SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulations No. 4 and 16]

RIN 0960–AB73

Determining Disability and Blindness; Substantial Gainful Activity Guides

AGENCY: Social Security Administration.

ACTION: Final rules.

SUMMARY: We are revising our rules to reflect amendments to the Social Security Act (the Act) concerning the trial work period and the disability insurance reentitlement period. We are also clarifying certain standards we use to determine whether work is substantial gainful activity and whether an individual is entitled to a trial work period, thereby further explaining how we determine disability under titles II and XVI of the Act.

EFFECTIVE DATE: These regulations are effective August 10, 2000.

FOR FURTHER INFORMATION CONTACT: Georgia E. Myers, SSA Regulations Officer, Office of Process and Innovation Management, L2109 West Low Rise Building, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–3632 or TTY 1–800–988–5906. For information about eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internal web site, SSAOnline, at www.SSA.gov.

SUPPLEMENTARY INFORMATION: These regulations explain how we determine whether a person is entitled to a period of trial work under title II of the Act and whether a person is engaging in substantial gainful activity under titles II and XVI of the Act. The term ''substantial gainful activity'' combines two concepts, substantial work activity and gainful work activity. Substantial work activity means work activity that involves doing significant physical or mental activities, even if the work is done on a part-time basis or with less activities, pay, or responsibilities than in past work. Gainful work activity means work activity done for pay or profit. Work activity is gainful if it is the kind of work that is usually performed for pay or profit, whether or not a profit is realized.

We published a notice of proposed rulemaking (NPRM) in the **Federal Register** on March 6, 1995 (60 FR 12166). In the NPRM, we proposed to make revisions to a number of sections that address our rules for determining whether an individual is engaging in substantial gainful activity. The NPRM included certain changes in proposed §§ 404.1574(a)(3)–(6) and 416.974(a)(3)–(6) to clarify our policies on ''subsidy.'' In part because of public comments we received on the NPRM and because we want to consider further issues with regard to our policies concerning on-the-job subsidies provided by employers and on-the-job assistance provided by others, we have decided not to publish final rules with regard to the proposals on ''subsidy'' in proposed §§ 404.1574(a)(3)–(6) and 416.974(a)(3)–(6). However, we are publishing final rules for the remaining proposals in the NPRM, some of which have been modified in response to public comments. We discuss in detail the comments we received on the NPRM later in this preamble under ''Public Comments on Notice of Proposed Rulemaking.'' In addition, in these final rules, we have made certain changes from the proposed rules for technical accuracy and, consistent with the government's ''plain language'' initiative, to make our rules easier to read and understand. We have also included in these final rules several additional amendments to our regulations that, although not a part of the proposals in the NPRM, are necessary to reflect amendments to the Act relating to determinations of substantial gainful activity or the counting of trial work period months. These additional amendments affect §§ 404.15771 and 416.971, discussed below, and §§ 404.1584(d) and 404.1592(b), discussed later in this preamble.

In these final rules, we have made changes to §§ 404.1571 and 416.971 to reflect the provisions in sections 223(d)(4) and 1614(a)(3)(E) of the Act that were added by section 201 of Public Law (Pub. L.) 103–296, the Social Security Independence and Program Improvements Act of 1994. Under sections 223(d)(4) and 1614(a)(3)(E) of the Act, the Commissioner of Social Security (the Commissioner) is required to establish by regulations the criteria for determining when services performed by an individual or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity. In general, these sections of the Act provide that an individual whose services or earnings meet the criteria established by the Commissioner shall be found to be not disabled. The provisions added to the Act by Pub. L. 103–296 provide, in general, that the Commissioner shall make determinations of substantial gainful activity under these sections ''without regard to the legality'' of the work activity of the individual. We have included in these final rules changes to §§ 404.1571 and 416.971 to reflect these provisions of the Act. We have revised the first sentence of each of these sections to indicate that the work, without regard to legality, that an individual has done during any period in which the individual believes that he or she is disabled may show that he or she is able to work at the substantial gainful activity level. We explain our reasons for publishing these changes as final rules without notice-and-comment rulemaking at the end of this preamble.

We have revised §§ 404.1573(c) and 416.973(c) to explain in greater detail what we mean by work under special conditions that take into account an individual's impairments. We added information found in Social Security Ruling (SSR) 84–25, ''Titles II and XVI: Determination of Substantial Gainful Activity If Substantial Work Activity Is Discontinued or Reduced—Unsuccessful Work Attempt'' (Social Security Rulings, Cumulative Edition, 1984, p. 92), to clarify these regulatory provisions. As discussed later in this preamble, we also revised the paragraph in response to public comments.

We have amended §§ 404.1574(a) and 416.974(a) to add an expanded description of how we determine whether work performed by an employee is substantial gainful activity, what we mean by subsidized work, and how we determine the value of a subsidy. The changes reflect the interpretations in SSR 83–33, ''Titles II and XVI: Determining Whether Work Is Substantial Gainful Activity—Employees'' (Social Security Rulings, Cumulative Edition, 1983, p. 209).

These final rules also make changes to §§ 404.1574(b)(2), (b)(3), (b)(4), and (b)(6) and §§ 416.974(b)(2), (b)(3), (b)(4), and (b)(6) to clarify how we evaluate earnings from work in sheltered workshops. In paragraphs (b)(2), (b)(3), and (b)(6) of these sections, we provide thresholds that demonstrate earnings that ordinarily show that a person has engaged in substantial gainful activity (paragraph (b)(2)), that a person has not engaged in substantial gainful activity (paragraph (b)(3)), or that are not high or low enough to show whether a person has engaged in substantial gainful activity. Our intent is, and always has been, that paragraphs (b)(3) and (b)(6) apply only to workers who are not in sheltered workshops. This is because we ordinarily consider that individuals in sheltered workshops are not engaging in substantial gainful activity when they do not earn more than the threshold

amounts in paragraph (b)(2). In other words, we do not provide a ''middle ground'' category for workers in sheltered workshops, as we do for other workers under paragraph (b)(6), in recognition of the special circumstances of sheltered employment. We believe that the final rules now state this longstanding policy more clearly. The final rules also state more clearly our policy of evaluating sheltered workshop earnings that exceed the amount specified in paragraph (b)(2) in the same way we evaluate non-sheltered workshop earnings.

As a result of these clarifications in our final regulations, we are rescinding Acquiescence Ruling (AR) 87–4(8), *Iamarino* v. *Heckler* (Social Security Rulings, Cumulative Edition, 1987, p. 136; 55 FR 28302, August 31, 1987). We issued this acquiescence ruling in response to a decision of the U.S. Court of Appeals for the Eighth Circuit in *Iamarino* v. *Heckler*, 795 F.2d 59 (8th Cir. 1986). In the absence of regulations explicitly addressing the issue, the court in *Iamarino* held that, because our regulations provided a middle ground for evaluating earnings from competitive (*i.e.,* non-workshop) employment between specified upper and lower limits, we must also provide a middle ground for evaluating sheltered workshop earnings and not presume that an individual has engaged in substantial gainful activity when sheltered workshop earnings exceed the upper substantial gainful activity threshold amount. The revisions in these final rules make clear in our regulations that, ordinarily, we will find any individual, whether in competitive or sheltered work, to be engaging in substantial gainful activity when his or her earnings exceed the threshold for such earnings set out in §§ 404.1574(b)(2) and 416.974(b)(2). We clarify that the middle ground of earnings for individuals in competitive employment (i.e., the middle ground where we do not consider the earnings to be high or low enough to show whether a person has engaged in substantial gainful activity) lies *below* the upper threshold for substantial gainful activity in paragraph (b)(2) and above a *lower* threshold in paragraph (b)(3). Finally, we clarify that for individuals who are employed in sheltered workshops and whose earnings do not exceed the upper threshold above which we ordinarily find substantial gainful activity for all individuals, we will ordinarily find that there is *not* substantial gainful activity even when their earnings fall in the range that would constitute the middle ground of earnings for individuals in competitive employment.

We have also added new §§ 404.1574(d) and 416.974(d) and revised § 404.1592(b) to provide that we will not consider volunteer work done under programs mentioned in the Domestic Volunteer Service Act of 1973, 42 U.S.C. 5044, or the Small Business Act, 15 U.S.C. 637, in determining whether an individual has performed substantial gainful activity or, for individuals receiving benefits under title II of the Act, services in the trial work period. This exclusion is currently stated in SSR 84–24, ''Titles II and XVI: Determination of Substantial Gainful Activity For Persons Working In Special Circumstances—Work Therapy Programs in Military Service—Work Activity in Certain Government-Sponsored Programs'' (Social Security Rulings, Cumulative Edition, 1984, p. 87), and as required by the laws cited above.

We have also added new §§ 404.1574a and 416.974a to explain how we average earnings to determine if a person has been performing substantial gainful activity and the periods used for averaging. These amendments are based on SSR 83–35, ''Titles II and XVI: Averaging of Earnings in Determining Whether Work Is Substantial Gainful Activity'' (Social Security Rulings, Cumulative Edition, 1983, p. 237), and do not represent a change in practice.

We have revised § § 404.1575(a) and 416.975(a) to explain the order in which we will apply the three tests used to determine whether self-employed persons have engaged in substantial gainful activity. We also expanded the discussion in §§ 404.1575(c) and 416.975(c) of what we mean by substantial income for purposes of determining whether a self-employed person has engaged in substantial gainful activity. These revisions are based on SSR 83–34, ''Titles II and XVI: Determining Whether Work Is Substantial Gainful Activity—Self-Employed Persons'' (Social Security Rulings, Cumulative Edition, 1983, p. 222), and do not represent a change in practice.

We also made a nonsubstantive, technical correction to final §§ 404.1575(c)(2) and 416.975(c)(2) for consistency of language within our regulations. Both the former rules and the NPRM stated that we would consider self-employment income to be ''substantial'' if it averaged less than the amounts described in §§ 404.1574(b)(2) and 416.974(b)(2) but was either comparable to what the individual earned before he or she became ''severely impaired'' or was comparable to that of unimpaired self-employed persons in the community who were in the same or a similar business as their means of livelihood. However, the word ''severe'' in our regulations is a term of art under §§ 404.1520 and 416.920 and other regulations throughout subpart P of part 404 and subpart I of part 416, and it does not have the same meaning that we intended in §§ 404.1575(c)(2) and 416.975(c)(2). Therefore, we have revised the final rules to make our intent clear by changing the phrase ''severely impaired'' to ''seriously impaired.'' (For similar reasons, we are making the same changes in §§ 404.1574(b)(4) and 416.974(b)(4).)

We added to §§ 404.1574, 404.1575, 416.974, and 416.975 an explanation, now found in SSR 84–25, of how we evaluate brief periods of work activity to determine if they should be considered ''unsuccessful work attempts.'' The rules provide, consistent with SSR 84–25, that, ordinarily, work an individual has done will not show the ability to do substantial gainful activity if, after working for a period of 6 months or less, the individual was forced by his or her impairment to stop working or to reduce the amount of work so that earnings from such work fall below the substantial gainful activity earnings level. The work must also satisfy certain other conditions described in the regulations. The final rules also provide that we will not consider work performed at the substantial gainful activity level for more than 6 months to be an unsuccessful work attempt regardless of why it ended or why earnings were reduced to below the substantial gainful activity earnings level.

The criteria for an unsuccessful work attempt differ depending on whether the work effort is for a duration of 3 months or less or for a duration of between 3 and 6 months. These amendments reflect the interpretation in SSR 84–25.

In addition, we have added to § 404.1584(d) the substantial gainful activity earnings guidelines for evaluating the work activity of blind persons under title II for the years 1983 through 2000. We also explain, consistent with section 223(d)(4)(A) of the Act, that effective with 1996, the substantial gainful activity amount for blind individuals is no longer linked to the monthly exempt amount under the retirement earnings test for individuals aged 65 to 69. Beginning 1996, increases in the substantial gainful activity level for blind individuals depend only on the increases in the national average wage index. We are including this provision in § 404.1584(d) of the final rules to reflect this statutory change,

which resulted from amendments to the Act made by section 102 of Pub. L. 104–121. We explain our reasons for publishing final rules to reflect this statutory change without notice-and-comment rulemaking at the end of this preamble.

We have also included in these final rules an amendment to § 404.1592(b) to reflect an amendment to the definition of ''services'' in section 222(c)(2) of the Act which applies in determining when the trial work period has ended. Section 222(c)(2) of the Act, as amended, provides that, for purposes of the trial work period, ''the term 'services' means activity (whether legal or illegal) which is performed for remuneration or gain or is determined by the Commissioner of Social Security to be of a type normally performed for remuneration or gain.'' The parenthetical phrase ''(whether legal or illegal)'' was added to this provision of the Act by section 201 of Pub. L. 103–296. In these final rules, we are adding the same parenthetical phrase to the definition of ''services'' in § 404.1592(b). We explain our reasons for publishing final rules to reflect this change without notice-and-comment rulemaking at the end of this preamble.

We also have revised the fourth sentence of § 404.1592(b) to explain in clearer and more precise terms the type of activity that generally does not constitute ''services'' as that term is defined in section 222(c)(2) of the Act, quoted above. This revision clarifies that we generally do not consider work that is done without remuneration to be ''services'' for purposes of determining when the trial work period has ended if it is done merely as therapy or training or if it is work usually done in a daily routine around the house or in self-care. We have also added a new sentence at the end of § 404.1592(b) to state that we do not consider work as a volunteer in the Federal programs described in § 404.1574(d) in determining whether an individual has performed services in the trial work period.

