §§404.1619, 416.1019, POMS 23022.010. SSA will not entertain requests from advocates and claimants to have claims designated as QDD.

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

1.6.2 Appeals Process Overview

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

NOTE: Effective August 1, 2006, a revised administrative appeals process became effective through regulations promulgated at 20 C.F.R. §405.000 et seq. for initial disability claims. SSA piloted this process, known as Disability Service Improvements (DSI) in SSA’s Region 1 states (Connecticut, Maine, Vermont, Massachusetts, New Hampshire, and Rhode Island). SSA promulgated new Uniform Process rules on 12/16/16 that rescinded 20 C.F.R. §405.000. The uniform process rules, effective 1/17/17, revised the administrative appeals process nationwide. 81 FR 90987 (12/16/16).

(a) *Time*

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

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

(b) *Appeal Form*

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

- *Request for Reconsideration* - Used to appeal an initial determination.
- *Request for Hearing* - Used to appeal a reconsidered determination and bring the issue before an administrative law judge (ALJ).
- *Request for Review of the Hearing Decision* (Appeals Council) - Used to appeal an ALJ’s decision and bring the issue before the appeals council.

Practice Note

These, and many other SSA forms, are available on the SSA's website at www.ssa.gov/online/forms.html. In addition, increasingly, appeals can be filed online. See <https://www.ssa.gov/benefits/disability/appeal.html> to keep current with the appeals that can be filed online. Also SSA requires Appointed Representatives seeking Direct Fee payment to file appeals online, as online access becomes available. See *infra* §1.6.6 Rules of Representation.

Each form is a one-page, multi-copy document that is very simple to complete. However, a timely appeal can be made with any clear written request before the appeal time runs. A letter identifying the claimant (name, address, telephone, SSN) and indicating that a claimant wishes to appeal the denial of benefits received by the SSA during the appeal period will suffice to protect the claimant's appeal rights. The Social Security Act requires the claimant to complete the appropriate form. However, appeal rights will already have been preserved.

1.6.3 Initial Determinations

(a) Disability Determinations

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

Massachusetts law requires that existing medical evidence be provided to a claimant or claimant's advocate free of charge when requested for the purpose of supporting a claim or appeal under any provision of the Social Security Act or any federal or state financial needs-based benefit program. See MG.L. c. 111, —70 (hospitals, clinics); MG.L. c. 112, §12CC (physicians). "Existing medical evidence" includes doctor's notes, nurse's notes, hospital charts, and anything else that was in existence at the time of the request for medical information and was not prepared specifically in response to that request. The law does not require medical providers to write letters or fill out forms for no charge, although many will do so.

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

(b) Determinations Involving Other Than Disability

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

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

If an initial decision concerns the termination, reduction, or suspension of SSI benefits, the recipient shall receive continuing benefits pending the reconsideration decision if he or she files the appeal within ten days of receipt of the notice. 20 C.F.R. §416.1336(b).

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

The five-day mailing rule and the good cause for late filing rules apply to both of these ten-day rules. *See* Due Process Requirements - Title XVI, POMS DI 40515.010; Time Limit for Electing Benefit Continuation - Title II/Title XVI, POMS DI 12027.008.

§ 1.6.4 Reconsideration

Reconsideration is the first step in the administrative appeal process. The Reconsideration regulations are at 20 C.F.R. §404.913-404.922 for Title II benefits and at §§416.1407-416.1422 for title XVI benefits. The format of the appeal varies with the type of decision.

(a) *Reconsideration: Disability Determinations*

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

(c) *Reconsideration: Other SSI Eligibility Determinations*

When the decision involves SSI non-disability eligibility criteria, the appeal stays in the district office. The applicant may supply new evidence and may request a formal or informal conference at the district office. 20 C.F.R. §416.1413. The conferences are an

opportunity to have the SSA explain the decision in person and to present opposing views. The difference between formal and informal conferences is basically that subpoenas may be used in formal conferences. If a conference is not requested, the district office staff will review the decision and all the evidence, including any new evidence. After the district office makes a decision, a new notice will be sent to the applicant explaining the decision and the right to file a *Request for Hearing*.

The Reconsideration format option for Title II benefit appeals is limited to case review – unless the appeal involves a disability determination, as explained below. 20 C.F.R. §404.913.

(d) Special Appeals Process for Disability Terminations

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

These hearings are conducted by DDS hearing officers. The DDS will issue a reconsidered decision explaining the decision and the recipient's right to request a further appeal. If the DDS hearing decision upholds the termination, the recipient is still entitled to a de novo hearing before an ALJ. The recipients may also request continuing benefits pending appeal if they file the next appeal with ten days of the date of receipt of the DDS hearing notice and request continuing benefits. 20 C.F.R. §§404.1597a, 416.996.

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

The ALJ hearing step of the administrative appeal process has historically been the most important appeal stage in that the highest reversal of unfavorable decisions occurs here. This is the only step in the administrative review process where the decision maker sees and speaks with the applicant. About 50 percent of the cases appealed to this stage will be reversed. The hearings are de novo and are conducted by independent ALJs at the Office of Hearings Operations (OHO). New evidence may be submitted for the ALJ's consideration but see below for the details and limitations. 20 C.F.R. §§404.935, 416.1435, The ALJ will review all the evidence, including any new evidence submitted, and take testimony from the applicant or recipient and any witnesses called by the applicant or recipient. 20 C.F.R. §§404.929, 416.1429.

The ALJ may schedule a medical expert (M.E.) or vocational expert (V.E.) to provide opinions on medical or vocational issues. 20 C.F.R. §§404.1527, 404.1560, 416.927, 416.960, HALLEX I-2-5-48. The role of these experts is to provide opinion testimony in areas in which the ALJ lacks expertise. If present at the hearing, they will review the record, listen to testimony, and respond to the ALJ's questions. The ALJ will pose hypothetical questions to the vocational expert concerning the claimant's capacity for work. The claimant's advocate has the right to cross-examine the medical expert and the

vocational expert. Since there is no opportunity to depose these experts in advance, the best way to prepare for cross examination is to be very prepared with record evidence and your theories of the case. When the record has closed, the ALJ will then make a new decision and issue a notice explaining the decision and the right to appeal to the appeals council.

Depending upon the location, it may take up to twelve or more months to get an ALJ hearing date (from the date a request is filed). The appellant will be notified at least seventy-five days prior to hearing of the date of the time and location of the scheduled hearing. 20 C.F.R. §§404.938, 416.1438. The notice will also indicate whether experts will be in attendance and will include a general statement of the issue to be decided. Be sure to check the statement of the issue so that you can file a timely objection if necessary.

Memoranda outlining a claimant's case and providing relevant regulations and SSA policies may assist in explaining a claim to the ALJ. Consider providing a pre-hearing and/or a post-hearing memorandum. See below for time limits. It may be impossible to anticipate and address all issues prior to the hearing. In this event, a request for time to provide a memo, or supplemental memo, will generally be granted.

Remember that the SSA must provide communication access at hearings for appellants who are deaf and interpreters at hearings for individuals who do not speak English or who have limited English proficiency.

Video Teleconferencing of Hearings

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

Note: Since SSA closed its offices in March 2020 due to the pandemic, all ALJ hearings have been conducted by phone or by Video using the Microsoft Teams platform (the video option was not added until early Spring 2021. As of November 2021 there was no word on when in-person hearings would again be offered.

Uniform Process Rules at the ALJ Level of Appeal

1. *Advance notice requirement* is 75 days. 20 C.F.R. §§404.938, 416.1438, 20 days for amended notices of hearing. 20 CFR 404.938(d), 416.1438(d).
2. *Objections as to time and place of hearing* must be made within 30 days after receipt of the hearing notice. 20 C.F.R. §§404.936, 416.1436.
3. *Objections to issues in the hearing notice* must be made at least 5 business days in advance of the hearing. - 20 C.F.R. §§ 404.939, 416.1439. Note that the issues before the ALJ include all issues raised by the claim, regardless of whether the issues have already been decided in the claimants favor. ALJs may consider new issues at any time

after sending out the notice of hearing and before sending out the notice of decision - as long as the ALJ provides the claimant with an opportunity to address it.

4. *ALJ Evidence submission* - 20 C.F.R. §§404.935, 416.1435.
 - a) Evidence must be filed at least 5 business days prior to the hearing.
 - b) ALJs may accept and consider new evidence filed less than 5 days prior to the hearing or at the hearing if:
 - i. SSAs action mislead the claimant, or
 - ii. Claimant has physical, mental, educational or linguistic limitations, or
 - iii. Some other unusual, unexpected or unavoidable circumstance beyond the claimant's control prevented earlier filing.
 - c) The ALJ will accept and consider new evidence after the hearing but before the hearing decision if:
 - i. One of the three exceptions in 5.b. above applies, and
 - ii. There is a reasonable probability that the evidence, when considered alone or with the other evidence would affect the outcome.
 - d) The ALJ will consider new evidence after the ALJ decision if:
 - i. One of the three exceptions in 5.b. above applies, and
 - ii. There is a reasonable probability that the evidence, when considered alone or with the other evidence of record would change the outcome, and
 - iii. If submitted within 30 days of receiving the ALJ decision.
 - e) The claimant may ask the ALJ to hold the record open at the hearing. The ALJ may hold the record open if
 - i. the claimant is aware of additional evidence which she has been unable to obtain prior to the hearing, or
 - ii. the claimant is scheduled to undergo medical evaluation.
 - f) *Duty to Submit All Evidence* - 20 C.F.R. §§404.1512, 416.912.

Effective 4/20/2015, SSA regulations require the claimant to inform SSA about or submit all known evidence that relates to the disability or blindness claim. Representatives must help the claimant obtain and submit the required evidence. The regulations contain limited exceptions for attorney client privilege and work product. 20 C.F.R. §§404.1512, 416.912. Other regulations provide for penalties for failure to disclose material evidence. 20 C.F.R. §498.102.

In October 2017 SSA issued **SSR 17-4p**, explaining that "... we expect representatives to submit or inform us about written evidence as soon as they obtain or become aware of it. Representatives should not wait until 5 business days before the hearing to submit or inform us about written evidence unless they have compelling reasons for the delay (e.g., it was impractical to submit the evidence earlier because it was difficult to obtain or the representative was not aware of the evidence at an earlier date.)" The new ruling imposes additional duties on representatives to make good faith efforts to obtain evidence. The ruling is clear that merely informing SSA of evidence is not sufficient. "...it is only acceptable for a representative to inform us about evidence without submitting it if the representative shows that, despite good faith efforts, he or she could not obtain the evidence." In addition, "To satisfy the claimant's obligation under the regulations to 'inform' us about written evidence, he or she must provide information specific enough to identify the evidence (source, location, and dates of treatment) and show that the evidence relates to the individual's medical condition, work activity, job history, medical treatment, or other issues relevant to whether or not the individual is disabled or blind."

The SSR threatens possible sanction proceedings against representatives who fail to comply on the basis that such failure could unreasonably delay processing of the claim without good cause.

1.6.6 Rules of Representation

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

Representation is regulated by the SSA. Representatives are allowed to charge a fee for services; however, all fees must first be approved by the SSA. 20 C.F.R. §§404.1728, 416.1520. Fees are generally limited to 25 percent of the retroactive benefit. Where fee withholding and direct payment are allowed, SSA will pay the representative's fee directly from the retroactive award of benefits. SSA will approve fees for successful representation that does not result in a retroactive award of benefits. In these circumstances, it is the responsibility of the represented individual to then pay the fee.

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

In addition to the rules regarding fee collection, SSA's regulations also include conduct rules that representatives need to know. These include: who can be an appointed representative; the authority of an appointed representative; prohibited conduct; and sanctions for prohibited conduct. 20 C.F.R. §§404.1700-404.1715, 416.1500 – 416.1515. Effective 4/20/2015, the rules of conduct require representatives must help claimants obtain and submit the evidence required by 20 C.F.R. §§404.1512, 416.912. See also SSA's Best Practices for Claimants' Representatives https://www.ssa.gov/appeals/best_practices.html

All attorney and non-attorney representatives who practice before the Social Security Administration (SSA) must be aware of and comply with the revised (August 1, 2018) Rules of Conduct and Standards of Responsibility for Representatives (Rules of Conduct) found at 20 C.F.R. §§404.1740 and 416.1540. The Rules of Conduct specify both affirmative obligations and prohibited conduct. If a representative violates the Rules of Conduct or is not qualified to be either an attorney or non-attorney representative under 20 C.F.R. §404.1705 and 416.1505, SSA may file charges and initiate proceedings to suspend or disqualify that representative from acting as a representative before SSA.

On July 2, 2018, SSA issued final Rules of Conduct and Standards of Responsibility for Appointed Representatives effective August 1, 2018. According to SSA, the final rules address the agency's concerns about the integrity of the programs under the Social Security Act and provide "additional means to address representative actions that do not serve the best interests of claimants." 83 FR 30849.

The final rules impose additional affirmative duties on representatives and enlarge the scope of prohibited conduct. The most significant changes are an affirmative duty to disclose to SSA if a representative referred or suggested that the claimant seek an

examination from, treatment by, or the assistance of an individual providing a medical or vocational opinion; a duty to disclose to SSA if a representative consulted with a medical source or helped to prepare or draft a medical opinion submitted to SSA by a medical source; a duty to “immediately” disclose to SSA if a representative discovers that a claimant is using, or has used, their services to commit fraud against the agency, and a duty to provide information to SSA about a representative’s availability for the upcoming ALJ hearings. Under the final Rules of Conduct, SSA also restricted a representative’s ability to withdraw from a case after a hearing is scheduled.

See the power point presentation, Rules of Conduct and Standards of Responsibility For Appointed Representatives (November 2018) for further details.

Practice Note: SSA’s website at <https://www.ssa.gov/representation/> includes a gateway page called “Representing Social Security Claimants,” which includes information about the attorney fee rules.

Practice Note: Increasingly, SSA is requiring appointed representatives who seek direct fee payment to conduct Social Security business online. <https://www.ssa.gov/representation/> Appeals that may be filed online, must be filed online. And, these appointed representatives will have an affirmative duty to go online to access their clients’ disability files at the hearings and Appeals Council levels beginning August 16, 2016, the effective date of the mandate. Effective 11/4/2020, these representatives must use electronic means to file evidence at the Office of Hearings Operations (OHO) and Appeals Council levels of appeal.

1.6.7 Appeals Council

(a) Appeals Council

The appellant dissatisfied with an ALJ decision may request that the appeals council review an ALJ’s decision, and new evidence related to the period considered by the ALJ may be submitted. This is last step in the administrative appeal process. 20 C.F.R. §§404.981, 416.1481. Most requests for review are denied. If review is granted, the appeals council may uphold the decision, reverse the decision, or remand the case to the ALJ for further proceedings. 20 C.F.R. §§404.969, 416.1467. To make these decisions, the appeals council will review the ALJ decision and the evidence of record. After making a decision, the appeals council will issue a notice explaining the decision and the right to appeal to federal court.

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

The appeals council takes the position that a claimant’s request for review opens the entire ALJ decision to review and not only those issues challenged by the claimant. For

example, should an ALJ award benefits but with an unfavorable onset date, the appeal filed by the claimant will be viewed by the appeals council as giving that body the ability to review the entire decision.

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

(b) New Evidence Submissions at the Appeals Council

For non-Uniform Process cases, i.e., cases that do not involve an application for benefits - the Appeals Council will consider new and material evidence which related to the period on or before the date of the ALJ decision. 20 C.F.R. §§416.1470(b), 404.970(b).

The Uniform Process regulations, effective 1/17/17, apply additional limits, for cases to which they apply. Under the Uniform Process rules, the evidentiary record is essentially closed after the date of the ALJ decision. New evidence submitted to the Appeals Council will be considered only if it relates to the period considered by the ALJ, and only if the claimant shows there is a reasonable probability that the evidence would change the outcome, and either: that SSA misled the claimant; or that the claimant had a physical, mental, educational, or linguistic limitation that prevented earlier submission of the evidence; or that some other unusual, unexpected or unavoidable circumstance prevented the claimant from submitting the evidence earlier. 20 C.F.R. §§404.970, 416.1470.

Practice Note: Administrative Finality, Good Cause for Late Appeal and Reopening.

