than 6,000 poisonings of young children with ''moderate'' or ''major'' (life-threatening) effects. In addition, 42 children died in these accidents in 1992, the last year for which the Commission has complete data.

During the more than 20 years since the PPPA was adopted, the Commission has found that, contrary to requirements of the PPPA, ''normal'' adults of all ages have difficulty using typical CRP. Moreover, the Commission's data indicate that the difficulty in using CRP results in a substantial number of accidental ingestions by young children because adults purchase hazardous substances in non-CRP or disable CRP by leaving the caps off or loose or transferring the package contents to another container.

Accordingly, the Commission sought to address the safety hazard created by difficult to open CRP. On January 19, 1983, the Commission published an advance notice of proposed rulemaking (''ANPR'') outlining its concerns in this area and explaining and seeking comment on possible actions to increase the proper use of CRP, to simplify the test procedures, and to make the test procedures less affected by possible variables. 48 FR 2389.

Older adults typically have the most difficulty with CRP. Therefore, in order to eliminate the currently-marketed CR package designs that are most difficult for ''normal adults'' of all ages to open, the Commission indicated that older adults, ages from 60–75 years, could be substituted for the current panel of 100 18–45-year-olds.

After considering comments on the ANPR and other available information, the Commission proposed amendments to the protocol to address this problem. The proposed amendments would also change the protocol to make the test results more consistent and make the child test easier to perform. The Commission published its initial proposal in the **Federal Register** of October 5, 1990, for public comment. 55 FR 40856.

In addition to the requests for comments in January 1983 and October 1990 noted above, the Commission announced additional comment periods on March 5, 1991, (56 FR 9181) and March 21, 1994 (59 FR 13264). The Commission's staff evaluated the comments received in response to each of these requests.

On December 20, 1994, the Commission was briefed by its staff on the comments on the proposed rule and the changes recommended by the staff. On January 6, 1995, the Commission met and decided to approve the rule recommended by the staff, but to exclude from the scope of the rule those products that must be packaged in metal cans or aerosol form. The staff made appropriate changes to the draft **Federal Register** notice that would issue the final rule, and that notice was approved by the Commission on February 6, 1995.

Immediately thereafter, the Coalition for Responsible Packaging, an industry group, raised concerns about the Commission's action. Most of these concerns already had been addressed in the rulemaking proceeding. Two concerns, however, had not been the subject of specific comments by interested parties in this rulemaking.

Specifically, the new comments can be summarized as follows. First, in establishing an adult test panel consisting of adults aged 60–75, the Commission allegedly exceeded its statutory authority to require that child-resistant packaging not be difficult for ''normal adults'' to use properly. Second, the rule allegedly addresses consumer convenience, rather than safety, which the comment claims is not properly the subject of a Commission regulation. In addition, the second comment contends that to the extent that child-resistant packages exist that will pass the ''senior friendly'' test approved by the Commission, market forces will be an adequate and more appropriate mechanism to ensure that the more convenient packaging will be adopted.

The Commission wanted to assure that it had an opportunity to consider these new arguments that had not previously been raised in the rulemaking. Accordingly, on February 8, 1995, the Commission voted unanimously to withhold publication of the **Federal Register** notice that would have issued the final rule, to consider the new arguments.

On February 21, 1995, the Commission published a **Federal Register** notice announcing that written comments, limited to these two issues only, could be submitted until March 7, 1995. 60 FR 9654. The Commission has now decided to also receive oral comments on these two new issues. Oral comments on these new issues alone may be presented to the Commission at a Commission hearing beginning at 10:00 a.m., March 16, 1995.

A request to present oral comments and an outline or text of the comments must be received by the Commission on or before March 10, 1995. The oral comments shall be limited to 10 minutes per commenter. The Commission reserves the right to further limit repetitious comments. Comments addressing other issues will not be considered.

The hearing will be held in the Commission's Hearing Room, 4330 East-West Highway, 4th Floor, Bethesda, MD 20814. Requests to present oral comments and outlines or text of the comments shall be mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, or delivered to the Office of the Secretary, Consumer Product Safety Commission, Room 501, 4340 East-West Highway, Bethesda, MD 20814.

Dated: March 1, 1995.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 95–5502 Filed 3–2–95; 11:42 am]

BILLING CODE 6355–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Parts 404 and 416

[Regs. No. 4 and 16]

RIN 0960–AB73

Determining Disability and Blindness; Substantial Gainful Activity Guides

AGENCY: Social Security Administration, HHS.

ACTION: Proposed rules.

SUMMARY: These proposed rules reflect amendments to the Social Security Act (the Act) concerning the trial work period and the disability insurance reentitlement period. The proposed rules also clarify 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.

DATES: To be sure that your comments are considered, we must receive them no later than May 5, 1995.