We have revised § 404.1592(d) to explain, consistent with SSR 82–52, ''Titles II and XVI: Duration of Impairment'' (Social Security Rulings, Cumulative Edition, 1982, p. 106), that a claimant is not entitled to a trial work period when he or she performs work demonstrating the ability to engage in substantial gainful activity within 12 months after the onset of an impairment that otherwise could be the basis for a finding of disability and before the date of any notice of determination or decision making a finding of disability. These revisions, which do not represent a change in practice, are based on our interpretation of the duration requirement of section 223(d)(1)(A) of the Act and clarify the issues raised by the courts in *McDonald* v. *Bowen*, 800 F.2d 153 (7th Cir. 1986), amended on rehearing, 818 F.2d 559 (7th Cir. 1987), *Walker* v. *Secretary of Health and Human Services*, 943 F.2d 1257 (10th Cir. 1991), and *Newton* v. *Chater*, 92 F.3d 688 (8th Cir. 1996). We have issued acquiescence rulings for each of these cases, and do not currently plan to rescind the acquiescence rulings. (See AR 88–3(7), *McDonald* v. *Bowen*, Social Security Rulings, Cumulative Edition, 1988, p. 115, and 55 FR 28302, March 31, 1988; AR 92–6(10), *Walker* v. *Secretary of Health and Human Services*, Social Security Rulings, Cumulative Edition, 1992, p. 91, and 57 FR 43007, September 17, 1992; and AR 98–1(8), *Newton* v. *Chater*, 63 FR 9037, February 23, 1998.)

The trial work period is a period during which a person who becomes entitled to title II disability benefits may test his or her ability to work and still be considered disabled. Under section 222(c)(3) of the Act, the trial work period begins with the month an individual ''becomes entitled'' to title II disability benefits and generally ends after 9 months of work within a 60-consecutive-month period whether or not the 9 months are consecutive. Section 222(c) provides that any services rendered during the trial work period may not be considered in determining whether ''disability has ceased'' during that period.

In order to be found disabled under section 223(d)(1)(A), an individual must be unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or ''which has lasted or can be expected to last for a continuous period of not less than 12 months.'' Under our longstanding interpretation of this provision, as reflected in SSR 82–52, the duration requirement to establish disability will not be met and a disability claim will be denied based on evidence that, within 12 months after the onset of an impairment which prevented substantial gainful activity and before we have issued any notice of determination or decision finding disability, the impairment no longer prevents substantial gainful activity. Under these circumstances, it is not necessary to determine whether earlier in the 12-month period the impairment was expected to prevent the performance of SGA for 12 months. We determine whether an impairment is expected to prevent substantial gainful activity for 12 months only when the claim is being adjudicated within 12 months after the onset of the person's inability to work and the evidence shows that the impairment currently prevents substantial gainful activity. We believe that Congress provided that disability can be found based on an impairment which ''can be expected to last'' 12 months simply to provide a means for us to adjudicate disability claims without having to wait 12 months from onset, rather than to permit claims to be allowed in the face of specific evidence that the claimant's impairment did not, in fact, prevent him or her from engaging in substantial gainful activity for 12 continuous months.

Because section 222(c) provides that a trial work period shall begin with the month in which a person becomes entitled to title II disability benefits, a claimant who does not become entitled to disability benefits cannot receive a trial work period. Under our interpretation of the duration requirement, a person cannot be found to be under a disability if he or she performs work demonstrating the ability to perform substantial gainful activity within 12 months after onset and before we have issued any notice of determination or decision finding disability. Because the person cannot become entitled to disability benefits in this situation, there can be no trial work period. On the other hand, if a claimant returns to work before we have made a determination or decision finding disability, but more than 12 months from onset, the duration requirement may be satisfied (unless it is not satisfied for some other reason, such as medical improvement less than 12 months after onset), the claimant may become entitled to benefits, and the work may be protected by the trial work period even though the work began prior to a finding of disability.

We have made several changes in § 404.1592(d)(1) and (2), which describe situations in which an individual is and is not entitled to a trial work period. We revised paragraph (d)(1) from the proposed rule by replacing ''receiving'' with ''entitled to.'' We made this change in order to clarify, consistent with our discussion in the preambles to both the proposed rules and these final rules, that a person may be awarded a trial work period as part of the adjudication of an initial application when he or she returns to work more than 12 months from onset, but prior to the adjudication and prior to the receipt of any disability benefits. We also made nonsubstantive changes to paragraphs (d)(1) and (d)(2)(i) for greater consistency between these two paragraphs and made other slight technical changes to paragraph

(d)(2) from the proposed rule for additional clarity. None of these revisions is intended as a change in practice. As in the NPRM, we deleted the rule in prior paragraph (d)(2)(ii) which stated that an individual is not entitled to a trial work period if he or she is receiving disability insurance benefits in a second period of disability for which a waiting period was not required. This deletion reflects section 5112 of Pub. L. 101–508.

As in the NPRM, we added new paragraphs (d)(2)(ii), and (d)(2)(iii), and (d)(2)(iv) to § 404.1592 specifying additional circumstances in which an individual will not be entitled to a trial work period. Final paragraph (d)(2)(ii) provides that an individual who performs work demonstrating the ability to engage in substantial gainful activity during any required waiting period will not be entitled to a trial work period. Paragraph (d)(2)(iii) incorporates the provision, discussed above in this preamble, that explains that an individual who performs work demonstrating the ability to engage in substantial gainful activity within 12 months after onset and before the date of any notice of determination or decision finding disability will also not be entitled to a trial work period. Both of these provisions were in the NPRM, although we did make several minor clarifications to the language we proposed for paragraph (d)(2)(iii): We changed the word ''which'' to ''that'' and we expanded the word ''decision'' to the phrase ''determination or decision.'' The latter was a technical change made for consistency with § 404.901, which provides that the words ''determination'' and ''decision'' are terms of art in our program applicable to initial and reconsideration determinations and administrative law judge or Appeals Council decisions, respectively. The revision merely rectifies an unintentional omission in the NPRM and will make clear that these rules apply at all levels of the administrative review process. Finally, we made a revision to clarify that a person may be entitled to a trial work period if he or she returns to substantial gainful activity within 12 months of onset and after receiving a notice of a determination or decision finding that he or she is disabled even in the relatively unusual situation in which that notice precedes the notice of a determination or decision awarding him or her title II disability benefits.

Final § 404.1592(d)(2)(iv) clarifies our rules, consistent with current § 404.1592(e), that an individual cannot be entitled to a trial work period for any month prior to the month he or she files an application for disability benefits. We revised final § 404.1592(d)(2)(iv) from the language we proposed in the NPRM to avoid a possible interpretation we had not intended that might have precluded trial work periods for some individuals who should be entitled to trial work periods. We explain our reasons for this revision in more detail in the public comments section of this preamble.

We revised § 404.1592(e) to reflect a provision of section 5112 of Pub. L. 101–508, the Omnibus Budget Reconciliation Act of 1990, which provides that one of the conditions under which the trial work period will end is the 9th month within a period of 60 consecutive months if that 9th month is after December 1991. Prior to this statutory change, the trial work period would end after 9 service months no matter when they were completed.

We amended § 404.1592a to clarify that the earnings averaging and unsuccessful work attempt criteria do not apply in determining whether to pay benefits for any month during or after the reentitlement period after disability has been determined to have ceased because of the performance of substantial gainful activity. Those criteria do apply during and after the reentitlement period in determining whether disability has ceased due to the performance of substantial gainful activity.

Based on several public comments, we revised the proposed rules to clarify our intent, especially in the provisions of § 404.1592a(a). These amendments reflect and clarify our interpretations in SSR 83–35 and SSR 84–25. They also clarify the averaging methodology issue addressed in *Conley* v. *Bowen*, 859 F.2d 261 (2d Cir. 1988). As a result of these clarifications to our regulations, we are rescinding the *Conley* v. *Bowen* Acquiescence Ruling, AR 93–2(2). Other final rules also provide cross-references to § 404.1592a in the explanations of the averaging and unsuccessful work attempt policies contained in § § 404.1574(c), 404.1574a, and 404.1575(d).

These regulations also reflect section 9010 of Pub. L. 100–203, the Omnibus Budget Reconciliation Act of 1987, which extended, as of January 1, 1988, the reentitlement period from 15 months to 36 months. During this period, the title II disability benefits of an individual whose benefits are stopped because of substantial gainful activity may be reinstated without the need to file a new application if his or her work falls below the substantial gainful activity level as long as the individual continues to have a ''disabling impairment'' as defined in § 404.1511 of our regulations. This statutory change is reflected in amendments to § § 404.321, 404.325 and 404.1592a.

Pub. L. 99–643, the Employment Opportunities for Disabled Americans Act, required a number of changes in the way we handle supplemental security income (SSI) cases under title XVI when a disabled person eligible for SSI benefits works. Certain SSI recipients who work despite otherwise disabling impairments and begin to earn amounts that would ordinarily represent substantial gainful activity will not have their earnings considered when determining whether they continue to be disabled. Pursuant to section 4 of Pub. L. 99–643, the trial work period and the reentitlement period no longer apply in SSI disability cases. Accordingly, we have deleted § § 416.973(f), 416.976(f)(2), 416.992, 416.992a, and 416.994(b)(3)(v), (b)(5)(i), the first paragraph of (b)(6)(i), (b)(6)(i)(D), and (b)(6)(ii). We have revised § § 416.901(m), 416.991, and 416.1331(a) by removing references to the trial work period and reentitlement period. (The rules for continuing disability in § 416.994a for children under SSI did not need modification because we took these changes in the law into account when we first promulgated that regulation. See 56 FR 5534 (February 11, 1991).) A substantial gainful activity test is still necessary to establish an individual's initial eligibility for SSI benefits based on disability.

Finally, we made a number of minor changes to conform the text of the regulations in part 404 and part 416, for consistency, technical accuracy, and to comply with Executive Order 12866 and the President's memorandum dated June 1, 1998, which requires us to write all rules in ''plain language.'' None of these changes is intended to be a change in practice.

Public Comments on Notice of Proposed Rulemaking

When we published the NPRM in the **Federal Register** on March 6, 1995 (60 FR 12166), we provided interested parties 60 days to submit comments. We received comments from 10 individuals and organizations, including attorneys and organizations representing the interests of individuals with mental impairments. We considered carefully the comments we received on the proposed rules in publishing these final regulations.

As noted at the beginning of this preamble, we decided not to include in these final regulations the changes

reflected in proposed §§ 404.1574(a)(3)-(6) and 416.974(a)(3)-(6). We have retained, without change, existing §§ 404.1574(a)(3) and 416.974(a)(3). For these reasons, we have not responded to the comments we received on the proposed revisions that we have withdrawn.

Also, there were a few comments that were outside the scope of the NPRM and these final rules. Some commenters provided recommendations for revising our overall work incentive provisions or changing the substantial gainful activity amounts or revising a number of other specific provisions in our rules that were not the subject of the proposed rules. Although we did not summarize or address these comments below because they are outside the scope of these final rules, we have forwarded them to the appropriate SSA components for consideration.

Also, in a separate regulatory action, we published final rules in the **Federal Register** on April 15, 1999 (64 FR 18566 and 64 FR 22903 April 28, 1999) to increase from $500 to $700 the average monthly earnings guidelines used to determine whether work done by a non-blind individual is substantial gainful activity. The change was effective July 1, 1999.

The rest of the comments, which we received on the NPRM and our responses to the comments, are set forth below. Although we condensed, summarized, or paraphrased the comments, we believe we have expressed the views accurately and have responded to all of the relevant issues raised.

General Comments

Comment: One commenter was concerned about what appeared to be a ''negative tone'' and ''clear efforts to 'tighten up' the benefits of work incentives'' throughout the proposed rules. Another commenter, who identified herself as a disability beneficiary who has been attempting to work, commented that the proposed rules reflected, though perhaps not sufficiently, her experiences, and praised the proposal to recognize some factors that ''truly detract from'' substantial gainful activity.

Response: It was certainly not our intent to give the impression that we discourage the attempts of our beneficiaries who want to work to gain employment or that we were ''tightening up'' on beneficiaries'' efforts to try to work. To the contrary, we are supporting on several fronts the efforts of our beneficiaries who want to work to gain employment. Our only intent was to update and clarify our existing rules. Therefore, as we made further changes in the final rules in response to the comments, we were mindful of these overall comments and tried to avoid giving the impression that the first commenter received.

Specific Comments

Section 404.321 When a Period of Disability Begins and Ends

Comment: One commenter recommended that we revise § 404.321(c)(3) more substantively than in the proposed rules, in which we proposed only to update the language to delete the reference to the ''15-month'' reentitlement period. The commenter suggested that the regulation should be revised to clarify that payment status may end during the reentitlement period, but that a period of disability cannot end due to substantial gainful activity before the end of the reentitlement period, and to make § 404.321 consistent with proposed § 404.325.

Response: We did not adopt the comment. The ''clarification'' suggested by the commenter would have changed the meaning of the regulation and our intent, which *is* to provide that a ''period of disability'' under section 216 of the Act may end during the reentitlement period, as required by the Act. Section 216(i)(2)(D) of the Act provides that a period of disability will end with the close of whichever of several months is the earliest. One such month listed in section 216(i)(2)(D) is ''the month preceding * * * the first month for which no benefit is payable by reason of section 223(e), where no benefit is payable for any of the succeeding months during the 36-month period referred to in such section [i.e., the reentitlement period].'' Thus, § 404.321(c)(3) reflects section 216(I)(2)(D) of the Act. Section 404.325 reflects the provision of section 223(a)(1) of the Act, which defines the ''termination month'' for purposes of determining when entitlement to disability insurance benefits terminates. In some cases, entitlement to a period of disability and entitlement to disability insurance benefits may end simultaneously with the month preceding the termination month. However, under the Act, entitlement to a period of disability will end with an earlier month if the above-quoted provision of section 216(I)(2)(D) applies.

Section 404.325 The Termination Month

Comment: One commenter noted that the examples in the proposed rules used dates in the past, thereby showing only ''retroactive'' cessations well in the past.

Response: We adopted the comment. We changed the dates in § 404.325 and throughout the final rules to be more current. However, it should be understood that with the passage of time, these dates will also fall farther and farther in the past.

Comment: The same commenter, and several others, suggested that we revise § 404.325 to eliminate the possibility of retroactive cessations of disability and disability benefit payments under title II based on substantial gainful activity. One suggested that we not cease the payment of benefits under these circumstances earlier than the month we send the beneficiary a notice stating that cash benefits are being stopped. Another suggested that we not retroactively cease disability or cash benefits based on work and earnings at the substantial gainful activity level unless the person fails to report work and earnings to us timely.