An unappealed administrative decision is final unless 1) the claimant can show good cause for late appeal, or 2) reopening applies. There is no time limit for showing good cause for late appeal. The criteria for good cause are at 20 C.F.R. §§404.911, 416.1411. Time limits do apply for requesting reopening of an administrative appeal decision that has become final. For the specific reopening criteria that apply to Title II benefits, see 20 C.F.R. §§404.987 – 404.989. For the specific reopening criteria that apply to Title XVI benefits, see 20 C.F.R. §§416.1487 – 416.1489.

Practice Note: SSA has rescinded its subsequent application policy

Effective July 28, 2011, SSA has rescinded its longstanding (since December 1999) policy of allowing claimants to both reapply and file an Appeals Council appeal for the same Title and the same disability. The details of this policy change can be seen in Social Security Ruling 11-1p and POMS GN 03104.370 & SI 04040.025.

1.6.8 Federal Court Review

The appeals council decision is the final administrative decision of the SSA, unless the appeals council declines to review an ALJ decision. In that case, the ALJ decision is the final decision of the SSA. Claimants may file a complaint for judicial review with the

United States District Court within sixty days of the receipt of the denial notice from the appeals council decision or denial of review.. 42 U.S.C. §405(g); 20 C.F.R. §§404.981, 416.1481.

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

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

The Equal Access to Justice Act (EAJA), 42 U.S.C. §2412, provides for attorney fees in cases in which the plaintiff is the “prevailing party” and in which the SSA was not “substantially justified” in defending the earlier decision. Awards of fees are not uncommon.

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

In *Mills*, the First Circuit held that:

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

1.7 SSI BENEFITS FOR CHILDREN UNDER AGE EIGHTEEN

Children under age eighteen may qualify for SSI if they:

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

The residence and citizenship or immigration status eligibility criteria for children are the same as those for adults. The income and asset counting rules that apply to adults also apply to the income and assets of children. In addition, some of the countable income and assets of a child’s parents may also be counted to determine the child’s eligibility, as explained in 1.5.14, SSI Eligibility - Income, above. The blindness standard for children

is also the same as that for adults. However, the disability standard for children is quite different than that for adults and has undergone several recent changes, as described below.

1.7.1 SSI Disability Definition for Children

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

1.7.2 The Sequential Evaluation of Disability for Children

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

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

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

1.7.3 Step 1: Is the Child Performing Substantial Gainful Activity?

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

Practice Note

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

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

1.7.4 Step 2: Does the Child Have a Severe Impairment?

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

1.7.5 Step 3: Does the Child Have an Impairment That Meets or Equals a Listed Impairment?

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

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

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

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

(a) Meeting a Listing (20 C.F.R. §416.925)

A child’s impairment meets a listing only when it manifests the specific findings described in the medical criteria for that listing. This is shown by comparing the symptoms, signs, and laboratory findings of the impairment with the corresponding criteria shown for the listing. The listings are divided into fourteen categories or body systems. See 20 C.F.R. pt. 404, subpt. P, app. 1, pt. B. These include the following: growth impairments (100.00); musculoskeletal system (101.00); special senses and speech (102.00); respiratory system (103.00); cardiovascular system (104.00); digestive system (105.00); genito-urinary system (106.00); hemic and lymphatic system (107.00); endocrine system (109.00); multiple body systems (110.00); neurological (111.00); mental disorders (112.00); neoplastic diseases (malignant) (113.00); and immune system (including HIV/AIDS) (114.00).

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

(b) Medically Equaling a Listing

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

- When an impairment is described in a listing but not all specified medical findings are exhibited, medical equivalence is shown when there are other medical findings related to the impairment that are of “equal medical significance.”
- When an impairment is described in a listing but not all medical findings are as severe as specified in the listing, medical equivalence is shown when there are other medical findings related to the impairment that are of “equal medical significance.”
- When an impairment is not described in the listings, medical findings will be compared with those in a “closely analogous” listing. Equivalence to the analogous listing is shown when the medical findings are of “equal medical significance.”
- When there is a combination of impairments, no one of which meets or equals a listing, the medical findings are also compared to a “closely analogous” listing. Equivalence is shown when the combination of medical findings establishes severity equivalent to the most closely analogous listing.

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

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

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

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

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

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

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

Practice Note

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

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

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

20 C.F.R. §416.926a(b)(2).

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

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

- *Acquiring and using information* -This domain includes the ability to think, to

acquire and use information, visual and verbal reasoning, problem solving, and idea development. It also includes perceptual, sensorimotor, language, and memory processes necessary to learn.

- *Attending and completing tasks* -This domain considers the child's level of alertness, ability to work at an appropriate pace, allay impulses, and initiate, sustain, and change focus. It also includes the capacity to focus on certain stimuli and ignore others.
- *Interacting and relating with others* -This domain assesses all aspects of social interaction and relationships with groups and individuals. This incorporates speech and language skills necessary to communicate effectively. It also includes the ability to respond to emotional and behavioral cues and form intimate relationships and externalized maladaptive behaviors, e.g., running away, hurting others, etc.
- *Caring for yourself* -This domain measures the child's ability to care for his or her physical needs and to maintain a healthy emotional state. It includes the ability to care for one's own health and safety and to cooperate with others to meet one's needs. It also incorporates the concept that the child should be developing an increasing sense of independence and competence.
- *Moving about and manipulating objects* -This domain looks at the child's ability to perform physical functions like sitting, standing, balancing, shifting weight, bending, crawling, running, and transferring. It also includes the ability to hold, carry, and manipulate objects, as well as the capacity to plan, remember, and execute movements. Also considered are the child's coordination, dexterity, and integration of sensory input.
- *Health and physical well-being* -This domain looks at the cumulative physical effects of physical or mental impairments. Considered are the effects of chronic illness, including shortness of breath, reduced stamina, pain, and poor growth. Also included are the impact of therapies, medications, and periods of exacerbation and remission.

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

The ability to function in the domains means the **ability to “independently initiate, sustain or complete” activities**. In addition, the SSA must also consider the “interactive and cumulative” effects of impairments, meaning that the effects of an impairment must be considered in all affected domains. The SSA also makes clear that the effects of multiple impairments, considered together, may have greater effect on an ability to function in a domain or domains than when considered separately. 20 C.F.R.

§416.926a(c). Perhaps the most helpful change is the clarification that a child's ability to function must be compared to that of same-age children without impairments. 20 C.F.R. §416.924a(b)(3).

The final regulations also beef up the regulatory language on “other factors,” making it much more clear how these factors must be used. *See* 1.7.10(c), Functional Equivalence Under the Interim Final Regulations Effective Until January 2, 2001, above. First, the SSA retains all the “other factors” but deletes the word “other” and clarifies that the “factors” are to be used simultaneously with the assessment of the child's ability to function in the domains, and not as an add-on after the functional analysis is complete.

Second, the SSA deletes “highly” from the “structured setting” factor to clarify that all structures and supports must be considered in the severity assessment. Third, the SSA includes a separate section on special education and other school accommodations with an example that shows that children in special classes and reports are not being compared to same-age children without impairments.

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

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

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

20 C.F.R. §416.924a(b).

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

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

20 C.F.R. §416.924a(b)(5).

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

- A new provision cautions adjudicators against strict adherence to IQ and other test scores. Instead, the SSA says it is reiterating its longstanding policy of considering all relevant evidence in the record and against considering evidence in isolation. The SSA did not include a provision on the Standard Error of Measurement (SEM) but did state that a child with test scores slightly higher than “marked” may be considered to have a “marked” limitation, based on the totality of the evidence, and vice versa. 20 C.F.R. §416.926a(e)(4).
- A new reference in “medical sources” explains the SSA’s longstanding policy of

considering information provided by a nonmedical source (a parent or child) to be a clinical sign when the medical source has accepted and relied upon it to reach a diagnosis. 20 C.F.R. §416.924a(a)(2).

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

Practice Note

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

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

- *Marked* - In the final regulations, “marked” remains defined as “seriously interfering” with the child’s ability to independently initiate, sustain, or complete activities, but this general definition has been moved to the beginning of the definition. A standardized test score between two and three standard deviations below the norm for the test is one way to meet this standard. 20 C.F.R. §416.926a(e)(2).
- *Extreme* - The definition of “extreme” has been improved. In the final rules, “extreme” has been redefined as “interferes very seriously” with the ability to function. A test score at or below three standard deviations below the norm for the test is one way to meet this standard. In addition, the new regulations state that the SSA will not consider any piece of evidence in isolation, including test scores. The developmental milestones standard still generally applies to younger children, unless standardized test scores are in the record. 20 C.F.R. §416.926a(e)(3).
- *Totality of Evidence* - SSA will not rely on any one piece of evidence, including test scores, in isolation. Instead, the totality of the evidence must be considered in determining whether the child has marked or extreme limitations. The final regulations also provide that the interpretation of test scores is primarily for the professional who administered the test, meaning that medical source information may be necessary to resolve inconsistencies. 20 C.F.R. §416.926a(e)(1), 416.926a(e)(4).
- *Marked and Extreme in the “Health and Physical Well-Being” Domain* - The intent of this domain is to capture the effects of chronic illness and episodic illness. In this domain, a “marked” limitation requires episodes of illness or exacerbations that occur an average of three times in a year, each lasting two weeks or more. More frequent episodes of shorter duration or less frequent

episodes of longer duration may also be individually considered. “Extreme” in this domain is defined as exacerbations substantially in excess of the standard for “marked.” The SSA cautions that impairments with an “extreme” level of exacerbations should generally medically meet or equal a listing. Note that the other definitions of “marked” and “extreme” also apply in this domain, where appropriate. 20 C.F.R. §§416.926a(e)(2)(iv), 416.926a(e)(3)(iv).

- *Definition of Exacerbation* - The final regulations contain no definition of an “exacerbation” and no guidance on when an episode begins or ends. However, the preface of the Federal Register publication of the final regulations references similar episodic criteria in two adult listings. 65 Fed. Reg. 54,747, 54,757 - 54,758 (Sept. 11, 2000). The adult mental impairment listings use the same episodic standard as the final regulations for the new “Repeated Episodes of Decompensation” B criterion. See 65 Fed. Reg. 50,746, 50,777 (Sept. 20, 2000). The preface to the mental impairment listings at 12.00C defines “episodes of decompensation” as “exacerbations or temporary increases in symptoms or signs accompanied by loss of adaptive functioning, as manifested by difficulties in performing ADLs [activities of daily living], maintaining social relationships, or maintaining concentration, persistence or pace.” The preface further provides that “episodes of decompensation may be demonstrated by an increase in signs or symptoms that would ordinarily require increased treatment or a less stressful situation (or both) [and] . . . may be inferred from medical records showing significant alteration in medication; or . . . need for a more structured setting . . . ; or other relevant information. . . .” The adult immune system listing for HIV at 14.00D.8. also uses similar episodic criteria that may provide a useful analogy. See 20 C.F.R. pt. 404, subpt. P, app.1, 14.000.8.

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

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

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

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

The following infants also meet the functional equivalence guidelines:

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

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

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

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

20 C.F.R. §416.927(e) provides the ultimate decision as to whether an individual is meets the disability criteria is among the issues reserved to the SSA. Note, however, that the regulation does not specifically reference functional equivalence.

1.8 DISABILITY STANDARD FOR ADULTS

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

1.8.1 Statutory Blindness

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

Practice Note

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

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

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

1.8.2 Definition of Disability for Adults

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

Practice Note: See SSR 11-2p for a helpful explication of information from SSA regulations on documenting and evaluating disability in young adults. The SSR also provides guidance on how SSA applies its policies to determine whether a young adult is disabled.

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

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

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

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

(a) *Definition of SGA*

The vocational portion of the definition of disability requires that the claimant be “unable to engage in any substantial gainful activity [SGA].” 20 C.F.R. §§404.1505, 416.905. SGA involves the performance of significant physical or mental duties productive in

nature. At Step 1 in the sequential analysis of disability, it is not necessary that the work be full-time to be “substantial”; part-time work may be sufficient.

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

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

Note that: SSI applicants meeting the definition of statutory blindness are exempt from the SGA test and from meeting the duration requirement. 20 C.F.R. §416.983

Note also re: Statutory Blindness: SGA for Title II benefits based on Statutory Blindness for those age 55 and older, considers whether the individual is unable to engage in SGA requiring skills and abilities comparable to those of any gainful activity engaged in with some regularity and over a substantial period of time. 20 C.F.R. §404.1584.

(b) Determining SGA

The SSA has developed a complex set of rules for evaluating when work activity should be considered SGA. The primary consideration for employees is the amount of gross monthly wages. Count gross pay when the work was done to earn it, as opposed to when it was paid. POMS DI 10505.010C. Effective 9/23/16 SSA is allowed to presume pay was earned in the month paid - post-entitlement – unless there is readily available information to show when the pay was earned. Bipartisan Budget Act of 2015 (10/28/15). POMS DI 10505.005, 10505.010.

In addition, watch out for Social Security’s use of the Pay Distribution Calculator described in Subsection C.2 of POMS DI 10505.005. The intent of this tool is to distribute pay to the proper month when a pay period straddles two months, but it is not accurate in all circumstances, especially where the beneficiary works part-time or a variable schedule.

For the self-employed, the SSA considers not only earnings but also the value of the activity to the business. In addition, there are several factors that may be applied to reduce earnings below the SGA level. As the SSA seldom completely develops these factors, it is important to be aware of them and develop them where appropriate. *See the SGA evaluation rules at 20 C.F.R. §§404.1571 et seq.; 20 C.F.R. §416.971 et seq.*

(c) The Pre-2001 SGA Rules

For work performed prior to January 2001, there is a three-tiered definition of SGA. Gross wages of less than \$300 a month, in the absence of evidence to the contrary, are

presumed not to be SGA. 20 C.F.R. §§404.1574(b)(3), 416.974(b)(3). Gross monthly wages over the SGA threshold are presumed to be SGA. For individuals with gross earnings in the middle tier, between \$300 and the SGA threshold, the SSA is required to investigate whether the earnings constitute SGA. The determining factors are:

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

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

(d) Presumed SGA

In general, in 2021, the presumed SGA threshold for employees is \$1310 or more a month in gross wages. For those meeting the statutory blind criteria, the 2021 SGA threshold is \$2190.

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

- 2020 – \$1260 disabled, \$2110 blind
- 2019 - \$1220 disabled, \$2040 blind
- 2018 - \$1180 disabled, \$1970 blind
- 2017 - \$1170 disabled, \$1950 blind
- 2016 - \$1130 disabled, \$1820 blind
- 2015 - \$1090 disabled, \$1820 blind
- 2014 - \$1070 disabled, \$1800 blind
- 2013 - \$1040 disabled, \$1740 blind
- 2012 - \$1010 disabled, \$1690 blind
- 2011 - \$1000 disabled, \$1640 blind
- 2010 - \$1000 disabled, \$1640 blind
- 2009 - \$980 disabled, \$1640 blind
- 2008 - \$950 disabled, \$1570 blind
- 2007 - \$900 disabled, \$1500 blind
- 2006 - \$860 disabled, \$1450 blind
- 2005 - \$830 disabled, \$1390 blind
- 2004 - \$810 disabled, \$1350 blind
- 2003 - \$800 disabled, \$1330 blind

- 2002 - \$780 disabled, \$1300 blind
 - 2001 - \$740 disabled, \$1240 blind
 - July 1999 – Dec. 2000 - \$700 disabled (blind \$1170 in 2000, \$1110 in 1999);
 - January 1990 to June 1999 - \$500 disabled (blind SGA changed yearly);
 - 1980 to 1989 - \$300 disabled (blind SGA changed yearly).
- 20 C.F.R. §§404.1574, 416.974. See POMS DI 10501.105 for SGA amounts for prior years.

Practice Note

Information about cost-of-living increases is available on the SSA’s website at www.socialsecurity.gov and in the Disability section of www.masslegalservices.org.

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

- when the earnings include a **subsidy** reducing the true earnings below the SGA level, 20 C.F.R. §§404.1574(a)(2), 416.974(a)(2);
- the work activity involves **special circumstances** such that it should not be considered SGA, 20 C.F.R. §§404.1573(c), 416.973(c);
- the individual’s impairment forces him or her to quit working within a short period of time (no more than six months), constituting an **unsuccessful work attempt**, 20 C.F.R. §§404.1574(c), 416.974(c) and SSR 05-02: Determination of Substantial Gainful Activity if Substantial Work Activity Is Discontinued or Reduced--Unsuccessful Work Attempt; and
- the individual has **impairment- related work expenses** that reduce monthly wages below the SGA level, 20 C.F.R. §§404.1576, 416.976.