ADDRESSES: Comments should be telefaxed to (410) 966–0869 or submitted in writing to the Commissioner of Social Security, Department of Health and Human Services, P.O. Box 1585, Baltimore, MD 21235, or delivered to the Office of Regulations, Social Security Administration, 3–B–1 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, between 8 a.m. and 4:30 p.m. on regular business days. Comments may be inspected during these same hours by making arrangements with the contact person shown below.

FOR FURTHER INFORMATION CONTACT: Sandy Bond, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965–1794.

SUPPLEMENTARY INFORMATION: We propose to revise §§ 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 have added information found in Social Security Ruling 84–25 to clarify these regulatory provisions.

We propose to amend §§ 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. We explain in more detail: (1) How earnings may show that an employee has done substantial gainful activity; (2) what we consider in determining the amount an employee earns; (3) how we use information from an employer as to whether wages have been subsidized; (4) how we determine the value of subsidized earnings when the value has not been explained adequately by the employer; (5) how we determine the amount of any subsidy that may be provided by organizations that employ individuals with handicaps; and (6) how we evaluate earnings received by persons working in a sheltered or special environment. The changes we are proposing to these regulations reflect Social Security Ruling 83–33.

These proposed rules also clarify how we evaluate earnings from work in sheltered workshops. Under §§ 404.1574(b)(4) and 416.974(b)(4) of our current and proposed regulations, a person working in a sheltered workshop ordinarily will be found not to be doing substantial gainful activity when his or her average monthly earnings are not greater than the specified amounts that ordinarily show that a worker who is not in a sheltered workshop situation is engaging in substantial gainful activity. The average monthly earnings amount currently specified is $500 per month for years after 1989. These sections of the current regulations do not provide rules for evaluating sheltered workshop earnings above the specified average monthly earnings amount because it is our policy that sheltered workshop earnings that exceed the specified average monthly earnings amount must be evaluated under §§ 404.1574(b)(2) and 416.974(b)(2) in the same way as non-sheltered workshop earnings. We propose to amend §§ 404.1574(b)(4) and 416.974(b)(4) to state this policy explicitly.

Our current regulations also specify a lower amount (currently $300 per month for earnings in calendar years after 1989) below which earnings outside a sheltered workshop will ordinarily show that an individual has not engaged in substantial gainful activity. Non-sheltered workshop earnings that are above these amounts but below the upper substantial gainful activity threshold amounts, that is, between $300 and $500 per month for calendar years after 1989, are ordinarily evaluated on a more case-by-case basis. However, there is no such middle ground for evaluating earnings from sheltered workshop employment on a more case-by-case basis because we do not impose separate, lower amounts on sheltered workshop employees as we have done for employees outside of sheltered workshops. If sheltered workshop earnings exceed the upper substantial gainful activity threshold amounts, we ordinarily consider the individual to have engaged in substantial gainful activity. A Federal circuit court decision, *Iamarino* v. *Bowen,* 795 F.2d 59 (8th Cir. 1986), has interpreted our regulations differently. In *Iamarino,* the court held that because our regulations provide a middle ground for evaluating non-sheltered workshop earnings between specified upper and lower limits, we also must provide a middle ground for evaluating sheltered workshop earnings and not presume substantial gainful activity when sheltered workshop earnings exceed the upper substantial gainful activity threshold amounts. Because this was not the intent of our regulations, we propose to revise §§ 404.1574(b)(4) and 416.974(b)(4) to clarify our policy on this point. At the same time we are proposing a minor editorial correction to the heading of paragraph 404.1574(b)(6) to change the word ''of'' to the word ''or.''

We also propose to add new paragraphs 404.1574(d) and 416.974(d) and to revise paragraph 404.1592(b) to provide that volunteer work done under programs mentioned in the Domestic Volunteer Service Act of 1973 or the Small Business Act shall not be considered in determining whether an individual has performed substantial gainful activity or services in the trial work period. This exclusion is currently stated in Social Security Ruling 84–24 and is required by 42 U.S.C. 5044 and 15 U.S.C. 637.

We also propose to add new §§ 404.1574a and 416.974a to explain how we average earnings or self-employment income to determine if a person has been performing substantial gainful activity and the periods used for averaging. These amendments are based upon Social Security Ruling 83–35 and do not represent a change in policy.

We propose revisions to §§ 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 propose to expand 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 upon Social Security Ruling 83–34 and do not represent a change in policy.