Response: We did not adopt the comments. Section 404.325 does not deal specifically with the determination as to when a title II beneficiary's disability ceases due to the performance of substantial gainful activity. That determination is made under the provisions of §§ 404.1594(d)(5), (g)(3) and (g)(4) of the regulations. As pertinent here, these provisions of the regulations, which are based on section 223(d)(4) and (f) of the Act, provide that we will find that an individual's disability ceased in the month in which the individual demonstrated the ability to engage in substantial gainful activity following completion of a trial work period, or if the individual is not entitled to a trial work period, in the month in which the individual does substantial gainful activity.

Section 404.325 reflects the provisions of section 223(a)(1) of the Act, as well as the parallel provision of section 202(d), (e) and (f) of the Act, which define the ''termination month'' for the purpose of prescribing when entitlement to title II benefits based on disability ends. In the absence of the occurrence of another event specified in the Act that requires the termination of entitlement to benefits, the aforementioned provisions of the Act provide that, subject to section 223(e) of the Act (discussed below), entitlement to title II benefits based on disability shall end with the month preceding the termination month. (See §§ 404.316, 404.337 and 404.352.) Consistent with the provisions of 202(d), (e) and (f) and 223(a)(1) of the Act, § 404.325 provides that for an individual who completes a trial work period and continues to have

a disabling impairment, the termination month will be the third month following the earliest month in which the individual performs substantial gainful activity or is determined able to perform substantial gainful activity, but that in no event will the termination month under these circumstances be earlier than the first month after the end of the reentitlement period described in § 404.1592a. Because entitlement to disability benefits ends with the month preceding the termination month, we cannot pay benefits for months after the month preceding the termination month. This is so even if the termination month occurred in the past. In addition, section 223(e)(1) states: ''No benefit shall be payable * * * for any month, after the third month, in which [the individual] engages in substantial gainful activity during the 36-month period following the end of (the individual's) trial work period * * *.'' Because the law specifies the month(s) for which benefits are not payable during the reentitlement period (i. e., any month, after the third month, in which the beneficiary engages in substantial gainful activity), an individual cannot be paid benefits for any such nonpayment month(s), even if it occurred in the past.

Comment: One commenter did not understand the language of the first example in proposed § 404.325 and suggested revisions to clarify it.

Response: We adopted the comment. However, the language recommended by the commenter was inaccurate, so we did not use the exact language the commenter suggested.

Comment: One commenter recommended that we delete or clarify the proposed second example under § 404.325. The commenter suggested that we should not make a finding of substantial gainful activity unless the work activity is sustained for 6 months; that is, that we should always consider whether the activity is an unsuccessful work attempt and average earnings, and never consider a month of work in isolation.

Response: We clarified the example in response to the comment, but we did not adopt the other suggestions to clarify the rule in the comment. The example in the proposed rule only updated the example in the prior rule to reflect the change in duration of the reentitlement period from 15 months to 36 months and to use more recent dates. The example was correct in that it provided that, under the Act, the termination month must be the third month after the earliest month that we determine an individual performs substantial gainful activity or does work showing the ability to perform substantial gainful activity.

However, in considering the comment, we believe that the example may not have been as clear as it could have been. Our policy, set out in final § 404.1592a(a) and explained in more detail below in our responses to comments about that section, is that when a person with a ''disabling impairment'' works, we will first determine whether the work activity shows that his or her disability has ceased; i.e., by the individual's actual engagement in substantial gainful activity or by demonstrating the individual's ability to engage in substantial gainful activity. When we consider whether the individual's disability has ceased because of work, we do apply our rules regarding unsuccessful work attempts and averaging of earnings when they are relevant to the determination. This does not mean that we will wait 6 months to see whether an individual who has returned to work will be successful; we may decide that the earnings in a single month show that the individual is engaging in substantial gainful activity or has the ability to do so. However, if we have information showing that work was an unsuccessful work attempt, we will not decide that the individual's disability has ceased because of the work activity.

Once we have determined that an individual's disability has ceased because of work activity, we believe that the Act requires us to consider months of work in isolation for purposes of establishing the termination month; that is, we consider only what the earnings show for the relevant month in which the individual works without regard to whether the work could have been an unsuccessful work attempt and without averaging the earnings with earnings from other months. Therefore, we are not revising the rules as the commenter suggested.

The second example in proposed and prior § 404.325 presumed that we had already determined that the individual engaged in substantial gainful activity in the month in which he or she returned to work and that disability had ceased. However, based on the comment, we realize that it could have been difficult to understand, and we have clarified it accordingly. We have also clarified the rules in final § 404.1592a(a) in response to this comment and others, as well as other provisions throughout these final rules, to make clear when we will apply the provisions regarding unsuccessful work attempts and averaging of earnings.

Sections 404.1573(c) and 416.973(c) If Your Work is Done Under Special Conditions

Comment: Two commenters, while agreeing with the policy in the proposed rules, suggested that the rules could discourage some individuals from trying to work. The commenters suggested a reorganization of the paragraph and additional language to be more positive and send a more balanced message about work.

Response: We revised our regulations based on these comments, although we did not use all of the specific language proposed by the commenters.

Comment: Several commenters suggested that we expand the list of examples of special conditions in § § 404.1573(c) and 416.973(c). The suggestions included special assistance from a job coach, counselor, or case manager in performing the work, and when the work is primarily rehabilitative, the individual obtained the job non-competitively, or the duration of work was limited because of therapeutic considerations. However, one commenter viewed the list of examples as exhaustive.

Response: We did not add examples, but we revised the text of the regulations in response to these comments to make clear that the list comprises *only* examples and ''is not limited to'' those examples. We decided not to add to the examples because they are fairly general and the more specific we make our examples, the more likely our examples would be misinterpreted as being exhaustive in nature.

Comment: One commenter stated that there should be a better, clearer distinction made between the examples of special conditions in proposed § § 404.1573(c) and 416.973(c) and indicators of possible subsidy in proposed § § 404.1574(a) and 416.974(a), or that we should indicate how they are related, if they are related.

Response: As noted above, we decided to withdraw the proposed changes reflected in proposed § § 404.1574(a)(3)–(6) and 416.974(a)(3)–(6), regarding subsidies. We also clarified the provisions of § § 404.1573(c) and 416.973(c) in these final rules.

Sections 404.1574 and 416.974 Evaluation Guides if You Are an Employee

Comment: One commenter suggested that in the first sentence under proposed § § 404.1574(a)(1) and 416.974(a)(1) we should delete the clause ''our primary consideration is the earnings that are derived from the work activity'' and that

we should refocus our consideration away from earnings and onto the work activity itself as the clearer indicator of whether substantial gainful activity, or the ability to perform substantial gainful activity, exists.

Response: We did not delete the language, but we clarified our intent in response to the comment. The final rules now provide that, generally, we will first look at the individual's earnings, but we will further evaluate the individual's work activity, if appropriate. The final rules clarify our longstanding interpretation that substantial gainful activity is shown primarily by earnings from work, irrespective of the severity of an individual's impairment. However, these rules also recognize that there are some circumstances in which we should not count all of an individual's earnings. For this reason, a new second sentence in paragraph (a)(1) of the final rules provides that we will use an individual's earnings to determine whether there is substantial gainful activity unless we have information from the individual, his or her employer, or others that shows that we should not count all of the earnings.

Comment: One commenter thought that we should not determine that work is at the substantial gainful activity level until and unless a person earns over the substantial gainful level for a period of at least 6 consecutive months.

Response: We did not adopt the comment. It is reasonable to expect that in many instances an individual will demonstrate the ability to work at the substantial gainful activity level in fewer than 6 months.

Sections 404.1574(c), 404.1575(d), 416.974(c), and 416.975(d) The Unsuccessful Work Attempt

Comment: Two commenters thought that it was not clear whether we would consider if work was an unsuccessful work attempt at the time of an initial application. One commenter noted that it was unclear whether we would consider these rules at each point in the appeals process if the claimant began to work after he or she filed an application but before he or she received a determination or decision on his or her appeal.

Response: We adopted the comments. We revised §§ 404.1574(c) and 404.1575(d) to clarify that we will apply the unsuccessful work attempt concept when we make an initial determination on an application for title II disability benefits and throughout any appeal the individual may request and to provide a cross-reference to the provisions of § 404.1592a(a). We have revised § 404.1592a(a) to explain when we will and will not consider the unsuccessful work attempt concept and the provisions for averaging earnings during and after a reentitlement period. We did not make similar revisions to §§ 416.974(c) and 416.975(d) because we apply the rules in §§ 416.974 and 416.975 only in determining whether an individual is initially eligible for SSI. However, we did add sentences to §§ 404.1574(a), 404.1575(a), 416.974(a), and 416.975(a) to state expressly that all of the provisions of these sections (including the provisions on unsuccessful work attempts) apply at the time of the initial determination and throughout any appeals in connection with the application.

Comment: Two commenters suggested that the existing limit on a period of substantial gainful activity that may be considered an unsuccessful work attempt (*i.e.,* 6 months or less) is too short. They suggested that the number of months be increased to at least 9 months to be consistent with the 9-month trial work period.

Response: We did not adopt the comments. The final rules reflect our longstanding interpretation in SSR 84–25, and our experience which has been that 6 months is a sufficient time period to determine whether a work attempt will be unsuccessful. We do not believe that our interpretation on unsuccessful work attempts is analogous to the 9-month trial work period that is provided under a specific provision of the Act. For example, the ''6-months or less'' for the unsuccessful work attempt refers to a consecutive period of months. The trial work period does not require work to be in 9 consecutive months.

Comment: One commenter requested that we include inappropriate work behavior as a basis for an unsuccessful work attempt in §§ 404.1574(c)(4), 404.1575(d)(4), 416.974(c)(4), and 416.975(d)(4). The commenter noted that although a person's work product or services may be acceptable to an employer or in a business, the behavior may be so inappropriate that the individual may lose his or her job or business.

Response: We decided not to add this example because we believe that the examples given in our rules are general enough to cover a multitude of situations, including inappropriate work behavior due to an impairment. Work may be considered unsatisfactory for a number of reasons; one such reason is that a person exhibits inappropriate behavior with work peers, supervisors or the public to such a degree that it is harmful to the business. Unsatisfactory work due to an impairment already is included as a situation that may result in an unsuccessful work attempt. If an individual's inappropriate behavior at work causes him or her to lose the job in 6 months or less, we may consider this an unsuccessful work attempt. If the employer tolerates the behavior or accommodates the individual by providing special circumstances or work conditions, we would evaluate the value of the services and earnings to determine whether the services are substantial gainful activity.

Sections 404.1574a and 416.974a When and How we Will Average Your Earnings

Comment: One commenter suggested that we should average earnings whenever we decide whether an individual is doing substantial gainful activity, including during and after the 36-month reentitlement period. Another commenter stated that the proposed language for § 404.1574a was unclear with respect to whether averaging applies when deciding whether an individual's cash benefits should be terminated during and after the reentitlement period.

Response: We did not adopt the first comment. However, we clarified the rules in § 404.1592a in response to both comments to make clear when we will average earnings during and after a reentitlement period. In addition, in response to other comments, in § 404.1574a we updated the example and added a second example to better show when we will average earnings during and after a reentitlement period. We will apply the rules on averaging earnings when we make an initial determination on an application for title II disability or title XVI blindness or disability benefits and throughout any appeal the individual may request.

As we explain and clarify in the examples in §§ 404.1574(a) and 404.1592a, we will apply the rules on averaging earnings when we evaluate the work activity of a title II beneficiary to determine if his or her disability has ceased during or after the reentitlement period due to the performance of substantial gainful activity. We will not average earnings after the first month that we determine an individual performed substantial gainful activity during or after the reentitlement period. Thus, as we explain in §§ 404.1574a(d) and 404.1592a, we will not average a title II beneficiary's earnings in determining whether benefits should be paid for any month(s) during or after the reentitlement period that occurs after the month that we determined that disability ceased because of the

performance of substantial gainful activity.

Comment: One commenter stated that the example of averaging did not show when earnings could be averaged and asked that such an example be included.

Response: We added a second example which illustrates completion of the 9-month trial work period in a period of 10 consecutive months, when we will average earnings, and when it is not appropriate for us to average earnings.

Comment: One commenter believed that proposed § 416.974a, for averaging earnings when determining whether an individual is eligible for SSI disability benefits, was inconsistent with section 1619(a) of the Act.

Response: There is no inconsistency. Section 1619 of the Act applies to individuals whom we find eligible based on disability to receive benefits for at least 1 month and who begin work at the substantial gainful activity level in a subsequent month. We average earnings only to determine whether an individual is doing substantial gainful activity at the time he or she applies for SSI benefits to determine if the individual is eligible for SSI benefits. Once an individual is receiving SSI benefits, we do not consider whether he or she is engaging in substantial gainful activity to determine whether he or she continues to be eligible for benefits, consistent with the provisions of section 1619(a).

Section 404.1592(b) What We Mean by Services

Comment: One commenter stated that subsidy and impairment-related work expenses should be considered to reduce countable earnings when determining ''services'' for purposes of counting trial work period months.

Response: Subsidy and impairment-related work expenses are concepts which we use to reduce an employee's gross earnings in a month(s) in determining whether the work he or she has done or is doing is substantial gainful activity. Our regulations which provide for subtracting the value of any subsidy from an individual's gross earnings in determining whether the individual's earnings show that he or she has engaged in substantial gainful activity are based on the rulemaking authority granted to the Commissioner of Social Security under sections 223(d)(4)(A) and 1614(a)(3)(E) of the Act. These sections of the Act provide that the Commissioner ''shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity.'' Our regulations which provide for deducting impairment-related work expenses in determining whether an individual's earnings show that he or she has engaged in substantial gainful activity are based on provisions of these same sections of the Act which specifically require that impairment-related work expenses be excluded in determining whether an individual is able to engage in substantial gainful activity by reason of his or her earnings.