(e) Self-Employment Income

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

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

(f) Rebutting the Presumption of SGA

As mentioned above, SGA-level gross monthly wages will not be considered SGA for a particular month if it can be shown that the wages are reduced below the presumed SGA amount any of the following

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

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

- special assistance from other employees;
 - irregular hours or frequent rest periods;
 - specially arranged circumstances, e.g., permitting the individual to get to and from work;
 - lower standard of productivity or efficiency; and
 - family relationships or past association with the employer.
- See* 20 C.F.R. §§404.1573(c), 416.973(c).

Practice Note

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

- ***Impairment Related Work Expenses (IRWE)*** may be used to reduce monthly earnings below the SGA level. An IRWE is a cost of employment borne by the claimant. The cost of an IRWE must be paid by the recipient and without reimbursement from any source. 20 C.F.R. §§404.1576(b)(3), 416.976(b)(3). IRWE costs documented by the claimant will be deducted from monthly gross earnings before the SSA is allowed to make an SGA determination. IRWE deductions may include the unreimbursable claimant-paid costs of items or services necessary to the claimant's ability to work, including medications, wheelchairs, counseling services, specially adapted vehicles, etc.
- ***Unsuccessful Work Attempts.*** An Unsuccessful Work Attempt (UWA) is an attempt by a recipient to reenter the workforce that lasted no more than six months or where wages were reduced below the SGA level within 6 months.. To be considered a UWA, the work attempt must be terminated because of an impairment-related inability. A UWA should not result in a determination that the claimant is able to engage in SGA. The SSA will not consider the work activity or wages earned by the claimant during the UWA as evidence of ability to perform SGA. *See* 20 C.F.R. §§404.1574(a)(1), 416.974(a)(1). *See also* SSR 05-02: Determination of Substantial Gainful Activity if Substantial Work Activity is Discontinued or Reduced—Unsuccessful Work Attempt.

(g) Duration Requirement

As stated above, the definition of disability is the inability to engage in any substantial gainful activity by reason of medically determinable physical or mental impairments that can be expected to last for a continuous period of not less than twelve months or result in death. A 2002 Supreme Court case dealt with the issue of what the 12-month duration requirement applies to: a person's "inability" to engage in SGA or simply the disabling impairment(s) that causes the inability to work. In *Barnhart v. Walton*, 122 S.Ct. 1265, 152 L.Ed.2d 330, 70 U.S.L.W. 4231 (2002), the Court clarified that, in order for a claimant to meet the legal definition of disability, his/her inability to engage in SGA must last, or be expected to last, at least 12 months from the date of onset of the disabling impairment(s). Under *Walton*, if a claimant returns to SGA level work within 12 months of the date of onset *and* before the SSA makes a decision on his/her application for benefits, then he/she cannot be found disabled. If, however, if a claimant returns to SGA level work *after* the 5 month waiting period and *after* SSA has found him/her disabled but within 12 months of the onset date, the finding of disability will stand. See 20 C.F.R. §404.1592(d).

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

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

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

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

Practice Note: Impairments must be considered in combination at all steps of the sequential analysis of disability. This means that it is incorrect to determine that an impairment is "non severe" at this step and then fail to consider it in combination with other impairments at later steps. Even if all impairments are not severe when considered separately, the SSA must consider whether, together, they result in a severe impairment. 20 C.F.R. §§404.1523, 416.923.

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

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

The listings change over time, as medical knowledge expands and new treatments are developed. In recent years, the SSA has revised many of the listings. For example, SSA substantially revised the mental impairment listings effective 1/17/17 (81 Fed. Reg. 66138 (9/26/17)). The “A” criteria portion of each mental impairment listing was revised to comport with DSM-5 criteria. The “B” criteria were revised to better measure the potential effect of mental impairments on the ability to sustain work activity as defined in SSRs 96-8p and 96-9p (7 or 8 hours a day, 5 days a week). Other changes include:

- reorganizing and renaming the mental impairment listings;
- substantially revising listing 12.05 (Intellectual Disorder); and
- adding new listings for neurodevelopmental disorders, eating disorders, and trauma and stressor related disorders.

In addition, SSA rejected validity testing to identify malingering as unreliable. 81 Fed. Reg. 66143. SSA also added helpful guidance in the headnotes to the mental impairment listings, including:

- Evidence of functioning in unfamiliar setting does not necessarily show the ability to work, 12.00C.6.;
- Lack of treatment or noncompliance may be due to the mental impairment, 12.00G.2.b.;
- A complete picture of ADLs is necessary, 12.00F.3.;
- Support and structure must be evaluated, 12.00D.;
- Ability to perform some routine activities without help does not necessarily mean the person has no mental impairment or is not disabled. Routine activities include caring for personal needs, cooking, shopping, paying bills, living alone, or driving. 12.00D.3.

Practice Note

The online edition of SSA’s publication, *Disability Evaluation Under Social Security*, also known as the Blue Book, contains a version of the listings that incorporates the all changes that have become effective, through January 2019. The online Blue Book is updated more frequently than the hard copy of the Code of Federal Regulations and is a good resource for advocates. See <https://www.ssa.gov/ssi/text-disable-ussi.htm>

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

At this step, the SSA determines the individual claimant’s residual functional capacity (RFC). The RFC is basically what a person can still do despite his or her physical or mental impairments. 20 C.F.R. §§404.1594(c)(2), 416.994(b)(iv), 404.1545, 416.945. See also SSR 96-8p. The claimant has the burden of proof at this stage. *Gray v. Heckler*,

760 F.2d 369 (1st Cir. 1985). The SSA compares the individual claimant's RFC with the functional requirements of the individual's past relevant work, as customarily performed in the economy. 20 C.F.R. §§404.1546, 416.946.

Past relevant work (PRW) usually means work performed in the last fifteen years. 20 C.F.R. §§404.1565, 416.965. SSR 82-61—Titles II and XVI—Past Relevant Work—The Particular Job or Occupation Generally Performed. The work must have been performed at the Substantial Gainful Activity (SGA) level to be considered PRW. In addition, work performed sporadically or for too short a period to have learned the job may not be PRW. See Social Security Ruling 82-62. In a 2003 decision, *Barnhart v. Thomas*, 124 S.Ct. 376, 157 L.Ed.2d 333, 72 USLW 4001 (2003), the Supreme Court ruled that at Step 4 there is no requirement that the claimant's previous work still exists in the national economy. In other words, a claimant will be found not disabled at step 4 if s/he retains the ability to return to a job that is obsolete or no longer exists.

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

Practice Note

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

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

At this final step in the sequential analysis, the SSA determines whether the claimant can perform other work that exists in the regional or national economy, considering his or her RFC and vocational factors, i.e., age, education and literacy, and work history. If there are other jobs that exist in significant numbers in the regional economy, disability

benefits will be denied. If such other jobs do not exist, benefits will be paid. 20 C.F.R. §§404.1560, 416.960.

To make this determination, the SSA first looks to the Medical Vocational Guidelines, also known as the “Grids,” at 20 C.F.R. Pt. 404, Subpt. P, App. 2. 20 C.F.R. §§404.1569, 416.969. The Grids are a set of three matrices, based on exertional capacities for sedentary, light, and medium work, designed to match the availability of significant numbers of jobs with the claimant’s age, education and literacy, and work history. SSR 83-10—Titles II and XVI—Determining Capability to Do Other Work—The Medical Vocational Rules of Appendix 2

The exertional levels are defined at 20 C.F.R. §§404.1567, 416.967. The age criteria are defined at 20 C.F.R. §§404.1563-68, 416.963-68. The rules for applying the Grids are found in Section 200 of Appendix 2. If the applicant’s impairments are exertional only, the Grids are determinative of disability or non-disability at Step 5. Exertional impairments basically result in limitations in the ability to perform the “strength” demands of jobs. 20 C.F.R. §§404.1569a, 416.969a.

The Grids do not apply to non-exertional impairments. Non-exertional impairments are impairments that interfere with an individual’s ability to work whether or not they are exerting themselves, e.g., mental impairments, skin and sensory impairments, pain, and fatigue. If the individual’s impairments are all non-exertional, the SSA must perform an individualized determination at this step. See SSR 85-15, 85-16, 96-8p.

If the claimant’s impairments are both exertional and non-exertional, the SSA may first look to the Grids to see whether the claimant can be found disabled on his or her exertional impairments alone. If not, the SSA must consider the degree to which the non-exertional impairments diminish the claimant’s capacity for work he or she could otherwise do considering his or her exertional capacity, age, education, and work history. 20 C.F.R. Pt. 404, Subpt. P, App. 2, 200.00(e). SSR 83-14.

If the claimant’s occupational base is significantly eroded by non-exertional impairments or if the claimant’s impairments are solely non-exertional, the SSA must make an individualized determination at Step 5, using the appropriate regulations. *See Ortiz v. Sec’y*, 890 F.2d 520 (1st Cir. 1989). *See also*, Social Security Ruling 96-9p. As the Grid rules are quite rigid, it is usually beneficial to determine whether the claimant has non-exertional impairments that can be documented in order to get an individualized determination at Step 5.

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

Practice Note

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

Practice Note: Be aware of three Special Medical Vocational Profiles that may apply at Step 5.

1) Work Experience Limited to Arduous Unskilled Physical Labor. This profile applies to applicants who a) have a history of 35 years or more of arduous unskilled work, and b) can no longer perform this past work due to a ‘severe’ impairment (as defined in 20 C.F.R. §§404.1520(c), 416.920(c)), and c) have no more than a marginal education. 20 C.F.R. §404.1562, 20 C.F.R. §416.962, SSR 82-63.

2) No Work Experience and 55 or older. This profile applies to applicants who a) are at least 55 years old, and b) have no more than a limited education, and c) have no past relevant work experience, and d) have a ‘severe’ impairment (as defined in §§404.1520(c), 404.921).

20 C.F.R. §404.1562, 20 C.F.R. §416.962, SSR 82-63

3) Lifetime Commitment. This profile, which appears only in the POMS, <https://secure.ssa.gov/apps10/poms.nsf/lnx/042501000>, applies to applicants who a) have a lifetime commitment (30 years or more) to a field of work that is unskilled, or, is skilled or semi-skilled but with no transferable skills, and b) can no longer perform this past work because of a ‘severe’ impairment(s), and c) are closely approaching retirement age (age 60 or older), and d) have no more than a limited education.

1.8.8 Mental Impairments

SSA published final regulations at 81 Fed. Reg.66138 (9/26/16) that substantially revised the mental impairment listing and headnotes.DSM-5. The headnotes (20 C.F.R. pt. 404, subpt. P, app. 1, Rule 12.00) to the mental impairment listings contain helpful language that is useful to the evaluation of mental impairments throughout the sequential analysis, i.e., the need for a longitudinal assessment; the importance of lay evidence in completing the assessment of functional limitations; and the need to consider the effects of structured settings to accurately assess the ability to function in a work setting. Social Security Rulings 85-15, 85-16, 96-8p, and 96-9p (Assessing Residual Functional Capacity In Initial Claims) also contain helpful language about evaluating mental impairments.

In addition, 20 C.F.R. §§404.1520a and 416.920a explain that individual functional limitation assessment in mental impairments is a complex and highly individualized process requiring consideration of multiple issues, including structured settings, chronicity, and a longitudinal view of function.

Practice Note

Because the severity of the functional limitations due to mental impairments varies from person to person, the listings of mental impairments usually include both medical criteria (A criteria) and functional criteria (B criteria). Some mental impairment listings also include C criteria. The C criteria are functional criteria for mental impairments attenuated

by treatment but that still result in significant functional limitations due to the impairment itself or to treatment.

When the SSA considers the individual functional limitations of claimants with mental impairments at Steps 4 and 5 of the sequential analysis, it is not unusual to see claimants with quite severe mental impairments considered capable of unskilled work by the SSA. This is especially true for younger claimants. However, the basic mental demands of even unskilled work include the abilities (on a sustained basis)

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

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

It is also common to see denials based upon the ability to work in “low stress” jobs.

However, the reaction to the demands of work (stress) is highly individualized, and mental illness is characterized by adverse responses to seemingly trivial

circumstances. *Lancellotta v. HHS*, 806 F.2d 284, 286 (1st Cir. 1986). Because stress is an individual’s subjective response to a particular situation and not a job characteristic, it is often inappropriate to find a claimant capable of “low-stress” work without an individualized evaluation of what produces the stress. *Lancellotta*, 806 F.2d 284 - 87, citing SSR 85-15.

Another common rationale for denial is to “laundry list” the claimant’s daily activities and to conclude that they show the ability to work. However, this approach does not necessarily assess the sustainability of work-like activities in an ordinary work schedule and the effect of non-exertional impairments. *Waters v. Sec’y HHS*, 709 F. Supp. 278, 284 (D. Mass. 1989); see also *Bjornson v. Astrue*, 671 F.3d 640 (7th Cir, 2012)(The critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility

in scheduling the former than the latter, can get help from other persons (in this case, Bjornson’s husband, and other family members), and is not held to a minimum standard of performance, as she would be by an employer.); Social Security Ruling 85-15 (individuals with mental disorders often adopt a highly restrictive or inflexible lifestyle with which they appear to function well).

1.8.9 Pain, Fatigue, and Other Subjective Symptoms

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

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

An individual’s statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory

diagnostic techniques, which show the existence of a medical impairment . . . which can reasonably be expected to produce the pain alleged.

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

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

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

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

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

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

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

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

These two issues are often confused by adjudicators. The underlying impairment must be medically determinable by an acceptable medical source using medically acceptable clinical and laboratory diagnostic techniques. See 20 C.F.R. §§404.1508, 404.1513, 404.1529, 416.908, 416.913, 416.929. If the severity of the pain alleged is greater than indicated by the objective medical evidence, the adjudicator must then consider all the available evidence, medical and other, that reflects on the nature and severity of the impairment and resulting limitations of function. “Other” evidence that may be used to show the severity of pain includes medical sources not “acceptable” under 20 C.F.R. §§404.1513, 416.913, like chiropractors, as well as “lay” sources, like family and friends, employers, counselors, etc.

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

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

(c) Clinical Diagnostic Evidence Versus Laboratory Diagnostic Evidence

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

Practice Note

Claims involving conditions such as Chronic Fatigue Syndrome (CFS), for which there is no definitive laboratory test establishing a diagnosis, have tended to be particularly difficult. Social Security Ruling 14-1p (Evaluating Cases Involving Chronic Fatigue Syndrome), provides helpful guidance on evaluating CFS. The ruling confirms that CFS, when accompanied by appropriate medical signs or laboratory findings, is a medically determinable impairment that can be the basis for a finding of disability. In addition, the ruling gives examples of the kinds of medical signs and laboratory findings that may establish a medical diagnosis of

CFS. *See also* Evaluation of Chronic Fatigue Syndrome, SSR 12-2p; POMS DI 24515.075; *Rose v. Shalala*, 34 F.3d 13 (1st Cir. 1994). Recent Social Security Rulings on a similarly difficult-to-prove conditions may also provide guidance to advocates. *See* SSR 02-2p, Evaluation of Interstitial Cystitis (IC); SSR 03-2p - Reflex Sympathetic Dystrophy (Complex Regional Pain Syndrome).

1.8.10 Limitation on Disability Benefit Eligibility for Alcoholism and Drug Abuse

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

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

- **Step 1**- Does the individual meet the disability standard, using the five-step sequential analysis of disability and considering all the individual’s impairments, including any DAA impairments? If not, the individual is not disability eligible.
- **Step 2** - If so, is there medical evidence of drug addiction or alcoholism? Medical evidence is defined as evidence from an “acceptable medical source” that is sufficient and appropriate to establish that the individual has a medically determinable substance abuse disorder. Statements by claimants alone are insufficient to establish a substance abuse disorder. Medically determinable substance use disorders are medical conditions described as “substance dependence” and “substance abuse” disorders in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (DSM-IV), American Psychiatric Assoc., Washington, D.C., 1995. If not, the individual is “disabled.”
- **Step 3** - If so, is the individual’s substance use condition material to the disability determination? If so, the individual is not “disabled” for disability benefits purposes. If not, the individual is disability eligible. The materiality assessment requires an evaluation as to which functional limitations would remain without the DAA and whether the individual would still meet the disability standard considering only those limitations.