We are also proposing to add to §§ 404.1574, 404.1575, 416.974, and 416.975 an explanation, now found in Social Security Ruling 84–25, of how we evaluate periods of brief work activity to determine if they should be considered unsuccessful work attempts. The proposed rules on an unsuccessful work attempt provide, consistent with Social Security Ruling 84–25, that we will not consider work performed at the substantial gainful activity level for more than six 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. We propose to amend §§ 404.1574, 404.1575, 416.974, and 416.975 to explain when we will find that substantial work activity that is discontinued or reduced below a specified level is an unsuccessful work attempt. If there is an unsuccessful work attempt, we disregard, for substantial gainful activity determination purposes, brief work attempts that do not demonstrate sustained substantial gainful activity. The criteria for an unsuccessful work attempt differ depending on whether the work effort is for a duration of three months or less or for a duration of between three and six months. These proposed amendments to the regulations on unsuccessful work attempts reflect Social Security Ruling 84–25.

In addition, we propose to add 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 1994.

We propose to revise the last sentence of current § 404.1592(b) to clarify that we generally do not consider work which 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 propose revisions to § 404.1592(d) to explain, consistent with Social Security Ruling 82–52, that a trial work period may not be awarded when a claimant performs work demonstrating the ability to engage in substantial gainful activity within 12 months after the alleged onset of disability and prior to an award of benefits. These revisions, which do not represent a change in policy, are based upon our interpretation of the duration requirement of section 223(d)(1)(A) of the Act and will 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) and *Walker* v. *Secretary of Health and Human Services,* 943 F.2d 1257 (10th Cir. 1991).

The trial work period is a period during which a person who becomes entitled to title II 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 it generally ends after 9 months of work whether or not the 9 months are consecutive. Section 222(c) provides that work performed 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 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.*'' (Emphasis added.) Under our longstanding interpretation of this provision as reflected in Social Security Ruling 82–52, the duration requirement to establish disability will be found not to have been met and a disability claim denied based on evidence that, within 12 months of the onset of an impairment which prevented substantial gainful activity and prior to an award of benefits, 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 substantial gainful activity 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 of onset 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 the Social Security Administration to adjudicate disability claims without having to wait 12 months from the alleged onset of disability, rather than to permit claims to be allowed in the face of evidence that the claimant's impairment did not prevent 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 of onset and prior to an award of benefits. 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 prior to an award of benefits, but more than 12 months from onset, the duration requirement may be satisfied, 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 an award of benefits.

We propose to revise § 404.1592(d)(2) by deleting the rule stating 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. We are also proposing to revise § 404.1592(e) to show that the trial work period ends when 9 service months are completed within a consecutive 60-month rolling period. Prior to a statutory change, the trial work period would end after 9 service months no matter when they were completed. These two proposed changes reflect section 5112 of Public Law (Pub. L.) 101–508 which took effect on January 1, 1992.

We are proposing to make minor wording changes to § 404.1592(d)(1) to establish consistency with the wording in § 404.1592(d)(2)(i). This rewording does not represent a change in our policy concerning who is entitled to a trial work period.

We are also proposing to add a new § 404.1592(d)(2)(iv) to clarify our policy, consistent with current § 404.1592(e), that an individual is not entitled to a trial work period if he or she demonstrates an ability to engage in substantial gainful activity level work at any time after the onset of the impairment(s) which prevented the individual from engaging in substantial gainful activity but before the month he or she files an application for disability benefits.

We are also proposing to amend § 404.1592a to clarify that the earnings averaging and unsuccessful work attempt concepts 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 concepts do apply during and after the reentitlement period in determining whether disability has ceased due to the performance of substantial gainful activity. This amendment reflects and clarifies Social Security Ruling 83–35 and Social Security Ruling 84–25. This amendment also will clarify the averaging methodology issue raised by the court in *Conley* v. *Bowen,* 859 F.2d 261 (2d Cir. 1988). These proposed rules also provide cross-references to § 404.1592a in the explanations of the averaging and unsuccessful work attempts concepts contained in §§ 404.1574(c), 404.1574a, and 404.1575(d).

These proposed regulations also reflect section 9010 of Pub. L. 100–203 which extended, as of January 1, 1988, the reentitlement period from 15 months to 36 months. During this extended reentitlement period, the title II benefits of a disabled individual whose benefits are stopped because of substantial gainful activity can be reinstated without the need to file a new application if his or her work falls below the substantial gainful activity level. These statutory changes are reflected in proposed amendments to §§ 404.321, 404.325 and 404.1592a.

Public Law 99–643 made a number of changes in the way we handle supplemental security income cases under title XVI of the Act when a disabled person, eligible for supplemental security income benefits, works. Certain supplemental security income 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 title XVI disability cases, and we are accordingly proposing to delete §§ 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) from the regulations and to amend §§ 416.901(m), 416.991, and 416.1331(a) by removing references to the trial work period and reentitlement period. A substantial gainful activity test is still necessary to establish an individual's initial eligibility for SSI benefits based on disability under title XVI.