By contrast, the term ''services'' for purposes of counting trial work period months is specifically defined by statute. Section 222(c)(2) of the Act provides that, for purposes of the trial work period, ''the term 'services' means activity (whether legal or illegal) which is performed for remuneration or gain or is determined by the Commissioner of Social Security to be of a type normally performed for remuneration or gain.'' Under this definition, activity which is performed for remuneration or gain (e.g., wages, pay or profit) constitutes ''services'' for purposes of counting trial work period months whether or not an individual's earnings are subsidized or the individual incurs impairment-related work expenses. Consequently, consistent with the definition of ''services'' in section 222(c)(2) of the Act, we do not consider subsidies or impairment-related work expenses when we determine whether an individual has performed ''services'' for purposes of counting trial work period months.

Comment: Another commenter questioned the basis for the proposed revision of the fourth sentence of § 404.1592(b). The commenter interpreted the existing sentence to mean that we generally do not consider certain work, such as work done as therapy or training, to be ''services'' even if the work is done for remuneration. The commenter expressed the view that the proposed revision appeared to represent a change in policy in that it would exclude such work from being considered ''services'' only if the work is done ''without remuneration.''

Response: The revision of the fourth sentence of § 404.1592(b) in these final rules is not a change in interpretation. Rather, it is intended to eliminate an ambiguity in the existing language that could lead to a misinterpretation of the provision. Because of the ambiguity, some, such as the commenter, may have interpreted the existing provision in a manner that is inconsistent with the Act and our intent. Section 222(c)(2) of the Act provides that work activity is ''services'' for trial work period purposes if the activity ''is performed for remuneration or gain *or* is determined by the Commissioner of Social Security to be of a type normally performed for remuneration or gain'' (emphasis added). Consistent with this provision of the Act, our longstanding interpretation has been that when an individual receives pay or profit in work that is done as therapy or training, we count that work as ''services'' for purposes of counting months of a trial work period. Conversely, we generally do not consider activity that is not performed for pay or profit, and that is done merely as therapy or training (or is the kind of activity usually done in a daily routine around the house or in self-care), as ''services'' for purposes of counting trial work period months. The purpose of the revision in these final rules is to clarify this intent.

Comment: One commenter stated that work activity performed in sheltered workshops or other similar environments is ''pre-vocational and/or training'' in nature and should not be considered ''services'' in determining trial work period months. Other commenters thought that § 404.1592(b) should be revised to exclude any activity that is ''transitional employment'' from being considered ''services'' for purposes of counting trial work period months.

Response: We did not adopt the comments. Whether activity performed by an individual constitutes ''services'' for purposes of the trial work period is determined on a case-by-case basis in accordance with the criteria specified in § 404.1592(b). Consistent with section 222(c)(2) of the Act, discussed above, § 404.1592(b) defines ''services'' to mean any activity, whether or not it is substantial gainful activity, ''which is done by a person in employment or self-employment for pay or profit, or is the kind normally done for pay or profit.'' We use this standard to determine whether work activity performed by an individual, including work performed in a sheltered workshop or in ''transitional employment,'' constitutes ''services'' for purposes of determining when the trial work period has ended. The criteria in § 404.1592(b) apply whether the activity is performed in competitive employment, in a sheltered workshop, in ''transitional employment,'' in some other type of supported or subsidized employment, or in any other circumstance.

Section 404.1592(d) Who Is and Is Not Entitled to a Trial Work Period

Comment: Several commenters were critical of our proposed revisions to clarify that a claimant is not entitled to

a trial work period when he or she performs work demonstrating the ability to perform substantial gainful activity within 12 months after the alleged onset of disability and before we have issued any notice of determination or decision finding disability. It was contended that this policy is based on an ''overly technical'' statutory interpretation by SSA and is ''completely arbitrary in its application'' because entitlement to a trial work period for similarly situated individuals can depend on whether SSA makes a determination on their claims before or after they return to work.

Response: We did not adopt the comments. As noted in the NPRM, the revisions we are making clarify, but do not change, our interpretation set forth in SSR 82–52. Both the preambles to the NPRM and to these final regulations provide a more detailed explanation and justification for that longstanding interpretation than does SSR 82–52. As those preambles explain, our interpretation is based on the statutory 12-month duration requirement for establishing disability. We believe that our interpretation is a reasonable one that reflects congressional intent that disability claims should not be allowed in the face of evidence that a claimant's impairment(s) did not prevent substantial gainful activity for 12 consecutive months.

The legislative history of the duration requirement indicates the intent of Congress that the disability program not ''result in the payment of disability benefits in cases of short-term, temporary disability.'' S. Rep. No. 404, 89th Cong. 1st Sess. 98–99, *reprinted* in 1965 U.S. Code Cong. & Ad. News 1943, 2038–39. The requirement in the statutory definition of disability of an inability to engage in any substantial gainful activity by reason of an impairment ''which has lasted or can be expected to last for a continuous period of not less than 12 months'' can most reasonably be interpreted to mean that the time of adjudication is the relevant point of reference. If Congress had intended benefits to be awarded based on evidence that a claimant's impairment(s) did not in fact prevent substantial gainful activity for 12 continuous months, but only had been expected to do so at some earlier point in the 12-month period, we believe that Congress would have provided for a finding of disability based on an impairment(s) which *was* expected to last 12 months, in addition to one which *can be* expected to last 12 months.

Furthermore, at the time the trial work period provision was enacted in 1960, the Act defined disability as the inability to engage in substantial gainful activity by reason of an impairment which can be expected to result in death or ''to be of long-continued and indefinite duration.'' It was not until 1965 that the Act was amended to broaden the protection provided by the disability program by replacing the quoted language with the current 12-month duration requirement. Given the definition of disability in effect in 1960, it appears doubtful that Congress intended for the trial work period to be available when a claimant had already demonstrated the ability to perform substantial gainful activity by returning to work before we issue a determination or decision making a finding of disability.

With respect to the contention that our policy is arbitrary because a claimant's entitlement to a trial work period can be affected by the amount of time which passes before SSA adjudicates the claim or by when the application is filed, we recognize that it is possible for different outcomes to occur because of the amount of time needed to carefully and correctly adjudicate a particular claim. However, we believe that such outcomes on the relatively infrequent, but regrettable, occasions in which they occur, are a reasonable consequence of a program that was established by Congress in a way that would implement and accommodate two separate goals: (1) The disability program should not result in the payment of disability benefits in cases of short-term, temporary disability, and (2) claimants whose impairments will prevent them from being able to engage in substantial gainful activity for at least a year should not be required to meet this duration requirement by waiting the full year before they can be awarded and receive benefits. As the program was established, both these goals are accomplished except in the situation in which SSA awards benefits based on a finding that a claimant's inability to engage in substantial gainful activity can be expected to last for at least 12 months, and that prediction later turns out to be incorrect. While an award of benefits in this situation could be viewed as inconsistent with the first goal, such award is necessary in order to permit SSA to adjudicate disability claims and award benefits without having to wait 12 months from onset.

Finally, some claimants can seek relief under the unsuccessful work attempt policy, which permits benefits to be awarded to a claimant who attempts to return to work if that work attempt turns out to be ''unsuccessful'' under the provisions of final §§ 404.1574(c) and 404.1575(d) which are discussed in greater detail earlier in this preamble. We will disregard work attempts lasting 6 months or less that do not demonstrate the ability to perform sustained substantial gainful activity even if the unsuccessful work attempt occurs prior to adjudication of the claim for benefits.

Comment: One commenter was critical of our proposed revisions to § 404.1592(d) that were intended to clarify and be consistent with the provisions of § 404.1592(e). The commenter expressed the opinion that ''(t)he proposed regulation is arbitrary because it treats persons differently, for trial work period purposes, based on the fortuity of when they apply for benefits.''

Response: The proposed revisions and the final rules are consistent with our longstanding regulations which, since 1968, have provided that a trial work period may not begin prior to the month in which the application for benefits is filed. See § 404.1592(e). These regulations are based on section 222(c) of the Act, which provides that a trial work period begins with the month in which a person becomes entitled to disability benefits, and section 223(a)(1)(C) of the Act, which provides that, in order for a person to become entitled to disability benefits, he or she must have filed an application for benefits.

However, in reviewing § 404.1592(d)(2)(iv) of the proposed regulations in connection with these comments, we realized that the language we proposed could be misinterpreted to be more restrictive than we had intended. The proposed rule provided that an individual would not be entitled to a trial work period if he or she performed work demonstrating the ability to engage in substantial gainful activity at any time after the onset of the impairment(s) which prevented the individual from engaging in substantial gainful activity but before the month the individual filed his or her application for disability benefits. Taken literally, this could have prevented us from establishing trial work periods for some individuals we did not mean to exclude. For example, taken literally, the language could have been misinterpreted to exclude individuals whose impairments were not *disabling* at the time of their ''onset'' even though they were the impairments ''which'' ultimately prevented the individuals from working. It might have also been misinterpreted to exclude individuals with episodic impairments, such as mental disorders, that permit them to work intermittently, who might have worked in the past, and who might be

entitled to a trial work period for months after they have filed applications. Therefore, we revised the final rules to state more clearly our policy that we will not grant a trial work period for any month prior to the month of application.

Section 404.1592(e) When the Trial Work Period Begins and Ends

Comment: One commenter recommended that individuals who completed the trial work periods before January 1992 should be ''grandfathered in.'' The commenter stated that individuals who completed their trial work period prior to January 1992 are not covered under the provisions of the law which state that the trial work period must be completed within a consecutive 60-month period. Under provisions effective January 1992, trial work months for the period prior to the 60-month period are not counted in the current 60-month period. Another commenter suggested that we should allow multiple trial work periods within the same period of disability. Another commenter suggested that we consider a trial work period completed only when 9 consecutive months of trial work are performed.

Response: Our longstanding interpretation has been that the statutory requirement for counting the 9 trial work period months in a consecutive 60-month period, which took effect January 1, 1992, does not apply to beneficiaries who complete their trial work period before that date. We believe this policy is consistent with and supported by the statutory language.

Section 404.1592a The Reentitlement Period

Comment: One commenter recommended that we clarify § 404.1592a to indicate when we would apply the policies regarding the unsuccessful work attempt in the reentitlement period. The commenter also asked that we include an example.

Response: As already noted in response to this and other comments, we have revised § 404.1592a(a) in these final rules to explain when we will and will not consider the unsuccessful work attempt and averaging policies during and after the reentitlement period. We did not provide an example because we believe the revised provisions are sufficiently clear.

Beginning with the month following the 9th trial work period month, if an individual continues to have a disabling impairment, he or she is entitled to a 36-month reentitlement period. During the reentitlement period, an individual may continue to test his or her ability to work. At any time after the trial work period ends and during and after the reentitlement period, we will evaluate any work and earnings to determine if it is substantial gainful activity and requires a cessation of disability status. To make this decision, we will, if applicable, average the work and earnings over the actual period of time that the individual worked. This may include work performed during the trial work period or during or after the reentitlement period. We will also consider whether the work was an unsuccessful work attempt and if there were any impairment-related work expenses, subsidy, special conditions or for self-employed individuals, unincurred business expenses. In no event will the cessation of disability based on substantial gainful activity be earlier than the first month after the end of the 9-month trial work period.

If we determine that disability ceased based on substantial gainful activity, then entitlement to disability benefits will terminate as of the third month following the month we find that the individual began substantial gainful activity, but in no event earlier than the first month after the end of the 36-month reentitlement period. We will evaluate all work activity that occurs in or after the third month following the month that we determine disability ceased based on substantial gainful activity on a month-by-month basis. This is because an individual is due payment for the month we find his or her disability ceased based on substantial gainful activity and the two succeeding months, whether or not the individual performs substantial gainful activity during those succeeding months. After those three months, an individual is not due benefits for any month he or she performs substantial gainful activity. However, he or she is due benefits for any month during the reentitlement period in which he or she does not engage in substantial gainful activity. We do not apply the provisions regarding an unsuccessful work attempt in determining whether to pay benefits for any month after the month disability ceased based on substantial gainful activity. Also, we do not average earnings. If we did, this could result in paying an individual less than what he or she is due. Likewise, after the reentitlement period ends, if we have previously determined that disability ceased based on substantial gainful activity during the reentitlement period, we must determine substantial gainful activity based on work and earnings on a month-by-month basis. When we calculate substantial gainful earnings on a month-by-month basis, we continue to consider any impairment-related work expenses, subsidy, and special conditions and for self-employed individuals, unincurred business expenses. If an individual's disability benefits were reinstated during the reentitlement period, they will terminate effective with the first month he or she does substantial gainful activity after the reentitlement period. This is because the individual has already demonstrated the ability to perform substantial gainful activity. We believe this longstanding interpretation is consistent with sections 223(a)(1) and 223(e)(1) of the Act. The intent of the 36-month reentitlement period is to encourage disability beneficiaries to continue working after the 9-month trial work period and after demonstrating the ability to do substantial gainful activity.

Comment: One commenter suggested eliminating the reentitlement period time limit (creating an unending reentitlement period) to make it easier for title II beneficiaries to receive benefits again after their benefits end because they did substantial gainful activity.

Response: We did not adopt the comment. The law specifically provides a 36-month limit to the reentitlement period. To make the changes suggested would require a change in the law.

Regulatory Procedures

Pursuant to section 702(a)(5) of the Act, 42 U.S.C. 902(a)(5), the Social Security Administration follows the Administrative Procedure Act (APA) rulemaking procedures specified in 5 U.S.C. 553 in the development of its regulations. The APA provides exceptions to its NPRM procedures when an agency finds that there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. For the reasons that follow, we have determined that under 5 U.S.C. 553(b)(B), good cause exists for waiving the NPRM procedures with respect to the following changes made to our regulations: (1) The changes made to § § 404.1571 and 416.971 to reflect the provisions of sections 201(a)(4)(A) and 201(b)(4)(A) of Pub. L. 103–296; (2) the changes made to § 404.1592(b) to reflect the provisions of section 201(a)(4)(B) of Pub. L. 103–296; and (3) the changes made to § 404.1584(d) to reflect the provisions of section 102 of Pub. L. 104–121.