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

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

Practice Note

SSA issued DAA Social Security Ruling 13-2p (3/22/13), which replaced EM-96200 (8/30/96). The SSR deviates little from the EM and provides additional insight to SSA’s DAA policy. It is must reading for claims involving DAA.

http://ssa.gov/OP_Home/rulings/di/01/SSR2013-02-di-01.html

1.9 EVALUATION OF EVIDENCE IN DISABILITY DETERMINATIONS FOR CLAIMS FILED PRIOR TO 3/27/17

NOTE THAT – The rules described below in §§1.9.1 – 1.9.3 apply ONLY to claims filed Prior to 3/27/2017. Final rules published in the federal register at 82 FR 5844 (1/18/17) make substantial revisions to the rules for considering evidence for claims filed on or after 3/27/17. For the rules that apply to claims filed on or after 3/27/17, see the power points, Regulation Changes for the Submission and Consideration of Medical Evidence, November 2021, elsewhere in the program materials.

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

1.9.1 Acceptable Medical Sources to Establish Medically Determinable Impairments

Medical determinable impairments must be diagnosed by “acceptable medical” sources. 20 C.F.R. §§404.1521, 416.1421. Generally, an acceptable medical source must be a licensed physician, osteopath, or psychiatrist. The term also includes licensed or certified psychologists. In addition, the following are acceptable sources for limited diagnoses:

- optometrists for visual acuity and visual field measurements;
- podiatrists for foot and ankle impairments;

- licensed or certified school psychologists for mental retardation, learning disabilities, and borderline intellectual function; and
- qualified speech and language pathologists for speech and language impairments.

For claims filed on or after 3/27/2017, the following are also acceptable medical sources: Advance Practice Registered Nurses; Physician Assistants; and Audiologists. 20 C.F.R. §§404.1502(a), 416.902(a).

1.9.2 Evidence to Establish the Nature and Severity of the Impairment

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

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

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

Practice Note: Massachusetts Medical Records Laws

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

1.9.3 Weighing Evidence – for claims filed prior to 3/27/17. For the rules that apply to claims filed on or after 3/27/17, see the power points Regulation Changes for the Submission and Consideration of Medical Evidence, November 2021, elsewhere in the program materials.

It is worth the effort to ensure that the record contains sufficient evidence from **treating sources**. Treating source evidence is often entitled more weight than that from other sources, e.g., the doctors hired by the SSA to review claims and provide an opinion or to

provide a consultative examination and report. This is due to the treating source's greater familiarity with the individual and the impairment, based on examinations of the individual and longitudinal perspective. The SSA's criteria for the contents of a complete medical report are at 20 C.F.R. §§404.1513(d), 416.913(d).

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

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

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

Practice Note

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

- the amount of understanding that an acceptable medical source has of our disability programs and their evidentiary requirements, regardless of the source of that understanding, and the extent to which an acceptable medical source is familiar with the other information in your case record; and
- state agency medical and psychological consultants and other program physicians and psychologists are highly qualified physicians and psychologists who are also experts in Social Security disability evaluation. 20 C.F.R. §§404.1527(d)(6), 416.927(d)(6), published at 65 Fed. Reg. 11,866 (Mar. 7, 2000). These revisions would appear to favor agency doctor opinion, at least on opinions reserved for the SSA. *See also* Social Security Ruling 96-2p, SSR 96-6p—Policy Interpretation Ruling—Titles II and XVI—

Consideration of Administrative Findings of Fact by State Agency Medical and Psychological Consultants and Other Program Physicians and Psychologists at the Administrative Law Judge and Appeals Council Levels of Administrative Review; Medical Equivalence.

1.9.4 Duty to Submit All Evidence

Effective 4/20/2015, revised regulations require the following:

*The claimant must tell SSA about or submit all known evidence that relates to whether the claimant is disabled or blind. See 1.6.5.section 4(f) *supra* for discussion of SSR 17-4p on this duty.

*The affirmative duties of a claimant's representative including acting with reasonable promptness to help the claimant and submit the evidence the claimant must submit.

*Exceptions to the duty to submit all evidence are limited to narrow definitions of attorney-client privilege and attorney work product.

*These rules apply to both attorneys and to non-attorney representatives.

*20 C.F.R. §§404.1512, 416.912, 405.331. HALLEX I-2-5-1.

See also, SSA's Best Practices for Claimants' Representatives

https://www.ssa.gov/appeals/best_practices.html

1.10 SSI PRESUMPTIVE DISABILITY

A child or an adult who appears to meet the disability standard and who meets all other SSI eligibility criteria at the initial application may be presumptively eligible for up to six months while the SSA completes the formal eligibility determination process.

Presumptive disability decisions may not be made at the reconsideration or higher stages. Presumptive disability payments are not considered overpayments if the SSA later determines that the child is not disabled. An overpayment may result if the SSA later determines that the child was not financially eligible for SSI.

Presumptive disability decisions can be made by either the district office or the DDS.

District offices are authorized to make presumptive disability findings for impairments on the following list consisting of impairments which are easily observable or confirmable:

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

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

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

1.11 POSTELIGIBILITY ISSUES

1.11.1 Retroactive Benefits

Because the SSA's eligibility determination process generally takes months or even years to complete, successful applicants are usually entitled to an award of retroactive benefits. Once the individual has been determined disability eligible, the case is returned to the SSA component responsible for implementing the decision and determining benefit amount. Individuals who are concurrently eligible for SSI and SSDI benefits will not receive full retroactive awards of both benefits. Instead, the SSA will use the "windfall offset" provisions to reduce the retroactive award of the benefit paid last by the amount of the benefit paid first. *See* 20 C.F.R. §§404.408b, 416.1123(d). The SSA will generally pay the retroactive SSI first, which is calculated ignoring SSDI benefit eligibility. Then, when the SSA calculates the retroactive SSDI benefit, the SSA will offset the retroactive amount by the retroactive SSI for the same period. The "windfall offset" applies to the full retroactive SSI amount and not the amount actually due the recipient after any interim assistance reimbursement described below. *See* The Windfall Offset Provision, POMS SI 02006.001.

Practice Note: TAFDC

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

(a) Retroactive SSDI Benefits

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

(b) Retroactive SSI Benefits

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

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

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

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

SSI recipients have nine months, effective for payments received on or after 3/2/04 (20 C.F.R. §416.1235, as amended by 431, Pub.L.No.108-203 (3/2/04)) to spend down retroactive awards of SSI or SSDI benefits before those benefits count toward countable resources. The exclusion period for underpayments received prior to 3/2/04 was six months. However, for the exclusion to apply, the retroactive funds must be identifiable from other funds. Generally, this means that the best practice is to hold these funds in a separate account for ease of verifying the spend down. 20 C.F.R. §416.1233. Recipients must spend these funds on themselves for fair market value. To do otherwise is to risk a transfer of asset penalty. See section 1.5.13 above. Recipients must also keep receipts to verify that the funds have been spent, when spent, and on what..

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

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

The exceptions to the installment payment requirement are these, stated in POMS 02101.020:

- claimant who has a medical condition which is expected to result in death within 12 months; or
- Claimant who is no longer eligible for SSI and is determined likely to remain ineligible for the next 12 months.

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

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

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

After August 22, 1996, retroactive awards of SSI payable to eligible children that exceed six times the maximum monthly benefit payable are subject to rules that limit its use. The SSA will notify the child's representative payee that he or she must open a separate

account into which the SSA will pay the retroactive award. These funds will not be counted toward the child's SSI resource limit. *See* 20 C.F.R. §416.640(e).

The child's payee will have access to the dedicated account funds. However, the payee is limited in how he or she can spend the money. Generally, dedicated account funds must be spent on items or services that are related to the child's disability and which benefit the child. Examples of appropriate expenditures might include medical treatment and education or job training. Other examples of items that may be related to a child's disability include: personal needs assistance; special equipment; housing modification; therapy or rehabilitation; specialized camp or day care; and special clothing or dietary needs.

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

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

- First, payees may request prior approval of a proposed expense from their local Social Security offices. Payees must be prepared to explain how the proposed expense is related to the child's disability and provide documentation, i.e., from the child's doctor or other provider. The SSA must review the request and provide a written notice either approving or denying the request. These decisions are appealable through the SSA's administrative appeal process. Permitted Expenditures from Dedicated Accounts, POMS GN 00602.140(C)(2), (6) .
- Second, the SSA will review each payee's dedicated account expenditures on a yearly basis. If the SSA finds that the payee knowingly spent the money on items that are not related to the child's disability, the SSA will require the payee to repay the money to the SSA. Decisions that payees have misapplied dedicated funds are also appealable. Permitted Expenditures from Dedicated Accounts, POMS GN 00602.140(C)(7).

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

Children's representative payees must keep records and receipts for the use of dedicated account funds and provide them to the SSA upon request. Representative payees will be liable to repay the SSA for knowing use of dedicated account funds for expenses that are

not permitted. A determination that a use of funds is not permitted is appealable. 20 C.F.R. §416.640(e)(4). Children who are eligible for past due benefits in amounts in excess of twelve times the maximum benefit payable will be subject to both the installment payment rule and the dedicated account rules. Permitted Expenditures from Dedicated Accounts, POMS GN 00602.140.

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

1.11.4 SSI and SSDI Recipient Reporting Responsibilities

Benefit recipients must report to the SSA any change that may affect benefit eligibility and payment amount. SSI recipients have the greater reporting burden because there are more eligibility criteria and many circumstances that affect payment amount. At this writing, the SSA, spurred by Congress, is focusing on “fraud,” making reporting an especially important issue for recipients. Do not assume that benefit recipients understand the rules and their responsibilities for their benefits. Many have had a lot of information thrown at them during the application process, a very stressful time for most and may not even be aware that they missed something or do not understand. Due to the SSA staff reductions, many may have had little or no opportunity for further meaningful contact with the SSA about their rights and responsibilities. People with cognitive limits, mental impairments, or limited proficiency in English are especially vulnerable.

(a) *What to Report*

All benefit recipients must report any change in circumstances that may affect their eligibility. SSI recipients have the most to report. The required reports for SSI recipients include, but are not limited to: changes in address or living arrangements; changes in income or resources; changes in marital status; admission to or discharge from an institution, jail, prison, or health-care facility; eligibility for other benefits; death of a spouse or anyone in household; and absence from the U.S. 20 C.F.R. §416.704, 416.708. see this link for SSI reporting requirements. <https://www.ssa.gov/ssi/text-report-ussi.htm> See this link for SSDI reporting instructions. <https://www.ssa.gov/pubs/EN-05-10153.pdf>

These reporting duties also apply to representative payees. 20 C.F.R. §§416.635, 404.2035.

Practice Note

Recipients should endeavor to ensure that there is a record of any reports they make. The best way to do this is to make each report in writing and either mail it certified mail, return receipt requested or bring the writing to a SSA District Office and request a “receipt.” SSA staff may be able to provide a “receipt” by using the SSA Report of Contact form. This is a blank form on which the SSA employee taking the report can note what has been reported and the date and

provide a copy to the recipient. Recipients should always keep copies of anything submitted to the SSA and file the copies in a place where they can be retrieved. If information is received over the telephone, the recipient should keep a written record of the date and time of the conversation, the name of the SSA employee, the phone number used, and what was said. Reports of earnings should result in a computer generated receipt, whether the report is made in person or otherwise.

(b) *When to Report*

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

1.11.5 Effect of Residence in an Institution

(a) *SSI Benefits*

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

(b) *Children's SSI*

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

Deeming of parental income and assets does not apply to children who are residents of medical care facilities and who are subject to the \$30 FBR. 20 C.F.R. §416.1165(g)(5); Waiver of Parental Deeming Rules, POMS SI 01310.201. In addition, children who were eligible for the \$30 FBR may remain eligible for the deeming exemption when they leave the medical care facility under the following circumstances: the child continues to meet the disability standard; the child is eligible for Medicaid under a state home care plan; and the child would be ineligible for SSI benefits if parental income or assets were deemed.

Waiver of Parental Deeming Rules, POMS SI 01310.201; *see also* 20 C.F.R. §§416.1161a, 416.12. In Massachusetts, the children who are eligible for this SSI-deeming waiver tend to be children eligible for home and community based services

through the Kaleigh Mulligan program. For more information on the Kaleigh Mulligan, see 130 CMR 519.007(A).

(c) *SSDI*

SSDI benefit recipients can continue to receive their benefits while in a public institution, unless they are confined by court order in connection with a crime punishable by a sentence of one year or more. *See* Title II Prisoner and Other Inmate Suspension Provisions, POMS GN 02607.001 . This rule took effect as of March 1995. The effect is to create ineligibility for SSDI beneficiaries for any month in which they are confined at public expense to a correctional facility for conviction of a crime punishable by imprisonment for more than one year or to a mental health facility by reason of a verdict of not guilty by reason of insanity or a finding that the individual is incompetent to stand trial in connection with such a crime. 42 U.S.C. §402(x).

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

(d) Prohibition of Payment of Retroactive Benefits to Prisoners

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

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

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

Martinez v. Astrue

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

- 1. SSA stopped, effective 4/1/09, suspending benefits for other than a) warrants for probation or parole violations, and b) warrants with code 4901, 4902, 4999, which are issued for flight or escape. *See* EM 09025, 4/1/09.**

2. The *Martinez* settlement does not apply to warrants for probation and parole violations because the statute clearly does not require intent for benefit suspensions for those warrants.

3. Those whose benefits were suspended or denied on or after January 1, 2007, or who received an administrative appeal decision after January 1, 2007, and those with a live administrative claim on 8/11/08, who continue to be otherwise eligible, will receive be reinstated with retroactive benefits without having to reapply or undergo a continuing disability review.

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

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

For more information on the *Martinez* settlement, see POMS <https://secure.ssa.gov/apps10/poms.nsf/lrx/0202615000> and <https://www.masslegalservices.org/content/advocate-guide-understanding-martinez-settlement>

Clark v. Astrue

1. *Clark* applies to probation and parole warrants. The case was remanded in a very strong decision by the Second Circuit Court of Appeals to the federal district court, where a national class was certified. The Federal District Court for the Southern District of New York issued the final order on April 13, 2012.

2. SSA has published EM-11032 (5.9.11) prohibiting further benefit suspensions base solely on outstanding probation or parole warrant. SSA issued implementing POMS instructions in November 2012, at GN 02615.000 *et seq.* <https://secure.ssa.gov/apps10/poms.nsf/lrx/0202615000>

3. The class entitled to relief under the settlement consists of the following. All persons nationwide whose benefits were suspended or denied on or after 10/24/06, based solely on a warrant for an alleged parole or probation violation. The class also includes those who received a notice of overpayment for this reason during the same time period and those who had an appeal pending of such determinations on or after 10/24/06.

4. To see the case documents and to stay tuned for developments on class relief go to the website of lead class counsel, the National Senior Citizens Law Center, at <https://justiceinaging.org/our-work/litigation/clark-v-astrue-litigation/>

1.11.6b. SSI/SSDI Suspense Rules for Outstanding Warrants

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

Section 202(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193 (Aug. 22, 1996), precludes SSI eligibility for applicants and recipients who are

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

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

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

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

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

Mandatory Good Cause

The mandatory good cause exception provides that SSA **shall**, for good cause shown, pay the individual benefits that have been withheld or would otherwise be withheld if a court of competent jurisdiction has: (1) found the individual not guilty of criminal offense, (2) dismissed the charges, (3) vacated the warrant for arrest, or (4) issued any similar exonerating order (or taken similar exonerating action); or the individual was erroneously implicated in connection with the criminal offense by reason of identity fraud.

Mandatory good cause may be raised at any time.

Discretionary Good Cause

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

Option 1:

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

Option 2:

- The offense or parole or probation violation was nonviolent AND not drug-related; AND
- The claimant attests that s/he was not convicted of or did not plead guilty to another felony since date of warrant; AND
- The warrant is the only existing warrant and is 10 or more years old; AND
- One of following applies:
 - claimants medical condition impairs his/her mental capacity to resolve warrant; or
 - claimant is “incapable” or “legally incompetent;” or
 - claimant has a rep payee.