Regulatory Procedures

Paperwork Reduction Act

These regulations contain reporting requirements in §§ 404.1574(a)(3) and 416.974(a)(3). We would normally seek approval of these requirements (under the Paperwork Reduction Act) from the Office of Management and Budget (OMB). We are not doing so in this situation because we already have clearance from the OMB to collect this information using form SSA–3033 (OMB No. 0960–0483).

The public reporting burden for this collection of information is estimated to average 15 minutes per response. This includes the time it will take to read the instructions, gather the necessary facts, and provide the information. We expect approximately 12,500 employers to complete form SSA–3033 annually, and estimate the total burden to be 3,125 hours. If you have any comments or suggestions on this estimate, write to the Social Security Administration, ATTN: Reports Clearance Officer, 1–A–21 Operations Building, Baltimore, Maryland 21235, and to the Office of Management and Budget, Paperwork Reduction Project (0960–0483), Washington, DC 20503.

Regulatory Flexibility Act

We certify that these proposed regulations, if promulgated, will not have a significant economic impact on a substantial number of small entities because they primarily affect individuals who are applying for or receiving title II or title XVI benefits because of disability or blindness.

Executive Order 12866

OMB has reviewed these rules and determined they do not meet the criteria for a significant regulatory action under E.O. 12866.

(Catalog of Federal Domestic Assistance Program No. 93.802, Social Security-Disability Insurance; No. 93.807, Supplemental Security Income.)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Death benefits, Disability benefits, Old-Age, Survivors and Disability Insurance.

List of Subjects in 20 CFR Part 416

Administrative practice and procedure, Aged, blind, disability benefits, Public assistance programs, Supplemental security income.

Dated: September 6, 1994.

Shirley S. Chater,

Commissioner of Social Security.

Approved: November 22, 1994.

Donna E. Shalala,

Secretary of Health and Human Services.

Parts 404 and 416 of chapter III of title 20 of the Code of Federal Regulations are proposed to be amended as follows:

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

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, 228(a)–(e), and 1102 of the Social Security Act; 42 U.S.C. 402, 403(a) and (b), 405(a), 416, 423, 428(a)–(e), and 1302.

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: You complete your trial work period in December 1988. You are then working 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 1992, which is the 37th month—that is, the first month in which you performed substantial gainful activity after the 36th month following your trial work period.

Example: You complete your trial work period in December 1988 but you are not able to work at the substantial gainful activity level until March 1992, 3 months after the last month of your reentitlement period. Your termination month will be June 1992—that is, the third month after the earliest month you performed substantial gainful activity.

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 1102 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 1302; sec. 505(a) of Pub. L. 96–265, 94 Stat. 473; secs 2(d)(2), 5, 6, and 15 of Pub. L. 98–460, 98 Stat. 1797, 1801, 1802, and 1808; sec. 10103 of Pub. L. 101–239, 103 Stat. 2472.

5. 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.* Even though the work you are doing is 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, it may still show that you have the necessary skills and ability to work at the substantial gainful activity level. 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. Examples of the special conditions that may relate to your impairment include 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.

* * * * *

6. Section 404.1574 is amended by redesignating current paragraph (a)(3) as (a)(6); revising paragraphs (a)(1), (a)(2), newly designated (a)(6), (b)(1), and (b)(4) and the heading of paragraph (b)(6); and adding new paragraphs (a)(3) through (a)(5), (c), and (d) to read as follows:

§ 404.1574 Evaluation guides if you are an employee.

(a) * * *

(1) *Your earnings may show you have done substantial gainful activity.* In evaluating an employee's work activity for substantial gainful activity purposes, our primary consideration is the earnings that are derived from the work activity. The amount of your earnings from work you have done 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 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 handicapped person 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. Paragraphs (a)(3), (a)(4), (a)(5), and (a)(6) of this section explain how we determine the amounts of subsidies.

(3) *Evidence of subsidy from your employer.* We will first ask your employer to tell us if your wages have been subsidized and, if so, the amount of the subsidy. Your employer may set a specific amount as the reasonable value of your services. If the wages you receive exceed the reasonable value of the actual services you performed, we will regard the excess as a subsidy rather than earnings. Any of the following circumstances may indicate the existence of a subsidy:

(i) You work in sheltered employment.

(ii) Childhood disability is involved.

(iii) You have a mental impairment.

(iv) There is a marked discrepancy between the amount of your pay and the value of your services.

(v) You receive an unusual degree of help from others to do your work.

(vi) Your impairment indicates you would need an unusual degree of help from others.

(vii) You are involved in a government-sponsored job training and employment program.

(4) *When your employer does not tell us the value of your subsidy.* If your earnings are subsidized and your employer does not set the amount of the subsidy, or does not adequately explain how the subsidy was determined, we will use the following criteria to determine the amount of your subsidy:

(i) In most instances, we will determine the amount of your subsidy by comparing the time, energy, skills, and responsibility involved in your services with the time, energy, skills, and responsibility involved in the performance of the same or similar work by unimpaired individuals in your community. We will estimate the proportionate value of your services according to the prevailing pay scale for your work.