Sections 201(a)(4)(A) and 201(b)(4)(A) of Pub. L. 103–296 amended sections 223(d)(4) and 1614(a)(3) of the Act, respectively, to provide that we shall

make determinations of substantial gainful activity with respect to services performed by an individual ''without regard to the legality'' of the services. Section 201(a)(4)(B) of Pub. L. 103–296 added the parenthetical phrase ''(whether legal or illegal)'' into the definition of ''services'' in section 222(c)(2) of the Act to provide that for trial work purposes '' 'services' means activity (whether legal or illegal) which is performed for remuneration or gain or is determined by the Commissioner of Social Security to be of a type normally performed for remuneration or gain.'' These amendments to the Act became effective on August 15, 1994, the date Pub. L. 103–296 was enacted. Section 102 of Pub. L. 104–121, enacted March 29, 1996, amended section 223(d)(4)(A) of the Act to provide that, for years after 1995, an increase in the substantial gainful activity amount for blind individuals under title II of the Act depends only on increases in the national average wage index.

Because the language of the statutory provisions added by these amendments is clear and does not provide for any discretionary policy, we believe that the use of notice-and-comment rulemaking procedures for the issuance of rules to reflect these statutory provisions is unnecessary. On this basis, good cause exists for dispensing with such procedures under the APA. Accordingly, we find that prior notice and comment are unnecessary with respect to these specific changes made to the rules.

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB), and OMB has determined that these rules meet the criteria for a significant regulatory action under Executive Order 12866. Thus, OMB has reviewed these rules. We believe that changes in the number of individuals affected by these rules will be minimal and any associated costs will be cost neutral. We believe that based on these clarifications in our rules, any increase in the number of individuals found performing substantial gainful activity and therefore not disabled or no longer disabled under the Act will be offset by individuals who are working and found not performing substantial gainful activity and disabled because of certain adjustments that we make in calculating earnings for substantial gainful activity purposes. With these rules, we provide clarifications and better descriptions of our interpretations of the Act. We believe this will assist SSA personnel in providing our applicants and beneficiaries with more accurate information about SSA's work incentives (and thus, better service). Also, we believe, that people with disabilities who are working or who want to work will be better able to understand the employment support provisions and better perform their benefits and career planning in attempting to gain and keep employment, join America's mainstream and become more independent.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because they affect only individuals who are applying for or receiving title II or title XVI benefits because of disability or blindness. Therefore, a regulatory flexibility analysis, as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These final rules impose no additional reporting or recordkeeping requirements subject to Office of Management and Budget clearance. If you have any questions on this issue, write to the Social Security Administration, ATTN: Reports Clearance Officer, 1–A–21 Operations Building, Baltimore, Maryland 21235–6401, and to the Office of Management and Budget, Paperwork Reduction Project (0960–0483), Washington, DC 20503.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Death benefits, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: March 17, 2000.

Kenneth S. Apfel,

Commissioner of Social Security.

For the reasons set forth in the Preamble, subparts D and P of part 404 and subparts I and M of part 416 of chapter III of title 20 of the Code of Federal Regulations are amended as set forth below.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart D—[Amended]

1. The authority citation for subpart D of part 404 continues to read as follows:

Authority: Secs. 202, 203 (a) and (b), 205(a), 216, 223, 225, 228(a)–(e), and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 403 (a) and (b), 405(a), 416, 423, 425, 428(a)–(e), and 902(a)(5)).

2. Section 404.321 is amended by revising paragraph (c)(3) to read as follows:

§ 404.321 When a period of disability begins and ends.

* * * * *

(c) * * *

* * * * *

(3) If you perform substantial gainful activity during the reentitlement period described in § 404.1592a, the last month for which you received benefits.

* * * * *

3. Section 404.325 is revised to read as follows:

§ 404.325 The termination month.

If you do not have a disabling impairment, your termination month is the third month following the month in which your impairment is not disabling even if it occurs during the trial work period or the reentitlement period. If you continue to have a disabling impairment and complete 9 months of trial work, your termination month will be the third month following the earliest month you perform substantial gainful activity or are determined able to perform substantial gainful activity; however, in no event will the termination month under these circumstances be earlier than the first month after the end of the reentitlement period described in § 404.1592a.

Example 1: You complete your trial work period in December 1999. You then work at the substantial gainful activity level and continue to do so throughout the 36 months following completion of your trial work period and thereafter. Your termination month will be January 2003, which is the first month in which you performed substantial gainful activity after the end of your 36-month reentitlement period. This is because, for individuals who have disabling impairments (see § 404.1511) and who work, the termination month cannot occur before the first month after the end of the 36-month reentitlement period.

Example 2: You complete your trial work period in December 1999, but you do not do work showing your ability to do substantial

gainful activity during your trial work period or throughout your 36-month reentitlement period. In April 2003, 4 months after your reentitlement period ends, you become employed at work that we determine is substantial gainful activity, considering all of our rules in §§ 404.1574 and 404.1574a. Your termination month will be July 2003; that is, the third month after the earliest month you performed substantial gainful activity.

Subpart P—[Amended]

4. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189.

5. Section 404.1571 is amended by revising the first sentence to read as follows:

§ 404.1571 General.

The work, without regard to legality, that you have done during any period in which you believe you are disabled may show that you are able to work at the substantial gainful activity level. * * *

6. Section 404.1573 is amended by revising paragraph (c) to read as follows:

§ 404.1573 General information about work activity.

* * * * *

(c) *If your work is done under special conditions.* The work you are doing may be done under special conditions that take into account your impairment, such as work done in a sheltered workshop or as a patient in a hospital. If your work is done under special conditions, we may find that it does not show that you have the ability to do substantial gainful activity. Also, if you are forced to stop or reduce your work because of the removal of special conditions that were related to your impairment and essential to your work, we may find that your work does not show that you are able to do substantial gainful activity. However, work done under special conditions may show that you have the necessary skills and ability to work at the substantial gainful activity level. Examples of the special conditions that may relate to your impairment include, but are not limited to, situations in which—

(1) You required and received special assistance from other employees in performing your work;

(2) You were allowed to work irregular hours or take frequent rest periods;

(3) You were provided with special equipment or were assigned work especially suited to your impairment;

(4) You were able to work only because of specially arranged circumstances, for example, other persons helped you prepare for or get to and from your work;

(5) You were permitted to work at a lower standard of productivity or efficiency than other employees; or

(6) You were given the opportunity to work despite your impairment because of family relationship, past association with your employer, or your employer's concern for your welfare.

* * * * *

7. Section 404.1574 is amended by revising paragraphs (a), introductory text, (a)(1), (a)(2), (b)(1), (b)(2), introductory text, (b)(3), introductory text, (b)(4), and (b)(6), introductory text, and by adding new paragraphs (c) and (d) to read as follows:

§ 404.1574 Evaluation guides if you are an employee.

(a) We use several guides to decide whether the work you have done shows that you are able to do substantial gainful activity. If you are working or have worked as an employee, we will use the provisions in paragraphs (a) through (d) of this section that are relevant to your work activity. We will use these provisions whenever they are appropriate, whether in connection with your application for disability benefits (when we make an initial determination on your application and throughout any appeals you may request), after you have become entitled to a period of disability or to disability benefits, or both.

(1) *Your earnings may show you have done substantial gainful activity.* Generally, in evaluating your work activity for substantial gainful activity purposes, our primary consideration will be the earnings you derive from the work activity. We will use your earnings to determine whether you have done substantial gainful activity unless we have information from you, your employer, or others that shows that we should not count all of your earnings. The amount of your earnings from work you have done (regardless of whether it is unsheltered or sheltered work) may show that you have engaged in substantial gainful activity. Generally, if you worked for substantial earnings, we will find that you are able to do substantial gainful activity. However, the fact that your earnings were not substantial will not necessarily show that you are not able to do substantial gainful activity. We generally consider work that you are forced to stop or to reduce below the substantial gainful activity level after a short time because of your impairment to be an unsuccessful work attempt. Your earnings from an unsuccessful work attempt will not show that you are able to do substantial gainful activity. We will use the criteria in paragraph (c) of this section to determine if the work you did was an unsuccessful work attempt.

(2) *We consider only the amounts you earn.* When we decide whether your earnings show that you have done substantial gainful activity, we do not consider any income that is not directly related to your productivity. When your earnings exceed the reasonable value of the work you perform, we consider only that part of your pay which you actually earn. If your earnings are being subsidized, we do not consider the amount of the subsidy when we determine if your earnings show that you have done substantial gainful activity. We consider your work to be subsidized if the true value of your work, when compared with the same or similar work done by unimpaired persons, is less than the actual amount of earnings paid to you for your work. For example, when a person with a serious impairment does simple tasks under close and continuous supervision, our determination of whether that person has done substantial gainful activity will not be based only on the amount of the wages paid. We will first determine whether the person received a subsidy; that is, we will determine whether the person was being paid more than the reasonable value of the actual services performed. We will then subtract the value of the subsidy from the person's gross earnings to determine the earnings we will use to determine if he or she has done substantial gainful activity.

* * * * *

(b) *Earnings guidelines.* (1) *General.* If you are an employee, we first consider the criteria in paragraph (a) of this section and § 404.1576, and then the guides in paragraphs (b)(2), (3), (4), (5), and (6) of this section. When we review your earnings to determine if you have been performing substantial gainful activity, we will subtract the value of any subsidized earnings (see paragraph (a)(2) of this section) and the reasonable cost of any impairment-related work expenses from your gross earnings (see § 404.1576). The resulting amount is the amount we use to determine if you have done substantial gainful activity. We will generally average your earnings for comparison with the earnings guidelines in paragraphs (b)(2), (3), (4), and (6) of this section. See § 404.1574a for our rules on averaging earnings.

(2) *Earnings that will ordinarily show that you have engaged in substantial*

gainful activity. We will consider that your earnings from your work activity as an employee (including earnings from sheltered work, see paragraph (b)(4) of this section) show that you have engaged in substantial gainful activity if—* * *

(3) *Earnings that will ordinarily show that you have not engaged in substantial gainful activity*. Unless you work in a sheltered workshop or a comparable facility (see paragraph (b)(4) of this section), we will generally consider that the earnings from your work as an employee will show that you have not engaged in substantial gainful activity if—* * *

(4) *If you work in a sheltered workshop*. If you work in a sheltered workshop or a comparable facility especially set up for persons with serious impairments, we will ordinarily consider that your earnings from this work show that you have engaged in substantial gainful activity if your earnings meet the levels in paragraph (b)(2) of this section. Earnings from a sheltered workshop or a comparable facility that are less than those indicated in paragraph (b)(2) of this section will ordinarily show that you have not engaged in substantial gainful activity without the need to consider the other information in paragraph (b)(6) of this section regardless of whether they are more or less than those indicated in paragraph (b)(3) of this section. When your earnings from a sheltered workshop or comparable facility are less than those indicated in paragraph (b)(2), we will consider the provisions of paragraph (b)(6) of this section only if there is evidence showing that you may have done substantial gainful activity.

* * * * *

(6) *Earnings that are not high or low enough to show whether you engaged in substantial gainful activity*. Unless you work in a sheltered workshop or a comparable facility (see paragraph (b)(4) of this section), if your earnings, on the average, are between the amounts shown in paragraphs (b)(2) and (3) of this section, we will generally consider other information in addition to your earnings, such as whether—

* * * * *

(c) *The unsuccessful work attempt.*—(1) *General*. Ordinarily, work you have done will not show that you are able to do substantial gainful activity if, after working for a period of 6 months or less, your impairment forced you to stop working or to reduce the amount of work you do so that your earnings from such work fall below the substantial gainful activity earnings level in paragraph (b)(2) of this section, and you meet the conditions described in paragraphs (c)(2), (3), (4), and (5), of this section. We will use the provisions of this paragraph when we make an initial determination on your application for disability benefits and throughout any appeal you may request. Except as set forth in § 404.1592a(a), we will also apply the provisions of this paragraph if you are already entitled to disability benefits, when you work and we consider whether the work you are doing is substantial gainful activity or demonstrates the ability to do substantial gainful activity.

(2) *Event that must precede an unsuccessful work attempt.* There must be a significant break in the continuity of your work before we will consider that you began a work attempt that later proved unsuccessful. You must have stopped working or reduced your work and earnings below the substantial gainful activity earnings level because of your impairment or because of the removal of special conditions that were essential to the further performance of your work. We explain what we mean by special conditions in § 404.1573(c). We will consider your prior work to be ''discontinued'' for a significant period if you were out of work at least 30 consecutive days. We will also consider your prior work to be ''discontinued'' if, because of your impairment, you were forced to change to another type of work or another employer.

(3) *If you worked 3 months or less*. We will consider work of 3 months or less to be an unsuccessful work attempt if you stopped working, or you reduced your work and earnings below the substantial gainful activity earnings level, because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work.

(4) *If you worked between 3 and 6 months*. We will consider work that lasted longer than 3 months to be an unsuccessful work attempt if it ended, or was reduced below substantial gainful activity earnings level, within 6 months because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work and—

(i) You were frequently absent from work because of your impairment;

(ii) Your work was unsatisfactory because of your impairment;

(iii) You worked during a period of temporary remission of your impairment; or

(iv) You worked under special conditions that were essential to your performance and these conditions were removed.

(5) *If you worked more than 6 months*. We will not consider work you performed at the substantial gainful activity earnings level for more than 6 months to be an unsuccessful work attempt regardless of why it ended or was reduced below the substantial gainful activity earnings level.