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

Good Cause Procedures

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

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

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

Practice Note

These benefit suspensions are appealable through the appeals process laid out in 20 C.F.R. §416.1400 *et seq.* *See* POMS 00501.005. In addition, recipients can request appeals and/or waivers of any resulting overpayments. Potential issues

for appeal may include factual as well as legal issues. The information SSA receives from law enforcement may be out of date or incorrect, *e.g.*, the matter was resolved but the resolution was not entered into the appropriate database. The information from law enforcement may also not indicate whether the warrant issued on the basis of an appropriate finding that the claimant was fleeing to avoid prosecution, etc., as required by 20 C.F.R. §416.1339(b)(i). The basis on which warrants issue will vary from state to state. Finally, although the SSA has taken the position that it does not consider intent to flee in determining whether an individual with an outstanding felony-related warrant is a “fleeing felon,” as would seem to be required in the choice of the words “fleeing” or “fugitive,” a number of courts have endorsed the intent requirement. *See, e.g., Fowlkes v. Adamec*, 432 F.3d 90 (2nd Cir. 2005); *Hull v. Barnhart*, 336 F.Supp.2d 1113 (D.Or. 2004); *Thomas v. Barnhart*, No. 03-182-B-W (D. Me. August 4, 2004); *Blakely v. Comm’r Social Security*, 330 F.Supp.2d 910 (W.D. Mich. 2004); *Garnes v. Barnhart*, 352 F.Supp.2d 1059 (N.D.Cal. 2004).

1.11.7 Representative Payment

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

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

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

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

20 C.F.R. §§404.2010, 416.610.

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

The SSA may also individually determine that it is in a recipient’s best interest to receive benefits through a payee. 20 C.F.R. §§404.2001(b), 404.2010(a), 404.2015, 416.601(b), 416.610(a), 416.615. These recipients may appeal the determination that they need a payee by presenting evidence that they are mentally or physically capable of managing their own benefits. 20 C.F.R. §§404.902(o), 416.1402(d). Also, if no suitable payee is available, the SSA must pay the recipient directly while continuing to assist the recipient to look for a payee. The SSA may not suspend the benefits of these recipients because they do not have a payee, unless the SSA determines that direct payment would result in substantial harm to the recipient. Even then, the SSA can only suspend payment for thirty days. When the Suspension of Benefits is Permitted, GN 00504.105.

Prior to the enactment of the 1994 Reform Act, P. L. No.104B21, individuals whose alcoholism or drug addiction (DAA) was material to the disability determination were

required to receive their benefits through a payee. The 1994 Reform Act eliminated benefits eligibility for DAA beneficiaries and created a new class of beneficiaries -those with DAA conditions. A DAA condition exists when a beneficiary has a medically determined substance use disorder that is not material to the disability determination. There is no mandatory payee requirement for DAA condition beneficiaries. Instead, the SSA must determine, on a case-by-case basis, the capability of these beneficiaries, as described above. POMS GN 00502.020A.4. However, there is no limit on suspension for these beneficiaries, once SSA finds substantial harm with direct payment. POMS GN 00504.105A.2.c.

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

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

Section 102 of the Strengthening Protections for Social Security Beneficiaries Act of 2018, Public Law 115-165, exempts the following payees from the annual accounting requirement:

- * natural or adoptive parents of a minor child who primarily resides in the same household as the beneficiary (stepparent and grandparent payees are still required to complete annual accounting forms unless they qualify for the exemption under the legal guardian exemption);
- * legal guardian of a minor child entitled who primarily resides in the same household as the beneficiary;
- * natural or adoptive parents of a disabled adult who primarily resides in the same household as the beneficiary (stepparents and grandparents of a disabled individual are not exempt payees); or
- * spouse payees.

Note, however, that all representative payees should keep good records of how they spend beneficiary benefits as Social Security may request any payee to complete an accounting report anytime information is received that raises a question about the payee's use of monthly benefits or conserved funds.

POMS GN 00605.001, GN 00605.015.

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

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

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

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

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

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

108-203.

- SSA may impose a civil monetary penalty for offenses involving representative payee misuse of Social Security or SSI benefits, effective for violations committed after 3/2/04. 106, Pub.L. No. 108-203
- SSA must report to Congress on the effectiveness on the representative payee selection criteria and on how benefits are used by representative payees. 103, 107, Pub.L. No. 108-203.

(f) *Noncitizen Parents of SSI Eligible Children*

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

Practice Note

A bigger problem for some noncitizen parents may lie in the income and asset verification requirements. The SSI application requires information about the income and assets of the both the child and the parents who live with the child. The SSA must verify the parents' income and assets before the child can be found eligible for benefits. This is because a portion of the parents' income and assets is counted to the child to determine whether the child is SSI eligible and what the benefit amount should be. Verification is by paychecks, bank statements, and tax records. The SSA also verifies reported income with the parents' employers. This reporting and verification process may pose significant problems for parents who are working without authorization or working "under the table." Also note that the SSA shares reported and verified income with the IRS on a regular basis.

1.12 ELIGIBILITY REDETERMINATIONS

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

1.12.1 SSI Non-disability Criteria

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

within twelve months. When suspense status continues for twelve consecutive months, eligibility terminates. 20 C.F.R. §416.1335. When benefit eligibility terminates, the individual must reapply to regain eligibility.

1.12.2 Continuing Disability Reviews (CDRs)

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

1.12.3 CDR Standard for Adults

(a) Medical Improvement

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

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

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

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

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

(b) Medical Improvement Related to the Ability to Work

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

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

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

Where the individual's impairment previously met a listing but no longer does, the SSA will deem increased RFC and find medical improvement related to the ability to work. 20 C.F.R. §§404.1594(c)(3)(i), 416.994(b)(2)(iv)(A). The SSA will apply the same listing to determine whether medical improvement related to the ability to work has occurred, even if the listing has since been revised. 20 C.F.R. §§404.1594(c)(3)(i), 416.994(b)(2)(iv)(A). Excepted from this rule are the adult mental impairment listings. Instead, the SSA must use the more favorable 1985 version of these listings. Prior versions of the listings are included in the POMS. Pre-1968 Obsolete Versions of Part A Listings, POMS DI

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

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

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

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

Practice Note

“Gaps” in eligibility do not necessarily mean termination of benefits. See SSR 13-3p, “.....when we review a medical disability cessation determination or decision, we must consider whether the beneficiary was disabled at any time through the date of the adjudicator(s)’s final determination or decision.”

1.12.4 Exceptions to the Medical Improvement Standard

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

(a) *The First Group of Exceptions*

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

Substantial Gainful Activity

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

The SGA exception does not apply at all to SSI recipients. 20 C.F.R. §416.994(b)(3) and (b)(4), POMS DI 13005.005, DI 28020.001 . An SSI recipient determined to be performing SGA is entitled to benefits under Section 1619(a), the SSI work incentive program, as long as he or she continues to have a disabling impairment. This means that the disability eligibility of SSI recipients cannot be terminated merely for performing SGA, regardless of their earnings. They may be terminated, however, for medical reasons, as the result of a CDR, and they may lose financial eligibility for cash benefits as a result of their earnings.

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

Practice Note

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

Advances in Medical or Vocational Technology or Therapy

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

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

Vocational Therapy

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

New or Improved Diagnostic Techniques or Evaluations

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

The Prior Disability Decision Was in Error

This exception applies when there is substantial evidence that any prior disability determination was in error. 20 C.F.R. §§404.1594(d)(4), 416.994(b)(3)(iv). The key point here for advocates is that this exception is not intended to substitute current judgment for that used in the prior favorable decision, e.g., the SSA cannot simply re-review the same evidence and make a different decision. There are only three circumstances that will meet the error test:

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

earlier decision was wrong, i.e., a tumor thought to be malignant was actually benign.
20 C.F.R. §§404.1594(d)(4)(i)-(iii), 416.994(b)(3)(iv)(A)-(C).

(b) *The Second Group of Exceptions*

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

Fraud

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

Noncooperation

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

Practice Note

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

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

Inability to Locate

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

Failure to Follow Prescribed Treatment

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

Practice Note

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

1.12.5 Benefit Continuation With Participation in Vocational Rehabilitation Programs

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

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

- they are participating in an approved program of vocational rehabilitation that began prior to the determination of medical improvement; and

- SSA determines that continuation in or completion of the program increases the likelihood that the recipient will stay off benefits.

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

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

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

The revised benefit continuation rules also improve the criteria for determining when the individual needs to continue in or complete the program in order to increase the likelihood of staying off benefits. For example, the revised regulations remove the modifier “significantly” from the phrase “significantly increase the likelihood.” SSA implements this new language by requiring a determination that completion of or participation in the program will provide the individual with:

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

20 C.F.R. §§404.1597, 416.1338.

1.12.6 CDR Sequence of Review for Adults

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

- **Step 1:** Is the individual engaging in SGA? If yes, and the claimant is not entitled to eligibility under Section 1619 or to a TWP or re-entitlement period, the SSA will terminate the claimant’s benefits. If no, go to Step 2.
- **Step 2:** Do the individual’s current impairments meet or equal the Listings of impairments? If yes, the SSA will find that the claimant’s disability continues. If no, go to Step 3.

- **Step 3:** Has there been medical improvement in the conditions the individual had at the time of the last medical review? If yes, go to Step 4. If no, go to Step 5.
- **Step 4:** Is the medical improvement related to the individual's ability to work? (Compare current fictional RFC with old RFC or deemed or reconstructed RFC). If yes, go to Step 6. If no, go to Step 5.
- **Step 5:** Do any of the first or second group of exceptions apply? If one of the first group of exceptions applies, 20 C.F.R. §§404.1594(d), 416.994(b)(3), go to Step 6. If one of the second group of exceptions applies, 20 C.F.R. §§404.1594(e), 416.994(b)(4), the SSA will terminate or suspend the individual's benefits. Remember that the second group of exceptions may be applied at any time. If no exceptions apply, the individual's benefits will continue.
- **Step 6:** Does the individual have a "severe" impairment, considering all the individual's current impairments? If yes, go to Step 7. If no, the individual's benefits will end.
- **Step 7:** Is the individual able to perform past work, considering all the individual's current impairments? If yes, the individual's benefits will end. If no, go to Step 8.
- **Step 8:** Is the individual able to perform other work, considering all the individual's current impairments and the individual's age, education, and work history? If yes, the individual's benefits will end. If no, the individual's benefits will continue.

1.12.7 CDR Review Standard for Children Under Age Eighteen

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

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

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

POMS DI 28005.030(B)(4) . The second group of exceptions is exactly the same as described above for adults. 20 C.F.R. §416.994a(f).

1.12.8 CDR Sequence of Review for Children

- **Step 1:** Has there been medical improvement in the impairments present at the time of the most recent favorable decision? If there has been medical improvement, go to Step 2. If there has been no medical improvement, eligibility continues, unless an exception applies. If a group 1 exception applies, go to Step 3. If a group 2 exception applies, eligibility terminates.
 - **Step 2:** Do the impairments considered at the time of the most recent favorable decision meet or equal the severity of the listing they met or equaled at that time? Use the listing considered at that time even if it has been revised or removed. If the answer is yes, eligibility continues, unless an exception applies. If the answer is no, go to Step 3.
 - **Step 3:** Does the child have a severe (more than *de minimis* impairment, considering all the child's current impairments in combination? If the answer is no, eligibility terminates. If the answer is yes, go to Step 4.
 - **Step 4:** Do the child's current impairments meet or medically equal the severity of a listed impairment? If the answer is yes, eligibility continues. If the answer is no, go Step 5.
- Step 5:** Do the child's current impairments functionally equal the severity of a listed impairment? If the answer is yes, eligibility continues. If the answer is no, eligibility terminates.

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

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

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

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

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

The SSA initiates the age-eighteen redetermination between the recipient's eighteenth and nineteenth birthdays and will notify the recipient of the review and of the right to submit evidence. If the SSA determines that the recipient is not eligible under the adult disability standard, the SSA will notify the recipient of the appeal rights and the right to request continued benefits pending appeal. 20 C.F.R. §416.987(d).

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

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

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

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

Practice Note: Social Security Ruling (SSR) 11-2p provides a useful compilation of rules and policies for the evaluation of disability for young adults between the ages of 18 and approximately 25. The SSR includes discussion, e.g., of school records, nonmedical sources of evidence including school programs, structured settings and accommodations and extra help. http://ssa.gov/OP_Home/rulings/di/01/SSR2011-02-di-01.html

1.12.11 CDR and Age-Eighteen Review Procedure

The SSA will notify a recipient that a review has begun and will invite the recipient to submit evidence of continuing disability. Recipients who receive notice that their benefits will be terminated because they are no longer disabled may appeal that decision through the appeals process set out in 1.6, Applications and Appeals, above. They may also elect

to receive continuing benefits through the ALJ hearing appeal step, as long as they appeal within ten days at each appeal step and request continuing benefits. 20 C.F.R. §§ 404.1596(g), 416.996(g).

If the recipient loses on appeal, the SSA will consider the continued benefits to be an overpayment and will ask the recipient to repay. The recipient may, however, request a waiver of the overpayment and should meet the “not at fault” portion of the waiver standard if he or she appealed the termination in good faith and cooperated with the appeal. 20 C.F.R. §§404.1596(g), 416.996(g). *See* 1.13, Overpayments, below, for more information on the waiver standard.

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

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

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

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

1.13 WORK INCENTIVE PROGRAMS

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

Practice Note

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

1.13.1 SSDI Work Incentive Programs

(a) Trial Work Period

SSDI recipients are entitled to a nine-month trial work period. 20 C.F.R. §404.1592. A trial work month is a month in which the recipient earns \$940 or more in gross wages in 2021 in work that is not training or therapy. (it was \$910 in 2020) (See POMS DI 1301.050 for a table of trial work period trigger amounts for prior years.) Recipients continue to receive their full SSDI benefits during the trial work months, no matter how much they earn. The nine months do not have to be consecutive. Beneficiaries only get one trial work period for each period of disability.

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

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

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

(b) Extended Period of Eligibility and Re-entitlement Period

The EPE starts the month after the 9th Trial Work month. The EPE provides another period in which to test the ability to work without immediate loss of benefits. The first 36 months of the EPE is the Re-entitlement Period. During the 36 months of the Re-entitlement Period, SSDI recipients are SSDI payment eligible in months where countable gross earnings are under the substantial gainful activity (SGA) level, as long as they remain medically disabled. They are not payment eligible and overpaid if they receive the SSDI benefit in an SGA month. 20 C.F.R. §404.1592a. After the 36th month of the Re-entitlement Period portion of the EPE, the SPS can continue – but SGA in any month after the Re-entitlement Period ends results in termination of entitlement to SSDI.

Determining SGA. See [1.8.3](#) above for more information about SGA. In 2020, SSA presumed that gross wages of \$1260 per month or more showed the ability to perform SGA for those eligible on the basis of disability. The presumed SGA amount was \$2110 in 2020 for those eligible on the basis of blindness. In January 2021, these amounts increased to \$1310 and \$2190, respectively. This SGA threshold became subject to annual cost of living adjustments in 2001 and was lower in earlier years (see 1.8.3 for SGA levels for earlier years). In determining whether work during the EPE constitutes SGA, it is important to consider the following:

- **Impairment Related Work Expenses (IRWEs)** may be used to reduce monthly earnings below the SGA level. An IRWE is a cost of employment borne by the

claimant. The cost of an IRWE must be paid by the recipient and without reimbursement from any source. 20 C.F.R. §§404.1576(b)(3), 416.976(b)(3). IRWE costs documented by the claimant will be deducted from monthly gross earnings before the SSA is allowed to make an SGA determination. IRWE deductions may include the unreimbursable claimant- paid costs of items or services necessary to the claimant’s ability to work, including medications, wheelchairs, counseling services, specially adapted vehicles, etc. POMS DI 10505.000.