(ii) In other instances, it may be possible for us to determine the approximate extent of your subsidy based upon other indications of your productivity, such as your need for an unusual degree of supervision or assistance in the performance of simple tasks, the length of time you need to do simple tasks, or how efficiently you are able to do simple tasks.

(5) *Subsidies in organizations that hire the handicapped.* If you work for an organization that hires the handicapped and the organization either operates at a loss or receives charitable contributions or government aid, this does not necessarily establish that your work is subsidized. Our determination of whether or not you receive a subsidy, and the amount of any subsidy you may receive, will depend upon your productivity rather than the financial condition of your employer's business.

(6) *If you are working in a sheltered or special environment.* If you are working in a sheltered workshop, you may or may not be earning the amounts you are being paid. The fact that the sheltered workshop or similar facility is operating at a loss or is receiving some charitable contributions or governmental aid does not establish that you are not earning all you are being paid. Because persons in military service being treated for severe impairments usually continue to receive full pay, we evaluate their work activity in a therapy program or while on limited duty by comparing it with similar work in the civilian work force or on the basis of reasonable worth of the work, rather than on the actual amount of the earnings.

(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) * * *

(3) * * *

(4) *If you work in a sheltered workshop.* If you work in a sheltered workshop or a comparable facility especially set up for severely impaired persons, we ordinarily will consider that your earnings from this work show that you have engaged in substantial gainful activity if the guides in paragraph (b)(2) of this section are met.

Earnings 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 discussed in paragraph (b)(6) of this section even if those earnings are more than those indicated in paragraph (b)(3) of this section.

(5) * * *

(6) *Earnings that are not high or low enough to show whether you engaged in substantial gainful activity.* * * *

(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)(3) of this section and you meet the conditions described in paragraphs (c)(2), (3), (4), and (5), of this section. The unsuccessful work attempt criteria do not apply in determining whether payment should be made 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. The reentitlement period is explained in § 404.1592a.

(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. Your work must have been discontinued or reduced 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'' 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 which ended, or was reduced below the substantial gainful activity earnings level, because of your impairment or due to the removal of special conditions which took into account your impairment and permitted you to work to be an unsuccessful work attempt.

(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 and—

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

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

(iii) Your work was performed during a period of temporary remission of your impairment; or

(iv) Your work was done 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, any payments you receive from these programs will not be counted 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. Volunteer work you perform in other programs or any nonvolunteer work you may perform is not excluded under this paragraph. Also, your work will not be excluded if you work for one of the specified programs but are not a volunteer. 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. The value of any subsidy must be subtracted and the remainder used to determine if you have done substantial gainful activity. See paragraphs (a)(2)–(6) of this section.

7. 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, your earnings will be averaged 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) Earnings will not be averaged in determining whether payment should be made 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 example illustrates what we mean by a significant change in the work pattern of an employee.

Example: Mary Holmes began receiving disability insurance benefits in March 1986. In January 1988 she began selling magazines by telephone solicitation, with minimum time being expended, for which she received $125 monthly. In this manner, Mrs. Holmes used up her trial work period during the months of January 1988 through September 1988. It was determined, however, that she had not engaged in substantial gainful activity during her trial work period. Her reentitlement period began October 1988. In December 1988, Mrs. Holmes discontinued her telephone solicitation work to take a course in secretarial skills. In January 1990, she began work as a part-time temporary secretary in a banking firm. Mrs. Holmes worked 20 hours a week, without any subsidy or impairment-related work expenses, at beginner rates. She earned $285 per month in January 1990 and February 1990. In March 1990 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. Holmes' earnings increased to $525 per month effective March 1990. It was determined that she was engaging in substantial gainful activity in March 1990. A finding of disability cessation was made effective March 1990. Earnings for the period January 1990 and February 1990 were not averaged with the period beginning March 1990, because a significant change in earnings and work activity had taken place and made the two periods unrepresentative of each other. Thus, the earnings of January 1990 and February 1990 could not be averaged with those of March 1990 to reduce March 1990 earnings below the substantial gainful activity level. After disability has been determined to have ceased because of the performance of substantial gainful activity, her earnings cannot be averaged in determining whether payment should be made for any month during or after the reentitlement period. From March 1990 (the month of cessation) on, all of Mrs. Holmes' work activity would then be evaluated on a month-by-month basis.

8. 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.* 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 upon 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 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, tests two and three must be considered. 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.

(b) * * *

(c) *What we mean by substantial income.* Your normal business expenses are deducted 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 which 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 severely impaired 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. The unsuccessful work attempt criteria do not apply in determining whether payment should be made 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. The reentitlement period is explained in § 404.1592a.