(d) *Work activity in certain volunteer programs*. If you work as a volunteer in certain programs administered by the Federal government under the Domestic Volunteer Service Act of 1973 or the Small Business Act, we will not count any payments you receive from these programs as earnings when we determine whether you are engaging in substantial gainful activity. These payments may include a minimal stipend, payments for supportive services such as housing, supplies and equipment, an expense allowance, or reimbursement of out-of-pocket expenses. We will also disregard the services you perform as a volunteer in applying any of the substantial gainful activity tests discussed in paragraph (b)(6) of this section. This exclusion from the substantial gainful activity provisions will apply only if you are a volunteer in a program explicitly mentioned in the Domestic Volunteer Service Act of 1973 or the Small Business Act. Programs explicitly mentioned in those Acts include Volunteers in Service to America, University Year for ACTION, Special Volunteer Programs, Retired Senior Volunteer Program, Foster Grandparent Program, Service Corps of Retired Executives, and Active Corps of Executives. We will not exclude under this paragraph, volunteer work you perform in other programs or any nonvolunteer work you may perform, including nonvolunteer work under one of the specified programs. For civilians in certain government-sponsored job training and employment programs, we evaluate the work activity on a case-by-case basis under the substantial gainful activity earnings test. In programs such as these, subsidies often occur. We will subtract the value of any subsidy and use the remainder to determine if you have done substantial gainful activity. See paragraphs (a)(2)-(3) of this section.

8. A new § 404.1574a is added to read as follows:

§ 404.1574a When and how we will average your earnings.

(a) If your work as an employee or as a self-employed person was continuous without significant change in work patterns or earnings, and there has been no change in the substantial gainful

activity earnings levels, we will average your earnings over the entire period of work requiring evaluation to determine if you have done substantial gainful activity. See § 404.1592a for information on the reentitlement period.

(b) If you work over a period of time during which the substantial gainful activity earnings levels change, we will average your earnings separately for each period in which a different substantial gainful activity earnings level applies.

(c) If there is a significant change in your work pattern or earnings during the period of work requiring evaluation, we will average your earnings over each separate period of work to determine if any of your work efforts were substantial gainful activity.

(d) We will not average your earnings in determining whether benefits should be paid for any month(s) during or after the reentitlement period that occurs after the month disability has been determined to have ceased because of the performance of substantial gainful activity. See § 404.1592a for information on the reentitlement period. The following examples illustrate what we mean by a significant change in the work pattern of an employee and when we will average and will not average earnings.

Example 1: Mrs. H. began receiving disability insurance benefits in March 1993. In January 1995 she began selling magazines by telephone solicitation, expending a minimum of time, for which she received $225 monthly. As a result, Mrs. H. used up her trial work period during the months of January 1995 through September 1995. After the trial work period ended, we determined that Mrs. H. had not engaged in substantial gainful activity during her trial work period. Her reentitlement period began October 1995. In December 1995, Mrs. H. discontinued her telephone solicitation work to take a course in secretarial skills. In January 1997, she began work as a part-time temporary secretary in a banking firm. Mrs. H. worked 20 hours a week, without any subsidy or impairment-related work expenses, at beginner rates. She earned $285 per month in January 1997 and February 1997. In March 1997 she had increased her secretarial skills to journeyman level and was assigned as a part-time private secretary to one of the vice presidents of the banking firm. Mrs. H.'s earnings increased to $525 per month effective March 1997. We determined that Mrs. H. was engaging in substantial gainful activity beginning March 1997 and that her disability ceased that month, the first month of substantial gainful activity after the end of the trial work period. Mrs. H. is due payment for March 1997, the month of cessation, and the following 2 months (April 1997 and May 1997) because disability benefits terminate the third month following the earliest month in which she performed substantial gainful activity. We did not average earnings for the period January 1997 and February 1997 with the period beginning March 1997 because there was a significant change in earnings and work activity beginning March 1997. Thus, the earnings of January 1997 and February 1997 could not be averaged with those of March 1997 to reduce March 1997 earnings below the substantial gainful activity level. After we determine that Mrs. H.'s disability had ceased because of her performance of substantial gainful activity, we cannot average her earnings to determine whether she is due payment for any month during or after the reentitlement period. Beginning June 1997, the third month following the cessation month, we would evaluate all of Mrs. H.'s work activity on a month-by-month basis (see § 404.1592a(a)).

Example 2: Ms. M. began receiving disability insurance benefits in March 1992. In January 1995, she began selling cable television subscriptions by telephone solicitation, expending a minimum of time, for which she received $275 monthly. Ms. M. did not work in June 1995, and she resumed selling cable television subscriptions beginning July 1995. In this way, Ms. M. used up her 9-month trial work period during the months of January 1995 through May 1995 and July 1995 through October 1995. After Ms. M.'s trial work period ended, we determined that she had not engaged in substantial gainful activity during her trial work period. Ms. M.'s reentitlement period began November 1995. In December 1995, Ms. M. discontinued her telephone solicitation work to take a course in secretarial skills. In January 1997, she began work as a part-time temporary secretary in an accounting firm. Ms. M. worked, without any subsidy or impairment-related work expenses, at beginner rates. She earned $460 in January 1997, $420 in February 1997, and $510 in March 1997. In April 1997, she had increased her secretarial skills to journeyman level, and she was assigned as a part-time private secretary to one of the vice presidents of the firm. Ms. M.'s earnings increased to $860 per month effective April 1997. We determined that Ms. M. was engaging in substantial gainful activity beginning April 1997 and that her disability ceased that month, the first month of substantial gainful activity after the end of the trial work period. She is due payment for April 1997, May 1997 and June 1997, because disability benefits terminate the third month following the earliest month in which she performs substantial gainful activity (the month of cessation). We averaged her earnings for the period January 1997 through March 1997 and determined them to be about $467 per month for that period. We did not average earnings for the period January 1997 through March 1997 with earnings for the period beginning April 1997 because there was a significant change in work activity and earnings beginning April 1997. Therefore, we found that the earnings for January 1997 through March 1997 were under the substantial gainful activity level. After we determine that Ms M.'s disability has ceased because she performed substantial gainful activity, we cannot average her earnings in determining whether she is due payment for any month during or after the reentitlement period. In this example, beginning July 1997, the third month following the month of cessation, we would evaluate all of Ms. M.'s work activity on a month-by-month basis (see § 404.1592a(a)).

9. Section 404.1575 is amended by revising paragraphs (a) and (c) and adding a new paragraph (d) to read as follows:

§ 404.1575 Evaluation guides if you are self-employed.

(a) *If you are a self-employed person.* If you are working or have worked as a self-employed person, we will use the provisions in paragraphs (a) through (d) of this section that are relevant to your work activity. We will use these provisions whenever they are appropriate, whether in connection with your application for disability benefits (when we make an initial determination on your application and throughout any appeals you may request), after you have become entitled to a period of disability or to disability benefits, or both. We will consider your activities and their value to your business to decide whether you have engaged in substantial gainful activity if you are self-employed. We will not consider your income alone because the amount of income you actually receive may depend on a number of different factors, such as capital investment and profit-sharing agreements. We will generally consider work that you were forced to stop or reduce to below substantial gainful activity after 6 months or less because of your impairment as an unsuccessful work attempt. See paragraph (d) of this section. We will evaluate your work activity based on the value of your services to the business regardless of whether you receive an immediate income for your services. We determine whether you have engaged in substantial gainful activity by applying three tests. If you have not engaged in substantial gainful activity under test one, then we will consider tests two and three. The tests are as follows:

(1) *Test One:* You have engaged in substantial gainful activity if you render services that are significant to the operation of the business and receive a substantial income from the business. Paragraphs (b) and (c) of this section explain what we mean by significant services and substantial income for purposes of this test.

(2) *Test Two:* You have engaged in substantial gainful activity if your work activity, in terms of factors such as hours, skills, energy output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in your community who are

in the same or similar businesses as their means of livelihood.

(3) *Test Three:* You have engaged in substantial gainful activity if your work activity, although not comparable to that of unimpaired individuals, is clearly worth the amount shown in § 404.1574(b)(2) when considered in terms of its value to the business, or when compared to the salary that an owner would pay to an employee to do the work you are doing.

* * * * *

(c) *What we mean by substantial income.* We deduct your normal business expenses from your gross income to determine net income. Once we determine your net income, we deduct the reasonable value of any significant amount of unpaid help furnished by your spouse, children, or others. Miscellaneous duties that ordinarily would not have commercial value would not be considered significant. We deduct impairment-related work expenses that have not already been deducted in determining your net income. Impairment-related work expenses are explained in § 404.1576. We deduct unincurred business expenses paid for you by another individual or agency. An unincurred business expense occurs when a sponsoring agency or another person incurs responsibility for the payment of certain business expenses, *e.g.,* rent, utilities, or purchases and repair of equipment, or provides you with equipment, stock, or other material for the operation of your business. We deduct soil bank payments if they were included as farm income. That part of your income remaining after we have made all applicable deductions represents the actual value of work performed. The resulting amount is the amount we use to determine if you have done substantial gainful activity. We will generally average your income for comparison with the earnings guidelines in § § 404.1574(b)(2) and 404.1574(b)(3). See § 404.1574a for our rules on averaging of earnings. We will consider this amount to be substantial if—

(1) It averages more than the amounts described in § 404.1574(b)(2); or

(2) It averages less than the amounts described in § 404.1574(b)(2) but it is either comparable to what it was before you became seriously impaired if we had not considered your earnings or is comparable to that of unimpaired self-employed persons in your community who are in the same or a similar business as their means of livelihood.

(d) *The unsuccessful work attempt.*—(1) *General.* Ordinarily, work you have done will not show that you are able to do substantial gainful activity if, after working for a period of 6 months or less, you were forced by your impairment to stop working or to reduce the amount of work you do so that you are no longer performing substantial gainful activity and you meet the conditions described in paragraphs (d)(2), (3), (4), and (5) of this section. We will use the provisions of this paragraph when we make an initial determination on your application for disability benefits and throughout any appeal you may request. Except as set forth in § 404.1592a(a), we will also apply the provisions of this paragraph if you are already entitled to disability benefits, when you work and we consider whether the work you are doing is substantial gainful activity or demonstrates the ability to do substantial gainful activity.

(2) *Event that must precede an unsuccessful work attempt.* There must be a significant break in the continuity of your work before we will consider you to have begun a work attempt that later proved unsuccessful. You must have stopped working or reduced your work and earnings below substantial gainful activity because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work. Examples of such special conditions may include any significant amount of unpaid help furnished by your spouse, children, or others, or unincurred business expenses, as described in paragraph (c) of this section, paid for you by another individual or agency. We will consider your prior work to be ''discontinued'' for a significant period if you were out of work at least 30 consecutive days. We will also consider your prior work to be ''discontinued'' if, because of your impairment, you were forced to change to another type of work.

(3) *If you worked 3 months or less.* We will consider work of 3 months or less to be an unsuccessful work attempt if it ended, or was reduced below substantial gainful activity, because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work.

(4) *If you worked between 3 and 6 months.* We will consider work that lasted longer than 3 months to be an unsuccessful work attempt if it ended, or was reduced below substantial gainful activity, within 6 months because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work and—

(i) You were frequently unable to work because of your impairment;

(ii) Your work was unsatisfactory because of your impairment;

(iii) You worked during a period of temporary remission of your impairment; or

(iv) You worked under special conditions that were essential to your performance and these conditions were removed.

(5) *If you worked more than 6 months.* We will not consider work you performed at the substantial gainful activity level for more than 6 months to be an unsuccessful work attempt regardless of why it ended or was reduced below the substantial gainful activity earnings level.

10. Section 404.1584 is amended by revising paragraph (d) to read as follows:

§ 404.1584 Evaluation of work activity of blind people.

* * * * *

(d) *Evaluation of earnings.*—(1) *Earnings that will ordinarily show that you have engaged in substantial gainful activity.* We will ordinarily consider that your earnings from your work activities show that you have engaged in substantial gainful activity if your monthly earnings average more than the amount(s) shown in paragraphs (d)(2) and (3) of this section. We will apply §§ 404.1574(a)(2), 404.1575(c), and 404.1576 in determining the amount of your average earnings.

(2) *Substantial gainful activity guidelines for taxable years before 1978.* For work activity performed in taxable years before 1978, the average earnings per month that we ordinarily consider enough to show that you have done substantial gainful activity are the same for blind people as for others. See § 404.1574(b)(2) for the earnings guidelines for other than blind individuals.

(3) *Substantial gainful activity guidelines for taxable years beginning 1978.* For taxable years beginning 1978, if you are blind, the law provides different earnings guidelines for determining if your earnings from your work activities are substantial gainful activity. Ordinarily, we consider your work to be substantial gainful activity, if your average monthly earnings are more than those shown in Table I. For years after 1977 and before 1996, increases in the substantial gainful activity guideline were linked to increases in the monthly exempt amount under the retirement earnings test for individuals aged 65 to 69. Beginning with 1996, increases in the substantial gainful activity amount have

depended only on increases in the national average wage index.

TABLE I

Over	In year(s)
$334	1978
$375	1979
$417	1980
$459	1981
$500	1982
$550	1983
$580	1984
$610	1985
$650	1986
$680	1987
$700	1988
$740	1989
$780	1990
$810	1991
$850	1992
$880	1993
$930	1994
$940	1995
$960	1996
$1,000	1997
$1,050	1998
$1,110	1999
$1,170	2000

11. Section 404.1592 is amended as follows:

a. By revising the first and last sentences of paragraph (b),

b. Adding a new sentence to the end of paragraph (b), and

c. Revising paragraphs (d) and (e).

The revisions and additions to § 404.1592 read as follows:

§ 404.1592 The trial work period.

* * * * *

(b) *What we mean by services.* When used in this section, *services* means any activity (whether legal or illegal), even though it is not substantial gainful activity, which is done by a person in employment or self-employment for pay or profit, or is the kind normally done for pay or profit. * * * We generally do not consider work done without remuneration to be ''services'' if it is done merely as therapy or training or if it is work usually done in a daily routine around the house or in self-care. We will not consider work you have done as a volunteer in the Federal programs described in § 404.1574(d) in determining whether you have performed services in the trial work period.

* * * * *

(d) *Who is and is not entitled to a trial work period.* (1) You are generally entitled to a trial work period if you are entitled to disability insurance benefits, child's benefits based on disability, or widow's or widower's or surviving divorced spouse's benefits based on disability.