- The value of any **subsidies**, 20 C.F.R. §§404.1574(a)(2), **special conditions**, 20 C.F.R. §404.1573(c), should be deducted from monthly gross wages before deciding whether the wages show SGA. POMS DI 10505.010.
- **Count gross pay when the work was done to earn it**, as opposed to when it was paid. POMS DI 10505.010C. Effective 9/23/16 SSA is allowed to presume pay was earned in the month paid - post-entitlement – unless there is readily available information to show when the pay was earned. Bipartisan Budget Act of 2015 (10/28/15). POMS DI 10505.005, 10505.010.
In addition, watch out for Social Security’s use of the Pay Distribution Calculator described in Subsection C.2 of POMS DI 10505.005. The intent of this tool is to distribute pay to the proper month when a pay period straddles two months, but it is not accurate in all circumstances, especially where the beneficiary works part-time or a variable schedule.
- Only pay for work activity counts in determining SGA. **Pay for time not worked, such as paid sick or vacation time**, should not be included. POMS DI 10505.010.
- Earnings put into **pre-tax retirement plans** count toward SGA. POMS DI 10505.005 and DI 10505.010.
- **For self-employed beneficiaries**, SSA counts net income less the reasonable value of any significant unpaid help from family members. 20 C.F.R. §§404.1575(c), 416.975(c). In addition to counting actual earnings, SSA also considers the comparable worth of the self-employment activity. 20 C.F.R. §404.1575(a). See 1.8.3 (e) above for more on self-employment.

The Cessation Month. The first month after the 9th trial work month in which the SSDI recipient performs SGA is defined as the **cessation** month. In determining whether a beneficiary has performed SGA for the first time, SSA considers unsuccessful work attempts, 20 C.F.R. §404.1574(c), and average earnings, 20 C.F.R. §404.1574a, in addition to IRWEs, subsidies, and special conditions. 20 C.F.R. §404.1592a(a)(1). “Cessation” in this context does not mean that SSDI eligibility is lost. Instead, the significance of the cessation month is this:

- after cessation month, unsuccessful work attempts and averaging do not apply in determining SGA.
- SSDI benefits are payable in the cessation month and the following two months, regardless of the level of earnings.

20 C.F.R. §404.1592a(a)(2)(i).

The cessation month may occur during the EPE or after.

Averaging Earnings. In determining whether work is SGA, SSA may average earnings until the cessation month. Earnings may be averaged for periods in which the work or self-employment was continuous without significant change in work patterns or earnings, and there has been no change in the substantial gainful activity earnings levels. 20 C.F.R.

§404.1574a. If there is a significant change in work pattern or earnings during the period of work requiring evaluation, SSA will average earnings over each separate period of work. 20 C.F.R. §404.1574a(c). POMS DI 10505.015 Averaging Countable Earnings.

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

(c) Termination of Entitlement to SSDI Benefits After the 36th Month of the Re-entitlement Period Portion of the EPE

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

1.13.2 SSI Work Incentive Programs

(a) Earned Income Exclusion

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

\$585.00	gross earnings
- 20.00	(if unused on unearned income)
\$565.00	
- 65.00	
\$500.00	
\$500	divided by 2 = \$250 (countable income)
The SSI benefit is reduced by \$250.	

20 C.F.R. §§ 416.1112(c)(5)&(7),416.1112(c)(4).

(b) Impairment Related Work Expenses (IRWEs)

IRWEs are deducted from gross monthly income before applying the earned income exclusion to determine the monthly SSI benefit. *See* 20 C.F.R. §416.976, POMS DI 10505.000. Using the example above with \$100 in IRWEs:

\$585.00	gross earnings
- 20.00	(if unused on unearned income)
\$565.00	
- 65.00	
\$500.00	

- 100.00 (IRWEs)
\$400.00
\$400 divided by 2 = \$200 (countable income)

The SSI benefit is reduced by \$200.

(c) Blind Work Expenses (BWEs)

There are additional work expense deductions available to people who receive SSI on the basis of blindness. See 20 C.F.R. §416.1112(c)(8), POMS SI 00820.535. Some examples of BWE items include: service animal expenses, transportation to and from work, Federal, state, and local income taxes, Social Security taxes, attendant care services, visual and sensory aids, translation of materials into Braille, professional association fees, lunches at work, and union dues.

Items that could be either IRWEs or BWEs, and generally should be treated as BWEs. BWEs are more advantageous to the SSI recipient because BWEs are deducted after application of the earned income exclusion. Using the above example with \$100 in BWEs instead of IRWEs demonstrates this point:

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

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

The SSI benefit is reduced by \$150.

(d) Student Earned Income Exclusion

For students under age 22 and regularly attending school, SSA does not count up to \$1,930 of earned income per month in 2021 in calculating the SSI payment amount (capped at \$7770 in the calendar year). (it was \$1900/\$7670 in 2020) See POMS SI 00820.510. These amounts increase each January with the COLA.

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

- In a college or university for at least 8 hours a week; or
- In grades 7-12 for at least 12 hours a week; or
- In a training course to prepare for employment for at least 12 hours a week (15 hours a week if the course involves shop practice); or
- For less time than indicated above for reasons beyond the students control, such as illness. See 20 C.F.R. §416.1112(c)(3). POMS SI 00501.020.

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

Supplemental Security Income recipients who work at the SGA level are eligible for the 1619 program. 42 U.S.C. §1382h; 20 C.F.R. §§416.260-.267; POMS SI 02302.000 et seq. Recipients who have earnings above the SGA level can continue to receive cash payments under the 1619(a) program (special SSI payments for people who work) as long as they remain medically disabled and meet all other SSI financial and categorical eligibility requirements. The recipient's financial eligibility and payment amount will be calculated in the same way as for someone who is not working at the SGA level. Medicaid eligibility also continues with 1619(a) eligibility. When earnings become too high to allow for a cash payment, the recipient may be eligible for 1619(b) (continued Medicaid eligibility). 42 U.S.C. §1382h(b); 20 C.F.R. §§416.268-.269; POMS SI 02300.000 et seq.

In order to qualify, the recipient must

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

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

1.13.3 Plans to Achieve Self-Support (PASS)

PASS is a little-used SSI program that allows SSI blind and disabled applicants and recipients to save income and resources, which would otherwise be countable under SSI, for a vocationally feasible goal. Examples of income that may be sheltered in a PASS include the following: earned income, SSDI benefits, veterans' benefits, and private pension benefits. 20 C.F.R. §416.1226.

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

Under the Social Security Act and regulations, an individual can enter into a written plan with SSA to save and expend funds to achieve a vocational goal and, as a result, gradually achieve financial independence. 42 U.S.C. §§1382a(b)(4)(A)(iii) and (B)(iv), 1382b(a)(4); 20 C.F.R. §416.1226; POMS SI 00870.000 et seq. All funds saved in a PASS are excluded from countable income and resources, IF the individual follows the written plan in expending the PASS funds. The legislative history shows that Congress expressed "a desire to provide every opportunity and encouragement to the blind and disabled to return to gainful employment." Plans for Achieving Self-Support - Overview, POMS SI 00870.001(A).

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

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

A PASS must meet the following requirements, as laid out in Elements of a PASS, at POMS SI 00870.006 and 71 Fed. Reg. 28262 (5/16/06):

- be designed especially for the individual;
- be in writing;
- be approved by the SSA (a change of plan must also be approved);
- be designed for an initial period of not more than eighteen months. (The period may be extended for an indefinite number of 6 month extensions. POMS SI 00870.001) There is no time limit placed on PASS plans and, in fact a federal court struck down a 48 month time limit that existed in the prior version of the PASS regulations, *see Panzarino v. Heckler*, 624 F. Supp. 350 (S.D.N.Y. 1985). On May 16, 2006, SSA issued final regulations, published at 71 Fed. Reg. 28262 (5/16/06), establishing individualized time limits for Plans to Achieve Self-Support. These regulations implement Section 203 of the Social Security Independence and Program Improvements Act of 1994, Pub. L. 103-296;
- show the individual's specific occupational goal;
- show what resources the individual has or will receive for purposes of the plan and how he or she will use them to attain his or her occupational goal;
- show how the resources the individual set aside under the plan will be kept identifiable from his or her other funds;
- show a list of current earnings, if any, and estimated earnings when the vocational goal is obtained;
- show a detailed business plan, when self-employment is a goal, addressing each item set forth in Elements of a PASS, POMS SI 00870.006(A)(10) ; and
- show a list of "milestones" and "interim steps" to be achieved during the life of the PASS and an estimated time frame for the achievement of each "milestone."

All expenses involved with a PASS are subject to a "reasonable and necessary" test. For example, if the PASS includes the purchase of a vehicle, it may be necessary to explain in the PASS why leasing a vehicle will not satisfy the vocational goal. Any SSA challenge to a "reasonable and necessary" expense must contain local office documentation as to what less expensive options are available. Leveraging other sources of services and funding may add to the likelihood that a particular plan will be approved. For instance, a recipient could use tuition grants, state rehabilitation services, or Medicaid to provide some of the services or funding needed for items included in the plan. This may make the overall plan more financially feasible.

An individual may develop a plan on his or her own initiative, and any employer, social agency, the SSA employee, or other person can assist in setting up the plan and its goals. If appropriate, an individual may also be referred to a state rehabilitation agency or an agency for the blind for assistance. Any fee for the preparation of a PASS is an allowable expense and can be included in the PASS. Fees must be reasonable, and no fees for private PASS monitoring will be allowed.

SSA may reject the plan if, for instance, it concludes that the goals of the plan are not realistic for the particular individual or the funds available will not be adequate to meet the plan's goals. The POMS and emergency instructions encourage SSA to consider vocational information in order to determine if a PASS applicant's goal is "feasible" in light of that individual's disabling impairments. Vocational information can include the applicant's prior work history and education. PASS denials are appealable through SSA's regular administrative appeals process (Reconsideration, ALJ hearing, Appeals Council).

SSA regularly monitors PASS compliance and will begin to count the recipient's earned and unearned income and resources excluded under the PASS at the point that: 1) the recipient reaches the goal or completes the time schedule set forth in the plan; or 2) abandons or fails to follow the conditions of the plan. A PASS may be suspended, then reinstated and modified, with the written approval of the SSA, upon the recipient's request.

Practice Note

Free work incentive planning assistance is available for SSI/SSDI recipients through two programs in Massachusetts. Benefits specialists from Project Impact and BenePLAN provide clients with individualized analyses of the effect of work on SSI, SSDI, government assisted housing, food stamps, and other benefits. They also assist clients with PASS.

Project IMPACT:

If you live in Eastern Massachusetts and currently receiving SSDI and/or SSI due to a disability and have questions about the impact of your work, please contact please contact Joseph Reale at 617-204-3854 or Joseph.Reale@mrc.state.ma.us to be connected with a Project Impact Community Work Incentives Coordinator (CWIC). <https://www.mass.gov/service-details/statewide-employment-services>

BenePLAN:

If you live in Central/Western Massachusetts and are currently receiving SSDI and/or SSI due to a disability and have questions about the impact of your work, please BenePlan Community Work Incentives Coordinators (CWICs) at 1-877-937-9675. <https://workwithoutlimits.org/benefits-counseling/>

For general questions about how work earnings could impact SSI, Social Security disability benefits, work incentives, or the Ticket to Work program, please call the SSA Help Line at 1-866-968-7842 or 866-833-2967 (TTY), Monday-Friday 8AM-8PM ET.

1.13.4 The Ticket to Work and Work Incentives Improvement Act of 1999

On December 17, 1999, the Ticket to Work and Work Incentives Improvement Act was signed into law. Pub. L. No. 106-170 (Dec. 17, 1999). This act represents the most significant return-to-work development since the implementation of the SSI Section 1619 program. The express purposes of the act are:

- to provide health care and employment preparation and placement services to individuals with disabilities,

- to encourage states to adopt an expansion of Medicaid availability,
- to expand Medicare availability to disabled workers, and
- to establish a “ticket to work” that will allow an individual with a disability to obtain necessary services and supports to obtain and retain employment and reduce dependency on cash benefits.

Current work incentive programs, such as the Trial Work Period, Extended Period of Eligibility and the Section 1619 programs, are not affected by the new act and continue to be available to disabled SSDI recipients who wish to return to work.

(a) *The Ticket to Work*

A disabled beneficiary will be provided a “Ticket to Work” which will allow that individual to obtain employment services, vocational rehabilitation services, or other support services from any provider (public or private) that is willing to provide services to that individual. The Ticket will explain the SSA’s commitment to pay for all services provided in order to assist in the return to work effort. Each participating individual will develop an “individual work plan” with the provider that will set forth the planned employment goal as well as the services and supports necessary to attain that goal. Pub. L. No. 106-170, 101. Ticket distribution in Massachusetts began in early 2002. Tickets will be mailed to newly eligible recipients on a monthly basis. Current statistics indicate that about 1000 tickets are mailed to Massachusetts recipients each month. Nearly 7,000,000 Tickets have been sent out nationwide.

(b) *Expanded Medicare Benefits*

SSA published final regulations at 69 Fed. Reg. 57, 224 (Sept. 24, 2004) to implement the Ticket to Work and Work Incentives Improvement Act of 1999 provision establishing additional Medicare coverage for disabled beneficiaries who lose Title II disability benefits due to SGA. (SSA began implementing this provision on October 1, 2000 using subregulatory instructions.)

Prior to this change, Medicare entitlement ended with performance of SGA after the 36th month of the Re-entitlement Portion of the Extended Period of Eligibility (EPE) month. Effective October 1, 2000, Medicare entitlement can continue for up to 78 months after the 15th EPE month. Those who have lost entitlement to Title II disability cash benefits due to SGA, must continue to meet the disability standard to be eligible for continued Medicare.

(c) *Expanded Medicaid Benefits*

States will have the option of expanding Medicaid coverage to allow for “buy-in” programs for disabled beneficiaries who return to work. Options to cover up to 450 percent of the poverty level exist for each state. Disabled workers must work at least forty hours per month and continue to have a severe impairment. Pub. L. No. 106-179, 201.

(d) *Elimination of Work Disincentives – Two Types of CDR Protection*

Section 101C Protection. Under Section 101C of The Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA), effective January 1, 2001, SSA

will not initiate a Continuing Disability Review (CDR) for beneficiaries who are “using” a Ticket to Work. Section 101C protection applies to both work-triggered and regularly scheduled CDRs. To determine whether a Ticket is “in use,” the Vocational Rehabilitation agency or Employment Network to whom the Ticket is assigned has to certify that the beneficiary is making “timely progress” toward an employment outcome. This certification process has proved burdensome and confusing for VR agencies and ENs, and on December 29, 2005, SSA suspended all timely progress reviews until final regulations simplifying the process become effective. 20 C.F.R. §§404.1590(h), 416.990(h), as amended by 71 FR 66856, Nov. 17, 2006. POMS DI 13001.005, DI 55025.010

Section 111 Protection. Section 111 of TWWIA created a new work incentive that encourages long-term disability beneficiaries to return to work by ensuring that work activity would not trigger a medical Continuing Disability Review (CDR). Effective January 1, 2002, a title II or concurrently entitled title II and title XVI disability beneficiary, who has been entitled to benefits for at least 24 months, will not have a medical CDR triggered solely as result of work activity. This new work incentive is called "Section 111 protection." It applies whether or not the beneficiary has a Ticket to Work. Beneficiaries protected under section 111 will be subject to regularly scheduled medical CDRs unless they are using a ticket as part of the Ticket to Work program. 20 C.F.R. §§404.1590(i), 416.990(i), as amended by 71 FR 66856, Nov. 17, 2006.

(e) Expedited Reinstatement of Benefits (EXR)

The purpose of Expedited Reinstatement of Benefits (EXR) is to give people who have been terminated from SSDI or SSI benefits due to work activity a new and (theoretically) quick way to get back on benefits. Before EXR, filing a new application was the only way for a person to become eligible for benefits after termination. Here’s one typical scenario: an SSDI recipient completed her trial work period and the 36 month Re-entitlement Period portion of the Extended Period of Eligibility (EPE), working on and off during the Re-entitlement Period. After the 36th month of the Re-entitlement Period, her EPE continued because she was not working at the substantial gainful activity (SGA) level. Eventually her earnings went above the substantial gainful activity (SGA) level. The first month her earnings went over SGA after the 36th month of the Re-entitlement Period, her SSDI terminated. Period. If she later became unable to work due to her disability, her only option was to file a new application for benefits.

EXR has changed all that. Now a person who has been terminated from SSI or SSDI due to work and later requires disability benefits again can choose between reinstatement of prior entitlement to benefits (EXR) and a new application for entitlement to benefits.