(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. Your work must have been discontinued or reduced below substantial gainful activity because of your impairment or because of the removal of special conditions related to the impairment which 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 if you were out of work at least 30 consecutive days, or 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 related to the impairment which 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 related to the impairment which 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) Your work was performed during a period of temporary remission of your impairment; or

(iv) Your work was done 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 an unsuccessful work attempt regardless of why it ended or was reduced below substantial gainful activity.

9. 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.* The law provides a different earnings test for substantial gainful activity of people who are blind. We will not consider that you are able to engage in substantial gainful activity on the basis of earnings unless your monthly earnings average more than $334 in 1978; $375 in 1979; $417 in 1980; $459 in 1981; $500 in 1982; $550 in 1983; $580 in 1984; $610 in 1985; $650 in 1986; $680 in 1987; $700 in 1988; $740 in 1989; $780 in 1990; $810 in 1991; $850 in 1992; $880 in 1993; and $930 in 1994. (Sections 404.1574(a)(2), 404.1575(c), and 404.1576 are applicable in determining the amount of your earnings.) Thereafter, an increase in the substantial gainful activity amount will depend on increases in the cost of living. For work activity performed in taxable years before 1978, the earnings considered enough to show an ability to do substantial gainful activity are the same for blind people as for others.

10. Section 404.1592 is amended by revising the last sentence of paragraph (b), adding a sentence to paragraph (b), and revising paragraphs (d) and (e) to read as follows:

§ 404.1592 The trial work period.

(a) * * *

(b) * * * 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. Work as a volunteer in the Federal programs described in § 404.1574(d) is not considered 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 receiving 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 if—

(i) You are entitled to a period of disability but not 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; or

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

(iii) You perform work demonstrating the ability to engage in substantial gainful activity within 12 months of the onset of the impairment(s) which prevented you from performing substantial gainful activity and before the date of the decision awarding you disability benefits; or

(iv) You perform work demonstrating the ability to engage in substantial gainful activity at any time after the onset of the impairment(s) which prevented you from engaging in substantial gainful activity but before the month you file your application for disability benefits.

(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 earlier:

(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; or

(2) The 9th month (whether or not the months have been consecutive and whether or not the previous eight months of services were prior to January 1992) in which you have performed services within a rolling 60-month period 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.

11. 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. You will not be paid benefits for any month after the second month following the month disability ceased due to substantial gainful activity in this period in which you do substantial gainful activity and you will be paid benefits for months in which you do not do substantial gainful activity. (See §§ 404.316, 404.337, 404.352 and 404.401a.) 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. 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 discontinue doing substantial gainful activity during this period. In determining, for reentitlement benefit purposes, whether you do substantial gainful activity in a month, we consider only your work in or earnings for that month; we do not consider the average amount of your work or earnings over a period of months. When disability has been ceased because of the performance of substantial gainful activity, the unsuccessful work attempt criteria and averaging concepts do not apply in determining whether payments should be made for any particular month during or after the reentitlement period that occurs after the month disability ceased. The unsuccessful work attempt criteria and averaging concepts do apply during and after the reentitlement period in determining whether disability has ceased because of the performance of substantial gainful activity.

(b) * * *

(1) * * *

(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 elapsed as of January 1988. (See §§ 404.316, 404.337, and 404.352 for when your benefits end.)

* * * * *

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

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

Authority: Secs. 1102, 1614(a), 1619, 1631(a), (c) and (d)(1), and 1633 of the Social Security Act; 42 U.S.C. 1302, 1382c(a), 1382h, 1383(a), (c) and (d)(1), and 1383b; secs. 2, 5, 6, and 15 of Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808.

2. Section 416.901 is amended by revising paragraph (m) to read as follows.

§ 416.901 Scope of subpart.

* * * * *

(m) Our rules on when disability or blindness continues and stops are contained in §§ 416.986 and 416.988 through 416.998. 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. We also explain how we consider the issue of medical improvement (and the exceptions to medical improvement) in determining whether you are still disabled.

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

§ 416.973 General information about work activity.

(a) * * *

(b) * * *

(c) *If your work is done under special conditions.* Even though the work you are doing is 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, it may still show that you have the necessary skills and ability to work at the substantial gainful activity level. 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. Examples of the special conditions that may relate to your impairment include 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, such as where 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.

* * * * *

4. Section 416.974 is amended by redesignating current paragraph (a)(3) as (a)(6); revising paragraphs (a)(1), (a)(2), newly designated (a)(6), (b)(1), and (b)(4); and adding new paragraphs (a)(3) through (a)(5), (c), and (d) to read as follows:

§ 416.974 Evaluation guides if you are an employee.