(2) You are not entitled to a trial work period—

(i) If you are entitled to a period of disability but not to disability insurance benefits, and you are not entitled to any other type of disability benefit under title II of the Social Security Act (i.e., child's benefits based on disability, or widow's or widower's benefits or surviving divorced spouse's benefits based on disability);

(ii) If you perform work demonstrating the ability to engage in substantial gainful activity during any required waiting period for benefits;

(iii) If you perform work demonstrating the ability to engage in substantial gainful activity within 12 months of the onset of the impairment(s) that prevented you from performing substantial gainful activity and before the date of any notice of determination or decision finding that you are disabled; or

(iv) For any month prior to the month of your application for disability benefits (see paragraph (e) of this section).

(e) *When the trial work period begins and ends.* The trial work period begins with the month in which you become entitled to disability insurance benefits, to child's benefits based on disability or to widow's, widower's, or surviving divorced spouse's benefits based on disability. It cannot begin before the month in which you file your application for benefits, and for widows, widowers, and surviving divorced spouses, it cannot begin before December 1, 1980. It ends with the close of whichever of the following calendar months is the earliest:

(1) The 9th month (whether or not the months have been consecutive) in which you have performed services if that 9th month is prior to January 1992;

(2) The 9th month (whether or not the months have been consecutive and whether or not the previous 8 months of services were prior to January 1992) in which you have performed services within a period of 60 consecutive months if that 9th month is after December 1991; or

(3) The month in which new evidence, other than evidence relating to any work you did during the trial work period, shows that you are not disabled, even though you have not worked a full 9 months. We may find that your disability has ended at any time during the trial work period if the medical or other evidence shows that you are no longer disabled. See § 404.1594 for information on how we decide whether your disability continues or ends.

12. Section 404.1592a is amended by revising paragraphs (a) and (b)(2) to read as follows:

§ 404.1592a The reentitlement period.

(a) *General.* The reentitlement period is an additional period after 9 months of trial work during which you may continue to test your ability to work if you have a *disabling impairment,* as defined in § 404.1511. If you work during the reentitlement period, we may decide that your disability has ceased because your work is substantial gainful activity and stop your benefits. However, if, after the month for which we found that your disability ceased because you performed substantial gainful activity, you stop engaging in substantial gainful activity, we will start paying you benefits again; you will not have to file a new application. The following rules apply if you complete a trial work period and continue to have a disabling impairment:

(1) The first time you work after the end of your trial work period *and* engage in substantial gainful activity, we will find that your disability ceased. When we decide whether this work is substantial gainful activity, we will apply all of the relevant provisions of §§ 404.1571–404.1576 including, but not limited to, the provisions for averaging earnings, unsuccessful work attempts, and deducting impairment-related work expenses. We will find that your disability ceased in the first month after the end of your trial work period in which you do substantial gainful activity, applying all the relevant provisions in §§ 404.1571–404.1576.

(2) (i) If we determine under paragraph (a)(1) of this section that your disability ceased during the reentitlement period because you perform substantial gainful activity, you will be paid benefits for the first month after the trial work period in which you do substantial gainful activity (i.e., the month your disability ceased) and the two succeeding months, whether or not you do substantial gainful activity in those succeeding months. After those three months, we will stop your benefits for any month in which you do substantial gainful activity. (See §§ 404.316, 404.337, 404.352 and 404.401a.) If your benefits are stopped because you do substantial gainful activity, they may be started again without a new application and a new determination of disability if you stop doing substantial gainful activity in a month during the reentitlement period. In determining whether you do substantial gainful activity in a month for purposes of stopping or starting benefits during the reentitlement period,

we will consider only your work in, or earnings for, that month. Once we have determined that your disability has ceased during the reentitlement period because of the performance of substantial gainful activity as explained in paragraph (a)(1) of this section, we will not apply the provisions of §§ 404.1574(c) and 404.1575(d) regarding unsuccessful work attempts or the provisions of § 404.1574a regarding averaging of earnings to determine whether benefits should be paid for any particular month in the reentitlement period that occurs after the month your disability ceased.

(ii) If anyone else is receiving monthly benefits based on your earnings record, that individual will not be paid benefits for any month for which you cannot be paid benefits during the reentitlement period.

(3) The way we will consider your work activity after your reentitlement period ends (see paragraph (b)(2) of this section) will depend on whether you worked during the reentitlement period and if you did substantial gainful activity. If you worked during the reentitlement period and we decided that your disability ceased during the reentitlement period because of your work under paragraph (a)(1) of this section, we will find that your entitlement to disability benefits terminates in the first month in which you engage in substantial gainful activity after the end of the reentitlement period (see § 404.325). (See § 404.321 for when entitlement to a period of disability ends.) When we make this determination, we will consider only your work in, or earnings for, that month; we will not apply the provisions of §§ 404.1574(c) and 404.1575(d) regarding unsuccessful work attempts or the provisions of § 404.1574a regarding averaging of earnings. If we did not find that your disability ceased because of work activity during the reentitlement period, we will apply all of the relevant provisions of §§ 404.1571–404.1576 including, but not limited to, the provisions for averaging earnings, unsuccessful work attempts, and deducting impairment-related work expenses, to determine whether your disability ceased because you performed substantial gainful activity after the reentitlement period. If we find that your disability ceased because you performed substantial gainful activity in a month after your reentitlement period ended, you will be paid benefits for the month in which your disability ceased and the two succeeding months. After those three months, your entitlement to a period of disability or to disability benefits terminates (see §§ 404.321 and 404.325).

(b) * * *

(2)(i) The last day of the 15th month following the end of your trial work period if you were not entitled to benefits after December 1987; or

(ii) The last day of the 36th month following the end of your trial work period if you were entitled to benefits after December 1987 or if the 15-month period described in paragraph (b)(2)(i) of this section had not ended as of January 1988. (See §§ 404.316, 404.337, and 404.352 for when your benefits end.)

13. Section 404.1594 is amended by revising the second sentence of paragraph (f)(7) and by revising paragraph (g)(9) to read as follows:

§ 404.1594 How we will determine whether your disability continues or ends.

* * * * *

(f) *Evaluation steps.* * * *

(7) * * * That is, we will assess your residual functional capacity based on all your current impairments and consider whether you can still do work you have done in the past. * * *

* * * * *

(g) *The month in which we will find you are no longer disabled.* * * *

(9) The first month you were told by your physician that you could return to work, provided there is no substantial conflict between your physician's and your statements regarding your awareness of your capacity for work and the earlier date is supported by substantial evidence.

* * * * *

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND AND DISABLED

Subpart I—[Amended]

14. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1611, 1614, 1619, 1631(a), (c) and (d)(1), and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c) and (d)(1), and 1383b); secs. 4(c) and 5, 6(c)–(e), 14(a) and 15, Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, 1382h note).

15. Section 416.901 is amended by revising the second sentence of paragraph (m) to read as follows:

§ 416.901 Scope of subpart.

* * * * *

(m) * * * We explain what your responsibilities are in telling us of any events that may cause a change in your disability or blindness status and when we will review to see if you are still disabled. * * *

16. Section 416.971 is amended by revising the first sentence to read as follows:

§ 416.971 General.

The work, without regard to legality, that you have done during any period in which you believe you are disabled may show that you are able to work at the substantial gainful activity level. * * *

17. Section 416.973 is amended by revising paragraph (c) and removing paragraph (f) to read as follows:

§ 416.973 General information about work activity.

* * * * *

(c) *If your work is done under special conditions.* The work you are doing may be done under special conditions that take into account your impairment, such as work done in a sheltered workshop or as a patient in a hospital. If your work is done under special conditions, we may find that it does not show that you have the ability to do substantial gainful activity. Also, if you are forced to stop or reduce your work because of the removal of special conditions that were related to your impairment and essential to your work, we may find that your work does not show that you are able to do substantial gainful activity. However, work done under special conditions may show that you have the necessary skills and ability to work at the substantial gainful activity level. Examples of the special conditions that may relate to your impairment include, but are not limited to, situations in which—

(1) You required and received special assistance from other employees in performing your work;

(2) You were allowed to work irregular hours or take frequent rest periods;

(3) You were provided with special equipment or were assigned work especially suited to your impairment;

(4) You were able to work only because of specially arranged circumstances, for example, other persons helped you prepare for or get to and from your work;

(5) You were permitted to work at a lower standard of productivity or efficiency than other employees; or

(6) You were given the opportunity to work, despite your impairment, because of family relationship, past association with your employer, or your employer's concern for your welfare.

* * * * *

18. Section 416.974 is amended by revising paragraphs (a), introductory text, (a)(1), (a)(2), (b)(1), (b)(2), introductory text, (b)(3), introductory text (b)(4) and (b)(6), introductory text,

and by adding new paragraphs (c) and (d) to read as follows:

§ 416.974 Evaluation guides if you are an employee.

(a) We use several guides to decide whether the work you have done shows that you are able to do substantial gainful activity. If you are working or have worked as an employee, we will use the provisions in paragraphs (a) through (d) of this section that are relevant to your work activity. We will use these provisions whenever they are appropriate in connection with your application for supplemental security income benefits (when we make an initial determination on your application and throughout any appeals you may request) to determine if you are eligible.

(1) *Your earnings may show you have done substantial gainful activity.* Generally, in evaluating your work activity for substantial gainful activity purposes, our primary consideration will be the earnings you derive from the work activity. We will use your earnings to determine whether you have done substantial gainful activity unless we have information from you, your employer, or others that shows that we should not count all of your earnings. The amount of your earnings from work you have done (regardless of whether it is unsheltered or sheltered work) may show that you have engaged in substantial gainful activity. Generally, if you worked for substantial earnings, we will find that you are able to do substantial gainful activity. However, the fact that your earnings were not substantial will not necessarily show that you are not able to do substantial gainful activity. We generally consider work that you are forced to stop or to reduce below the substantial gainful activity level after a short time because of your impairment to be an unsuccessful work attempt. Your earnings from an unsuccessful work attempt will not show that you are able to do substantial gainful activity. We will use the criteria in paragraph (c) of this section to determine if the work you did was an unsuccessful work attempt.

(2) *We consider only the amounts you earn.* When we decide whether your earnings show that you have done substantial gainful activity, we do not consider any income that is not directly related to your productivity. When your earnings exceed the reasonable value of the work you perform, we consider only that part of your pay which you actually earn. If your earnings are being subsidized, we do not consider the amount of the subsidy when we determine if your earnings show that you have done substantial gainful activity. We consider your work to be subsidized if the true value of your work, when compared with the same or similar work done by unimpaired persons, is less than the actual amount of earnings paid to you for your work. For example, when a person with a serious impairment does simple tasks under close and continuous supervision, our determination of whether that person has done substantial gainful activity will not be based only on the amount of the wages paid. We will first determine whether the person received a subsidy; that is, we will determine whether the person was being paid more than the reasonable value of the actual services performed. We will then subtract the value of the subsidy from the person's gross earnings to determine the earnings we will use to determine if he or she has done substantial gainful activity.

* * * * *

(b) *Earnings guidelines.*—(1) *General.* If you are an employee, we first consider the criteria in paragraph (a) of this section and § 416.976, and then the guides in paragraphs (b)(2), (3), (4), (5), and (6) of this section. When we review your earnings to determine if you have been performing substantial gainful activity, we will subtract the value of any subsidized earnings (see paragraph (a)(2) of this section) and the reasonable cost of any impairment-related work expenses from your gross earnings (see § 416.976). The resulting amount is the amount we use to determine if you have done substantial gainful activity. We will generally average your earnings for comparison with the earnings guidelines in paragraphs (b)(2), (3), (4), and (6) of this section. See § 416.974a for our rules on averaging earnings.

(2) *Earnings that will ordinarily show that you have engaged in substantial gainful activity.* We will consider that your earnings from your work activity as an employee (including earnings from sheltered work, see paragraph (b)(4) of this section) show that you have engaged in substantial gainful activity if—* * *

(3) *Earnings that will ordinarily show that you have not engaged in substantial gainful activity.* Unless you work in a sheltered workshop or a comparable facility (see paragraph (b)(4) of this section), we will generally consider that the earnings from your work as an employee will show that you have not engaged in substantial gainful activity if—* * *

(4) *If you work in a sheltered workshop.* If you work in a sheltered workshop or a comparable facility especially set up for persons with serious impairments, we will ordinarily consider that your earnings from this work show that you have engaged in substantial gainful activity if your earnings meet the levels in paragraph (b)(2) of this section. Earnings from a sheltered workshop or a comparable facility that are less than those indicated in paragraph (b)(2) of this section will ordinarily show that you have not engaged in substantial gainful activity without the need to consider the other information in paragraph (b)(6) of this section regardless of whether they are more or less than those indicated in paragraph (b)(3) of this section. When your earnings from a sheltered workshop or comparable facility are less than those indicated in paragraph (b)(2) of this section, we will consider the provisions of paragraph (b)(6) of this section only if there is evidence showing that you may have done substantial gainful activity.

* * * * *

(6) *Earnings that are not high or low enough to show whether you engaged in substantial gainful activity.* Unless you work in a sheltered workshop or a comparable facility (see paragraph (b)(4) of this section), if your earnings, on the average, are between the amounts shown in paragraphs (b)(2) and (3) of this section, we will generally consider other information in addition to your earnings, such as whether—

* * * * *

(c) *The unsuccessful work attempt*—(1) *General.* Ordinarily, work you have done will not show that you are able to do substantial gainful activity if, after working for a period of 6 months or less, you were forced by your impairment to stop working or to reduce the amount of work you do so that your earnings from such work fall below the substantial gainful activity earnings level in paragraph (b)(2) of this section and you meet the conditions described in paragraphs (c)(2), (3), (4), and (5) of this section.

(2) *Event that must precede an unsuccessful work attempt.* There must be a significant break in the continuity of your work before we will consider you to have begun a work attempt that later proved unsuccessful. You must have stopped working or reduced your work and earnings below the substantial gainful activity earnings level because of your impairment or because of the removal of special conditions that were essential to the further performance of your work. We explain what we mean by special conditions in § 416.973(c). We will consider your prior work to be ''discontinued'' for a significant period

if you were out of work at least 30 consecutive days. We will also consider your prior work to be ''discontinued'' if, because of your impairment, you were forced to change to another type of work or another employer.