Proposed EXR regulations were published at 68 Fed. Reg. 61162 (10/27/03) and the final regulations were published at 70 Fed. Reg. 57133 (9/30/05). The initial set of Ticket to Work regulations, issued in January, 2002, did not include EXR regulations, although EXR POMS were issued in early 2002. See POMS DI 13050.000 and DI 28057.000. The new EXR regulations add new sections §§404.1592b through 404.1592g and 416.999 through 416.999e to 20 C.F.R. Following are the key provisions of the POMS and EXR regulations:

Criteria for entitlement to EXR:

- SSDI: You were previously entitled to a disability benefit on your own record of earnings or as a disabled child or disabled widow(er), or to Medicare entitlement based on disability. SSI: You were previously eligible for a benefit based on disability or blindness.
- SSDI: Your disability entitlement was terminated because you did substantial gainful activity. SSI: Your disability or blindness eligibility was terminated because of earned income or a combination of earned and unearned income.
- In the month you file your request for reinstatement, you are not performing substantial gainful activity.
- Your current impairment must be the same as or related to your prior impairment and you must be disabled as determined under the *medical improvement review standard (MIRS)*. This is the same standard used in Continuing Disability Reviews. The advantage of using MIRS is that SSA will generally find that you are disabled unless your impairment has improved so that you are able to work or unless an exception under the MIRS process applies.
- Your current impairment must be the same as or related to your prior impairment and you must be disabled as determined under the *medical improvement review standard (MIRS)*. This is the same standard used in Continuing Disability Reviews. The advantage of using MIRS is that SSA will generally find that you are disabled unless your impairment has improved so that you are able to work or unless an exception under the MIRS process applies.
- SSA must receive your written request for EXR within the consecutive 60-month period that begins with the month in which your SSDI entitlement terminated due to doing substantial gainful activity or your SSI eligibility terminated due to earned income, or a combination of earned and unearned income. SSA may grant an extension for good cause.
- EXR went into effect January 1, 2001. No EXR benefits are payable prior to January 2001 for SSDI and February 2001 for SSI.

Provisional Benefits:

- You may receive up to 6 consecutive months of provisional cash benefits during the provisional benefit period, while SSA determines whether your disability benefit entitlement can be reinstated.
- The amount of the provisional benefits is equal to the last monthly benefit payable to you during your prior entitlement, increased by any cost of living increases that would have been applicable to the prior benefit amount. For SSI, provisional benefits do not include the state supplement.
- If SSA denies your request for reinstatement, it generally will not consider the provisional benefits you received as an overpayment.

24-Month Reinstatement Period:

- Your 24-month initial reinstatement period begins with the month your benefits are reinstated and ends with the 24th month that you have a benefit payable. For SSDI, a benefit is payable in a month when you do not do SGA. Averaging of earnings and unsuccessful work attempt do not apply during this period. For SSI, a benefit is payable in a month when, using normal SSI payment calculation procedures SSA determines you are due a monthly payment.
- After the 24-month initial reinstatement period is completed you are eligible for additional work incentives under SSDI (such as a trial work period and an extended period of eligibility), as well as possible future reinstatement through the

expedited reinstatement provision under SSDI and SSI.

Other Provisions:

- If you are reinstated on your own earnings record, SSA will compute your primary insurance amount with the same date of onset used in your most recent period of disability on your earnings record.
- Reinstated SSDI benefits can start as early as a year before the request for reinstatement is filed. Reinstated SSI benefits start with the month after the month you filed your request for reinstatement.
- If your reinstatement request is denied, SSA will treat that request as your intent to file an initial application for benefits.

For a helpful discussion of the relative merits of filing for EXR and reapplying, see POMS DI 13050.020 Filing Considerations - Expedited Reinstatement Versus Initial Claim.

(f) Removal of Sanctions for Refusal to Accept Vocational Rehabilitation

SSA regulations at 20 C.F.R. §§404.422, 416.213 provided for sanctions for benefit recipients who refused, without good cause, to accept rehabilitation services made available by a state vocational rehabilitation (VR) agency. The Ticket to Work and Work Incentives Improvement Act of 1999 repealed these rules, effective January 1, 2001, in favor of voluntary participation and choice in provider. The final regulations published at 68 Fed. Reg. 40119 (July 7, 2003) make the revisions required by the Ticket to Work Act.

1.14 OVERPAYMENTS

Overpayments result when a recipient receives more than the maximum amount he or she was eligible to receive. Sometimes the SSA makes mistakes and issues incorrect benefit payments. Sometimes a recipient causes overpayments by failing or forgetting to report changes in circumstances affecting eligibility. Sometimes a recipient reports changes but the SSA does not correct the benefit amount in a timely manner. Regardless of the cause, the SSA may ask the recipient to repay the overpayment.

1.14.1 Notice of Overpayment

The SSA must give written notice of a decision that a recipient has been overpaid that explains the reason for the overpayment, repayment options, and appeal rights. 20 C.F.R. §§404.502a, 416.558. Notification of Overpayment, POMS GN 02201.009 ; SSI OverpaymentCNotifying the Individual, POMS SI 02220.010 . The notice must be in clear, simple language, understandable to the recipient.

1.14.2 Overpayment Appeal Rights

If the recipient disagrees that he or she has been overpaid or disagrees with the amount of the overpayment, he or she may file a request for reconsideration. The appeal process applicable to overpayments is the appeal process described above in 1.6, Applications and Appeals. The recipient has sixty days from the date of receipt of the notice of

overpayment in which to file an appeal. However, if the appeal is filed within thirty days, the SSA cannot begin recovering the overpayment until a reconsidered decision has been made. 20 C.F.R. §404.502a(h); Notification of Overpayment, POMS GN 02201.009(B)(5) (Advance Notice Requirement) .

1.14.3 Request for Waiver of Overpayment

If the recipient agrees that he or she has been overpaid and agrees with the amount of the overpayment, he or she may file a request for waiver of the overpayment, asking to be relieved of the obligation to repay.

There are no time limits in which to file a waiver. Amount for Which Waiver Is Considered, POMS GN 02250.310(A); SSI Overpayment - Basic Requirements Concerning Waiver, POMS SI 02260.001 . However, if a waiver request is filed within thirty days of the receipt of the overpayment notice, the SSA may not begin recovery of the overpayment until an initial decision on the waiver has been made. Pre-recoupment Review, POMS GN 02201.011; SSI Overpayment - Basic Requirements Concerning Waiver, POMS SI 02260.001 . Even if a waiver is not filed until recovery has begun, recovery should stop with the filing of a waiver request until an initial decision has been made on the request. Pre-Recoupment Review, POMS GN 02201.011; SSI Overpayment - Basic Requirements Concerning Waiver, POMS SI 02260.001 . If the waiver request is denied and the recipient files a request for reconsideration within thirty days, recovery should again be stayed pending the reconsidered decision. If the reconsidered decision is unfavorable, the recipient can proceed through the appeal steps described in Applications and Appeals, above, but recovery of the overpayment may begin.

The SSA will grant a waiver of overpayment if both the following criteria are met:

- The recipient was without fault in causing the overpayment or appealed a termination of benefits with a good faith belief of continuing eligibility (The SSA will consider whether the recipient complied with reporting requirements and knew or reasonably should have known that they were not entitled to the benefit amounts received. The SSA will also consider the person’s age and mental or physical capacity to understand eligibility criteria and comply with the reporting requirements.); and
- The recipient needs all or substantially all of his or her income for ordinary living expenses (i.e., he or she cannot afford to repay the overpayment). SSI recipients are assumed to be unable to afford to repay the overpayment, regardless of the amount of SSI received. SSDI recipients will need to provide monthly household budget information indicating that all of monthly income is needed to meet basic needs.

1.14.4 Overpayment Recovery

The usual means of overpayment recovery is for the SSA to deduct money from the monthly benefit check until the overpayment is repaid. This is called recoupment. 20 C.F.R. §§404.515, 416.570.

In cases involving SSI benefits, recoupment is limited to the total monthly SSI benefit, or 10 percent of total monthly income, whichever is less. Where the individual cannot meet “current ordinary and necessary living expenses” recoupment may be reduced to less than

10 percent, and may be as little as \$1 per month. *See* 20 C.F.R. §416.571; Collection of Title XVI Overpayments by Mandatory Cross Program Recovery, POMS SI 02220.020 . If overpayments involve SSDI benefits, 100 percent of the monthly benefit can be withheld. Reductions in withholding can be requested in cases involving financial hardship, as is the case in SSI cases. 20 C.F.R. §404.515; Considering Different Rate of Adjustment, POMS GN 02210.030 .

(a) *Administrative Offset*

Since December 1997, the SSA has had final regulations, pursuant to Pub. L. 103 -387, Section 5 (1994) and Pub. L. 104-134, 31001(z)(2)(1996), in place to permit reporting of Title II overpayments that are past due and legally enforceable to the Department of Treasury (“the Treasury”) for administrative offset against federal tax refunds (20 C.F.R. §404.520) and against other federal payments due the overpaid individual (20 C.F.R. §§404.527, 422.305 -.317). The SSA and other federal agencies have had the ability to certify certain overpayments to the Treasury as past due and legally enforceable for administrative offset.

Note that the first \$750 of Title II benefits are protected from offset. The offset is further limited to 15 percent of the individual’s monthly benefit. *See* www.fms.treas.gov/news/factsheets/benefitoffset.html.

It is important for Title II benefit recipients to pay attention to the notices federal agencies will send about the intent to certify a debt to the Treasury for administrative offset. *See* 31 C.F.R. §285.4. The individual’s best bet for contesting the debt and the appropriateness of certification probably lies with the debtor agency. Once the debt is certified to Treasury, the individual will have to deal with Treasury. Collection of Title II Overpayments by Administrative Offset, POMS GN 02201.031 ; Collection of Title XVI Overpayments by Administrative Offset, POMS SI 02220.013 .

(b) *Tax Refund Offset*

In certain circumstances, the SSA can recover SSDI and SSI overpayments by intercepting the overpaid individual’s federal income tax refund. 20 C.F.R. §§404.520 - .526, 416.580 - .586; Collection of Title II Overpayments by Tax Refund Offset (TRO), POMS GN 02201.030 - .031 ; Collection of Title XVI Overpayments by Tax Refund Offset (TRO), POMS SI 02220.012 . The SSA may not use this method of collecting an overpayment if there any appeals pending on the overpayment or on a waiver of the overpayment. If the overpaid individual is making payments of the overpayment, the SSA may not use tax refund offset. Before intercepting the tax refund, the SSA must send the overpaid individual a sixty-day advance notice. The individual must be given those sixty days to dispute the overpayment or file a request for waiver of the overpayment.

(c) *Cross-Program Recoupment*

The Noncitizen Benefit Clarification and Other Technical Amendment Act of 1998, Pub. L. No. 105-306, 1147 (Oct. 28, 1998) amending 42 U.S.C. §1383(b), allows SSA to recover SSI overpayments from SSDI benefits. Prior to this change, SSA could not perform cross-program recoupment without the permission of the recipient. This amendment specifically waives the anti-assignment clause of 42 U.S.C. §407 to allow for recovery of SSI overpayments from SSDI benefits where the overpaid individual no longer receives SSI. Recoupment is limited to 10 percent of the SSDI benefit payable,

unless the overpayment was due to fraud. The provision applies to overpayments outstanding on the day of enactment. SSA published final regulations implementing this change on July 26, 2001. *See* 20 C.F.R. §§404.401, 416.570 (published at 66 Fed. Reg. 38,902 (July 26, 2001)).

The Social Security Protection Act of 2004, Pub.L.No. 108-203, 201(3/2/04), expands SSAs cross-program recoupment authority to include all benefits. This means that SSA can collect overpayments in any program from benefits paid under any other program. Recovery from current recipients is limited to 10% of Title II benefits and to the lesser of the monthly SSI benefit or 10% of monthly income. However, up to 100% of any underpayment may be withheld to recover an overpayment. These new provisions apply to overpayments outstanding on March 2, 2004.

(d) *Administrative Wage Garnishment*

On January 22, 2004, final regulations went into effect regulations allowing SSA to require employers to garnish pay to recover SSI and SSDI benefit overpayments, after certain procedural requirements are met. SSA can bring civil actions against employers who fail to comply.

SSA will NOT apply Administrative Wage Garnishment (AWG) in the following circumstances:

- while Title II benefits are stopped during a re-entitlement period portion of an EPE;
- during the deemed Medicare entitlement period (Ticket to Work Medicare Extension);
- when the recipient is “using” a Ticket to Work.

Otherwise, AWG will be available to SSA when:

- the debt (overpayment) is past due;
- SSA has completed its billing system (initial, reminder and past-due notice);
- the individual is no longer receiving benefits;
- the individual has not made an installment payment agreement or has missed two consecutive payments;
- the individual has not requested reconsideration or reconsideration has been denied; and
- the individual has not requested waiver or waiver has been denied.

Prior to implementing AWG, SSA must send the individual 60 days advance notice. Within the 60 days, the individual may request information about and review of the debt, inspect and copy records, and request waiver. If the individual responds within 60 days, SSA will NOT begin AWG until the review is complete. Good cause applies to this 60 day period. If review is requested late with good cause, SSA will tell the employer to stop any AWG that has started. AWG applies to "disposable pay." Disposable pay is total compensation, including salary, wages, bonuses, commissions and vacation pay, after deductions for health insurance premiums and amounts withheld as required by law. SSA plans to garnish the lesser of 15% of "disposable pay" or the amount by which "disposable pay" exceeds 30 X the minimum wage provided in 15 U.S.C. §1673(a)(2).

The final regulations include a hardship provision for requesting a reduction in the garnished amount. The individual must present evidence showing that the AWG amount would deprive the individual of income necessary to meet ordinary and necessary living expenses- including basic expenses, medical & similar expenses, expenses for the support of those for the individual is legally responsible, & other reasonable expenses which are part of the individuals standard of living. However, SSA will not reduce AWG below \$10 per pay period

The final regulations were published at 68 Fed. Reg. 74177 (12/23/03), following proposed regulations published in January 2003. POMS instructions on AWG were issued in January 2005. See GN 02201.040.

(e) Additional SSI Overpayment Recovery Options

Section 203 of the Foster Care Independence Act of 1999, Pub. L. No. 106-169 (Dec. 14, 1999), amends 42 U.S.C. §1383(b) to authorize the SSA to the same debt collection tools in the SSI program as are available to recover overpayments of SSDI overpayments. These are laid out in 31 U.S.C. Ch. 37, and include the use of private collection agencies, reporting delinquent accounts to consumer reporting agencies, and the use of administrative offset. The provision applies to overpayments outstanding on or after the date of enactment. The SSA published final regulations to implement this amendment at 65 Fed. Reg. 67,078 (Dec. 28, 2001). The proposed regulations would apply the collection activities in 20 C.F.R. §§422.301 -.317 to the SSI program. These methods can only be used for overpayments that occurred after the individual attained age eighteen. In addition, the overpayment must be determined otherwise unrecoverable.

This means that the individual:

- has been sent a past due notice,
- has not entered into an installment payment agreement or is not complying with the agreement,
- has not requested waiver, or
- has not requested reconsideration of a waiver denial.