(a) * * *

(1) *Your earnings may show you have done substantial gainful activity.* In evaluating an employee's work activity for substantial gainful activity purposes, our primary consideration is the earnings that are derived from the work activity. The amount of your earnings from work you have done 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 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 handicapped person 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. Paragraphs (a)(3), (a)(4), (a)(5), and (a)(6) of this section explain how we determine the amounts of subsidies.

(3) *Evidence of subsidy from your employer.* We will first ask your employer to tell us if your wages have been subsidized and, if so, the amount of the subsidy. Your employer may set a specific amount as the reasonable value of your services. If the wages you receive exceed the reasonable value of the actual services you performed, we will regard the excess as a subsidy rather than earnings. Any of the following circumstances may indicate the existence of a subsidy:

(i) You work in sheltered employment.

(ii) Childhood disability is involved.

(iii) You have a mental impairment.

(iv) There is a marked discrepancy between the amount of your pay and the value of your services.

(v) You receive an unusual degree of help from others to do your work.

(vi) Your impairment indicates you would need an unusual degree of help from others.

(vii) You are involved in a government-sponsored job training and employment program.

(4) *When your employer does not tell us the value of your subsidy.* If your earnings are subsidized and your employer does not set the amount of the subsidy, or does not adequately explain how the subsidy was determined, we will use the following criteria to determine the amount of your subsidy:

(i) In most instances, we will determine the amount of your subsidy by comparing the time, energy, skills, and responsibility involved in your services with the time, energy, skills,

and responsibility involved in the performance of the same or similar work by unimpaired individuals in your community. We will estimate the proportionate value of your services according to the prevailing pay scale for your work.

(ii) In other instances, it may be possible for us to determine the approximate extent of your subsidy based upon other indications of your productivity, such as your need for an unusual degree of supervision or assistance in the performance of simple tasks, the length of time you need to do simple tasks, or how efficiently you are able to do simple tasks.

(5) *Subsidies in organizations that hire the handicapped.* If you work for an organization that hires the handicapped and the organization either operates at a loss or receives charitable contributions or government aid, this does not necessarily establish that your work is subsidized. Our determination of whether or not you receive a subsidy, and the amount of any subsidy you may receive, will depend upon your productivity rather than the financial condition of your employer's business.

(6) *If you are working in a sheltered or special environment.* If you are working in a sheltered workshop, you may or may not be earning the amounts you are being paid. The fact that the sheltered workshop or similar facility is operating at a loss or is receiving some charitable contributions or governmental aid does not establish that you are not earning all you are being paid. Because persons in military service being treated for severe impairments usually continue to receive full pay, we evaluate their work activity in a therapy program or while on limited duty by comparing it with similar work in the civilian work force or on the basis of reasonable worth of the work, rather than on the actual amount of the earnings.

(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) * * *

(3) * * *

(4) *If you work in a sheltered workshop.* If you work in a sheltered workshop or a comparable facility especially set up for severely impaired persons, we ordinarily will consider that your earnings from this work show that you have engaged in substantial gainful activity if the guides in paragraph (b)(2) of this section are met. Earnings 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 discussed in paragraph (b)(6) of this section even if those earnings are more than those indicated in paragraph (b)(3) of this section.

(5) * * *

(6) * * *

(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)(3) 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. Your work must have been discontinued or reduced 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'' 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 which ended, or was reduced below the substantial gainful activity earnings level, because of your impairment or due to the removal of special conditions which took into account your impairment and permitted you to work, to be an unsuccessful work attempt.

(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 and—

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

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

(iii) Your work was performed during a period of temporary remission of your impairment; or

(iv) Your work was done 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, any payments you receive from these programs will not be counted 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 Small Business Act. Programs explicitly mentioned in these 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. Volunteer work you perform in other programs or any nonvolunteer work you may perform is not excluded under this paragraph. Also, your work will not be excluded if you work for one of the specified programs but are not a volunteer. 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. The value of any subsidy must be subtracted and the remainder used to determine if you have done substantial gainful activity. See paragraphs (a)(2)–(6) of this section.

5. A new section 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.

6. 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.* 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 upon 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, tests two and three must be considered. 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.

(b) * * *

(c) *What we mean by substantial income.* Your normal business expenses are deducted 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 which 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 severely impaired 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. Your work must have been discontinued or reduced below substantial gainful activity because of your impairment or because of the removal of special conditions related to the impairment which 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 if you were out of work at least 30 consecutive days, or 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 related to the impairment which 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 related to the impairment which 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) Your work was performed during a period of temporary remission of your impairment; or

(iv) Your work was done 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 an unsuccessful work attempt regardless of why it ended or was reduced below substantial gainful activity.