(3) *If you worked 3 months or less.* We will consider work of 3 months or less to be an unsuccessful work attempt if you stopped working, or you reduced your work and earnings below the substantial gainful activity earnings level, because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work.

(4) *If you worked between 3 and 6 months.* We will consider work that lasted longer than 3 months to be an unsuccessful work attempt if it ended, or was reduced below the substantial gainful activity earnings level, within 6 months because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work and—

(i) You were frequently absent from work because of your impairment;

(ii) Your work was unsatisfactory because of your impairment;

(iii) You worked during a period of temporary remission of your impairment; or

(iv) You worked under special conditions that were essential to your performance and these conditions were removed.

(5) *If you worked more than 6 months.* We will not consider work you performed at the substantial gainful activity earnings level for more than 6 months to be an unsuccessful work attempt regardless of why it ended or was reduced below the substantial gainful activity earnings level.

(d) *Work activity in certain volunteer programs.* If you work as a volunteer in certain programs administered by the Federal government under the Domestic Volunteer Service Act of 1973 or the Small Business Act, we will not count any payments you receive from these programs as earnings when we determine whether you are engaging in substantial gainful activity. These payments may include a minimal stipend, payments for supportive services such as housing, supplies and equipment, an expense allowance, or reimbursement of out-of-pocket expenses. We will also disregard the services you perform as a volunteer in applying any of the substantial gainful activity tests discussed in paragraph (b)(6) of this section. This exclusion from the substantial gainful activity provisions will apply only if you are a volunteer in a program explicitly mentioned in the Domestic Volunteer Service Act of 1973 or the Small Business Act. Programs explicitly mentioned in those Acts include Volunteers in Service to America, University Year for ACTION, Special Volunteer Programs, Retired Senior Volunteer Program, Foster Grandparent Program, Service Corps of Retired Executives, and Active Corps of Executives. We will not exclude under this paragraph volunteer work you perform in other programs or any nonvolunteer work you may perform, including nonvolunteer work under one of the specified programs. For civilians in certain government-sponsored job training and employment programs, we evaluate the work activity on a case-by-case basis under the substantial gainful activity earnings test. In programs such as these, subsidies often occur. We will subtract the value of any subsidy and use the remainder to determine if you have done substantial gainful activity. See paragraphs (a)(2)–(3) of this section.

19. A new § 416.974a is added to read as follows:

§ 416.974a When and how we will average your earnings.

(a) To determine your initial eligibility for benefits, we will average any earnings you make during the month you file for benefits and any succeeding months to determine if you are doing substantial gainful activity. If your work as an employee or as a self-employed person was continuous without significant change in work patterns or earnings, and there has been no change in the substantial gainful activity earnings levels, your earnings will be averaged over the entire period of work requiring evaluation to determine if you have done substantial gainful activity.

(b) If you work over a period of time during which the substantial gainful activity earnings levels change, we will average your earnings separately for each period in which a different substantial gainful activity earnings level applies.

(c) If there is a significant change in your work pattern or earnings during the period of work requiring evaluation, we will average your earnings over each separate period of work to determine if any of your work efforts were substantial gainful activity.

20. Section 416.975 is amended by revising paragraphs (a) and (c) and adding a new paragraph (d) to read as follows:

§ 416.975 Evaluation guides if you are self-employed.

(a) *If you are a self-employed person.* If you are working or have worked as a self-employed person, we will use the provisions in paragraphs (a) through (d) of this section that are relevant to your work activity. We will use these provisions whenever they are appropriate in connection with your application for supplemental security income benefits (when we make an initial determination on your application and throughout any appeals you may request). We will consider your activities and their value to your business to decide whether you have engaged in substantial gainful activity if you are self-employed. We will not consider your income alone because the amount of income you actually receive may depend on a number of different factors, such as capital investment and profit-sharing agreements. We will generally consider work that you were forced to stop or reduce to below substantial gainful activity after 6 months or less because of your impairment as an unsuccessful work attempt. See paragraph (d) of this section. We will evaluate your work activity based on the value of your services to the business regardless of whether you receive an immediate income for your services. We determine whether you have engaged in substantial gainful activity by applying three tests. If you have not engaged in substantial gainful activity under test one, then we will consider tests two and three. The tests are as follows:

(1) *Test One:* You have engaged in substantial gainful activity if you render services that are significant to the operation of the business and receive a substantial income from the business. Paragraphs (b) and (c) of this section explain what we mean by significant services and substantial income for purposes of this test.

(2) *Test Two:* You have engaged in substantial gainful activity if your work activity, in terms of factors such as hours, skills, energy output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in your community who are in the same or similar businesses as their means of livelihood.

(3) *Test Three:* You have engaged in substantial gainful activity if your work activity, although not comparable to that of unimpaired individuals, is clearly worth the amount shown in § 416.974(b)(2) when considered in terms of its value to the business, or when compared to the salary that an

owner would pay to an employee to do the work you are doing.

* * * * *

(c) *What we mean by substantial income.* We deduct your normal business expenses from your gross income to determine net income. Once net income is determined, we deduct the reasonable value of any significant amount of unpaid help furnished by your spouse, children, or others. Miscellaneous duties that ordinarily would not have commercial value would not be considered significant. We deduct impairment-related work expenses that have not already been deducted in determining your net income. Impairment-related work expenses are explained in § 416.976. We deduct unincurred business expenses paid for you by another individual or agency. An unincurred business expense occurs when a sponsoring agency or another person incurs responsibility for the payment of certain business expenses, *e.g.,* rent, utilities, or purchases and repair of equipment, or provides you with equipment, stock, or other material for the operation of your business. We deduct soil bank payments if they were included as farm income. That part of your income remaining after we have made all applicable deductions represents the actual value of work performed. The resulting amount is the amount we use to determine if you have done substantial gainful activity. We will generally average your income for comparison with the earnings guidelines in §§ 416.974(b)(2) and 416.974(b)(3). See § 416.974a for our rules on averaging of earnings. We will consider this amount to be substantial if—

(1) It averages more than the amounts described in § 416.974(b)(2); or

(2) It averages less than the amounts described in § 416.974(b)(2) but it is either comparable to what it was before you became seriously impaired if we had not considered your earnings or is comparable to that of unimpaired self-employed persons in your community who are in the same or a similar business as their means of livelihood.

(d) *The unsuccessful work attempt.*—(1) *General.* Ordinarily, work you have done will not show that you are able to do substantial gainful activity if, after working for a period of 6 months or less, you were forced by your impairment to stop working or to reduce the amount of work you do so that you are no longer performing substantial gainful activity and you meet the conditions described in paragraphs (d)(2), (3), (4), and (5) of this section.

(2) *Event that must precede an unsuccessful work attempt.* There must be a significant break in the continuity of your work before we will consider you to have begun a work attempt that later proved unsuccessful. You must have stopped working or reduced your work and earnings below substantial gainful activity because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work. Examples of such special conditions may include any significant amount of unpaid help furnished by your spouse, children, or others, or unincurred business expenses, as described in paragraph (c) of this section, paid for you by another individual or agency. We will consider your prior work to be ''discontinued'' for a significant period if you were out of work at least 30 consecutive days. We will also consider your prior work to be ''discontinued'' if, because of your impairment, you were forced to change to another type of work.

(3) *If you worked 3 months or less.* We will consider work of 3 months or less to be an unsuccessful work attempt if it ended, or was reduced below substantial gainful activity, because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work.

(4) *If you work between 3 and 6 months.* We will consider work that lasted longer than 3 months to be an unsuccessful work attempt if it ended, or was reduced below substantial gainful activity, within 6 months because of your impairment or because of the removal of special conditions which took into account your impairment and permitted you to work and—

(i) You were frequently unable to work because of your impairment;

(ii) Your work was unsatisfactory because of your impairment;

(iii) You worked during a period of temporary remission of your impairment; or

(iv) You worked under special conditions that were essential to your performance and these conditions were removed.

(5) *If you worked more than 6 months.* We will not consider work you performed at the substantial gainful activity level for more than 6 months to be an unsuccessful work attempt regardless of why it ended or was reduced below the substantial gainful activity level.

§ 416.976 [Amended]

21. Section 416.976 is amended by removing paragraph (f)(2) and by redesignating paragraphs (f)(3) through (f)(6) as paragraphs (f)(2) through (f)(5), respectively.

§ 416.991 [Amended]

22. Section 416.991 is amended by removing the parenthetical sentence.

§ 416.992 [Removed and reserved]

23. Section 416.992 is removed and reserved.

§ 416.992a [Removed and reserved]

24. Section 416.992a is removed and reserved.

25. Section 416.994 is amended as follows:

a. By revising the section heading,

b. Removing paragraph (b)(3)(v), and

c. By revising paragraphs (b)(5) and (b)(6).

The revisions to § 416.994 read as follows:

§ 416.994 How we will decide whether your disability continues or ends, disabled adults.

* * * * *

(b) * * *

(5) *Evaluation steps.* To assure that disability reviews are carried out in a uniform manner, that a decision of continuing disability can be made in the most expeditious and administratively efficient way, and that any decisions to stop disability benefits are made objectively, neutrally, and are fully documented, we will follow specific steps in reviewing the question of whether your disability continues. Our review may cease and benefits may be *continued* at any point if we determine there is sufficient evidence to find that you are still unable to engage in substantial gainful activity. The steps are:

(i) *Step 1.* Do you have an impairment or combination of impairments which meets or equals the severity of an impairment listed in appendix 1 of subpart P of part 404 of this chapter? If you do, your disability will be found to continue.

(ii) *Step 2.* If you do not, has there been medical improvement as defined in paragraph (b)(1)(i) of this section? If there has been medical improvement as shown by a decrease in medical severity, see step 3 in paragraph (b)(5)(iii) of this section. If there has been no decrease in medical severity, there has been no medical improvement. (See step 4 in paragraph (b)(5)(iv) of this section.)

(iii) *Step 3.* If there has been medical improvement, we must determine whether it is related to your ability to do work in accordance with paragraphs (b)(1)(i) through (b)(1)(iv) of this section; i.e., whether or not there has been an

increase in the residual functional capacity based on the impairment(s) that was present at the time of the most recent favorable medical determination. If medical improvement is *not* related to your ability to do work, see step 4 in paragraph (b)(5)(iv) of this section. If medical improvement *is* related to your ability to do work, see step 5 in paragraph (b)(5)(v) of this section.

(iv) *Step 4.* If we found at step 2 in paragraph (b)(5)(ii) of this section that there has been no medical improvement or if we found at step 3 in paragraph (b)(5)(iii) of this section that the medical improvement is not related to your ability to work, we consider whether any of the exceptions in paragraphs (b)(3) and (b)(4) of this section apply. If none of them apply, your disability will be found to continue. If one of the first group of exceptions to medical improvement applies, see step 5 in paragraph (b)(5)(v) of this section. If an exception from the second group of exceptions to medical improvement applies, your disability will be found to have ended. The second group of exceptions to medical improvement may be considered at any point in this process.

(v) *Step 5.* If medical improvement is shown to be related to your ability to do work or if one of the first group of exceptions to medical improvement applies, we will determine whether all your current impairments in combination are severe (see § 416.921). This determination will consider all your current impairments and the impact of the combination of these impairments on your ability to function. If the residual functional capacity assessment in step 3 in paragraph (b)(5)(iii) of this section shows significant limitation of your ability to do basic work activities, see step 6 in paragraph (b)(5)(vi) of this section. When the evidence shows that all your current impairments in combination do not significantly limit your physical or mental abilities to do basic work activities, these impairments will not be considered severe in nature. If so, you will no longer be considered to be disabled.

(vi) *Step 6.* If your impairment(s) is severe, we will assess your current ability to engage in substantial gainful activity in accordance with § 416.961. That is, we will assess your residual functional capacity based on all your current impairments and consider whether you can still do work you have done in the past. If you can do such work, disability will be found to have ended.

(vii) *Step 7.* If you are not able to do work you have done in the past, we will consider one final step. Given the residual functional capacity assessment and considering your age, education, and past work experience, can you do other work? If you can, disability will be found to have ended. If you cannot, disability will be found to continue.

(6) *The month in which we will find you are no longer disabled.* If the evidence shows that you are no longer disabled, we will find that your disability ended in the earliest of the following months.

(i) The month the evidence shows that you are no longer disabled under the rules set out in this section, and you were disabled only for a specified period of time in the past;

(ii) The month the evidence shows that you are no longer disabled under the rules set out in this section, but not earlier than the month in which we mail you a notice saying that the information we have shows that you are not disabled;

(iii) The month in which you return to full-time work, with no significant medical restrictions and acknowledge that medical improvement has occurred, and we expected your impairment(s) to improve (see § 416.991);

(iv) The first month in which you fail without good cause to follow prescribed treatment, when the rule set out in paragraph (b)(4)(iv) of this section applies;

(v) The first month you were told by your physician that you could return to work, provided there is no substantial conflict between your physician's and your statements regarding your awareness of your capacity for work and the earlier date is supported by substantial evidence; or

(vi) The first month in which you failed without good cause to do what we asked, when the rule set out in paragraph (b)(4)(ii) of this section applies.

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Subpart M—[Amended]

26. The authority citation for subpart M of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1611–1615, 1619 and 1631 of the Social Security Act (42 U.S.C. 902(a)(5), 1382–1382d, 1382h, and 1383).

27. Section 416.1331 is amended by revising paragraph (a) to read as follows:

§ 416.1331 Termination of your disability or blindness payments.

(a) *General.* The last month for which we can pay you benefits based on disability is the second month after the first month in which you are determined to no longer have a disabling impairment (described in § 416.911). (See § 416.1338 for an exception to this rule if you are participating in an appropriate vocational rehabilitation program, and § 416.261 for an explanation of special benefits for which you may be eligible.) The last month for which we can pay you benefits based on blindness is the second month after the month in which your blindness ends (see § 416.986 for when blindness ends). You must meet the income, resources, and other eligibility requirements to receive any of the benefits described in this paragraph. We will also stop payment of your benefits if you have not cooperated with us in getting information about your disability or blindness.

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