EXHIBIT 1A - Massachusetts SSI Payment Levels in 2021

Living Arrangement A - FULL COST OF LIVING				
	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT*	<u>TOTAL</u>
INDIVIDUAL	Aged	\$794.00	\$128.82	\$922.82
	Disabled	\$794.00	\$114.39	\$908.39
	Blind	\$794.00	\$149.74	\$943.74
MEMBER OF A COUPLE	Aged	\$595.50	\$100.86	\$696.36
	Disabled	\$595.50	\$ 90.03	\$685.53
	Blind	\$595.50	\$348.24	\$943.74

Living Arrangement B - SHARED LIVING				
	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT*	<u>TOTAL</u>
INDIVIDUAL	Aged	\$794.00	\$ 39.26	\$833.26
	Disabled	\$794.00	\$ 30.40	\$824.40
	Blind	\$794.00	\$149.74	\$943.74
MEMBER OF A COUPLE	Aged	\$595.50	\$100.86	\$696.36
	Disabled	\$595.50	\$ 90.03	\$685.53
	Blind	\$595.50	\$348.24	\$943.74

Living Arrangement C - HOUSEHOLD OF ANOTHER				
	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT*	<u>TOTAL</u>
INDIVIDUAL	Aged	\$529.34	\$104.36	\$633.70
	Disabled	\$529.34	\$ 87.58	\$616.90
	Blind	\$529.34	\$410.40	\$943.74

MEMBER OF A COUPLE	Aged	\$397.00	\$107.90	\$504.90
	Disabled	\$397.00	\$ 97.09	\$494.09
	Blind	\$397.00	\$546.74	\$943.74
Living Arrangement E - LICENSED REST HOME				
	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT*	<u>TOTAL</u>
INDIVIDUAL	Aged	\$794.00	\$293.00	\$1087.00
	Disabled	\$794.00	\$293.00	\$1087.00
	Blind	\$794.00	\$149.74	\$943.74
MEMBER OF A COUPLE	Aged	\$595.50	\$491.50	\$1087.00
	Disabled	\$595.50	\$491.50	\$1087.00
	Blind	\$595.50	\$348.24	\$943.74

Living Arrangement F - RESIDENT OF A TITLE XIX FACILITY WHERE MEDICAID PAYS MORE THAN 50 % OF COST OF CARE				
	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT*	<u>TOTAL</u>
INDIVIDUAL	Aged	\$30.00	\$42.80	\$72.80
	Disabled	\$30.00	\$42.80	\$72.80
	Blind	\$30.00	\$42.80	\$72.80
MEMBER OF A COUPLE	Aged	\$30.00	\$42.80	\$72.80
	Disabled	\$30.00	\$42.80	\$72.80
	Blind	\$30.00	\$42.80	\$72.80

Living Arrangement G - ASSISTED LIVING				
	BENEFIT TYPE	FEDERAL BENEFIT	STATE SUPPLEMENT*	<u>TOTAL</u>
INDIVIDUAL	Aged	\$794.00	\$454.00	\$1248.00
	Disabled	\$794.00	\$454.00	\$1248.00
	Blind	\$794.00	\$454.00	\$1248.00
MEMBER OF A COUPLE	Aged	\$595.50	\$340.50	\$936.00
	Disabled	\$595.50	\$340.50	\$936.00
	Blind	\$595.50	\$340.50	\$936.00

* Effective 4/1/12, Massachusetts assumed state administration of the SSI state supplement. This means that the state determines the state supplement amount and provides the payment separately. For more information see <https://www.mass.gov/service-details/learn-about-massachusetts-state-supplement-program-eligibility-and-payments>

EXHIBIT 1B - 2021 SSI and SSDI Threshold Amounts

SSI Resource Limit - Individual	\$2000.00
SSI Resource Limit - Couple	\$3000.00
SSI Federal Benefit Rate	\$794.00 (individual) \$1191.00 (elg. couple)
SSI Child Allocation	\$397.00
SSI Student Earned Income Exclusion	\$1930.00/month up to \$7770.00/year
Value of 1/3 Reduction (reduction in FBR applied when individual/couple lives throughout a month in another person's household and receives both food and shelter from others living in the household)	\$284.00 (individ) \$417.00 (elg. couple)
1619(b) Thresholds (individualized threshold available if actual medical expenses are higher than average Medicaid expenditure)	\$43,001 gross/yr. (disabled) \$43,850 gross/yr. (blind)
Substantial Gainful Activity - Disabled	\$1310.00/month
Substantial Gainful Activity - Blind	\$2190.00/month
SSDI Trial Work Month	\$910.00
SSDI Cost of 1 Quarter of Coverage	\$1410.00 (\$5640/year for 4 QC)

Maximum Monthly Social Security Retirement Benefit (at full retirement age)	\$3011.00
Maximum Taxable Earnings (amount of earnings subject to FICA taxes to fund Social Security Retirement, Disability, and Survivors)	\$137,700.00
Medicare Part B Premium	Std premium is \$144.30, higher if income \$85,000/year. See Medicare.gov for details

EXHIBIT 1C Sources of Law and Information

Social Security Act

Title II (SSDI), 42 U.S.C. 401 et seq.

Title XVI (SSI), 42 U.S.C. 1381 et seq.

Online at <http://ssa.gov/regulations/#a0=3>

Regulations

20 C.F.R. 404 et seq. (SSDI)

20 C.F.R. 416 et seq. (SSI)

Online at <http://ssa.gov/regulations/#a0=3>

Regulatory Changes - Federal Register

Federal Register published daily. Online at <http://www.gpoaccess.gov/fr/index.html>.

Social Security Rulings available on the SSA's website, at

<http://ssa.gov/regulations/#a0=3>

Program Operations Manual System (POMS). Available free on the SSA's website at

<http://ssa.gov/regulations/#a0=3> Easily browsable. Also searchable at

[https://secure.ssa.gov/apps10/poms.nsf/subchapterlist/\\$searchform?searchview](https://secure.ssa.gov/apps10/poms.nsf/subchapterlist/$searchform?searchview) .

Additional operating instructions in the form of **Emergency Messages (EM's)** are also available at the POMS site.

Hearings, Appeals and Litigation Law Manual (HALLEX) available on the SSA's

website at <http://ssa.gov/regulations/#a0=3>

National Organization of Social Securities Claimants' Representatives (NOSSCR)

Social Security Practice Guide 1-5 Matthew Bender, Inc., *National Organization of Social Securities Claimants' Representatives Social Security Practice Guide*. Five-volume, loose-leaf service by Matthew Bender, Inc. Available by subscription from Lexis Publishing, New York and San Francisco. See <http://www.bookstore.lexis.com> or call 1-800-223-1940.

Commerce Clearing House Social Security Reporter 1, 1A & 1B, Commerce Clearing House, Inc., *Social Security Reporter*. Loose-leaf updates. Available by subscription from Commerce Clearing House, Inc., Chicago, Ill. See <http://www.cctt.com> or call 1-800-449-9525.

West Social Security Reporting Service Available by subscription from West Publishing Company. For more information about this service, see <http://www.westgroup.com> or call 1-800-733-2889.

Social Security Disability Practice

C. Hall, *Social Security Disability Practice*, West's Handbook Series, repub'd yearly.

Dictionary of Occupational Titles I- II, U.S. Dep't of Labor, Employment & Training

Admin., *Dictionary of Occupational Titles* (4th ed.1991). Online at

<http://www.oalj.dol.gov/libdot.htm>.

Newsletters

NOSSCR, *Social Security Forum*. Published monthly. Available by subscription from NOSSCR, 6 Prospect Street, Midland, NJ 07432. <http://www.nosscr.org>.

Basic Medical References

Merck, Sharpe & Dohme Research Laboratories, *The Merck Manual of Diagnosis and Therapy*.

http://www.merckmanuals.com/professional/about/about_the_merck_manual/committed_to_providing_medical_information_merck_and_the_merck_manuals.html

Medical Economics Co., *Physician's Desk Reference (Medications)* <http://www.pdr.net>

F.A. Davis Co., *Tabers Cyclopedic Medical Dictionary* (21st ed.)

<http://www.tabers.com/tabersonline/ub?svar=a%7cgo&svar=c%7ctpda&gclid=CMPZz5r-pbECFYNx4AodeHer7Q>

American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders*, DSM-IV-TR (4th ed. 2002). <http://www.psych.org/practice/dsm>

Centers for Disease Control website: <http://www.cdc.gov>

Massachusetts Board of Registration in Medicine website: <http://www.massmedboard.org>.

National Library of Medicine website: <http://www.nlm.nih.gov>.

Websites

Social Security Online: www.socialsecurity.gov.

Massachusetts Legal Services: www.masslegalservices.org (Disability section)

Disability Law Center: www.dlc-ma.org.

Massachusetts Office of Medicaid (MassHealth): www.state.ma/masshealth

NOSSCR Online: www.nosscr.org.

Justice in Justice in Aging (formerly the National Senior Citizens Law Center),

www.justceinaging.org

Social Security Advisory Service: <http://www.ssas.com>.

Bazelon Center for Mental Health Law: <http://www.bazelon.org/>

THOMAS, for tracking federal legislation: <http://thomas.loc.gov/home/thomas.php>

Government Printing Office (Federal Register): www.gpoaccess.gov

EXHIBIT 1D Parent-to-Child Deeming Worksheet (2021)

20 C.F.R. §416.1165

PARENTS' INCOME TREATMENT:

1. Unearned income \$ _____
2. Less allowance for non-SSI eligible children¹ - _____
3. Less \$20 general exclusion - (20.00)
4. Total parents' countable unearned income ' \$ _____
5. Gross earned income \$ _____
6. Less balance of child allocation(s)² - _____
7. Less balance of \$20 general exclusion³ - _____
8. Less \$65 earned income disregard - (65.00)
9. Subtotal ' _____
10. Less of 1/2 subtotal (earned income deduction) - _____
11. Total countable earned income ' _____
12. Total countable income ' _____
13. Less individual or couple FBR⁴ - _____
14. Amount deemed to SSI child. ' _____

1 Allocation for non-SSI children living in the same household as the SSI child is \$397 for calendar year 2021. Allocations are reduced by the non-SSI child's own income and the allocation is not available to a child who receives public maintenance assistance payments.

2 Any or all of the allocation not used in #2 can be deducted from earned income in #6.

3 See footnote 2.

4 In calendar year 2021 the FBR for an individual is \$7943 and the FBR for a couple is \$1191.

CALCULATING A CHILD'S MONTHLY SSI AMOUNT

1. Child's SSI grant level⁵ \$ _____
2. Unearned income (including deemed income from #14 on deeming worksheet). \$ _____
3. Two-thirds of child support paid on behalf of the SSI child + _____
4. Less \$20 general exclusion - (20.00) ' _____
5. Countable earned income⁶ + _____
6. Child's total countable income - _____
7. Child's monthly SSI grant ' _____

5 The maximum SSI/SSP amount for a disabled child where deeming applies is \$908.39 (\$794 SSI + \$114.39 SSP) in calendar year 2021 for eligibility based on disability. For children meeting statutory blindness criteria, the amount is \$943.74 (\$794 SSI + \$149.74).

6 The first \$1,930 per month (up to \$7770 in calendar year) of a student's earned income is excluded in 2021. Children also receive the benefit of all the deductions for earned income available to adults, e.g., \$65 exclusion, less ½ remainder.

EXHIBIT 1E Spousal Deeming Worksheet (2021)

Step 1 Children's Allocations¹ \$ _____

Step 2 Unearned Income Treatment

Spouse's Unearned Income \$ _____
Subtract Children's Allocations \$ _____
TOTAL UNEARNED INCOME \$ _____

Step 3 Earned Income Treatment

Spouse's Earned Income \$ _____
Subtract Children's Allocations² \$ _____
TOTAL EARNED INCOME \$ _____

Step 4 Total countable income

Unearned income (step 2) \$ _____
Add earned income (step 3) \$ _____
TOTAL COUNTABLE INCOME \$ _____

If the TOTAL COUNTABLE INCOME (step 4) is \$397, or less, no income will be deemed to the eligible spouse. If the TOTAL COUNTABLE INCOME is more than \$397, income will be deemed to eligible spouse and calculations must continue.

Step 5

Calculate SSI payable to eligible spouse by using SSI Benefit Calculation Worksheet (2021).

1. First determine SSI benefit payable without deeming application; as if the ineligible spouse did not exist.
2. Compute an SSI payment level with deeming, using TOTAL COUNTABLE INCOME figures from Spousal Deeming Worksheet (2021).
3. The SSI recipient will receive the lesser of SSI payable amounts from 1 & 2 above.

1 The 2021 Child Allocation is \$397 per child, less the child's own countable income. No allocation is allowed for children receiving public benefits.

2 Children's allocation can only be taken once. At this step in the deeming process, only the amount of the children's allocation not exhausted by unearned income can be deducted.

SSI BENEFIT CALCULATION FOR DEEMED INCOME WORKSHEET (2021)

Step A: Compute Countable Unearned Income.

Total Income

ADD: Unearned Income, DIB Payments, etc. \$ _____

PLUS: Rental Income + _____

PLUS: Deemed Income+ _____

1. TOTAL UNEARNED INCOME \$ _____

Deductions

ADD: General Deductions \$20.00

PLUS: Expenses Incurred for Rental Property + _____

PLUS: 1/3 Child Support Received by SSI Child + _____

2. TOTAL DEDUCTIONS -\$ _____

3. COUNTABLE UNEARNED INCOME (Subtract Line 2 from Line 1) ‘ \$ _____

Step B: Compute Countable Earned Income.

Total Income

ADD: Gross Wages, Workshop Income, etc. \$ _____

PLUS: Net Earnings from Self-employment + _____

4. TOTAL EARNED INCOME \$ _____

Deductions ADD: \$20 (or remainder), if not used in Step A _____

PLUS: Student Earnings (\$1,900/month up to \$7670 annually + _____

PLUS: Earned Income Deduction + 65.00 PLUS: IRWEs (if disabled) + _____

5. TOTAL DEDUCTIONS - \$ _____ Subtract Line 5 from Line 4 ‘ \$ _____

Divide Result by 2 _____

Subtract: Work Expenses (if blind) - _____

Subtract: PASS (if applicable) - _____

6. COUNTABLE EARNED INCOME ‘ \$ _____

Step C: Determining the SSI Monthly Payment

ADD: Countable Earned Income (Line 6) _____

PLUS: Countable Unearned Income (Line 3) + \$ _____

7. TOTAL COUNTABLE INCOME ‘ \$ _____

Maximum SSI Amount for Month _____

Subtract: Countable Income (Line 7) - _____

8. SSI Monthly Payment’ \$ _____

EXHIBIT 1F Sponsor-to-Alien Deeming Worksheet (2021)

Step A:

Sponsor's Gross Income

Enter Gross Non-excludable Income of Sponsor and Spouse (if any) \$ _____

Deductions

ADD: Sponsor Allowance _____

PLUS: Allowance for Sponsor's Spouse (if any)

a. \$794 (if co-sponsor) b. \$397 (if not) + _____

PLUS: Dependent Deduction (\$397 x number of dependents) + _____

TOTAL DEDUCTIONS ' _____

Subtract Deductions from Gross Income-\$ _____

TOTAL INCOME DEEMED TO ALIEN '\$ _____

Step B:

ENTER TOTAL INCOME DEEMED TO ALIEN IN STEP A OF SSI BENEFIT
CALCULATION WORKSHEET (2021)

SSI BENEFIT CALCULATION FOR DEEMED INCOME WORKSHEET (2021)

Step A: Compute Countable Unearned Income.

Total Income

ADD: Unearned Income, DIB Payments, etc. _____

PLUS: Rental Income + _____

PLUS: Deemed Income + _____

1. TOTAL UNEARNED INCOME \$ _____

Deductions

ADD: General Deductions (\$20.00) + _____

PLUS: Expenses Incurred for Rental Property+ _____

PLUS: 1/3 Child Support Received by SSI Child + _____

2. TOTAL DEDUCTIONS -\$ _____

3. COUNTABLE UNEARNED INCOME (Subtract Line 2 from Line 1) ‘ \$ _____

Step B: Compute Countable Earned Income.

Total Income

ADD: Gross Wages, Workshop Income, etc. _____

PLUS: Net Earnings from Self-employment + _____

4. TOTAL EARNED INCOME \$ _____

Deductions

ADD: \$20 (or remainder), if not used in Step A _____

PLUS: Student Earnings (\$1,930/month up to \$7770 annually) + _____

PLUS: Earned Income Deduction + 65.00 + _____

PLUS: IRWEs (if disabled) + _____

5. TOTAL DEDUCTIONS -\$ _____ Subtract Line 5 from Line 4 ‘ \$ _____

Divide Result by 2 _____

Subtract: Work Expenses (if blind) - _____

Subtract: PASS (if applicable) - _____

6. COUNTABLE EARNED INCOME ‘ \$ _____

Step C: Determining the SSI Monthly Payment

ADD: Countable Earned Income (Line 6) _____

PLUS: Countable Unearned Income (Line 3) + _____

7. TOTAL COUNTABLE INCOME ‘ \$ _____

Maximum SSI Grant for Month _____

Subtract: Countable Income (Line 7) - _____

8. SSI Monthly Payment ‘ \$ _____