§ 416.976 [Amended]

7. 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]

8. Section 416.991 is amended and by removing the parenthetical sentence immediately preceding the example.

§ 416.992 [Removed and Reserved]

9. Section 416.992 is removed and reserved.

§ 416.992a [Removed and Reserved]

10. Section 416.992a is removed and reserved.

11. Section 416.994 is amended by removing paragraph (b)(3)(v) and revising paragraphs (b)(5) and (b)(6) to 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 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 improvements 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 following month—

(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 in which 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.

* * * * *

12. The authority citation for Subpart M of Part 416 continues to read as follows:

Authority: Secs. 1102, 1611–1615, 1619 and 1631 of the Social Security Act; 42 USC 1302, 1382–1382d, 1382h, 1383.

13. 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 to which you may be entitled.) 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.

* * * * *

[FR Doc. 95–5171 Filed 3–3–95; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD05–94–092]

Drawbridge Operation Regulations; New Jersey Intracoastal Waterway, Beach Thorofare, NJ

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: At the request of the National Railroad Passenger Corporation (AMTRAK), the Coast Guard is considering a change to the regulations governing operation of the AMTRAK/New Jersey Transit Rail Operation (NJTRO) drawbridge across the Beach Thorofare, at New Jersey Intracoastal Waterway, mile 68.9, at Atlantic City, New Jersey, by permitting the bridge to be operated remotely from AMTRAK's Philadelphia office. This proposal is being made in an effort to combine bridge tender and dispatcher positions, enhance rail safety and operation, and reduce operating costs. This action should relieve AMTRAK of the burden of having to man the bridge constantly to open the draw, and should still provide for the reasonable needs of navigation.

DATES: Comments must be received on or before June 5, 1995.

ADDRESSES: Comments may be mailed to Commander (ob), Fifth Coast Guard District, c/o Commander (obr), First Coast Guard District, Bldg. 135A, Governors Island, New York 10004–5073.

Any comments received will become part of this docket and will be available for inspection and copying by appointment at Bldg. 135A, Governors Island, New York 10004–5073. Normal office hours are between 7 a.m. and 3:30 p.m., Monday through Fridays, except Federal holidays. Comments may also be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: Gary Kassaf, Bridge Administrator—NY, Fifth Coast Guard District, (212) 668–7069, 668–7021, or 668–7165.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written views, comments, data, or arguments. Persons submitting comments should include their names and addresses, identify this rulemaking (CGD05–94–092), and the specific section of this proposal to which each comment applies, and give reasons for each comment. The Coast Guard requests that all comments and attachments be submitted in an unbound format suitable for copying and electronic filing. If not practical, a second copy of any bound material is requested. Persons desiring acknowledgment that their comments have been received should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period. It may change this proposal in view of the comments received.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the Commander (ob) at the address under **ADDRESSES**. The request should include reasons why a hearing would be beneficial. If it determines that the opportunity for oral presentations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place to be announced by a later notice in the **Federal Register**.

Drafting Information

The drafters of this notice are Mr. J. Arca, Fifth Coast Guard District, Bridge Branch—NY, Project Officer, and LCDR C.A. Abel, Fifth Coast Guard District Legal Office, Project Attorney.

Background and Purpose

A permit was issued by the Coast Guard on December 20, 1988, to replace and slightly raise the superstructure of the Beach Thorofare bridge. The new drawbridge provides a vertical clearance of 4 feet at mean high water and 9 feet at mean low water when in the closed position. Prior to its rehabilitation in 1988, the old bridge was left in the open position and unused for 5 to 10 years. However, the regulations governing operation of this bridge require that the bridge open on signal from 11 p.m. to 6 a.m. From 6 a.m. to 11 p.m., the draw is required to open on signal from 20 minutes to 30 minutes after each hour and remain open for all waiting vessels. As a result of the rehabilitation and replacement work, the bridge now operates according to the published regulations, and AMTRAK seeks to operate the bridge remotely from its Philadelphia office.

The Beach Thorofare section of the New Jersey Intracoastal Waterway is used primarily by recreational power boats ranging in length from eighteen (18) to thirty-eight (38) feet. The bridge is required to open for vessel traffic infrequently during the winter months. The number of openings increases during the normal season boating season. However, the number of openings is not excessive. During the period from February 1994 through June 1994, drawlogs for the Beach Thorofare Bridge show the bridge averaged 1 opening per day in February; 1 or 2 openings per day in March; 2 openings per day in April; 6 openings per day in May; and 7 openings per day in June. During the same 5 month period, data provided by AMTRAK shows the number of trains per month crossing the bridge in both directions remained fairly constant, averaging between 900 and 1000 trains per month. The vast majority of these trains are passenger/shuttle type trains transporting persons wishing to visit Atlantic City, New Jersey. Train traffic across the bridge is proportionately much heavier than waterway traffic requiring openings of the bridge. Because of the relatively few requests for bridge openings, AMTRAK